REPORTS

OF THE

SUPREME COURT

OF

CANADA.

REPORTER

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1911.

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

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

" Désire Girouard J.

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

" John Idington J.

" Lyman Poore Duff J.

" Francis Alexander Anglin J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

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

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Jacques Bureau K.C.

MEMORANDUM.

On Friday, the 6th of May, 1910, it pleased Almighty God to take to His mercy our late SOVEREIGN LORD EDWARD VII. of blessed and glorious memory.

On Monday, the 9th May, 1910, during the Spring Session, the Supreme Court of Canada assembled pursuant to adjournment, all the members of the court being present except His Lordship the Chief Justice, who was absent at The Hague on duty as an arbitrator in a reference made by the Government of Great Britain and the Government of the United States of America.

Their Lordships having taken their seats on the bench, His Lordship Mr. Justice Girouard, the acting Chief Justice, announced that he had duly taken the oath of allegiance as well as the judicial oath to HIS MOST GRACIOUS MAJESTY KING GEORGE THE FIFTH, which was administered to him on Saturday, 7th May, 1910, by the Clerk of His Majesty's Privy Council for Canada. His Lordship then administered the oaths, in open court, to Their Lordships Justices Davies, Idington, Duff and Anglin.

His Lordship the Right Honourable Sir Charles Fitzpatrick C.J. took the oaths upon a subsequent day.

On the 9th day of May, 1910, His Excellency the Governor-General of Canada, by Proclamation, authorized all judges of the Dominion and Provincial Courts in Canada to severally continue in the due exercise of their respective duties and functions.

ADDENDA ET CORRIGENDA.

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

Page 163—Add foot-note.—"Leave to appeal to Privy Council granted, 15 July, 1910."

" 164, lines 6 and 8—For "IV.," read "VII."

" 190, line 9—Delete the word "not."

" 433—Add foot-note.—"Leave to appeal to Privy Council granted, 8 Nov., 1910."

" 434, line 15—Insert "in" after "as."

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOLUME 42 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

Berlin, Town of, v. *Berlin and Waterloo Street Rway. Co.* (42 Can. S.C.R. 581). Leave to appeal to Privy Council refused, 15 July, 1910.

Burchell v. *Gowrie and Blockhouse Collieries* (not reported). Appeal to Privy Council allowed with costs, 29 July, 1910.

Burrard Power Co. v. *The King* (43 Can. S.C.R. 27). Appeal to Privy Council dismissed with costs, 1st Nov., 1910.

Canadian Pacific Rway. Co. v. *City of Toronto et al.* (42 Can. S.C.R. 613). Leave to appeal to Privy Council granted, on two petitions, 22 July, 1910. (NOTE.—The petitions for leave related to the *"Viaduct Case,"* cited above, and to the *"Yonge Street Bridge Case"* (19 Ont. L.R. 663).)

Canadian Northern Rway. Co. v. *Robinson* (43 Can. S.C.R. 387). Leave to appeal to Privy Council granted, 22 Nov., 1910.

Carroll et al. v. *Erie County Natural Gas and Fuel Co. et al.* (29 Can. S.C.R. 591). As noted in Cout. Dig. (1903), at p. 1584, a petition for leave to appeal to the Privy Council was refused (34 Can. Gaz. 272); subsequently, however, after damages had been assessed, an appeal direct from the Court of Appeal for Ontario upon the judgment settling such damages was heard by the Privy Council and, on 14 Dec., 1910, the appeal was allowed in part, with costs, and a cross-appeal was dismissed with costs. The effect of the decision of the Privy Council was to vary the judgment of the Supreme Court of Canada.

Equity Fire Insurance Co. et al. v. *Thompson* (41 S.C.R. 491). Appeal to Privy Council allowed with costs, 15 July, 1910.

Fralick v. *Grand Trunk Rway. Co.* (43 Can. S.C.R. 494). Leave to appeal to Privy Council was refused, 25 July, 1910.

Grand Trunk Rway. Co. v. *McDonald* (not reported). Leave to appeal to Privy Council was refused, 25 July, 1910.

Grand Trunk Pacific Rway. Co. et al. v. *City of Fort William et al.* (43 Can. S.C.R. 412). Leave to appeal to Privy Council was granted, 8 Nov., 1910.

Horne v. *Gordon* (42 Can. S.C.R. 240). Appeal to Privy Council allowed with costs, 29 July, 1910.

Lovitt v. *The King* (43 Can. S.C.R. 106). Leave to appeal to Privy Council was granted, 15 July, 1910.

Montreal Street Rway. Co. v. *City of Montreal* (43 Can. S.C.R. 197). Leave to appeal to Privy Council was granted, 25 July, 1910.

"Nanna," The, v. *The "Mystic"* (41 Can. S.C.R. 168). Appeal to Privy Council dismissed with costs, 7 July, 1910.

Ontario, Province of, v. *Dominion of Canada* (42 Can. S.C.R. 1). Appeal to Privy Council dismissed, 29 July, 1910 ([1910] A.C. 637).

Quebec, Province of, v. *Province of Ontario* (42 Can. S.C.R. 161). Appeal to Privy Council dismissed, 29 July, 1910.

Sedgewick v. *Montreal Light, Heat and Power Co.* (41 Can. S.C.R. 639). Appeal to Privy Council allowed with costs, 25 July, 1910.

Standard Trust Co. et al. v. *Attorney-General of Canada* (not reported). Leave to appeal to Privy Council was granted, 13 July, 1910.

Stuart v. *Bank of Montreal* (41 Can. S.C.R. 516). Appeal to Privy Council dismissed with costs, 2 Dec., 1910.

Vaughan v. *Eastern Townships Bank* (41 Can. S.C.R. 286). By virtue of the Judicial Committee's Rule, No. 32, the appeal was withdrawn and stood dismissed, 5 Sept., 1910.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED.

A.

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V.

W.

Z.

IN MEMORIAM.

Edward VII.

KING AND EMPEROR

DIED 6TH MAY, 1910.

GOD SAVE THE KING!

MINUTES OF THE PROCEEDINGS OF THE SUPREME COURT OF CANADA, ON THE 9TH OF MAY, 1910.

During the Spring Session of the Supreme Court of Canada the court assembled, pursuant to an adjournment, on Monday, the 9th day of May, 1910, all the members of the court being present except His Lordship the Chief Justice, who was absent at The Hague on duty as an Arbitrator in a Reference made by the Government of Great Britain and the Government of the United States of America.

Their Lordships having taken their seats on the Bench, His Lordship Mr. Justice Girouard, the acting Chief Justice, announced that he had duly taken the oath of allegiance to His Most Gracious Majesty King George the Fifth, which was administered to him last Saturday by the Clerk of His Majesty's Privy Council for Canada.

A Roll of the Supreme Court was thereupon presented by the Registrar to the Acting Chief Justice containing the oath of allegiance to King George the Fifth, which was duly administered by His Lordship to the other judges present in open court.

His Lordship, the Acting Chief Justice, then said:

"In consequence of the sad news of the death of His "Most Gracious Majesty King Edward the Seventh, it is "fitting, in accordance with precedent, that this court "should at once adjourn until to-morrow morning."

The court adjourned accordingly.

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS.

THE BRITISH COLUMBIA ELECTRIC RAILWAY CO. (DEFENDANTS) ..... APPELLANTS;

AND

FRANK CROMPTON (PLAINTIFF) .... RESPONDENT.

1909
*Oct. 14.
1910
*Feb. 15.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Construction of statute—Limitations of actions—Contract for supply of electric light—Negligence—Injury to person not privy to contract—"Consolidated Railway Company's Act, 1896," 59 V. c. 55 (B.C.), ss. 29, 50, 60.

The appellant company, having acquired the property, rights, contracts, privileges and franchises of the Consolidated Railway and Light Company, under the provisions of "The Consolidated Railway Company's Act, 1896" (59 Vict. ch. 55 [B.C.]), is entitled to the benefit of the limitation of actions provided by section 60 of that statute. Idington J. dissenting.

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

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The limitation so provided applies to the case of a minor injured, while residing in his mother's house, by contact with an electric wire in use there under a contract between the company and his mother.

Judgment appealed from (14 B.C. Rep. 224) reversed, Davies and Idington JJ. dissenting.

APPEAL from the judgment of the Supreme Court of British Columbia(1), reversing the judgment of Lampman, Co.J., and maintaining the plaintiff's action with costs.

The plaintiff, an infant suing by his next friend, was injured, while residing in his mother's house, by coming in contact with an electric wire in use there in connection with the supply of electric light under a contract between the company, defendants, and his mother. The defendants acquired the property, rights, contracts, privileges and franchises of the Consolidated Railway and Light Company, under the provisions of "The Consolidated Railway Company's Act, 1896" (55 Vict. ch. 55 (B.C.)), and carried on the operation thereof in their own name. By the 60th section of this Act it was provided that actions for indemnity for injury sustained by reason of the works or operations of the company should be commenced within six months next after the date when the injury was sustained and not afterwards. The injury was sustained on the 26th of December, 1907, and the action was commenced on the 31st of October, 1908. The action was dismissed at the trial, but this judgment was reversed by the judgment now appealed from.

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

(1) 14 B.C. Rep. 224.

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Davies J.

A. E. McPhillips K.C. for the appellants.

Travers Lewis K.C. for the respondent.

THE CHIEF JUSTICE.—I agree in the opinion stated by Mr. Justice Duff.

DAVIES J. (dissenting).—I have had the opportunity of reading the judgment in this case prepared by Duff J. and I agree with his reasoning and conclusion that the appellants are entitled to claim the protection of section 60 of the "Consolidated Railway Companies Act, 1896," of British Columbia, in cases coming within it.

I am, however, unable to agree with him that such section can be invoked in the circumstances of this case.

The duty for breach of which the defendants here have been held liable was a duty arising out of their contract to supply electric light to the house of the plaintiff's mother. That contract, which does not appear to have been in writing, was not a personal one to supply light to and for the use of the occupier alone, but to my mind obviously from its very nature, object and purpose extended as well to those of her household. The 44th section of their charter provided expressly that defendants should "supply electricity to *any premises* lying within fifty yards of any main supply or cable suitable for that purpose on being required by the owner or occupier of such premises." It was clearly within the contemplation of all parties that the electricity supplied should be for the premises of the occupier and therefore necessarily for the use of the occupants of the house. I hold that the duties

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and obligations arising out of such a contract extend to all those for whose use and benefit it was clearly entered into, and are not limited to the person contracted with alone. Such duties and obligations towards the members and servants of the household are the same as and of equal degree with those towards the householder himself with whom the contract was made. In each case it is an implied duty or obligation arising out of the contract, and being so not affected by the section referred to. I understand my learned brother's opinion to be that the section could not be invoked by the company against the mother with whom they made the contract, because in her case, as he puts it, such an action would be based upon a violation of a contractual right. I agree to that, but it is not a violation of any express right, but of an implied duty arising out of the contract, and is in my opinion available as well to those for whose benefit the contract was undeniably made as to the person entering into it. I assume therefore that the only difference between us is as to the proper interpretation and meaning of the contract for supplying electricity.

The contract being for the supply of electricity to the house of plaintiff's mother, and as I think it must be read for the use of herself and family and servants, was subject to such stipulations and conditions as the parties to it might expressly agree upon. These might well be the measure of the defendant's duty arising out of it as well to the person with whom they contracted as to others for whose benefit the contract was entered into. If the company faithfully carried out their contract and injury nevertheless ensued they might be absolved from all liability on the

plain ground that they owed no duty to any person of which they were guilty of a breach. But it does seem to me that the measure of the duty they owed to the person with whom they undeniably contracted was the same as that which they owed to all those for whose benefit the contract was obviously made. In all such cases the duty is an implied one, and arises as necessarily in the case of those for whose use the electric fluid is to be supplied as in that of the actual party to the contract. This it is which distinguishes the case of those persons for whose benefit and use the contract is made from the general public. In the present case, as I hold, a clear duty arises out of the contract to this special class of persons for a breach of which when injured any member of it has a right to sue, and which duty and right arising out of the special contract is not within the limiting provision of section 60, invoked by the company here as an answer to this action. The electricity supplied to and for the house of the plaintiff's mother in this case was necessarily, to the knowledge of the company supplying it, for the use of all persons lawfully in the house, whether as members of the family or servants of the owner or occupier.

The duty arising out of the company's contract to supply the house with electricity, involved on the part of the company the exercise of the highest skill, care and attention with respect to their wires and the transmission through them into the house of such a dangerous element or power as electricity. To construe the clause limiting the liability of the company to damages for negligence in the discharge of such duty as not applicable to cases where the person immediately contracting has been injured, but as ap-

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plicable to others for whose benefit the contract must have been entered into, and who I hold were within the contemplation of the parties to the contract, would be to attribute an intention to the legislature which the language of the section does not, as I interpret it, express. I rest my judgment upon the broad ground that the section in question does not extend to any breach of the duty arising out of the contractual obligation on the defendant's part to supply the house of the plaintiff's mother with electricity, and that such duty and obligation arises in the circumstances of this case out of the contract as well towards the son of the owner or occupier living in the premises with his mother as towards the mother herself, and that such being the case and the section not being invocable by the company against the boy's mother in a case of damage to her own person cannot be invoked against the son.

The negligence which caused the plaintiff's injuries in this case was not active and positive negligence amounting to misfeasance, but was non-feasance on the part of the company's servants in neglecting to keep their wires leading into the premises of the plaintiff's mother properly insulated. To maintain his action, therefore, plaintiff must have shewn the existence of a contract entered into for his benefit as well as others, and for a breach of the defendant's duty arising under which he had a right of action. Such a contract I have already attempted to shew was proved.

As to authorities I have carefully studied the cases cited on the argument and others. Many of them are reviewed by Osler J.A. in *Ryckman* v. *Hamil-*

ton, Grimsby and Beamsville Electric Railway Co.(1), and more recently by Riddell J. in *Allen* v. *Canadian Pacific Railway Co.*(2). The cases of *Taylor* v. *Manchester, Sheffield and Lincolnshire Railway*(3), where *Alton* v. *Midland Railway Co.*(4), is discussed and commented on, *Marshall* v. *York, Newcastle and Berwick Railway Co.*(5), and *Austin* v. *Great Western Railway*(6), though cases against carriers, are instructive upon the general question involved here.

For the above reasons I would dismiss the appeal with costs.

IDINGTON J. (dissenting).—The question raised on this appeal is whether or not the respondent's action must be held barred by the following section which appears in an Act to amend an Act to incorporate the Consolidated Railway and Light Company, and to consolidate certain Acts relating thereto, and to change the name thereof to the Consolidated Railway Company, and which reads as follows:—

> All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained.

By section 29 of the said Act the Consolidated Railway Company, amalgamating a number of other railway companies was given the right to mortgage

> all tolls, incomes, franchises, uncalled capital and property both real and personal,

and subject to certain conditions named,

> to take possession of the said property so mortgaged, and to hold and run the same for the benefit of the bondholders thereof; or to lease or

(1) 10 Ont. L.R. 419.
(2) 19 Ont. L.R. 510.
(3) [1895] 1 Q.B. 134.
(4) 19 C.B. (N.S.) 213.
(5) 11 C.B. 655.
(6) L.R. 2 Q.B. 442.

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sell the said property so mortgaged after such default, and upon such terms and conditions as may be stated in such deed; and in case of any such lease or sale, the lessee or purchaser shall have the right to exercise all the powers and franchises by this Act conferred upon the company, and the said property may continue to be held and operated under the provisions of this Act, with the corporate name and powers of the company; and such lessee or purchaser shall have the same rights, powers, privileges and franchises, and shall stand in the same position, as regards the said tolls, incomes, franchises, powers, uncalled capital and property, real and personal, as the company itself under this Act.

The Consolidated Railway Company under the powers given in said section ultimately sold to the appellant in exercise of the powers in said section 29, but did not

operate under the provisions of said Act with the corporate name and powers of the company.

The appellants kept their own corporate name and acted under their own powers, and those given a buyer under said statute.

The accident to the respondent was a result of negligence on the part of the appellants in carrying on the electric lighting part of the business.

Another statute known as the "British Columbia Railway Act," by section 8, provided as follows:—

Every company established under a special Act shall be a body corporate under the name declared in the special Act, and shall be invested with all such powers, privileges, and immunities as are necessary to carry into effect the intentions and objects of this Act and of the special Act therefor, and are incident to such corporation or are expressed or included in the "Interpretation Act," 1890, ch. 39, sec. 8.

That section and section 42 of the same Act, with other sections thereof, were incorporated by the Act above referred to therein. That section 42, so far as it bears on the case before use, reads as follows:—

All actions for indemnity for damage or injury sustained by reason of the railway shall be instituted within one year next after the time

of the supposed damage sustained, or if there be continuance of damage, then within one year next after the doing or committing of such damage ceases and not afterwards; and the defendants may plead not guilty by statute, and give this Act and the special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act and the special Act.

I consider both sections, 60 of the first mentioned Act, and section 42 of the "British Columbia Railway Act," may have operative effect given to them without at all helping the appellant's contention. As to the effect of sections 29 and 60 of the first above mentioned Act, if I understand that contention aright, it is that inasmuch as a lessee or purchaser under section 29 is given

the same rights, powers, privileges and franchises, and shall stand in the same position as regards the said tolls, incomes, franchises, powers, uncalled capital, and property real and personal, as the company itself under this Act,

the protection given by section 60 limiting actions against the consolidated, or selling company, is carried by the words just quoted to the protection of the appellant, that is the purchasing company in actions against it.

We must interpret these words just quoted without the aid of direct authority as no case can be found directly in point.

Probably no one ever before tried to strain so far a kind of legislation usually given a restricted interpretation.

It is not seriously contended that the words "powers and franchises" are to be looked for to maintain appellant's contention. The words "rights and privileges" were in themselves, or each in itself, and especially coupled with these other words, relied upon.

Can the word "rights" in this connection, cover-

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ing much that is obviously in relation to property or right thereto or therein or something transferable from the Consolidated Railway Company to the British Columbia Electric Company, as result of purchase, be extended to something implied as subject matter liable to be so operated upon by the enactment as to constitute the vesting in the latter of anything in the nature of a right to set up the statute of limitations which appears in section 60?

I have tried unsuccessfully to find any case wherein the word "right" has been held as meaning any such legislative substitution as we must hold it to mean if by virtue of it we give effect to appellant's contention.

One or two cases illustrate its legislative meaning and the disinclination of the courts to extend same beyond the context in which it is found. *In re Earl of Devon's Settled Estates*(1), was a case arising under the "Real Property Limitations Act, 1833," when it was contended that the word "right" as used therein covered a power of appointment to uses. Chitty J. said as to such contention:—

> No real property lawyer in 1833 would have spoken of a power of appointing uses as an "estate, interest, right or possibility." The terms "right" and "possibility" are used in their technical sense. "Right," for instance, applies to the case of an estate turned to a right which could be enforced only in a real action. I hold that a power is not within the section.

Then we have numerous analogous cases cited in Stroud's Judicial Dictionary, vol. 3, pages 1738 *et seq.*

In the case of *Kearns* v. *The Cordwainers' Co.*(2), it was held competent for the Thames Conservancy,

(1) [1896] 2 Ch. 562. (2) 6 C.B. (N.S.) 388.

1857, to invade the common right which any of the public had theretofore exercised, notwithstanding the words of the reservation that none of the powers in the Act contained,

> shall extend to take away, alter or abridge any *right*, claim, privilege, franchise, exemption or immunity to which any owners or occupiers of any lands, etc., are now by law entitled; nor to take away or abridge any local right of ferry, etc. The same shall remain and continue in full force,

and also that these words must be held to have been intended to cover something vested, and not that falling within a general public right.

Perhaps the nearest application of the word "right" to what is in question is that maintained in the case of *Ex parte Raison*(1), where it was held that a bankrupt's right to apply for his discharge under the provisions of section 28 of the "Bankruptcy Act" of 1833, notwithstanding its repeal, was preserved to *him* by section 38 of the "Interpretation Act" of 1889. It was held that section 38, declaring that the repeal of an Act is not to affect any right, privilege, obligation, or liability, acquired, accrued or incurred in that section, preserved the right.

That was the reservation to the individual of a personal right and illustrates both what I have referred and what I am about to refer to.

Nor do I think the word "privileges" any more effective. It may mean benefits affecting a class of persons or a right conferred on a definite person. In neither sense does it serve herein the appellant which is not one of a class in this relation, nor is it the specific person named.

The right to plead a statute of limitations is a

(1) 60 L.J.Q.B. 206.

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privilege, but only as Wood on Limitations, ch. 4, section 31, puts it, and that defence it gives, as follows:

> The plea of the Statute of Limitations is generally a personal privilege, and may be waived by a defendant, or asserted, at his election; but where he has parted with his interest in property, his grantees, mortgagees, or other persons standing in his place are entitled to avail themselves of all the advantages of his plea.

I think it would be futile to suggest that the grantees or mortgagees of the property in question herein fall within the meaning of this paragraph except in a limited sense.

And that limited sense so far as relative to the quality of transferability is confined to its effect as an incident of the property or right transferred. It passes only therewith and not otherwise.

If, for example, there happened to be any right of property or contractual right possessed by the vendors or mortgagors herein at the time when they transferred, mortgaged or sold the property, I think it would be quite within the right of the appellant in such case as the mortgagee or vendee to plead, just as the vendor might have pleaded, the Statute of Limitations involved in that relation.

But is this case in hand the raising of an issue at all like unto that? What is the Statute of Limitations in this section 60 relative to? Is it not against something done or omitted to have been done by the company individually enabled to set up the defence provided for in section 60.

It is not the case that arises under the "General Railway Act" in relation to a class.

Its individual character would probably be effective to protect in the appellants' hands the assets transferred as against actions for something done or omitted by the consolidated company.

The section does not in terms provide that its assignee may have any such right in regard to some act or omission that the assignee may have been or become guilty of.

The express provision in question, it is to be observed, appears, by accident probably, in the same Act in which is incorporated as shewn above the general law of the province in regard to the subject of railways.

Why attribute to the legislation an intention to extend such an absurdity?

It is only by a process of ratiocination resting on inferences and implications that such a result as appellant desires can be arrived at.

Having regard to these and other foregoing considerations and to the well-known rule that anything in the way of legislation abridging the public rights or the rights of any of the public in favour of one acquiring a concession from Parliament or other legislative body must be construed strictly, and that the right must not be extended by implication, can we say that that process I refer to as relied on herein is satisfactory?

I prefer to say with Lord Cottenham in *Webb* v. *Manchester and Leeds Railway Co.* (1):

> If there be any reasonable doubt as to the extent of the powers (given in the private Act) they must go elsewhere and get enlarged powers but they will get none from me by way of construction of their Act of Parliament.

Moreover the section in its very wording is expressly as against anything sustained "by reason of the tramway or railway" and the words following "or the works or operations of the company" may

(1) 4 Mylne & C. 116.

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well be confined to the same subject matter of the railway.

If the rule just now referred to regarding the restrictions of concessions is adhered to it may well be argued the privilege is not definitely extended to the lighting department of the company, and all which that implies. That leads to the same result and even if that is waived for argument sake, it is not shewn this particular part of that work existed at the time of the transfer and hence could not have been transferred with such a right.

It may be said in reply it is not the work that is transferred, but the right itself.

Take it that way then the selling company was left without any Statute of Limitations to protect not only its interest in regard to accident cases, but also manifold interests of any and every kind for no distinction is made.

Is it conceivable such ever was the the intention of anybody? It may be said that is not what is meant by transfer of such a right, but the enjoyment of the like right in common with the selling company.

Tried that way the obvious reply is that this language is not that which any one would use to confer such a common right.

Nay, more, we find the language and purpose of section 29 is relative to property and rights of property to be enjoyed and even if need be the entire corporate powers may be enjoyed by the vendees; yet we find the vendee itself shrank, for some reason or other, from going so far in the acquisition and exercise of rights of the vendor.

In short, it refrained from accepting that alone which would have given semblance to a right to claim what it now seeks.

I have looked at many cases dealing with the application of Statutes of Limitations, and they uniformly treat, as already said, such statutes in a strict sense restricting them to operations within the literal limits expressed in each case.

Having regard to the foregoing I think the appeal should be dismissed with costs.

DUFF J.—This appeal arises out of an action brought by the respondent (a minor) against the appellants, in the County Court of Victoria, B.C., claiming indemnity for injuries suffered by him in consequence of an electric shock received through a wire connecting the lights in his mother's house with the mains of the appellants' lighting system in Victoria.

At the trial it was shewn by the appellants that the wire through which these lamps were supplied was under normal conditions charged with a harmless (secondary) current of electricity at low pressure (110 volts), but that it was carried by cross-bars upon which was also carried a wire owned by the municipality of Victoria, conveying a (primary) current of high pressure (2,000 volts) supplying an arc lamp for lighting a street in the vicinity.

The accident was explained by the appellants on the theory that the swaying of a tree near these wires had brought about a contact between them, thereby causing the current of high pressure to be transferred to the wire connected directly with that through which respondent was injured; and the jury found that the injury was attributable to the negligence of the defendants in maintaining their wires in a situation too close to the trees and in stringing their wires too close to that of the municipality.

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Duff J.

The questions arising upon the appeal are two: First, whether the appellants are entitled to claim the protection of section 60 of the "Consolidated Railway Companies Act of 1896," upon which they rely; and secondly, assuming them to be so, whether that section has any application in the circumstances of this case.

It will be more convenient (since I have come to the conclusion that the appellants are entitled to invoke that enactment) to discuss the second of these questions first. The words of the section are as follows:—

> All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the company, shall be commenced within six months next after the time when such supposed damage is sustained, or if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act.

If we leave out the words "or the works or operations of the company" the section is the same as that found in the "Railway Act" of Canada before the amendment of 1903, except that the period of one year prescribed by the latter Act is by this section reduced to six months. Before the Act which we have now to construe came into force this provision of the Dominion "Railway Act" and the corresponding provisions of the provincial railway Acts had been the subject of much judicial discussion. The various opinions and perhaps even the various decisions are not quite harmonious; but there had been, I think (subject to one observation), a substantial concurrence of decision and almost a concurrence of opinion upon two points: First, that the limitation pre-

scribed by the section was not available where the action was or might have been founded upon a violation of some contractual right; and, secondly, that in any case it only applied where the cause of action was something done or omitted to be done by the company in the exercise or the professed exercise of what, for want perhaps of a better phrase, have been called its "statutory powers." In "statutory powers" one does not, of course, mean to include all the corporate capacities of a company constituted by statute; but only the various powers (conferred by the legislature) to do something which, if done without statutory authority, would (either by reason of the doing of the thing itself, or by reason of some harm arising out of it) expose the person doing it to proceedings for legal redress at the suit of an individual or *ad vindicatam publicam* at the instance of the proper authorities. The reported judgments, however, suggest the observation that there has been some doubt whether the application of the section is restricted in either of these two respects where the thing done or omitted which gives rise to the action is done or omitted in carrying on some business which the statute not only empowers, but requires the company to carry on. By a still narrower construction of the words "by reason of the railway," Mr. Justice Gwynne, in the *North Shore Railway Co.* v. *McWillie*(1), appears to confine the operation of the section to those cases in which the cause of action arises out of some act done or omitted in the exercise, or professed exercise, of the company's powers in respect either of the construction or the maintenance of its line. For the purpose of deciding the immediate point under consideration

(1) 17 Can. S.C.R. 511.

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it is immaterial I think which of these views be accepted. The words of the section before us are

> by reason of the tramway or railway or the works or operations of the company;

and if we give to these words the narrowest of all the constructions suggested it is difficult to see on what ground it can be held that they are not applicable to the circumstances of this case. The negligence from which the respondents suffered consisted in the company permitting the wire conveying the electric supply for incandescent lamps to be so situated that it was liable to be brought into contact with a wire charged with electricity at a dangerously high pressure. That was negligence either in the construction of its works or in the maintenance of its works. Upon their plain reading the words

> damages or injury by reason of the * * * works * * * of the company

obviously embrace any harm arising from such negligence, and it is sufficiently apparent, if I have justly appreciated the effect of the judicial pronouncements touching the construction of the corresponding clause in the railways Acts, that there is nothing in the opinions so expressed to require or justify the exclusion of this case from the operation of the section, unless indeed the circumstances bring it within the principle of those cases in which the section has been held not to be applicable because of the action being based upon a violation of a contractual right.

I do not think this case can be brought within that principle.

It is impossible to hold that in contracting with the mother to supply light for her dwelling house, they contracted with her as agent for the various members

of her family and thereby became liable to be sued by each of them for any failure in the execution of the contract. The duty which they owed the respondent was precisely that which they owed generally to persons coming in contact with appliances connected with their system, viz.: so to construct, maintain and work their system that as far as reasonable (which means in this case the highest practicable) care and skill could avoid it such persons should not be exposed to unnecessary danger of injury by electricity, whether generated by them or transmitted to their wires from the mains of the municipality which they were supporting on their poles.

In respect of his rights against the appellants in this action, the respondent stands in the same situation as that of any other person suffering from a breach of the same general duty; and without taking undue liberties with the words of the section they cannot be so narrowed as to exclude all such persons from its operation.

To come then to the question whether the defendants are entitled to invoke this section. The answer to that question depends chiefly upon the construction of section 29 of the Act, which is in the following words:—

The directors of the company may from time to time raise and borrow, for the purposes of the company, such sum or sums of money, upon such terms and in such manner, as they may consider expedient, and may issue bonds or debentures of the company, in sums of not less than fifty dollars, or ten pounds sterling, each, and on such terms and credit and at such prices as they may think proper, and may pledge or mortgage all the tolls, incomes, franchises, uncalled capital and property, both real and personal (whether then acquired or that may hereafter be acquired), of the company, or any part thereof for the repayment of the moneys so raised or borrowed, and the interest thereon; and any such mortgage deed may contain such description of the property, tolls, incomes, franchises, uncalled capital

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and property, real and personal (acquired or to be acquired), mortgaged by such deed and upon such conditions respecting the payment of the bonds or debentures secured thereby and of the interest thereon, and the remedies which shall be enjoyed by the holder of such bonds, or by any trustee or trustees for them, in default of such payment, and the enforcement of such remedies; and may provide for such forfeitures and penalties in default of such payment as may be approved by the directors; and may also contain, with the approval aforesaid, authority to the trustee or trustees upon such default as one of such remedies, to take possession of the said property so mortgaged, and to hold and run the same for the benefit of the bondholders thereof; or to lease or sell the said property so mortgaged after such default, and upon such terms and conditions as may be stated in such deed; and in case of any such lease or sale, the lessee or purchaser shall have the right to exercise all the powers and franchises by this Act conferred upon the company, and the said property may continue to be held and operated under the provisions of this Act, with the corporate name and powers of the company; and such lessee or purchaser shall have the same rights, powers, privileges, and franchises, and shall stand in the same position, as regards the said tolls, incomes, franchises, powers, uncalled capital, and property real and personal, as the company itself under this Act.

The majority of the full court have held that the effect of the sentence

and the said property may continue to be held and operated under the provisions of this Act with the corporate name and powers of the company,

is to limit the application of section 60 to the case of actions against the Consolidated Railway Company itself or against a purchaser or lessee operating "with the name of" that company. It is not disputed, and it was assumed, I think, by all the members of the court below, that the rights conferred by the succeeding sentences of the section do not rest upon any such condition. In this view, it may or may not be that to take advantage of the authority here given to "hold and operate" the property

under the provisions of the Act with the corporate name and powers of the company,

(whatever may be the precise meaning of those words) it is necessary that the purchaser should assume the name of the Consolidated Railway Company either alone or in conjunction with the "corporate powers" of the company; but whatever may be said upon that point, the purchaser might elect to act or not to act under this authority, and if he should elect not to take advantage of it, he would not be thereby deprived of the benefit of any of the rights which, as purchaser, he would, under other parts of the section, be entitled to exercise. In a word, in this view, the assumption of the corporate name if it be a condition at all, is a condition affecting only the exercise of the authority (whatever that may be) conferred by these particular words.

I think the weight of argument favours this view. The words quoted seem to be inserted parenthetically, and having regard to the circumstance that when the power of sale should come to be exercised the mortgagor company would most probably be in financial difficulties, it is highly unlikely that the legislature would encumber the transfer with a condition requiring that the purchasers should carry on the undertaking in that company's name. Such a condition would most certainly embarrass the company in raising money on the security of its debentures to an extent which might well prove almost prohibitive.

Does section 29 then (apart from these words) invest the purchasers with the authority to invoke the benefit of section 60? The object of that section (29) is to enable the company to raise money by debentures charged upon

the tolls, incomes, franchises, uncalled capital, and property both real and personal of the company or any part thereof.

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To carry out that object the company is authorized to mortgage to trustees for the debenture-holders such part of its property and franchises as it may see fit. The section goes on to provide that authority may be given to the trustees upon default to take possession of the property mortgaged and *"run it"* for the benefit of the debenture-holders and to lease and sell it; and then the section enacts that

> in case of any such lease or sale the lessee or purchaser shall have the right to exercise all the powers and franchises by this Act conferred upon the company,
>
> (here follow the words quoted above which I now omit);
>
> and such lessee or purchaser shall have the same rights, powers, privileges and franchises and shall stand in the same position as regards the said tolls, incomes, franchises, powers and uncalled capital and property, real and personal, as the company itself under this Act.

The legislature seems to have had in contemplation here two kinds of transactions, one in which some integral part of the company's undertaking should be mortgaged to secure the repayment of the moneys borrowed; the other, in which the whole of the company's undertaking should be the security. It is obvious that in its application to the first case some restriction must be put upon the generality of the concluding provision which I have just quoted; the "rights, powers, privileges and franchises" dealt with in the last sentence would in that case be such "rights, powers, privileges and franchises" only as should be comprised within or be necessary or incidental to that part of the undertaking charged. In the second case, the language leaves no room for doubt that the undertaking of the company was to be dealt with, to use Lord Wat-

son's phrase in *Redfield* v. *Wickham*(1) "as an integer" and that every power, privilege and franchise forming a part of the undertaking or necessary or incidental to the working of it conferred or confirmed by the Act or acquired under the authority of the Act should be exercisable by the purchaser to the same extent and subject to the same conditions as by the company itself. It is not disputed that in this case the whole of the property and franchises transferable under this section (so read) were acquired by the appellants.

With great respect, I am unable to agree with the contention that the right conferred upon the company by section 60 is not strictly a *privilege*. A reference to Austin, Jurisprudence, p. 519, and 8 Bacon's Abridgment (*verbo* "Privilege") shews that such a qualified immunity is not only so described with accuracy, but in accordance with the ordinary use of the word by English lawyers.

The only question, therefore, is whether there is anything in the context or in the purpose of the legislature as disclosed by the statute which requires us to give it a more restricted meaning. It is argued that it ought to be read in such a way as to bring it into harmony with the other terms in connection with which it is used and that in that view (I think I am putting the point fairly) it must be held to imply a privilege of a positive kind as distinguished from a mere immunity; that indeed, associated as it is with rights assigned as security for the payment of the company's debts and vesting in the purchaser directly as the result of the transfer to him, it connotes the idea of property. It is said, and quite truly, that the

(1) 13 App. Cas. 467, at p. 477.

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right granted by section 60 has nothing in it of this nature; and moreover that it is a right, so to speak, of a purely personal character, akin to the general power of the corporation to sue and be sued, and not one which is in any way incidental to the enjoyment of the company's property or to the working of its undertaking. I do not think after careful consideration that the word "privilege" as it occurs in the collocation "rights, powers, privileges and franchises" can properly be so limited. What the legislature seems to be providing for is the vesting in the purchaser not only of those things which are comprised within the enumerated "tolls, incomes, franchises, uncalled capital, and property both real and personal," which pass to him by the direct operation of a transfer from the trustees, but all those rights and privileges which are conferred by the Act upon the company as necessary or incidental to the full exercise and enjoyment of what is transferred.

I think the right conferred by section 60 is within this class of privileges. In my view that section is at least limited in its operation to causes of action arising out of something done or omitted in the course of the exercise by the company of its "statutory powers" (in the sense already explained) whether in its construction, maintenance or operation of its undertaking; whether a still narrower construction is the true one, it will be unnecessary to consider. It is observable that the statutory authority under which these powers are exercised merely has the effect of making lawful acts which, if done without such authority, would or might expose it to legal proceedings, and that this protection, speaking generally, is available only when those powers are exercised rea-

sonably. Section 60 goes a step further. It provides that where in the exercise or the professed exercise of these powers something is done or omitted in such a way (in such circumstances of negligence or otherwise) that the statute does not afford an absolute exemption from liability—in such a case, any action must be brought within the prescribed period. The provision thus seems to be rather an extension in a qualified sense of the protection just mentioned; and to be conferred upon the company not simply as a corporate entity bearing a particular name, but as a company incorporated by the legislature for the purpose of carrying on certain specified undertakings which it must be assumed the legislature has supposed to be of public importance.

I think the appeal should be allowed with costs in this court and of the appeal to the full court and the judgment of the County Court judge restored.

ANGLIN J.—I agree in the conclusion reached by Mr. Justice Duff and Mr. Justice Davies, that the appellants are entitled to the benefit of section 60 of the "Consolidated Railway Companies Act, 1896," to the same extent as was the Consolidated Railway Company itself.

For the reasons given by Mr. Justice Duff, I am also of the opinion that in order to obtain the benefit of that section, the defendants are not required to carry on their operations in the name of "The Consolidated Railway Company."

I am unable, however, to accept Mr. Justice Davies' view that the plaintiff's action is so founded upon contract that section 60 affords no defence to it. Had the plaintiff's mother, with whom the defendants con-

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tracted, been injured in circumstances similar to those attending the injury to the plaintiff, her action would have been in tort rather than in contract and section 60 would probably have been applicable even in her case. *Lyles* v. *Southend-on-Sea Corporation*(1). I fail to understand how the present plaintiff can found a claim upon breach of a contract to which he was not a party. His action, in my opinion, is necessarily in tort. *Edwards* v. *Vestry of St. Mary, Islington*(2), at page 341, *per* Bowen L.J.; *Earl* v. *Lubbock*(3); *Winterbottom* v. *Wright*(4), at page 114.

I would, therefore, allow this appeal with costs.

Appeal allowed with costs.

Solicitors for the appellants: *McPhillips & Heisterman.*

Solicitor for the respondent: *J. A. Aikman.*

(1) [1905] 2 K.B. 1.
(2) 22 Q.B.D. 338.
(3) [1905] 1 K.B. 253.
(4) 10 M. & W. 109.

THE BURRARD POWER COMPANY AND THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA (DEFENDANTS) ..... APPELLANTS;

AND

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF) ..... RESPONDENT.

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*Oct. 27, 28.
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*Feb. 15.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Constitutional law—Legislative jurisdiction—Crown lands—Terms of union B.C., art. 11—Railway aid—Provincial grant to Dominion—Intrusion—Provincial legislation—Water-records within "Railway Belt"—Construction of statute—B.N.A. Act, 1867, ss. 91, 109, 117, 146—Imperial O. C., 16th May, 1871—"Water Clauses Consolidation Act, 1897," R.S.B.C. c. 190.

While lands within the "Railway Belt" of British Columbia remain vested in the Government of Canada in virtue of the grant made to it by the Government of British Columbia pursuant to the eleventh article of the "Terms of Union" of that province with the Dominion, the Water Commissioners of the Province of British Columbia are not competent to make grants of water-records, under the provisions of the "Water Clauses Consolidation Act, 1897," R.S.B.C., ch. 190, which would, in the operation of the powers thereby conferred, interfere with the proprietary rights of the Dominion of Canada therein. *Cf. The Queen* v. *Farwell* (14 Can. S.C.R. 392).

Judgment appealed from (12 Ex. C.R. 295) affirmed.

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

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APPEAL and CROSS-APPEAL from the judgment of the Exchequer Court of Canada(1), whereby, with a variation of the findings of the referee that the Lillooet River, in British Columbia, was a navigable river, the action was maintained with costs.

The action was by information filed by the Attorney-General of Canada, on behalf of His Majesty, whereby it was alleged:

"1. That pursuant to the agreement of the Government of British Columbia contained in article 11 of the "Terms of Union" upon which the Colony of British Columbia was admitted into the Dominion of Canada(2), the legislature of British Columbia by 'An Act to grant Public Lands on the Mainland to the Dominion in aid of the Canadian Pacific Railway, 1880' (43 Vict. ch. 11, as amended by 47 Vict. ch. 14), granted to the Dominion Government for the purpose of constructing, and to aid in the construction of, the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust to be appropriated as the Dominion Government might deem advisable, the public lands along the line of the railway before mentioned, as therein particularly mentioned, and which lands are hereinafter called the 'Railway Belt' (3).

"2. That both the Lillooet River, which is a tributary of the Pitt River, and the Lillooet Lakes, from which it rises, are wholly situate within the limits of the said 'Railway Belt.' The Lillooet River is about twelve miles long, and is a public and navigable stream.

(1) 12 Ex. C.R. 295.
(2) Dom. Stat. 1872, p. lxxxiv.; R.S.C., 1906, p. 3169.
(3) *Cf.* R.S.C., 1906, ch. 59.

"3. That the defendant is an incorporated company, having its head office in the City of Vancouver, B.C.

"4. That on the 7th of April, 1906, upon the application of the defendant company, the Water Commissioner for the District of New Westminster, assuming to act under the "Water Clauses Consolidation Act, 1897," ch. 190, R.S.B.C., purported to grant the said company, at the annual rent and for the consideration therein mentioned, a record of 25,000 inches of water (subject to certain reservations) out of the said Lillooet Lakes and tributaries, and Lillooet River and its tributaries, such water to be used for generating electricity, for light, heat, and power, and for milling, manufacturing, industrial and mechanical purposes, at or near lot 404, New Westminster District, and to be diverted from its source at a point at or near the outlet of the lower Lillooet Lake and to be returned at a point at or near lot 404, group 1, New Westminster District, and to be stored or diverted by means of dams, pipes, flumes and ditches.

"5. That on the public lands forming part of the 'Railway Belt' and adjoining the said Lillooet Lakes and Lillooet River, is a large quantity of valuable timber, which is entitled of right to be floated down the said river, and the said alleged grant and the diversion thereby authorized will materially interfere with the said right.

"6. That the said alleged grant and the rights under the 'Water Clauses Consolidation Act' thereto attached will materially interfere with the rights of the Dominion Government in the 'Railway Belt.'

"7. That the capacity of the Lillooet River is about 25,000 inches, and the alleged grant and the proposed

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diversion thereby authorized will greatly diminish the quantity of water in the said river and materially interfere with the rights of the Dominion Government.

"8. That the alleged grant and the proposed diversion thereby authorized will materially interfere with the public right of navigation in the said river.

"9. That section 91 of the 'British North America Act, 1867,' provides that the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the following (amongst other) classes of subjects:

(1) The public debt and property.

(10) Navigation and shipping.

"10. That sub-section (2) of section 131 of the 'Water Clauses Consolidation Act, 1897,' provides that the power conferred by the first sub-section, of entering and taking Crown Lands, shall not extend to lands which shall be expressly reserved by the Crown for any purpose whatever."

The claim was for (*a*) a declaration that the grant of the water-record was invalid and conveyed no interest to the company and that it should be cancelled; (*b*) a declaration that it was invalid as being an interference with property subject to the exclusive authority of the Dominion of Canada; (*c*) a declaration that it was invalid as being an interference with the public right of navigation and the right of floating timber down the said river; (*d*) a declaration that it was invalid and unauthorized by or under the provisions of the "Water Clauses Consolidation Act, 1897"; (*e*) and an injunction to restrain the company from applying under the provisions of the "Water Clauses Consolidation Act, 1897," for approval of its undertaking and from taking any further steps in regard thereto.

The defence denied the allegations of the information, stated that it disclosed no cause of action, and that, in any event, the water-record or grant in question could not be declared invalid or cancelled except upon petition of the Attorney-General or other proper representative of the Province of British Columbia.

An order was made referring the determination of the issues of fact in the case to Mr. Justice Martin, a judge of the Supreme Court of British Columbia, and, by consent, the Attorney-General of British Columbia was added as a party defendant representing the interests of British Columbia, and appeared before the referee and took part in the proceedings. The referee made his report as follows:

"1. The allegations, founded upon certain statutes, contained in the first, ninth and tenth paragraphs of the information were not considered proper subjects of discussion before me under said order of reference.

"2. The allegations of fact contained in the third paragraph of said information were admitted.

"3. The allegations of fact contained in paragraph four of said information have been proved. It is to be explained that the given point of return of the water diverted from said lakes and rivers, *i.e.*, 'at or near lot 404, group 1, New Westminster District,' is not on the Lillooet River, but on Kanaka Creek, which creek at its nearest point is distant from said river about two miles to the south, and said creek discharges into the Fraser River.

"4. The allegations of fact contained in the fifth paragraph of said information have been proved.

"5. The allegations of fact contained in the sixth and seventh paragraphs of said information have been

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proved, and the rights of the Dominion, which have been materially interfered with, include navigation, timber, and fisheries; the result of defendant's proposed undertaking upon the salmon (sockeye) spawning beds in the lake would be specially detrimental, not to speak of the harmful effect upon that fish and other kinds of salmon and trout caused by the reduction of the ordinary volume of water in the river, thereby curtailing the spawning area and probably entirely preventing fish from ascending to the upper reaches of the river at the proper season of the year.

"6. The allegations of fact contained in the eighth paragraph of said information have been proved.

"7. With respect to the second paragraph of said information the allegations of fact therein contained that both the Lillooet River, which is a tributary of the Pitt River, and the Lillooet Lakes, from which it rises, are wholly situate within the limits of the said 'Railway Belt,' have been proved. Counsel for the defence and for the Attorney-General of British Columbia adduced a considerable body of evidence to shew that the sources of supply of said lakes were to a large extent outside the said 'Railway Belt,' but I have not entered upon the consideration of that matter because in my opinion it is an immaterial issue which it would not be profitable to pursue.

"With respect to the allegation in the same paragraph that the Lillooet River is about twelve miles long, and is a public and navigable stream, the evidence establishes the fact that the river is a tidal one for between five and six miles and a navigable one for a distance of upwards of nine miles from its mouth (at Pitt River). Of said nine miles, nearly six miles,

up to what is called the town-line bridge, are navigable for power craft of various sizes. Said bridge has prevented any evidence, based on actual experiment, being offered of the capacity of the stream above it for power craft, but the evidence points to the belief that a little and inexpensive work would enable such craft to go up another mile or so. Above the said bridge loggers' and other boats can go up for two or three miles, say about nine miles in all, nearly any time of the year. The balance of the river (which, as a whole, is probably nearer thirteen miles long than twelve, though there is no exact measurement) is for the most part of a different character, the stream becoming much swifter and narrower, and its use is made more difficult by riffles and rapids of varying depth and strength, and shallow and rocky places through which the channel makes its way with less or more facility according to the height of water. There are no falls in the river, and the rapids or shoals are not of a size or nature to prevent prospectors', fishermen's and loggers' loaded boats, of about twenty feet in length being labouriously poled or 'tracked' by line, following the more or less contracted channel, up to the lake during any part of the year, except at the top of freshets, which are of uncertain occurrence owing to their being largely caused by the varying rain or snow fall in the mountains surrounding the lakes.

"The river is not obstructed by ice, and is capable of being used to drive logs in a commercial sense for between eight or nine months in the year, the time for so doing depending upon the freshets, which do not as a rule occur in the latter part of June, or in July or August, or till the latter part of September. The river, as a whole, is not of so turbulent a nature as streams

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which are generally met with in the mountainous section of British Columbia, and it has more than the average natural facilities for driving logs.

"It is contended for the defence that the stream has no higher claim to be considered navigable than that portion of the Miramichi River above Price's Bend, which is described in the *Queen* v. *Robertson* (1), at page 129, and which was held not to be navigable, but in my opinion it is impossible to really compare the two streams in view of the somewhat meagre description given of the Miramichi. The fact that boats can only utilize a portion of a stream in the ascent thereof by resorting to more or less slow or labourious methods does not of itself determine its navigability any more than does the fact that the descent may be correspondingly swift and easy. In my opinion it comes to a question of degree, and regard must be had to the custom and nature of the country and the manner in which such streams are utilized by those experienced in their nature and peculiarities. The well-known navigation by steamboats of certain turbulent rivers in this province might well be regarded as an impossibility by those who had not the local knowledge and experience. I feel that the question is not an easy one to decide, but after giving due effect to the evidence and argument, I have been unable to reach any other conclusion than that this river is a navigable one."

The judgment appealed from (rendered on an appeal from the report of the referee), varied the referee's finding as to the river being navigable and declared the grant of the water-record invalid, (*a*) as being an interference with property subject to the exclusive authority of the Dominion of Canada; (*b*)

(1) 6 Can. S.C.R. 52.

because the diversion of water intended to be authorized thereunder will be a serious interference with the navigability of the river; (c) because the said record is not authorized by or under the provisions of the statute of British Columbia, the "Water Clauses Consolidation Act, 1897." The order was for the cancellation of the grant of the water-record and that the company should be restrained from applying under the "Water Clauses Consolidation Act, 1897," for approval of its undertaking and from taking any further steps in regard thereto.

Lafleur K.C. for the appellants and cross-respondents. The question, shortly stated, is: Has the Province of British Columbia lost its right to legislate over the "Railway Belt?" We contend that it has not lost that right, though it transferred the beneficial interest in the lands within the "Railway Belt" to the Dominion of Canada. It still has jurisdiction to pass laws with respect to the lands in the province, situate within that "Railway Belt," and the water-rights incident to such lands. No agreement between the Dominion and the province can have the effect of altering their respective legislative jurisdictions as established by the constitutional Acts. The Imperial Order in Council of 16th May, 1871(1), has the force and effect of Imperial legislation and is to be read with the "British North America Act, 1867," as part of the constitution of British Columbia. This leaves the provincial jurisdiction unimpaired. There has been no "carving out" of a portion of British Columbia as federal territory and investing the Dominion with legislative powers over the tract of lands in question.

(1) Dom. Stat., 1872, p. lxxxiv.

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During the argument council discussed the decisions in *The Queen* v. *Farwell*(1); *The Attorney-General of British Columbia* v. *The Attorney-General of Canada*(2); and the following cases were cited: *Keewatin Power Co.* v. *The Town of Kenora*(3); *McGregor* v. *The Esquimault and Nanaimo Railway Co.* (4); *The Esquimault Waterworks Co.* v. *The City of Victoria*(5); *Klondyke Government Concession* v. *Macdonald*(6), *per* Duff J., at page 91; and *Martley* v. *Carson*(7), *per* Gwynne J., at pages 654, 658, 659, 680, and 681.

Newcombe K.C. for the respondent and cross-appellant. The rights or powers which the company proposes to exercise depend solely upon the "Water Clauses Consolidation Act, 1897," of British Columbia, and it is impossible that the "Railway Belt," if part of the public property of Canada, can be affected by provincial legislation, since it is provided by section 91 of the "British North America Act, 1867," that the exclusive legislative authority of the Parliament of Canada extends, among other matters, to "(1) The public debt and property." The title of the Dominion to the "Railway Belt" is clear, and is assured by the "Terms of Union" and Act of the legislature.

We refer to *The Queen* v. *Farwell*(1), *per* Strong J., at page 425; *Farwell* v. *The Queen*(8), *per* King J., at pages 560, 561; *Attorney-General of Ontario* v. *Mercer*(9); *Attorney-General of British Columbia* v. *At-*

(1) 14 Can. S.C.R. 392.
(2) 14 Can S.C.R. 345; 14 App. Cas. 295.
(3) 16 Ont. L.R. 184.
(4) [1907] A.C. 462.
(5) [1907] A.C. 499, at p. 509.
(6) 38 Can. S.C.R. 79.
(7) 20 Can. S.C.R. 634.
(8) 22 Can. S.C.R. 553.
(9) 8 App. Cas. 767.

torney-General of Canada(1), at pages 301-305; *The St. Catherines Milling and Lumber Company* v. *The Queen*(2), at pages 55-59; *Ontario Mining Company* v. *Seybold*(3); *Attorney-General for Canada* v. *Attorney-General for Ontario*(4), at pages 210-211; and *McGregor* v. *Esquimault and Nanaimo Railway Co.* (5).

The diversion of the Lillooet River, whereby the riparian rights are destroyed and a useful waterway is converted into a dry river bed, and the building of dams, ditches, pipes and flumes for this purpose, all upon the property of the Crown, and without the consent or license of the Crown, are acts of interference which cannot be authorized except by legislation; and for such legislation the Parliament of Canada is the only competent authority.

It has been contended that the litigation was premature, as the grant to the company had not yet been approved by the Lieutenant-Governer in Council, or in so far as a right to an injunction was concerned. The company was taking the statutory steps. It had made its application, obtained its grant from the Water Commissioner, thus shewing its intention, and when this action was brought it insisted upon the validity of the grant, and the power of the local authorities to authorize the works. It is still insisting upon the same thing. Presumably if this action had not been brought the works would have been already constructed and in operation. If an intention to do the act complained of can be shewn to exist, or if a man insists on his right to do, or begins to do, or

(1) 14 App. Cas. 295.
(2) 14 App. Cas. 46.
(3) [1903] A.C. 73, at p. 79.
(4) [1897] A.C. 199.
(5) [1907] A.C. 462.

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threatens to do, or gives notice of his intention to do an act which must, in the opinion of the court, if completed, give a ground of action, there is a foundation for the exercise of this jurisdiction. Kerr on Injunctions (4 ed.), pages 13 and 14. It is not necessary that the breach in respect of which the interference of the court is sought should have been actually committed; it is enough that the defendant claims and insists on his right to do the act complained of, although he may not have actually done it. Kerr on Injunctions (4 ed.), page 358. The action has been commenced and the liability is denied at the bar, consequently, there is a right to claim indemnity by action. *Hobbs* v. *Wayet*(1), *per* Kekewich J.

The "Water Clauses Consolidation Act, 1897," must be construed as not intended to apply to the "Railway Belt," because of the incapacity of the local legislature to extend the provisions of the Act to the public property of Canada.

The grant and the works proposed to be executed thereunder are *ultra vires* of the local legislature to authorize as affecting navigation, which is under the exclusive legislative authority of the Parliament of Canada.

The referee finds that the Lillooet River is a navigable one, and this finding was only varied upon appeal by the declaration that it is a public and navigable river for a distance of upwards of nine miles from its mouth at Pitt River. Both the referee and the court appealed from hold that the proposed works would seriously interfere with the navigation. These findings are amply supported by the evidence.

The proposed works would destroy or interfere

(1) 36 Ch. D. 256, at p. 259.

with the fisheries of the Lillooet River and also of the lakes, and, consequently, could only be authorized by Parliament, in virtue of its exclusive legislative authority with regard to "Seacoast and Inland Fisheries."

It is contended, on the cross-appeal, that there is no occasion or sufficient reason for varying the finding of the referee that the Lillooet River is navigable. This finding must be construed *secundum subjectam materiam*. The issue is as to whether the flow of water in the Lillooet River is such as to give the river the quality of navigability. The execution of the proposed works would divert the water from the river, and destroy navigation. It is properly found that the river is navigable, and that its character as a navigable river is not affected by the conditions of the stream at or immediately below its origin or outlet from the Lillooet Lakes.

THE CHIEF JUSTICE.—I agree in the opinion of Mr. Justice Duff. In view of the grounds upon which the majority of the court dispose of the main appeal, it is not considered necessary or desirable to deal with the cross-appeal.

GIROUARD J.—I think we are bound by the decision in *The Queen* v. *Farwell*(1), and, therefore, the appeal must be dismissed with costs.

DAVIES J. concurred with Duff J.

IDINGTON J.—This appeal must be resolved by the meaning of the agreement between the Dominion and

(1) 14 Can. S.C.R. 392.

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British Columbia. I do not see why, though I will presently refer thereto, the local legislation relative to the use of water, should be of any significance in arriving at a determination of what the parties concerned had agreed upon or set forth in writing as agreed upon.

Speaking in general terms, there existed in English law at the time of the formation of the contract in question, a clear and definite meaning of what the term land (when used in contracts relative thereto) implied, which seems inconsistent with the exceedingly restricted meaning sought to be attached to it in the contract in question.

As between two such British colonies as these concerned therein dealing with regard to lands, I submit the principles of the English law must be kept in view and the primary meaning of the words "public lands" must be what that law would impute to such a term. The instrument must be read, of course, in light of the surrounding circumstances and the nature of the business the parties thereto had in hand as well as what the terms and conditions expressed in regard thereto must reasonably imply.

The question raised is not such as the precious metals case involved for the terms owning or conveying land have so passed current as meaning that of an ownership thereof that implied the exclusion of that covered by the prerogative rights of the Crown in or over the royal metals. And for that reason the court held, having regard to the nature of the contract and the instrument in question in the precious metals case, that the terms "public lands" was used in this restricted sense.

It seems to me that case is rather against than for the appellant.

If appellant's present contention that the right which passed to the Dominion must be not only subject to, but as a consequence limited by, what a British Columbia legislature, acting within its powers over civil rights, either had chosen or might choose to determine, is sound then there need never have been the trouble there was to decide that case.

Apart from that and before proceeding to consider the relation of such legislation to the land in question I would ask how can the term "public lands" be in the ordinary use of language so restricted as to imply an absolute severance in title in or to the land from the title in or to the use of all that water which is needed to make the land valuable and the use of which in law usually goes with it?

Is it to be supposed that it was contemplated as competent for the party making such a concession of public lands, forty miles wide and hundreds of miles long, of its own volition, so to drain therefrom the water thereon to serve other lands and uses on either side thereof as to leave this strip a barren waste?

It may be replied that the party granting was as deeply interested as the grantee in avoiding such a result. But it is as "a commercial transaction" the matter has to be considered in the first place, and next as a project of colonization.

The case in hand presents a good illustration of what a profitable use may be made of the water elsewhere and for other purposes and if uniformly persisted in how destructive of its commercial or settlement uses the exercise of such a power over the waters of and on the land may become.

Besides the land needing water for ordinary purposes, their irrigation may be a prime necessity to ren-

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dering them or any part of them worth anything for the purpose of settling them profitably or advantageously.

The grant is one of such magnitude that it would seem impossible for any one ever to have considered the acceptance thereof as something of value when undertaking to settle the lands without the water—the first necessity of the settler being in the power of the grantee assuming such a duty, either to give or assure the settler thereof or help him to develop its use.

To say that the province might do it better is evading the issue. We have not to approve or disapprove of what possibly neither party might with later experience dream of undertaking now.

The province, for example, might also lay out better roads, build bridges thereon, and do better all that which the doing so implies.

But this pre-eminently local concern of laying out roads or allowances therefor seems impliedly reserved for the Dominion, for the only restrictions the Act making the grant imposes in that regard is that it is not to

> affect or prejudice the rights of the public with respect to common or public highways existing *at the date* (of the Act) within the limits of the lands intended to be conveyed.

This expression of the legislature's thought then seems in curious contrast with the new view presented, and especially so when we find the local law had provided, by the 46th section of the "Land Act, 1870," that unless otherwise specially noted at the time of sale all Crown lands shall be sold subject to such public rights of way as may be thereafter specified by the Chief Commissioner of Lands and to the right of the Crown to take therefrom without compensation, any stone,

gravel or other material to be used in repairing the public roads and to such private right-of-way existing at the time of sale.

Are these locally useful reservations implied in the grant now in question? Clearly not and that because of the exclusive and comprehensive nature of the grant.

It is said ingeniously what use can be made of a right to the water along with these lands when immediately the Dominion grants any of them they must come under the local law which provides for a severance of the right to the water from that of the land.

I deny that it is so. I admit the land falls as do the rights of the owner within the legislative control of the province.

I admit the legislature has the power to expropriate the water on the land so soon as it passes out of the Dominion's control. It has not done so.

I admit it could expropriate the entire land as well as water so soon as it passes out of the Dominion's control, and that even without compensation. It has not done that either.

Here we have nothing to do with what it may or may not do, but only, if at all, the law as it exists.

The argument has in it more than one fallacy. But the chief one is assuming what is not in my view of the law correct. That is, that as a matter of course under the existing law of the legislature the waters on these lands, even if vested in the Dominion now, would, by the grant of the Dominion to another, *ipso facto* become the property of the Crown in right of the province.

No such thing happens. No such thing is provided for or expected.

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Even the present statute, "The Water Clauses Consolidation Act, 1897," further advanced, in the way of appropriating to the Crown control of all water, than any of its predecessors, fails to produce such result.

The unrecorded water is all it presumes to exercise jurisdiction over, and that is so defined as to exclude from its operation the water held under *"a special grant by public or private Act."*

If I am right in the meaning I attach to the words "public lands" in the agreement, and as a result in the statutes intended to carry out the agreement there is an end of the matter in these lands being thus excepted as a public grant.

But as so much importance seemed to be attached in argument to the bearing of the local legislation on the agreement, I may proceed and call attention to a few things overlooked in that view.

No legislation even in British Columbia has ever affirmed as an absolute proposition of law that unless expressed to the contrary we must in every case of a legislative or contractual nature assume that the title to the land carries with it no interest in the water thereon.

On the contrary to the present time the right to the use of the water as it passes is still recognized as in the owner of the land " for domestic and stock supply."

True, it is in such reservations spoken of as the property of the Crown, but yet as if in respect of its use by the land owner "a general right thereto" existed. It is hard even for legislators having to solve problems such as the water question in British Columbia to think of the matter as if the dissolution of the tenure of land and use or right to water thereon had become absolute.

The common law thought dominates, and rightly so unless something is clearly expressed to the contrary.

Not to go further back than 1870 the year before the agreement, we have to deal with a comprehensive land Act known as the Land Ordinance, 1870." In that Act for the purpose thereof "Crown lands" were defined to mean all lands of the colony held by the Crown in fee simple.

What did that mean? What did the holding of lands in "fee simple" mean? We have no explanation, and when we are seeking to find a basis for complete severance of title in the land from any right in the water we might expect something more explicit than such an ambiguous answer *or* interpretation of lands and especially of Crown lands.

We are not given any definition of the word "waters." What would seem to be enacted in this regard is not a disturbance of the ancient way of looking at land as associated with and carrying with it the title to the use of the water thereon, but a legislative provision which appears in section 30 of the Act providing for the diversion by a named class of any "unrecorded and unappropriated" water from

> the natural channel of the stream or river adjacent to or passing through such land.

And in the same section, following this provision, is this declaration:

> and no person shall have any exclusive right to the use of such water whether the same flow naturally through or over his land except such record shall have been made.

A similar provision applicable to water privileges for mining or other purposes appears in section 35,

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where the provision is made for the diversion of water "not otherwise lawfully appropriated."

I venture to think that up to the Act of 1870 and including that Act there was nothing in the legislation of British Columbia or otherwise to warrant the contention that in 1871, at the time of the agreement in question, there was any generally settled legal opinion that the phrase "Crown lands" or the phrase "public lands" meant more or less than the plain, ordinary meaning of these English words as they had been understood for ages previously.

I rather think the mining industry was what first induced the enactment of any such provision as looking to taking of the water from land possessed by the Crown or others. Some of the earlier provisions I am unable to find. Their publications ceased as they were repealed or replaced.

The earliest of these I have been able to see is in an Act of 1862, which provided for the sale of Crown lands and promoting settlement in the colony and in that Act appeared a provision in favour of miners and giving them the right of carrying water for mining purposes notwithstanding any recorded claim for the purchase of the land.

The phrases used to define what water might be taken are worth noting as well as the limited uses for which the taking or diverting was or ever has been permitted.

The words used in the "Land Ordinance" passed on 11th April, 1865, was "any unoccupied water" in section 44 thereof, which was the predecessor of the section 30 above referred to in the later Act of 1870.

The "Land Act of 1875" used the phrase:

> so much and no more of any unrecorded and unappropriated water, etc.

The "Land Act of 1884" used the same words as the preceding.

What was done in the way of legislation severing the right in, or to the use of, water from the land, consisted merely in the creation of a statutory easement, so to speak, and in each case in favour of cultivators of land and miners.

The ancient law otherwise remained and remains as it was before. In no sense can it be said that the land and the water were universally and uniformly supposed to depend upon separate rights of or in property.

The invasion of the common law doctrines in the province had not and has not yet gone so far as to interfere in any way therewith except in the case of, first, "unoccupied water," then, "unrecorded and unappropriated."

We are left to guess at or interpret what the word "unappropriated" means, there being no legislative interpretation assigned thereto.

Another thing worthy of notice is that the basic idea expressed in the agreement was to have

> a similar extent of public lands along the line of railway as may be appropriated for the same purpose by the Dominion Government from the public lands of the North-West Territories and the Province of Manitoba.

And these were given

> in trust to appropriate in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway.

These things, to my mind, all point to what was, from a British Columbia point of view, an entirely exceptional agreement as to public lands beyond the ordinary right given by the province to those acquir-

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ing any of them in the ordinary way merely by virtue of the "Land Ordinance, 1870," then in force or any succeeding "Land Ordinance."

Almost every term of the agreement is quite inconsistent with the encumbering purposes and policies of such Acts. The province substitutes by it another party, possessed of high, though not sovereign, power, for itself to deal with a large proportion of the Crown lands of the province, as it saw fit, unrestricted in any way except that it must bring or try to bring about their settlement.

The nature of the agreement is essentially in conflict with the idea that it must conform to the local policy of British Columbia in any other way than that of promoting settlement.

And so far from tending to restrict the primary meaning of the word "lands" all these things tend to emphasize it, and, if possible, magnify the importance of the rights given.

Another thing to be observed is that in none of these provisions or otherwise had the local Acts relied upon referred to the Crown or pretended in express terms to bind the Crown.

Waiving the question of the right of the Crown to make grants out of its rivers or lakes or in doing so to be guided by this method of procedure, there is no express enactment in that regard even in these Acts, though the Acts being specially for the administration of the Crown lands may furnish an irresistible inference that for that limited purpose the Crown is bound.

It is not intended and never could have been intended to apply to lands held by the Crown in right of the Dominion for other purposes, and which are not

at all within the purview of the legislation in question such as "The Water Clauses Consolidation Act, 1897."

Hence it seems to me idle to maintain in face thereof that the grant to a settler by the Dominion would as of course bring such land within these enactments.

The objection was made that an injunction could not be granted, or should not be granted, until application had been made and passed upon by the Lieutenant-Governor in Council.

The jurisdiction asserted is the common one of preventing threatened trespass or waste, and depends not on anything beyond the reasonable apprehension thereof, which is in no way dependent on the action or possible abstention therefrom by another court or authority.

I have preferred to rest my opinion on the broad right of the Dominion to the use of the water and issue raised in regard to it which is no doubt what the parties concerned desire to have determined rather than upon the narrow one of the possible interference with navigation, which must depend on the facts. These once ascertained as shewing an interference with navigation the Dominion's right is undoubted.

I think the appeal should be dismissed with costs.

As to the cross-appeal, though seeing no ground to complain of the judgment in the court below, I would not, unless the parties feel the issue must be decided, think it wise to cumber this record or embarass any future issue by a needless and fruitless declaration of what on this evidence the proper measure is of navigability or how far the navigable nature of the river extends.

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DUFF J.—The scheme of the "British North America Act, 1867," for the distribution of the public property of the provinces held by them at the time of the passing of the Act has been several times explained in the judgments of the Judicial Committee of the Privy Council. In *The Liquidators of the Maritime Bank* v. *The Receiver-General of New Brunswick*(1), at pages 441 and 442, it was said by Lord Watson, speaking on behalf of the Board, that the object of the Act

> was accomplished by distributing between the Dominion and the provinces, all powers, executive and legislative and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property and revenues as were necessary for the due performance of its constitutional functions and that the remainder should be retained by the province for the purposes of the Provincial Government.

The design of the Act appears to have been that such of the property as by the Act was appropriated to the Dominion should be subject to the exclusive control of the Dominion Legislature, and such as was left in the provinces should be subject to the exclusive provincial control. Section 117 provides as follows:

> 117. The several provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for the fortifications or for the defence of the country;

and this appears to be the only provision in the principal Act authorizing the Dominion to take provincial property. There is no provision expressly authorizing a province to assume any property appropriated by the Act to the Dominion. At pages 57 and 58(2), Lord Watson, speaking for the Judicial Committee, said:

(1) [1892] A.C. 437.

(2) *St. Catharines Milling and Lumber Co.* v. *The Queen*, 14 App. Cas. 46.

The enactments of section 109 are, in the opinion of their Lordships, sufficient to give to each province, subject to the administration and control of its own legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the Union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under section 108 or might assume for the purposes specified in section 117.

The subjects of the legislative jurisdiction conferred upon the Dominion by sub-section 1 of section 91 are described in the words "the public debt and property," but these words obviously mean "the public debt and property" of the Dominion. The only express provision touching the power of the provinces to legislate in respect of the public property is section 29, subsection 5, and the powers there conferred are confined to the public lands of the provinces. In *Attorney-General of Canada* v. *Attorney-General of Ontario* (1), at page 713, Lord Herschell, speaking for the Judicial Committee (comprising the Lord Chancellor, Lord Herschell, Lord Watson, Lord Macnaghten, Lord Morris, Lord Shand, Lord Davey, and Sir Henry de-Villiers), after a full argument, in which all the provinces, as well as the Dominion participated, pointed out the distinction between proprietary rights and legislative jurisdiction; and after observing that the power to legislate in respect of a particular subject-matter would necessarily enable the legislature so empowered to affect proprietary rights, said:

If, however, the legislature purports to confer upon others proprietary rights where it possesses none itself, that in their Lordships' opinion is not an exercise of the legislative jurisdiction conferred by section 91. If the contrary were held, it would follow that the Dominion might practically transfer to itself property which has, by the "British North America Act," been left to the provinces and not vested in it.

(1) [1898] A.C. 700.

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The reasoning upon which these decisions are based appears to involve the principle that except in the special case mentioned in section 117 the distribution of property between the Dominion and the provinces is not subject to be re-adjusted at the will of one of the parties without the consent of the others and consequently, that a province cannot take away either for the benefit of itself or for the benefit of another any of the property appropriated by the "British North America Act" to the Dominion.

The scheme of distribution found in the "British North America Act, 1867," was, as regards British Columbia, modified by the terms of union with that province. The eleventh article of the latter instrument provides for the transfer to the Dominion of a certain tract of land for aid in the building of a railway connecting the eastern provinces of Canada with the Pacific coast. In the *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1), it was said that this article was only one term in a general statutory arrangement, of which the leading enactments were those bringing into force the general scheme of the "British North America Act" for the distribution of the provincial property and that the article constituted an exception to that scheme. Having regard to the principle upon which the Judicial Committee seems to have acted in the cases already referred to, it would seem that the true view of the eleventh article is that the power to deal with and manage the tract of land to be transferred to the Dominion thereunder was vested in the Dominion, and that as a consequence the province could neither assume any part of the land so vested in the Dominion

(1) 14 App. Cas. 295.

for itself, nor dismember the Dominion's proprietary rights in it by conferring any such rights upon others. That, I think, is the view of the effect of the article expressed by the Judicial Committee in the case last mentioned.

That the carrying out of the plan of the power company would involve the dismemberment of the proprietary rights of the Dominion is too clear for discussion, and, indeed, I think is not disputed. The plan includes the occupation of the bed of the Lillooet River just below the embouchure of Lillooet Lake by a permanent dam, the raising of the surface of Lillooet Lake, the construction and maintaining of conduits and the permanent diversion of the waters of Lillooet River. If I am right in the views I have just expressed it is perfectly clear that the assumption of such rights by the province over the tract conveyed under the eleventh article either for its own benefit or for the purpose of conferring them upon others, is something which that article by necessary implication forbids.

That the transfer to the Dominion of proprietary rights of the province in the tract in question had the effect of vesting in the Dominion all the rights of the province in waters of the lakes and streams within the tract incident to the ownership of the tract seems to me to be clear. It is true that at the time of the Union, as well as at the date of the Act of 1884, the law of British Columbia conferred upon landowners and others the right to obtain from the Provincial Government grants of the right to divert the waters of natural lakes and streams for certain purposes; and it is also true that the legislature must have contemplated that in the existing conditions of the country such grants, in many, if not in most cases, might pre-

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judicially effect the Crown lands in respect of the flow of such waters through or past them.

It should seem, however, in view of the considerations mentioned above, the agreement contained in article 11 being carried out by the Act of 1884, the authority given to the provincial officers under the general legislation of the province to make such grants of water rights would *ipso jure* cease to apply to the tract thereby conveyed to the Dominion, while it remained the property of the Dominion.

ANGLIN J.—It was found by the learned judge to whom the issues of fact in this action were referred that the Lillooet River is navigable throughout its entire length. This finding was modified on appeal by the learned judge of the Exchequer Court, who held that this river is navigable in its lower reaches extending about nine miles up from its confluence with the Pitt River, but is not navigable in the upper reaches. The learned judge further finds that the navigability in fact of the river in its lower reaches does not depend on the flow of the tide. Against these findings of the Exchequer Court the defendants have not appealed.

The scheme of the company is to divert from the Lillooet River 25,000 inches of water flowing into it from the Lillooet Lakes, and to carry this water into Kanaka Creek and thence into the Fraser River. No part of the diverted water is to be returned to the Lillooet. The capacity of the Lillooet River at its exit from Lillooet Lake has been found to be about 25,000 inches, and from this finding there has been no appeal. It follows that, except in so far as it may be preserved by the flow of the tide, the proposed diversion will, if permitted, destroy the navigability of the Lillooet

River. The influence of the tide is felt only in the lower six miles of the river. In this state of facts it is manifest that if carried out the diversion proposed by the appellants will seriously interfere with, if not destroy, the right of navigation.

By section 91 (10) of the "British North America Act, 1867," legislative jurisdiction over navigation is vested exclusively in the Dominion Parliament, and it has prohibited the erection of any dam which shall interfere with navigation. R.S.C. [1906] ch. 116, sec. 4. Because the carrying out of the scheme of the appellants will involve the construction of a dam which will interfere with navigation, I am of opinion that the judgment in appeal should be sustained.

No doubt this appeal might be disposed of on this ground alone, and, having regard to what has been said by the Judicial Committee in *Citizens Ins. Co. of Canada* v. *Parsons* (1), at page 109, and approved of in later cases, I am not certain that it should not be so disposed of. But counsel expressed great anxiety that this court should determine the validity of the provincial grant of the water-power in question, apart from its undue interference with the rights of navigation. This is said to be a pressing question of general importance in British Columbia, and an expression of opinion upon it, though not necessary to the disposition of this appeal, may therefore be not improper. *The Attorney-General for British Columbia* v. *The Canadian Pacific Railway Co.* (2), at page 208.

In the *Precious Metals Case* (3), at page 301, Lord Watson, speaking of the transfer to the Dominion of the lands comprised in the "Railway Belt," said:

(1) 7 App. Cas. 96. (2) [1906] A.C. 204.
(3) 14 App. Cas. 295.

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It seems clear that the only "conveyance" contemplated was a transfer to the Dominion of the provincial right to manage and settle the lands, and to appropriate their revenues. It was neither intended that the lands should be taken out of the province, nor that the Dominion Government should occupy the position of a freeholder within the province. The object of the Dominion Government was to recoup the cost of constructing the railway by selling the land to settlers. Whenever land is so disposed of the interest of the Dominion comes to an end. The land then ceases to be public land, and *reverts* to the same position as if it had been settled by the Provincial Government in the ordinary course of its administration.

It was accordingly held in *McGregor* v. *Esquimault Railway Co.*(1), that other land, the beneficial interest in which had been conveyed by the province to the Dominion for railway purposes, but which had subsequently ceased to be the property of the Dominion by a grant thereof to a local railway company, was subject to provincial legislative authority.

While in both these cases it appears to have been recognized that the extent of the legislative control of the province over such lands is not the same while they are held by the Dominion as it is after they have passed into other hands —

> the land *reverts* to the same position as if it had been settled by the Provincial Government in the ordinary course of its administration —

to what extent provincial legislative jurisdiction over it, while held by the Dominion, is abrogated or curtailed is not defined.

In the *Precious Metals Case*(2) it was held that while the *jura regalia* were not transferred to the Dominion, the beneficial interest in the Crown's territorial rights—their management, and the revenues derivable therefrom—was so transferred. *Farwell* v. *The Queen*(3), at page 560.

(1) [1907] A.C. 462. (2) 14 App. Cas. 295.
(3) 22 Can. S.C.R. 553.

Water-powers existing upon streams flowing through these lands are not *jura regalia*. So far as they were subject to provincial control or disposition while the lands were held by the province—at all events where they are found upon non-navigable streams—they were incidents of the adjacent property which would pass with other beneficial interests in the nature of territorial rights from the province to any purchaser of the lands upon either side of the stream, unless they were expressly excepted by the terms of the grant itself or were excepted from it by provincial legislation. They are not excepted in the statutory conveyance to the Dominion, and the only legislation of the province in force at the time of the transfer to the Dominion to which we have been referred, as stated by Mr. Justice Cassels, does not affect this case. It does not except unrecorded water-rights from the interest of the lawful occupant of pre-empted and cultivated lands; it merely imposes a condition upon the exercise of his right to divert such waters from their natural course. This is something quite different from so excepting the ordinary rights in such waters which appertain to riparian ownership that they might be bestowed upon some stranger without derogating from the lawful interests of the riparian owner. These rights, therefore, in my opinion, passed to the Dominion under the statutory conveyance with other incidents of the property.

These undeveloped water-powers might have been very valuable interests—they may still prove almost indispensable privileges—for the use of the transcontinental railway itself, whose construction the transfer of the lands comprised in the "Railway Belt" was designed to aid, should electrical energy be utilized as its motive power. Without derogating from its

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grant, made pursuant to the terms of union sanctioned by Imperial Order in Council having the force of an Act of the Imperial Parliament, the province could not assert in respect to the lands themselves legislative jurisdiction to sanction their expropriation; neither can it do so with regard to such an incident of the property as the water-power here in question.

In my opinion, while held by the Dominion these lands are not subject to such provincial legislative jurisdiction as the appellants invoke.

The appellants object that this action has been prematurely brought, because, although the Water Commissioners acting under the "Water Clauses Consolidation Act" (R.S.B.C. [1897] ch. 190), have granted to the appellants " a record of 25,000 inches of water, etc.," their scheme requires the sanction of the Lieutenant-Governor in Council before they can proceed with their works. Mr. Lafleur suggests that the scheme as propounded may never receive this sanction, and that until it is given the Attorney-General of Canada cannot maintain this action. I am unable to agree in this view. The appellants should not be heard to say that they may not carry out that which they have avowed it to be their intention to perform. Such an avowal has always been deemed a sufficient ground for preferring a claim for an injunction. Kerr on Injunctions (4 ed.), pages 13, 14, 358.

I would dismiss this appeal with costs.

*Appeal dismissed with costs.**

Solicitors for the appellants: *Bowser, Reid & Wallbridge.*

Solicitor for the respondent: *E. L. Newcombe.*

*Leave to appeal to the Privy Council was granted, 26 April, 1910.

TRAVIS v. THE BRECKENRIDGE-LUND LUMBER AND COAL COMPANY.

1909
*Oct. 12, 13.
1910
*Feb. 15.

Mechanics' lien—6 Edw. VII. c. 21, (Alta.)—Contract—Overpayment to contractor—Liability of owner of land—Attaching of lien—Negotiation of note—Claim of lien-holder—Waiver—Estoppel.

APPEAL from the judgment of the Supreme Court of Alberta(1), reversing the judgment of Beck J. at the trial, and maintaining the plaintiffs' action with costs.

The plaintiff company brought the action to recover $5,185 and to enforce a lien, under the provisions of the "Mechanics' Lien Act," 6 Edw. VII. c. 21 (Alta.), for the unpaid balance of the price of materials supplied during the months of August and September, 1907, to one Short, who was the contractor for the erection of a number of buildings for the appellant (defendant) on his land, in the City of Calgary, in Alberta. The plaintiffs had supplied materials to Short, during the construction of the buildings, up to the end of July and had been paid therefor. The contractor being unable to complete his contract, on or about the 1st of October the appellant, in order to save his property, took over the works and completed the buildings. No formal cancellation of the contract with Short was made, but the evidence shewed that it had been in fact so taken over by the appellant; that all subsequent payments made by him were necessary to complete the

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

(1) 2 Alta. L.R. 71.

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buildings and that, added to payments formerly made, the amount paid largely exceeded the contract price. It also appeared that, at the end of July, the payments made to Short and upon his order amounted to a sum in excess of what was then due and owing to the contractor for the works executed by him up to that date. All claims for work and materials supplied in connection with the buildings had been paid with the exception of the balance claimed by the plaintiffs. On 5th September Short gave his promissory notes to the plaintiffs for the full amount of their claim and these notes were discounted by them, but, being dishonoured by the maker at maturity, they were subsequently paid by the plaintiffs.

At the trial Mr. Justice Beck dismissed the action and held that, under the circumstances of the case, there never having been any sum owing and payable to the contractor by the owner at the times when delivery of the materials were made by the plaintiffs in August and September, no lien attached. This judgment was reversed by the judgment now appealed from.

After hearing counsel on behalf of both parties, the Supreme Court of Canada reserved judgment and, on a subsequent day, allowed the appeal with costs and restored the judgment of the trial judge.

Appeal allowed with costs.

The appellant appeared in person.

Chrysler K.C. and *Clifford Jones* for the respondents.

JEAN B. BOULAY AND ADELARD LUCIER (SUPPLIANTS) ..... APPELLANTS;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

1909
*Nov. 26.
1910
*Feb. 15.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Contract—Delivery of goods—Conditions as to quality, weight, etc. —Inspection—Rejection—Conversion—Sale by Crown officials— Liability of Crown—Deductions for short weight—Costs.

The Minister of Agriculture of Canada entered into a contract with the suppliants for the supply of a quantity of pressed hay for the use of the British army engaged in the operations during the late South African war, the quality of the hay and the size, weight and shape of the bales being specified. Shipments were to be made f.o.b. cars at various points in the Province of Quebec to the port of Saint John, N.B., and were to be subject to inspection and rejection at the ship's side there by government officials. Some of the hay was refused by the inspector, as deficient in quality, and some for short weight in the bales. In weighing, at Saint John, fractions of pounds were disregarded, both in respect to the hay refused and what was accepted; there was also a shrinkage in weight and in number of bales as compared with the way-bills. The hay so refused was sold by the Crown officials without notice to the suppliants, for less than the prices payable under the contract, and the amount received upon such sales was paid by the government to the suppliants. In making payment for hay accepted, deductions were made for shortage in weights shewn on the way-bills and invoices, and credit was not given for the discarded fractions.

Held, the Chief Justice and Davies J. dissenting, that the appellants were entitled to recover for so much of the amount claimed on the appeal as was deducted for shrinkage or shortage in the weight of the hay delivered on account of the government weighers disregarding fractions of pounds in the weight of that accepted and discharged from the cars at Saint John.

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

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Per Girouard, Idington and Duff JJ.—The manner in which the government officials disposed of the hay so refused amounted to an acceptance which would render the Crown responsible for payment therefor at the contract price.

Judgment appealed from (12 Ex. C.R. 198) allowed in part with costs, the Chief Justice and Davies J. dissenting.

APPEAL from the judgment of the Exchequer Court of Canada(1), which dismissed the suppliants' petition of right with costs.

The case is stated in the head-note and in the judgments now reported.

Lafleur K.C. for the appellants.

Newcombe K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—Towards the end of 1901 and the beginning of 1902 the petitioners entered into certain contracts, nine in number, for the sale of a large quantity of hay to the Canadian Department of Agriculture for account of the Imperial Government. The contracts are substantially similar, though not identical in form, and provide for the delivery of the hay f.o.b. cars at shipping points in the Province of Quebec, but subject to inspection and rejection at the ship's side at St. John, N.B. The hay was intended for shipment to South Africa for the use of the Imperial troops during the late war in that country. The contracts specify in detail the quality of the hay and the size, weight and shape of each bale. The petitioners, by their petition of right, preferred a number of claims amounting to a large sum of money; but all were abandoned at the trial with the

(1) 12 Ex. C.R. 198.

exception of two amounting respectively to the sum of $544.50 and $2,317.59. The first item was for hay alleged to have been improperly rejected by the Government inspectors and disposed of without notice to the owners; and the second for an alleged shortage resulting from the improper methods adopted in weighing the hay at St. John. The trial judge says:

(1) The suppliants came forward with evidence of about as loose a character as could be possibly presented in support of their claim, and but for the production of information and evidence by the Crown it would have been almost impossible to arrive at the conclusion as to what they were claiming. The Crown has brought forward certain statements which shew the amount of hay rejected, and the reasons given for the rejection.

(2) All the evidence amounts to is practically this, that the suppliants, no doubt, honestly intended to supply hay in accordance with the contract, and they took it for granted that the parties from whom they bought the hay were supplying them with hay of a quality and weight which would fill the requirements of the contract.

It is admitted, however, that a certain quantity of hay was rejected and afterwards sold without notice to the petitioners and that when weighed at St. John it was found that the weight of the hay did not correspond with the weight given on the way-bills.

Two questions are to be considered: First, was the hay properly rejected as of inferior quality to that called for by the contract? Secondly, was full credit given for all the hay actually received and shipped to South Africa? Paragraphs 5, 6 and 7 of the contract read as follows:

5. The hay to be subject to inspection and acceptance by the department alongside the steamship at St. John, New Brunswick. In case more than ten (10) bales in any carload are found not up to the specifications, the whole of such carload may be rejected; and the balance of the contract or contracts then unfilled may be cancelled in the case of any shipper from whom more than three carloads have been rejected in that way.

6. The price to be fourteen dollars ($14.00) per ton of two thousand pounds f.o.b. cars, shipping point.

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7. A number of bales in each car to be weighed at St. John by an inspector for the department; the weight of the carload to be determined on this basis, and any short-weight that may be found to be charged against the shipper.

The Chief Justice.

I am of opinion that under this contract made in the Province of Quebec the hay remained the property of the vendor until it was weighed after having been found to be on inspection up to the standard of quality called for. It appears that competent inspectors were sent to St. John and the uncontradicted evidence is that they carefully inspected the hay when it was taken from the cars and placed in the sheds on the wharves and, again, when removed from the sheds to the ships, and that none was rejected except that which was not up to the requirements of the contract; so that the title to that rejected hay never passed from the vendor to the vendee (1474 C.C.). It is admitted that the department sold the rejected hay of the various shippers for the best price obtainable, forwarded them a true and correct account of all such transactions and remitted the proceeds of all sales. The allegation is that it was necessary to sell the rejected hay because the wharves and railway sidings at St. John were so congested with excessive shipments that it became necessary to clear the premises. Admitting that the Government officials were not strictly entitled to dispose of petitioners' property in this way, there is no evidence that the appellants suffered any damage and for this technical misdoing on the part of the officials, I would not hold the Crown liable in the special circumstances of this case.

It has been argued, however, that by the sale of the rejected hay an active dominion was exercised over it which constituted acceptance. If the buyer deals as owner with goods sold and delivered to him subject to

inspection before acceptance this may be received as evidence of an intention on his part to accept; but the act of dominion must be such as would justify a jury in finding that the vendee has accepted the goods. But where there is, as in this case, evidence of rejection after inspection, then a subsequent dealing with the goods, not as owner, but as trespasser, if you will, does not constitute acceptance, though the party who does it may be liable for a tort. There is no evidence here of the exercise of any dominion over the goods from which it is possible to infer that the Crown at any time dealt with the rejected hay as owner and there is evidence to justify the conclusion that the suppliants tacitly acquiesced in all that was done and accepted the cheque sent them with the account on 25th July, 1902, as a satisfactory settlement—the present claim not having been brought forward for about three years after the hay was sent to South Africa and a considerable time after all the accounts had been closed between the Department of Agriculture and their principals, the Imperial authorities. I am also of opinion that paragraph 5 of the contract was intended to give and did give to the department the right to reject any carload of hay in which more than ten bales were not up to the specifications; but there was no obligation to do so, and it was in the discretion of the department to accept any portion of any carload that was up to the requirements of the contract and to reject that portion that was below those requirements.

As to the complaint with respect to the weight, Lieutenant Walker H. Bell says:

My instructions were to test each individual car, and, during that time, I do not think that any one car escaped me. I flatter

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myself that it did not, at all events. It was customary to take ten bales from each car and they were not taken from any one particular spot in a car. As soon as the cars were broken open by the stevedores, the man would go in and get the hay, and from the time the car door was broken open until the hay was tested, I would be around there all the time. The bales would be tested from different parts of the car. Some would be taken from the top, some from the middle and some from the bottom, as the hay was being taken out. Each separate bale was weighed and measured at the same time.

He adds that he took the exact weight of each bale and made correct returns to Ottawa, and upon those returns the accounts were finally rendered and the cheque for the balance ascertained to be due paid over.

This evidence, which was not contradicted, and as to which Lieutenant Bell was not even cross-examined, establishes that the requirements of section 7 above cited were complied with. The only evidence we have as to the weight to support the suppliants' case is, as found by the trial judge, that they took it for granted that the parties from whom they bought gave them the weights that they paid for. There is no evidence of the exact weights except that which is to be extracted from the returns made by the Government officials.

I would dismiss the appeal with costs.

GIROUARD J.—I would allow this appeal entirely, because, under the contract, the Crown was not authorized to sell hay rejected. There is no voucher of the price which this sale realized nor of the party to whom it was made. The Crown should at least have been in a position to give this information when requested to do so in St. John, N.B. This is the principal reason why I would allow the full quantity of the hay which the witness Lucier says was shipped in good condition, deduction, of course, being made for what was received and paid for.

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The majority of this court does not share this view of the case. My brother Idington is also for allowing the appeal *in toto;* two of the other judges are for dismissing the appeal; and the fifth, Mr. Justice Anglin, is for allowing in part.

Not being able to have my conclusion adopted, I declare myself in favour of the opinion of Mr. Justice Anglin, who is to allow the appeal in part with costs before this court. This is the first time since I have had the honour of a seat on this Bench that the individual opinion of one judge became the judgment of the court.

DAVIES J. (dissenting).—I concur with the judgment of the Chief Justice, but desire to add a few words upon that part of the claim put forward for what was called "shortage." I have read this evidence very carefully and concur with the trial judge in the statement that

> the suppliants came forward with evidence of about as loose a character as could possibly be presented in support of their claim,

a remark applicable to the entire case. But on the question of shortage the plaintiff's case rests entirely upon a remark or statement made by Macfarlane, one of the defendant's witnesses, when being cross-examined. He was, what he himself described, superintendent of the shipments of hay, but I cannot gather that he interfered in any way with its weighing or had any personal knowledge of that. Answering, however, the following question relating to the method of weighing:

> Q.—Although the shipper had invoiced it (a bale of hay) at ninety-nine pounds if you found it to weigh only ninety-eight and three-quarters you stamped it at ninety-eight pounds.
>
> A.—Yes, we could not give one-quarter of a pound. We could

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not take the odd fractions at all. That is not customary in weighing anything wholesale.

Although this evidence is very general and seems only to have been given with reference to what the witness thought was a general custom, and not as to what actually occurred in this case, it might have been enough to found some kind of a claim for at least the quarter-pound discarded if not of all the odd fractions. But the claim on this head was not allowed by defendants to rest on this general and unsatisfactory statement of Macfarlane. Moore, who was in charge at Ottawa under Professor Robertson of the detail work in connection with the shipments of hay, explained very fully and minutely how the accounts had been made up, and that under the term "shortage" what was charged back to claimants was not the actual short weights only, but short number of bales delivered. He contended, in accordance with a letter he wrote claimants on 16th May, 1902, that

> the *greater part of the shortage* was caused by the fact that the number of bales received at St. John was less than the number invoiced by you.

The remaining part of the shortage, therefore, as to which only there could be any question at all was caused by short weights in the bales. On this point claimants' contention, based on Macfarlane's statement, above quoted, was met by the evidence of Lieutenant Bell, the officer who was "inspector of weights and general specifications of all storage contracts." He described with minuteness the manner and way in which he discharged his duties with respect to selection of the bales to be weighed and the manner of their weighing, and, after stating that "each separate bale was weighed and measured at the same time," he was

asked, "Did you take the necessary time to get the exact weight and measurement of each bale," and answered, "I consider that I did." Now Lieutenant Bell *was not cross-examined* except to prove that he had not taken any oath under the "Inspection Act." His evidence was accepted by both parties and not a bit of evidence of any kind was given by suppliants to throw even doubt upon his truthfulness or accuracy.

On this evidence, therefore, I cannot see that the learned trial judge could make any other finding on the point than the one he did.

IDINGTON J.—The Dominion Government acting on behalf of the home Government undertook to buy immense quantities of hay for the South African War.

The department in charge of the business, by a memorandum of agreement which specified the terms and conditions of purchase, offered to buy from the appellants, at a named price per ton, a specified number of tons of hay compressed into small bales of which sizes and weights and shape and mode of tying appear to have been important things to observe. The appellant accepted by a memorandum of acceptance at the foot. In all there were nine such contracts with the appellant.

The hay was to be as described and "to be shipped for St. John" not later than a stated date, but from where does not appear, unless implied to be from the residence or place of business of appellants where they accepted the contract.

The price was fixed "f.o.b. cars shipping point."

The provisions for inspection were as follows:

The hay to be subject to inspection and acceptance by the department alongside the steamship at St. John, New Brunswick. In case more than ten (10) bales in any carload are found not up to the

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specifications, the whole of such carload may be rejected; and the balance of the contracts then unfilled may be cancelled in the case of any shipper from whom more than three carloads have been rejected in that way.

Idington J.

Inspection of goods bought by sample or description is one of the purchaser's rights.

The time, place, opportunity and method thereof being unprovided for has time and again given rise to litigation.

The parties concerned here expressly provided for all these things as above.

If there had been no such provision the law would have bound the buyer to accept or reject the whole at the point where inspection could rightfully be exercised.

The vendee has no right of selection unless given it out of a vendor's tender at any one time.

The right was in no way modified by this provision beyond its exact terms.

Its terms seem clear, simple and direct. The place for inspection is fixed. The vendee was not driven to the necessity of rejecting or accepting a whole train load. There was a limited power given as to each carload. The right as to that was accurately defined. If ten bales in a car, which was, be it noted, about two and a half per cent. of the whole car, fell short of what the specifications called for, the vendee had the right to reject that car. No right of selection within that limit was given. None could be in law implied any more than in respect of a tender of the whole at one time.

If three carloads fell short the right, and the only right, given was to rescind the whole contract. Surely the protection—the unusual, but prudent, protection—thus given against imposition was ample.

The vendee in any case in the absence of express provision has the legal right of action for damages for non-fulfilment of the contract if the goods are not up to description or sample.

The incidental right to resist full payment may also exist and to these rights I will presently refer.

What the vendee's agents did in this case was to presume to make a selection which they were not entitled to either in law generally speaking or by the special terms of this contract.

The agents of the vendee thus not only without any right to do so, but of their own mere will took the goods and re-sold them.

I am quite unable to understand how, in law, this assertion of dominion over the goods (in respect of which a supposed mental reservation is alleged to have been made) can be anything but an acceptance thereof. If a vendee takes the goods it does not matter to the vendor what his secret intention may be or what use he makes of them.

The law on the point seems settled in accordance with common sense by the case of *Chapman* v. *Morton* (1), and others of a like character.

The cases of an acceptance induced by deception when the acceptance may be withdrawn or of apparent acceptance resulting from mistake are entirely another matter.

The assertion and exercise of dominion was such as to leave a clear right of action to appellants in this case. They were not parties in any way to the selection or rejection or other imaginary name one chooses to call it.

The mere receipt of part payment, unacknowledged

(1) 11 M. & W. 534.

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Idington J.

at the time or later, save as a fact at the trial, cannot affect the legal result.

It was certainly present to the minds of those framing the specifications that some bales would fall below the standard unless they assumed hay-dealers had reached a higher stage than the rest of humanity and would succeed in turning out only absolutely perfect work and ensure its being carried quite dry for hundreds of miles.

It was no doubt also present to the same minds that the event of slight failures should be provided for. This, I think, they did by reducing the possible default to a minimum and a very small percentage of the whole. In this case it would have turned out to be about one and a half per cent. of inferior, but not necessarily worthless hay.

If governments in their contracts could always reach so safe a line they would be doing well, and, indeed, better than ordinary business men.

But assuming, as I think we must, that a perfectly legal intention and method of action are to be imputed to the Crown, we find, I repeat, these goods accepted by reason of what was done.

The implied warranty there was, or right to the reduction of price for failure in quality may have been open to the respondent at the trial. But, in either case, the burthen of proof rested upon the respondent, and that has not been attempted.

The mere rendering of an account and making such a claim supported even by general evidence of the course of inspection and the results reached by the agents of the respondents is not alone sufficient.

The general evidence given by the appellants of their hay having been up to the standard displaces

(and refutes, if refutation is needed) all that which at its best furnishes no presumption.

As the case stands I think appellants entitled to judgment on this branch of the case for $554.50 and interest from the date of last remittance.

Another matter more difficult to deal with is the actual weight of the hay.

On the one hand appellants have proved their weighing it and claim that is the only thing left to govern the rights of the parties.

On the other hand the contract specifies a mode of weighing and determining the quantity.

That was as follows:

A number of bales in each car to be weighed at St. John by an inspector for the department; the weight of the carload to be determined on this basis, and any short weight that may be found, to be charged against the shipper.

In carrying this out the odd fractions of a pound were deducted from each bale weighed. Macfarlane says in evidence as follows:

Q.—Were you present frequently when they were weighing the hay? A.—Yes.

Q.—You weighed ten bales in each car? A.—Yes.

Q.—Supposing one bale was taken out and it was apparently ninety-nine pounds, and your weighers found it to weigh only ninety-eight and three-quarter pounds, the shipper only got credit for ninety-eight pounds? Isn't that right? Although the shipper had invoiced it at ninety-nine pounds, if you found it to weigh only ninety-eight and three-quarter pounds, you stamped it ninety-eight pounds? A.—Yes. We could not give one-quarter of a pound. We could not take the odd fractions at all. That is not customary in weighing wholesale.

Q.—These bales that you have mentioned as being taken from each car, were weighed one at a time? A.—Yes.

Q.—Individually? A.—Yes.

This system adopted was clearly not that laid down by the contract. The contract said that a number of

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bales from each car were to be weighed and the weight of these bales was to determine the weight of the car.

However excusable the docking of the fractional part of a pound in the total weight of ten bales as specified, or per car, might have been, this is not that, but a gross violation of the language of the contract.

For aught we know there might by this system be deducted nearly a pound per bale, and that as the bales had to be not less than 95, nor more than 105 pounds each, the loss or deduction might approximate one per cent. on the whole shipment.

The entire quantity was 10,106,733 lbs., and the half even of one per cent on this is not a trifle perhaps to appellants.

The half of that even which probably is nearer their actual loss on this score is at $14 a ton, something a frugal man should not despise.

Then there are cases of short shippings, but of these we have only two cars specified and the identification in regard to them covers only sixteen bales or less than a ton.

If the respondent's agents had failed to weigh any, the weights proven to have been shipped would have to be rebutted.

A weighing that is so obviously defective and against the contract does not rebut or stand for anything.

I have no doubt a little patient investigation of the records kept will enable the department to clear these matters up, and it would be worth while for both parties to have this made.

If they cannot agree there should be a reference in regard to these items of short weights and short shippings.

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DUFF J.—With respect to shortage of weights and shipments I agree with the view of Mr. Justice Idington. On the remaining contention of the appellants—that in the circumstances of the case the onus was upon the Crown to prove that the hay was below the standard prescribed by the contract, and that they failed to do so—I think the appellants should succeed.

There was a right of inspection and consequently a right of rejection at St. John if the hay should not correspond with the description under which it was sold. Rejection means something more, however, than putting aside physically with the intention of rejecting. It means some unequivocal act on the part of the purchaser conclusively manifesting an election to reject — a return of the goods, an offer to return them, or notice signifying the purchaser's rejection and that the goods are held at the seller's risk. In *Fisher* v. *Samuda*(1), at p. 193, Lord Ellenborough states the rule in these words:

> It was the duty of the purchaser of any commodity, immediately upon discovering that it was not according to order, and unfit for the purpose for which it was intended, to return it to the vendor, or to give him notice to take it back;

and it will be found stated in the same terms in *Couston, Thomson & Co.* v. *Chapman*(2), at pages 254, 256 and 257, and in *Grimoldby* v. *Wells*(3), at page 395. The reason of the rule is thus explained by Lord Ellenborough in *Hopkins* v. *Appleby*(4):

> When an objection is made to an article of sale, common justice and honesty require that it should be returned at the earliest period, and before the commodity has been so changed as to render it impossible to ascertain, by proper tests, whether it is of the quality contracted for * * * . It was incumbent on the defendants to give

(1) 1 Camp. 190.
(2) L.R. 2 H.L. Sc. 250.
(3) L.R. 10 C.P. 391.
(4) 1 Starkie 477.

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the seller an opportunity of establishing his case by the opinion of intelligent men on the subject, and not throw a veil of obscurity over it, and debar the party from the fair means of ascertaining the quality * * * . The party who extinguishes the light, and precludes the other party from ascertaining the truth, ought to bear the loss.

Failure on the part of the seller to notify the buyer within a reasonable time constitutes an election by the buyer against a rejection for the reasons Lord Ellenborough states. *A fortiori* any act of the buyer which in Lord Ellenborough's language precludes the purchaser from "ascertaining by proper tests the condition of the property" at the time of inspection and at the same time puts it out of the power of the purchaser to return the property must be treated as an election by the purchaser to accept. In this case both these conditions were present and the act of the agents of the Crown relied upon by the appellants — the sale of the goods — was, moreover, an act of dominion such as has been held to constitute in itself an acceptance. In the last edition of Benjamin on Sales, at page 752, the editors, referring to *Chapman* v. *Morton*(1), and *Parker* v. *Palmer*(2), make this comment upon those cases:

> The two preceding cases shew that a resale by the buyer *after* he has had an opportunity of exercising an option either of accepting or of rejecting the goods delivered is an acceptance, for by reselling he is presumed to have determined his election.

At the argument I was disposed to take the view that the sale of these goods was an independent tortious act, and that this proceeding was an attempt to sue the Crown for a tort committed by its servants; but under the contract the Crown was bound, I think, to have at St. John somebody with authority to accept or reject the hay, and the acts of the departmental agents there having such authority must, I think, be

(1) 11 M. & W. 534. (2) 4 B. & Al. 387.

taken as a whole. Taken as a whole, these acts must, on the principles above stated, be held as between the Crown and the appellants to constitute an election not to reject the hay.

Nor when one looks at the history of the rule do I think there is any foundation for a contention which at first sight appears to be susceptible of plausible statement, viz., that the rule in principle rests upon estoppel and, therefore, has no application to the Crown. It would be stretching the doctrine that estoppels *in pais* do not bind the Crown beyond, I think, all reasonable limits to hold that in cases of purchase of goods by the Crown the considerations upon which Lord Ellenborough bases the rule requiring prompt and unequivocal notice of rejection on the part of the purchaser, have no application. The rule, whatever its history, is now a substantive rule of law (it is embodied in section 35 of the "Sales of Goods Act"); and there seems to be no satisfactory ground upon which it can be held that it does not apply to transactions between the Crown and a subject. The Crown was, therefore, liable for the price of the hay sold subject to any reduction that might properly be claimed (under the rule in *Mondel* v. *Steel*(1)) as representing the difference in value arising from the inferiority of its quality; and, on this latter issue, the onus was upon the Crown to shew that the hay sold did not conform to the description contained in the contract. This, I think, has not been satisfactorily proved.

I should notice also the argument that the sale of these goods was justified by the course of business between the parties. A course of business may, no doubt, as effectually as express words, produce a modification

(1) 8 M. & W. 858.

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of the legal incidents of a contract of sale. Here, if it had been proved that the sale of these goods took place conformably to an established course of business known to and acquiesced in by the appellants, I should have had no hesitation in holding that the departmental agents in effecting the sale were acting within their authority as the agents of the sellers; but I have not found such proof in the record.

ANGLIN J.— The fifth clause of the contract, in my opinion, entitled the Government inspectors to reject every bale of hay which they found to be below standard. If the number of bales "found not up to the specifications" should exceed ten in any carload, they might—they were not bound to—reject the entire carload without further inspection. I do not read the contract as entitling the vendors to compel the acceptance of at least ten bales of inferior hay in every carload, or precluding the rejection of less than whole carloads.

The evidence supports the finding that the inspectors properly rejected the appellants' hay, which was not shipped to South Africa. I cannot assent to the view that in the circumstances of this case the subsequent sale of this rejected hay, which encumbered the Government sheds, constituted in itself an acceptance or affords conclusive evidence of an acceptance of such hay. At the most it would be cogent evidence of acceptance. Benjamin on Sales (5 ed.) (1906), page 752. The facts that the destination of all accepted hay was shipment to South Africa and that this hay was not so shipped, taken with the evidence of the officials as to its actual rejection and the reasons for its subsequent sale, make it clear that there never was an

intention to accept it, and, in my opinion, establish that there never was in law an acceptance.

Moreover, while such an act as the re-sale in question might, in certain circumstances, be held to constitute an acceptance by estoppel, in the case of the Crown the acts of its servants or agents do not bind by estoppel. *Bank of Montreal* v. *The King*(1). The re-sale of the hay may have been such a conversion of the appellant's property as would render an ordinary purchaser liable in damages. But for tortious acts of its servants the Crown may not be held responsible.

I agree with the view expressed by the learned judge of the Exchequer Court as to the meaning which should be ascribed to the phrase "f.o.b. cars" in the sixth clause of the contract, and I am of opinion that for so much of the sum of $2,292.41, admittedly deducted for shrinkage or shortage in weight and for shortage in the number of bales delivered, as represents shortage in the number of bales delivered, the appellants cannot recover. Mr. Moore says that the greater part of the deduction of $2,292.41 was in respect of "short shipments"; but some part of it was made for deficiency in weight of bales, and in regard to this portion of the appellants' claim I think they are entitled to some relief, although the actual sum for which they should receive credit may be comparatively small. I concur in the comment of Mr. Justice Idington upon the evidence of the defence witness, Macfarlane, and in my learned brother's appreciation of the method of weighing described by that witness; and I do not find in the sketchy testimony of Lieutenant Bell anything which satisfactorily meets Macfarlane's

(1) 38 Can. S.C.R. 258; 11 Ont. L.R. 595; 10 Ont. L.R. 117.

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statement. Bell was not cross-examined, it is true; but neither was Macfarlane re-examined in regard to the method of weighing the bales of hay as described by him in cross-examination. If not before, certainly after Macfarlane's evidence had been given, the burden was, in my opinion, upon the Crown to prove that whatever amount had been deducted for shortage in weight of bales had been rightly so deducted. This involved proving that the weight of the hay accepted for shipment had been ascertained in accordance with the provisions of the contract. This the Crown failed to do.

Upon the evidence as it stands, a legitimate inference would seem to be that by reason of the disregard of all fractions of a pound in the weighing of each individual bale of the number of bales weighed to ascertain the average weight per bale in each carload, pursuant to clause 7 of the contract, a substantial deduction for shortage in weight has been unwarrantably made. The amount so deducted, the appellants are, I think, entitled to recover.

Upon the present record it is impossible to determine what this amount is. Unless the parties can agree upon it, there should be a reference in the Exchequer Court to ascertain it, if the appellants so desire.

Should the respondent admit an amount to be due on the basis of this judgment, which the appellants are willing to accept, they should have judgment for that amount; or, in default of agreement, for such amount as may be found due to them upon the reference, if they elect to take it. Their election should be notified to the respondents within one month from the date of this judgment.

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The appellants have failed upon a substantial part of their appeal, but only by an equal division of opinion in this court. They have succeeded in respect of a part of their appeal, which may or may not prove to be substantial. But they were compelled to come to this court for such relief as they have obtained. They should have their costs of this appeal. The costs of the action in the Exchequer Court, including the costs of the reference now directed, should be reserved to be disposed of by the judge of the Exchequer Court after the reference is had, if it be taken, and, otherwise, after the time for election by the appellant shall have elapsed.

Appeal allowed in part with costs.

Solicitor for the appellants: *J. A. MacInnes.*

Solicitor for the respondent: *E. L. Newcombe.*

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*Feb. 15, 16.

STANISLAS DESORMEAUX (MIS-EN-CAUSE) ..... APPELLANT;

AND

THE VILLAGE OF STE. THÉRÈSE DE BLAINVILLE AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

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

Appeal—Jurisdiction—Prohibition—Quebec appeals—R.S.C. [1906] *c.* 139, *ss.* 39 *and* 46—*Construction of statute.*

No appeal lies to the Supreme Court of Canada from the judgment of a court of the Province of Quebec in any case of proceedings for or upon a writ of prohibition, unless the matter in controversy falls within some of the classes of cases provided for by section 46 of the "Supreme Court Act," R.S.C. 1906, ch. 139. *Shannon* v. *The Montreal Park and Island Railway Co.* (28 Can. S.C.R. 374) overruled.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Terrebonne, maintaining the plaintiffs' petition for a writ of prohibition.

MOTION, on behalf of the respondents, to quash the appeal on the ground that the Supreme Court of Canada is incompetent to entertain appeals in matters of prohibition from judgments rendered in the courts of the Province of Quebec inasmuch as such cases do not fall within the classes of cases in which provision

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for appeals is made by section 46 of the "Supreme Court Act," R.S.C. 1906, ch. 139.

The controversy involved in the proceedings arose in consequence of a resolution of the municipal council confirming certain certificates for the issue of licenses for the sale of intoxicating liquors, under the provisions of the statutes of the Province of Quebec, and refusing to confirm a certificate for the license applied for by the appellant. The writ of prohibition restrained the Magistrates' Court for the County of Terrebonne from further proceedings in a matter or cause pending before it in respect to the action of the council in regard to the certificates in question. The appeal did not involve any of the matters in respect of which provisions are made in the 46th section of the "Supreme Court Act."

Cousineau for the motion.

Surveyer, contra.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—This is a motion to quash an appeal from the judgment of the Court of King's Bench affirming a judgment of the Superior Court for the District of Terrebonne, granting a writ of prohibition, on the ground that no appeal lies to the Supreme Court of Canada from the Province of Quebec in any such case.

In *Shannon* v. *The Montreal Park and Island Railway Co.*(1), Taschereau J. gave the judgment of the court in which he held that the provisions of section 39 of the "Supreme Court Act," formerly

(1) 28 Can. S.C.R. 374.

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54 & 55 Vict. ch. 55, sec. 2, gave an appeal in cases of prohibition from the Province of Quebec. I regret that it is impossible for me to concur in that judgment. That section 39 of the "Supreme Court Act" applies to the whole Dominion is perfectly true, but the general jurisdiction conferred by that section is limited in so far as appeals from the Province of Quebec are concerned by the provisions of section 46. In other words, section 39 would seem to be a general section, like sections 36 and 38, which, notwithstanding the generality of their provisions, are subject to the special limitations provided by section 46, in Quebec, and by section 48 as to Ontario.

This motion must, therefore, be granted as this case does not come within any of the provisions of section 46, which determines the limits of our jurisdiction in appeals from Quebec.

Appeal quashed with costs.

Solicitor for the appellant: *Camille deMartigny.*

Solicitors for the respondents: *Bastien, Bergeron, Cousineau & Jasmin.*

WILLIAM JOHN WELLER (DEFENDANT) ..... } APPELLANT;

AND

THE McDONALD-McMILLAN COMPANY (PLAINTIFFS) ..... } RESPONDENTS.

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*Feb. 16.
*Feb. 17.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Appeal—Practice—Concurrent findings of fact.

The Supreme Court of Canada will not interfere with concurrent findings on questions purely of fact unless satisfied that the conclusions appealed from are clearly wrong.

APPEAL from the judgment of the Court of Appeal for Manitoba affirming the judgment of Macdonald J., on an interpleader issue, whereby it was adjudged that money paid into court to abide the result of the trial of the issue was the property of the plaintiffs.

While the defendant was in the employ of the plaintiffs, as superintendent of their works as contractors for the construction of a railway, he entered into a contract with the Canadian White Co. for the building of certain bridges forming part of the line. This sub-contract was made in the defendant's name, but, on being shown to the plaintiffs, they consented that it should be so made. During the time that the defendant was building the bridges under this sub-contract, he continued to draw his salary from the plaintiffs, but, on their completion, he claimed the

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amount due for this part of the work on the ground that he had undertaken the contract solely on his own behalf.

The Canadian White Co. applied for an interpleader order, and, on their application, affidavits were filed by both parties setting forth their respective claims, the money due was deposited in court, and an order was made for the trial of an issue to decide between the parties to this appeal as to whom they belonged. It was necessary for the decision of the issue to determine the relationship existing between the parties prior to the contract with the Canadian White Co. and the trial judge held that the defendant was the servant or agent of the plaintiffs, and that the contract in question had been made by him for the benefit of his employers. This decision was affirmed by the judgment appealed from.

J. Edward O'Connor for the appellant.

C. P. Fullerton for the respondents.

The judgment of the court was delivered by

THE CHIEF JUSTICE (oral).—The only question at issue on this appeal is one of fact, the determination of which depends largely, if not entirely, on the weight to be attached to the evidence given by the two witnesses, Weller and McMillan. The trial judge who saw the witnesses and had opportunities to test the relative merits of the different versions of the facts, which we have not, came to the conclusion that McMillan's version was absolutely correct and finds as a fact

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that the contract was made by Weller for the respondent company and that they are entitled to the money in dispute.

The conclusion reached by the trial judge has the unanimous approval of the Court of Appeal, a matter not lightly to be disregarded.

The jurisprudence of this court is well settled; we will not interfere with the concurrent findings of two courts on a pure question of fact unless we are satisfied that the conclusion reached is absolutely wrong.

Appeal dismissed with costs.

Solicitors for the appellant: *Morice & O'Connor.*

Solicitors for the respondents: *Aikins, Robson, Fullerton & Coyne.*

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*Feb. 17.
*Feb. 22.

WILLIAM SAMUEL CUNARD AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation of land—Water lots—Expectation of enhanced value —Crown grant—Statutory authority.

Land in Halifax, N.S., including a lot extending into the harbour, was expropriated for the purposes of the Intercolonial Railway. The title to the water lot was originally by grant from the Government of Nova Scotia, but no statutory authority for making such grant was produced. The lot could have been made much more valuable by the erection of wharves and piers for which, however, as they would constitute an obstruction to navigation, a license from the Dominion Government would have to be obtained. $10,000 was tendered as the value of all the land expropriated and the owners, claiming much more, appealed from the judgment of the Exchequer Court allowing that amount.

Held, Duff J. dissenting, that the owners were not entitled to compensation based on the enhanced value that could be given to the water lot by the erection of wharves and piers and the expectation that a license would be granted therefor, and if they were the amount tendered was, in the circumstances, sufficient.

Quære. Can a Crown grant of lands be made without statutory authority?

Held, per Duff J., that there was such authority in this case.

Judgment of the Exchequer Court (12 Ex. C.R. 414) affirmed.

APPEAL from a decision of the Exchequer Court of Canada (1), declaring the title to certain property of the defendants to be vested in His Majesty and the

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(1) 12 Ex. C.R. 414.

sum of $10,000 tendered in payment therefor to be sufficient.

The facts are sufficiently stated in the above headnote.

Harris K.C. for the appellants referred to *Wood* v. *Esson*(1); *Holman* v. *Green*(2); *In re Lucas Chesterfield Gas and Water Board*(3), at pages 25 and 31.

Newcombe K.C., Deputy Minister of Justice, for the respondent, cited Coulson & Forbes on Water (2 ed.), p. 19; Chitty's Prerogatives of the Crown 145; *Original Hartlepool Collieries Co.* v. *Gibb*(4).

THE CHIEF JUSTICE and GIROUARD J. concurred in the opinion of Mr. Justice Anglin.

DAVIES J.—I agree that the appeal should be dismissed. The substantive question to be determined was whether or not the sum of $10,000 awarded as damages by the Exchequer Court for the lands of the plaintiff expropriated by the respondent was sufficient. A careful examination of the evidence given has satisfied me that the sum allowed was a liberal one. The appellants, however, contended that the trial judge has erred in the construction he had put upon the decision of this court in *Wood* v. *Esson*(1), and had refused, in assessing damages, to allow the appellant anything for the exclusive right he possessed as grantee from the Crown of the lands in question to obtain from the Dominion Government a license to construct wharves

(1) 9 Can. S.C.R. 239.
(2) 6 Can. S.C.R. 707.
(3) [1909] 1 K.B. 16.
(4) 5 Ch. D. 713.

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or piers in the waters of the harbour over the lands granted which might be an obstruction to navigation.

I think the learned judge, if correctly reported, has not accurately stated the point decided in *Wood* v. *Esson*(1). That point is, I think, substantially and correctly stated in the head-note to the report of that case, namely, that the Crown could not, without legislative sanction, grant the right to place in a public harbour below low-water-mark any obstruction or impediment which would prevent the full and free right of navigation. The decision goes no further than that.

The learned judge therefore probably did not consider and give weight to the appellant's right as grantee of the soil to apply for and possibly to obtain a license from the Dominion Government under the statutes authorizing such licenses to build out in the waters of the harbour over the lands within his grant even to the obstruction of navigation.

But it is quite clear from his judgment that the learned judge allowed the appellant much more than the lands taken were, in his opinion, worth because of the offer of $10,000 made for them by the Crown. He gave judgment for this amount, not because he thought it fair value; it is evident he thought it excessive; but because the Crown had fixed and tendered that amount.

After carefully considering Mr. Harris's argument and the evidence, with special reference to the situation and surroundings of the land, I have concluded that this amount is full and liberal compensation for any right the appellant possessed in these lands, in-

(1) 9 Can. S.C.R. 239.

cluding any such contingent right as he claims the Exchequer Court had omitted to consider.

Under these circumstances I would dismiss the appeal with costs.

IDINGTON J.—The appellants chose to present a case to the learned trial judge of a claim for compensation, and to rest the valuation thereof entirely upon the theory of their absolute right to the land to do therewith what they might see fit in the way of erecting docks and piers to accommodate shipping.

They now seek in appeal to set up an entirely new kind of case based upon an alleged exclusive right, under the Crown grant to their predecessor in title, to apply to the Crown or Parliament for leave to make such erections interfering with, or in the possible judgment of the Crown, represented by the Governor in Council, or of Parliament, likely to interfere with the public rights of navigation.

The claim presented proceeded entirely upon the assumption of the existence of a complete realization of such possible expectations, an entirely different thing from the unrealized and speculative kind of claim now presented to us.

In respect of this latter claim I fail to see any evidence upon which any court could properly and intelligently proceed in the way of awarding any fixed sum by way of compensation therefor in excess of that sum tendered by respondent. If I were to try to estimate the value of the property in question on the assumption of an incomplete title, but yet carrying the right now claimed and make such allowance, as I understand might on the authority cited, if applicable, and in reason fairly to be considered, and have regard

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to all the evidence adduced, I would not be disposed to put a higher or perhaps as high a value as that tendered.

I might well hold either of these views as sufficient to dispose of the appeal.

Appellants urge, however, that the learned judge erred in his view of the law bearing upon the grant by the Crown and the right created thereby.

Assume for a moment he did. He did not in the slightest prevent the appellants from launching and making out a proper case. Indeed, at the outset he stated his view of the law and gave appellants every chance then to act as advised.

It was after the appellants' case was closed and duly answered, that they, finding the learned judge's view against them, sought in reply to set up another case, under pretext of meeting some evidence given by respondent's witnesses, as to the likelihood of obstruction to navigation by erections of a kind such as needed to render the property worth anything.

All that part of the evidence for respondent, though not objected to, can be treated as if never given and the case to my mind still stands in the result as I have stated.

But was the learned judge at all in error? Did any such error as is alleged affect his view of the matter?

It does not seem to me that the alleged error could have had from what he says any effect.

Moreover, as to the alleged error as he says, it was conceded that there was no Act of the provincial legislature authorizing the Government to grant the water lot.

Again, counsel on this appeal had in his opening

argument to say he was unable to shew any such statute, but later referred us to Revised Statutes of Nova Scotia, 3rd series, ch. 26, sec. 708, and the Nova Scotia Statutes of 1843.

I would not be inclined from a consideration of these Acts to suppose the grant in question was within the purview of either of them.

I am somewhat shaken in this by seeing (what we were not referred to) that an Act to amend the earlier Act refers to and specifically deals with grants of any water lot or portion of land covered with water or adjoining the shores of any of the bays, harbours, rivers or creeks of this province.

This Act was temporary and how the legislation ended is not clear.

But one thing is clear, that the words "land" and "lands" both by the "Interpretation Act" of the said Revised Statutes and by the use of such words in the Letters Patent making the grant in question, meant and were intended to mean, every interest in that land described therein that could possibly be conveyed.

It never was the purpose of anybody to convey merely what appellants now set up.

It possibly was intended by some one to give all, but this court long ago held such an attempt void. It clearly was an improvident attempt. I cannot see how if, for such reason, it failed of its purpose, as is practically conceded, it can now be set up and used for any other beneficial purpose than intended, merely because and if in law it may have had the technical effect of transferring the legal estate as Sir Henry Strong suggested in *Wood* v. *Esson*(1), at p. 243.

The matter has not been argued out so that we can

(1) 9 Can. S.C.R. 239.

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definitely determine, with safety, either that the grant was so wholly illegal and void as to be treated as a nullity or as liable to be revoked by means of writ of *scire facias,* or writ of intrusion or information in Chancery or other appropriate legal procedure to put an end to what never should have been issued, or, as contended for, a grant to operate in a way never intended yet as of the exclusive right to apply for supplementary grants to complete what once was improperly intended should be done or given.

In any of these or other ways the matter may possibly be looked at, I can see no foundation for the pretension set up as resultant therefrom.

The cases of *Alcock* v. *Cooke*(1), and of *Gledstanes* v. *Earl of Sandwich*(2), may be referred to on the point, not taken in argument, of the intended nature and extent of the grant, failing to coincide with that limited claim now said to have passed.

As to the power of a colonial governor where representative institutions exist the argument in the case of *Reg.* v. *Clarke*(3), indicated it must in absence of specific instructions be restricted to that authorized by statute. The court did not adopt the theory put forward here.

It was pointed out to appellant's counsel on the argument that a search in the Archives here would disclose the instructions in question herein, but we have not heard of any having been discovered to support this grant.

In any event I fail to see how a claim as of right to compensation can be founded on such a title. Such equities, and other good reasons which may have

(1) 5 Bing. 340.

(2) 4 M. & Gr. 995; 5 Scott N.R. 689.

(3) 7 Moo. P.C. 77.

moved the Crown to make the tender, are covered and protected by the judgment in allowing that sum.

I think the appeal should be dismissed with costs.

DUFF J. (dissenting).—The first question raised by this appeal touches the nature of the appellant's interest in the property expropriated. The property consists chiefly of about 12 acres of the bed of the harbour of Halifax; the appellant's title rests upon a grant of the year 1868 purporting to be made under the sanction of the Governor in Council of Nova Scotia. The learned trial judge, following, as it seemed to him, the decision of this court in *Wood* v. *Esson*(1), held this grant to be void. I do not agree with the learned judge's view of that case and I have no doubt that in 1865 the Governor in Council had power to authorize the grant in question. In the year 1849 an arangement was made whereby "all Her Majesty's casual and territorial revenues" were placed under the control of the House of Assembly of Nova Scotia, the Assembly in turn assuming the burden of the civil list of the province. The arrangement is recited in an Act of the Assembly which is chapter 1 of the statutes of that year, and the Act provides (by section 10) that the casual and territorial revenues vested in the control of the legislature should include (*inter alia*) all

> sums of money * * * arising * * * from * * * "any grant" of any of the Crown lands or Royalties of Her Majesty within the province "of whatsoever nature or description";

and (by section 14) that the sale and management of Crown lands should, notwithstanding the Act, "remain and be vested in such officers as Her Majesty" should

(1) 9 Can. S.C.R. 239.

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deem proper or *as might "be directed by any Act of the province."* The statute referred to by Mr. Harris, chapter 26, R.S.N.S. 1864, appears (by sections 7 and 8) to vest in the Governor in Council full authority over the sale of "ungranted lands" of the Crown.

It is true that these sections do not deal nominatim with the subject of the disposal of lands forming part of the bed of an arm of the sea below low water mark; but the language is clearly broad enough to embrace such lands, and on its true construction must, I think, be held to do so. Such lands being within the territory of Nova Scotia were *primâ facie* the property of the Crown, and to that extent were governed by the provisions of 12 Vict. ch. 1. It has never been doubted, so far as I know, that the Crown could at common law by matter of record convey such lands to a subject. The statute of 1702 by which the common law power of the Crown to dispose of the Crown lands was very much restricted may possibly have been carried into Nova Scotia with the general body of English law. Since the Treaty of Paris, 1763, and in consequence probably of article IV. of that Treaty Nova Scotia appears to have been regarded by the courts there as a colony acquired not by conquest or cession, but by settlement; *Uniacke* v. *Dickson* (1), 1848; but if that statute did originally apply to the Crown lands in Nova Scotia — it is clear that its provisions (long before 1864) had by the effect of local legislation ceased to govern the disposal of them; 3 Vict. ch. 12; 6 Vict. ch. 45; 10 Vict. ch. 61; 9 Vict. ch. 6; R.S. ch. 28 (1859). In any case, whatever view might have been taken touching the scope of the sections 7 and 8 of the Act of 1864, when read by themselves, there

(1) James (N.S.) 287.

is demonstrative evidence in an Act passed in 1843 (9 Vict. ch. 6) that the phrase "Crown lands" was as early as that date used in the legislation of Nova Scotia in a sense extending to the beds of navigable waters vested in the Crown within the territorial limits of the province, and in the absence of something restricting this the primary meaning of them we must give the words the same effect in the later Act.

The effect of a grant of such lands under proper authority is dealt with in two well-known passages which in view of the interpretation that has been put upon *Wood* v. *Esson*(1), may be worth quoting. First from Lord Westbury in *Gann* v. *Free Fishers of Whitstable*, in 1865(2), at pp. 207-8:

> The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea is by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or interfere with the right of navigation, which belongs by law to the subjects of the realm. The right to anchor is a necessary part of the right of navigation, because it is essential for the full enjoyment of that right. If the Crown therefore grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right, and he cannot in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right.

And secondly, Lord Blackburn, in *Orr Ewing* v. *Colquhoun*(3), at pp. 861 and 862:

> I think it clear law in England that, except at the instance of a person (including the Crown) whose property is injured, or of the Crown in respect of an injury to a public right, there is no power to prevent a man making an erection on his own land, though covered with water, merely on a speculation that some change might occur that would render that piece of land, though not now part of the water way, at some future period available as part of it. I think that the land being covered by water is in such a case a mere accident,

(1) 9 Can. S.C.R. 239.
(2) 11 H.L. Cas. 192.
(3) 2 App. Cas. 839.

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and that the defenders are as much at liberty to build on the bed of the river (if thereby they occasion no obstruction) as they would be to build on an island which might at some future period be swept away.

Such grants, that is to say, do not unless there is statutory authority for it, invest the grantee with any lawful right to obstruct the public in the exercise of the right of navigation with which, when vested in the Crown, the subject of the grant was burdened; but subject to that burden the grantee acquires whatever interest the grant professes to convey. I do not think there is anything in the decision of *Wood* v. *Esson*(1) which conflicts with this statement of the law. Some of the observations of Mr. Justice Henry are doubtless open to the meaning the learned trial judge attributes to them, but there seems to be nothing to support them in the judgments of the other members of the court and with respect they cannot, I think, be regarded as stating the rule by which we must be governed.

The next question is whether the learned trial judge having misdirected himself on the question already discussed the case should be remitted to the Court of Exchequer for a fresh consideration of the amount of compensation to be awarded. On this point I find myself in disagreement with my learned brothers. I think there is a substantial element of compensation in respect of which the learned trial judge, who has seen the witnesses, is in a much better position to form an opinion than we are; and that in justice to the parties concerned they should have an opportunity of taking that opinion.

The contention of the appellants is that this property affords special facilities for shipping on account of being adjacent on one side to the Intercolonial

Railway and on the other to the harbour of Halifax, and that it is specially adapted for use as a site for a wharf or for other purposes in connection with which such facilities would be of great value. I think that contention is well founded, and I think, moreover, that it is not at all clear on the evidence that this element of value has been compensated for.

The points upon which the counsel for the respondent dwell as indicating that this element of value is largely fanciful or at all events greatly exaggerated are these: First, it is said that since the appellants have no right to cross the railway and no means of compelling the railway to provide shipping facilities for this property, the property must be taken as against the railway authorities to be inaccessible on the landward side. Then it is said that this property, in so far as it comprises a part of the bed of the harbour, is situated at a place where the harbour is very narrow and where the whole space is actually used and required to ensure safe and convenient navigation; and thirdly, it is said that the erection of a structure on the bed of the harbour there (since it would interfere with the exercise of the public right of navigation) would be a nuisance unless sanctioned by the Governor in Council in the manner provided for in the "Navigable Waters Protection Act" (ch. 115, R.S.C.); and that since the property is required by the Minister of Railways for public purposes, authority under that Act for such a purpose could never be obtained.

As to the first and third of these contentions they both appear to me to be quite unsound. One principle by which the courts have always governed themselves in estimating the compensation to be awarded for pro-

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perty taken under compulsory powers is this: you are to apply yourself to the consideration of the circumstances as if the scheme under which the compulsory powers are exercised had no existence. The proper application of that principle to chapter 143, R.S.C., seems to me to be this—you are to estimate the value as if the property were not required for the public purpose to which the Minister, who is taking the proceedings, intends to devote it. The circumstance that it is so required is not to enter into the computation of value as either enhancing or diminishing it.

On this principle there appears to be no foundation for either of these two contentions. Whether means of communication to and from the landward side or shipping facilities over the railway on that side could be obtained is a question of fact for the tribunal assessing the compensation, but there is no *à priori* probability that they could not be obtained, and so far as I can see nothing in the evidence to suggest any reason to suppose the existence of any obstacle. So with the possibility of procuring the sanction required under chapter 115; that also is a question of fact and a question which must be examined on its merits apart from the purpose for which the Minister requires the property and just as if the compulsory powers were being exercised by some local authority having no sort of connection with the Governor in Council.

The second contention raises a question of substance. The argument as put before us appeared to rest upon the hypothesis that every structure raised upon the bed of a navigable water which might in any sensible degree restrict the area available for the purposes of navigation must be in law a public nuisance

as constituting an invasion of the public right of navigation. That proposition does appear to receive some countenance from some observations of Strong C.J., in *The Queen* v. *Moss*(1), at p. 332; but those observations were not necessary to the decision of the case, and, if they have the meaning attributed to them, then I must respectfully dissent from them. That the question whether a given structure so placed is or is not a public nuisance is a question of fact to be decided upon all the circumstances has long been settled. In *Attorney-General* v. *Terry* (2), Sir Geo. Jessel adopts as an accurate statement of the law a passage from the argument of Sir Wm. Follett in *King* v. *Ward*(3), at p. 395, in which that great lawyer stated the test for determining the question of nuisance or no nuisance where erections are made in a harbour below high water mark and in places where ships might perhaps have sailed, to be this—

> whether upon the whole they produce public benefit—not giving the terms public benefit too extended a sense, but applying them to the public frequenting the port.

There is nothing in chapter 115, R.S.C., section 7, touching the erection of structures which do not offend against this rule; therefore I cannot accept the argument as it is put. It may, of course, be argued that on the evidence as it stands the proper conclusion is that the water lots in question could not be utilized in a commercial sense without offering an obstruction to the actual navigation of that part of the harbour as it is now used, and that there is no evidence whatever of any counterbalancing public benefit. On the whole, I

(1) 26 Can. S.C.R. 322. (2) 9 Ch. App. 423.
(3) 4. A. & E. 384.

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think, that is the effect of the evidence, and although it would have been more satisfactory to have had the view of the trial judge upon it, I think the proper finding is that such structures as would be required to make the site productive of profit would constitute an unlawful, although probably very slight, interference with navigation unless authorized under the Act referred to.

In that view is any value to be attached to the possibility of obtaining such authority? The circumstance alone that such authority is required to legalize the structure would not appear to be entitled to much weight in determining the answer to this last question; and the evidence does not seem to indicate the probability of any such interference with navigation as would lead to a refusal of the necessary sanction if the scheme for which such sanction should be sought should appear to be likely to add materially to the public convenience in the use of the port. It is difficult to believe that the objection, the only objection suggested in the evidence, that schooners bound for Bedford Basin to discharge ballast beating against a head wind would find their passage impeded, is one which would present a serious obstacle to any plan designed to secure substantial improvement in the facilities for the use of the port as such. Upon this question I should have preferred to have the views of persons in a position to state the plans of the railway department respecting the use to which this property is to be put and respecting the expedients by which the suggested objection is to be overcome. In the absence of such evidence I am not disposed to attribute much weight to this objection. On the whole, I think the appraisal of this element of value which the learned judge has

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not considered had better be left to the Court of Exchequer and the case referred back for that purpose.

Anglin J.

ANGLIN J.—Assuming that the grant of 1865 vested in the appellants the subsoil of the water lot therein described, it is clear that they did not acquire a right to use this property for purposes or in a manner that would interfere with navigation or obstruct navigable waters. So much is certainly decided by *Wood* v. *Esson* (1). It may be that prior to the taking of the expropriation proceedings the appellants had some possibility—great or slight—of obtaining, under R.S.C. ch. 115, sec. 4, a Crown license to erect wharves upon the property in question, notwithstanding the interference with navigation which would be involved. That with such a right to build wharves and a right of access thereto across the Intercolonial Railway the interest of the appellants in their water-lot-property would be very valuable is clear upon the evidence. Its value without such rights, however, it is equally clear, is comparatively trifling.

The sum of $10,000 tendered by the Crown and awarded by the learned judge of the Exchequer Court is certainly in excess by many hundred dollars of the actual value of the property taken by the Crown if there were no possibility of the appellants securing the rights above mentioned. The learned judge allowed them this amount only because he did not see fit to allow a smaller compensation than that tendered by the Crown. The complaint of the appellants is that he refused to make them any allowance in respect of any increase in the value of the property because of the

(1) 9 Can. S.C.R. 239.

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possibility of their obtaining from the Crown a right of access to it across the Intercolonial Railway, and a license to erect thereon wharves, etc.

We have before us in evidence the circumstances surrounding this property. We are in as good a position as the learned judge of the Exchequer Court was, or could be upon a reference back to him, to appreciate the chance of the appellants' obtaining these rights from the Crown, and to value that chance. The circumstances in evidence—the narrowness of the channel opposite the appellants' lands and the requirements of the Intercolonial Railway owned by the Government of Canada—make it practically certain that the Crown would refuse an application for these rights by the appellants or by any purchaser from them. No judge or arbitrator would, in my opinion, be justified in placing upon the possibility or chance of obtaining such rights more than a nominal value.

Assuming that the learned judge erred in treating the grant to the appellants of the water lot in question as absolutely void, and that he was also technically wrong in declining to take into consideration the possibility or chance of their obtaining from the Crown rights of access over the Intercolonial and a license to erect wharves which would obstruct navigation; *Re Lucas and The Chesterfield Gas and Water Board* (1); *Re Fitzpatrick and The Town of New Liskeard* (2); it is clear that if he had considered the appellants to be owners of the subsoil of the water-lot, and if he had made them an allowance for any interest which they could have in the property under the grant of 1865, if valid, and also for the chance or possibility of their obtaining rights of access over the railway

(1) [1909] 1 K.B. 16. (2) 13 Ont. W.R. 806.

and a Crown license to obstruct navigation, the amount of the judgment in their favour would certainly not have been increased.

It follows that no substantial wrong has been done the appellants and that no purpose would be served by remitting this case to the Exchequer Court in order that the value of the appellants' interest in the subsoil of the water lot and of the possibility of their obtaining rights and privileges from the Crown might be there estimated.

For these reasons I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *W. A. Henry.*
Solicitor for the respondent: *R. T. MacIlreith.*

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*Oct. 27.
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*March 11.

IRVINE A. LOVITT AND OTHERS, EXECUTORS OF THE LAST WILL AND TESTAMENT OF GEORGE H. LOVITT, DECEASED (DEFENDANTS) } APPELLANTS;

AND

HIS MAJESTY THE KING, REPRESENTED BY THE RECEIVER-GENERAL OF NEW BRUNSWICK (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Succession duties—New Brunswick statute—Foreign bank—Special deposit in local branch—Depositor domiciled in Nova Scotia—Debt due by bank—Notice of withdrawal—Enforcement of payment.

L., whose domicile was in Nova Scotia, had, when he died, $90,000 on deposit in the branch of the Bank of British North America, at St. John, N.B. The receipt given him when the deposit was made provided that the amount would be accounted for by the Bank of British North America on surrender of the receipt and would bear interest at the rate of 3 per cent. per annum. Fifteen days' notice was to be given of its withdrawal. L.'s executors, on demand of the manager at St. John, took out ancillary probate of his will in that city, and were paid the money. The Government of New Brunswick claimed succession duty on the amount.

Held, reversing the judgment of the Supreme Court of New Brunswick (37 N.B. Rep. 558), Idington and Duff JJ. dissenting, that the Government was not entitled to such duty.

Held, per Davies and Anglin JJ., that notice of withdrawal could be given and payment enforced at the head office of the bank in London, England, and perhaps at the branch in Montreal, the chief office of the bank in Canada.

Attorney-General of Ontario v. *Newman* (31 O.R. 340, 1 Ont. L.R. 511), questioned.

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

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APPEAL from the judgment of the Supreme Court of New Brunswick(1), in favour of the respondent on a stated case.

The case stated and agreed upon for submission to the Supreme Court of New Brunswick was in the following terms:

"1. George H. Lovitt, late of Yarmouth, in the Province of Nova Scotia, ship-owner, departed this life at Yarmouth on the fourteenth day of November, A.D. 1900, having made his last will and testament, a copy of which is hereto annexed, whereby he appointed the defendants Irvine A. Lovitt, John Lovitt and Erastus H. Lovitt, the executors and trustees of his estate.

"2. That the said George H. Lovitt was, immediately before his death, a resident of Yarmouth aforesaid and was domiciled in the Province of Nova Scotia.

"3. Probate of the said will was duly granted by the judge of the Court of Probate, in and for the County of Yarmouth on the 19th day of November, A.D. 1900.

"4. That the following are the several persons to whom the estate of the said George H. Lovitt will pass under his last will and testament, and the degree of relationship in which they stand to the testator.

"Margaret Jane Lovitt, widow of testator; Frank Lovitt, Irvine Ashby Lovitt, Erastus Hurd Lovitt, sons of testator; and Jane J. Burrill, daughter of testator, all of Yarmouth, in the Province of Nova Scotia; and Abbie Thomas and Blanche Thomas, of St. John, in the Province of New Brunswick, no relation to testator, and "The Old Ladies' Home" of Yarmouth, in the Province of Nova Scotia.

"5. That the said George H. Lovitt died seized and

(1) 37 N.B. Rep. 558.

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possessed of real and personal property of the value of $557,982.88.

"6. That a portion of the estate of the said George H. Lovitt consisted of the sum of $90,351.75, which in his lifetime he had placed on special deposit in the Bank of British North America in the City of St. John, taking from the said bank two deposit receipts in the following form:

"No. 2111. Deposit Receipt.
"Incorporated. Royal Charter.
Bank of British North America.
St. John, N.B., 30th December, 1898.

"Received from George H. Lovitt the sum of eighty-six thousand, seven hundred and seventy-five dollars, and 92-100 dollars, which amount will be accounted for by the Bank of British North America on the surrender of this receipt, and will bear interest until further notice at the rate of three per cent. per annum. Fifteen days' notice to be given of its withdrawal and no interest to be paid unless the money remains in the bank three months.

"For the Bank of British North America,
H. A. HARVEY,
Manager.

"$86,775.92, Entd. O. H. SHARP,
Accountant.

"Not transferable.

"No. 2112. Deposit Receipt.
"Incorporated. Royal Charter.
Bank of British North America.
St. John, N.B., 30th December, 1898.

"Received from George H. Lovitt the sum of three thousand, five hundred and seventy-five dollars, and

83-100 dollars, which amount will be accounted for by the Bank of British North America on the surrender of this receipt, and will bear interest until further notice at the rate of three per cent. per annum. Fifteen days' notice to be given of its withdrawal and no interest to be paid unless the money remains in the bank three months.

"For the Bank of British North America,

H. A. HARVEY,
Manager.

"$3,575.83, Entd. O. H. SHARP,
Accountant.

"Not transferable.

"7. That the head office of the said Bank of British North America is in the City of London, in that part of the United Kingdom of Great Britain and Ireland called England.

"8. That at the time of the death of the said George H. Lovitt, the said deposit receipt was in his possession at Yarmouth aforesaid, in the Province of Nova Scotia aforesaid.

"9. That a portion of the real property of the said George H. Lovitt consists of a lot of land and premises at Carleton, in the Province of New Brunswick. The said lot of land was appraised at the sum of $2,000, and was devised specifically to Frank Lovitt, the son of testator.

"10. That the manager of the said bank at St. John aforesaid, refused to pay to the said executors the said amount, unless and until they took out ancillary probate as hereinafter mentioned, whereupon the defendants took out ancillary probate of the said last will and testament of George H. Lovitt in New Brunswick. Said ancillary probate was granted to the said defend-

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ants by the judge of probate for the City and County of St. John, in the Province of New Brunswick, whereupon the said executors were paid by the said manager of the Bank of British North America at St. John, the amount of the aforesaid deposit receipts.

"The plaintiff claims and the defendants deny that the defendants should pay succession duty in respect to the said sum of $90,351.75, so deposited in the branch of the Bank of British North America at Saint John aforesaid.

"The question for the decision of the court is, whether the said defendants or said estate, or the devisees, or any and which of them, are liable to pay succession duty in respect to the said sum of $90,351.75, the amount of the said deposit receipts issued by the said Bank of British North America, and if so, what amount to the Province of New Brunswick, and in determining the question the court may refer to and construe the statutes of Nova Scotia the same as if they had been proved before the court.

"If the judgment of the court upon the question raised herein is that the same be answered in the affirmative, judgment of the court may be entered for the plaintiff for the amount found by the court to be due, without costs, and if the said questions be answered in the negative, judgment may be entered for the defendants without costs.

"Dated this 16th day of February, A.D. 1905.

"(Signed) J. W. LONGLEY,
Attorney-General,
Nova Scotia.

WILLIAM PUGSLEY,
Attorney-General,
New Brunswick."

The above specifies all the provisions of the will annexed thereto as stated in the first paragraph which are material to the present appeal.

The executors appeal from the decision of the Supreme Court of New Brunswick, holding the estate liable for succession duties on the sum deposited in the Bank of British North America.

Newcombe K.C. for the appellants. A bank and its branches are one concern: *Bain* v. *Torrance*(1); and this debt was payable by the Bank of British North America, not by its branch in St. John, which is not an entity.

The imposition of this duty would be indirect taxation; *Bank of Toronto* v. *Lambe*(2); *Attorney-General of Quebec* v. *Queen Ins. Co.*(3); *Attorney-General of Quebec* v. *Reed*(4); *Brewers and Maltsters Assoc.* v. *Attorney-General of Ontario*(5).

In case of a devise or legacy to be acquired in the future the imposition of the duty must be postponed. *Attorney-General of Ontario* v. *Toronto General Trusts Corp.*(6), and this proceeding is, therefore, premature.

And it cannot be imposed on the residuary estate without express provision therefor in the will. *In re Botsford*(7).

Hazen K.C., Attorney-General of New Brunswick, for the respondent. For purposes such as those in question here the branch of a bank is a distinct entity.

(1) 1 Man. R. 32.
(2) 12 App. Cas. 575.
(3) 3 App. Cas. 1090.
(4) 10 App. Cas. 141.
(5) [1897] A.C. 231.
(6) 5 Ont. L.R. 216, at p. 223.
(7) 33 N.B. Rep. 55.

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Woodland v. *Fear*(1); *County of Wentworth* v. *Smith* (2); *Prince* v. *Oriental Bank Corp.*(3).

Succession duty is based upon administration: *Attorney-General of Ontario* v. *Newman*(4), and the appellants in taking out probate of the will in New Brunswick alleged that this money was "property within the province," and are now estopped from denying it.

If it is "property within the province" the fact that the testator had his domicile in Nova Scotia does not prevent the duty from attaching. *Harding* v. *Commissioners of Stamps for Queensland*(5).

THE CHIEF JUSTICE.—The facts out of which this appeal arises are fully stated in the opinion of Mr. Justice Anglin.

That portion of the testator's movable wealth upon which the respondent seeks to levy succession duty was not property which passed either by will or intestacy within the Province of New Brunswick. The debts evidenced by the two deposit receipts were due by the Bank of British North America, an English corporation having its head office at London, England, and the situs of these debts was at the domicile of the testator in Nova Scotia. The amount of the bank's indebtedness passed by Lovitt's will to his executors in the province where the will was admitted to probate and the succession devolved. Subsequently, however, to the devolution of the succession in Nova Scotia and in the course of the liquidation of the assets of the estate, the bank at the request of the executors paid the

(1) 7 E. & B. 519.
(2) 15 Ont. P.R. 372
(3) 3 App. Cas. 325.
(4) 31 O.R. 340; 1 Ont. L.R. 511.
(5) [1898] A.C. 769.

amount of its liability to them in the Province of New Brunswick after they had obtained ancillary letters of probate. Such payment by the bank cannot be said to be a devise or a transfer of property to a person or persons residing within the province within the meaning of the New Brunswick statute. I am of opinion that the amount of the bank's indebtedness to Lovitt was, in the terms of the proviso to the fifth section of the "Succession Duties Act of New Brunswick," property outside of the Province of New Brunswick owned at the time of his death by a person not then domiciled within that province, and that the New Brunswick Act cannot constitutionally have effect to impose a tax upon persons domiciled and resident in Nova Scotia in respect of a succession coming to them under the laws of Nova Scotia.

I would allow the appeal with costs.

GIROUARD J.—I am inclined to apply to this case the principle of international law recognized in nearly all the systems of law of the different civilized nations and laid down in article 6 of the Civil Code of Lower Canada, viz., that moveable or personal property is governed by the law of the domicile of the owner, and if I understand correctly the recent decision of the House of Lords in *Winans* v. *The Attorney-General* (1) the law is the same in England. The laws of New Brunswick have not imposed a succession duty upon the specific property claimed by the estate Lovitt, and consequently being personal it is governed by the law of the domicile of the late Mr. Lovitt, which was in Yarmouth, N.S., and not by the laws of New Brunswick. Being a mere contract debt, it cannot be contended

(1) [1910] A.C. 27.

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that it is situated in New Brunswick; but even if it was it cannot be denied that it was personal property. I have therefore no hesitation in coming to the conclusion that the appeal must be allowed with costs.

DAVIES J.—The question we have to decide in this appeal is whether or not a simple contract debt due by the Bank of British North America to the testator, Lovitt, at the time of his death, was subject and liable in the hands of the executors of the estate to the succession duties imposed and made payable by the statute of the Province of New Brunswick (R.S. vol. 1, ch. 17, sec. 5).

There is no dispute about the facts which are submitted to us in the form of a stated case.

Stated briefly, and so far as they are necessary for the conclusion I have reached, these facts are that the testator Lovitt was domiciled in Yarmouth, Nova Scotia, and died there, having first made his will and appointed the appellants his executors. That some time before his death testator deposited with the Bank of British North America at its branch in St. John, N.B., the sum of $90,351.75, which monies remained with the bank until withdrawn by the executors. That when making the deposit testator received a receipt for the same which specified that "the amount would be accounted for by the Bank of British North America on surrender of this receipt"; that it would bear interest at 3%; that fifteen days' notice was to be given of its withdrawal, and that no interest would be paid unless the money remained in the bank for three months.

The executors took out probate of the will in Yarmouth, Nova Scotia, on the testator's death, and after-

wards demanded payment of the debt and interest from the bank at its St. John agency, but the manager there required the executors to take out ancillary letters of probate in New Brunswick before paying them the money, which letters were taken out.

The deposit receipt, the evidence of the debt owing by the bank to Lovitt was with him at his domicile, Yarmouth, when he died.

The then Chief Justice, Tuck, with whom Landry J. concurred, reached the conclusion, as he says, "with much doubt," that the debt was liable to pay succession duty in New Brunswick relying upon the authority of *Attorney-General* v. *Newman*(1).

Barker J., now Chief Justice, with whom the other members of the court concurred, reached the same conclusion, resting his judgment upon the construction of the New Brunswick statute respecting succession duties, which he held was substantially the same as that upon which *Attorney-General* v. *Newman*(1) was decided, and upon the statement of Lord Hobhouse in the case of *Harding* v. *Commissioners of Stamps for Queensland*(2), who, speaking for the Judicial Committee at page 775, says, that if the amendment to the "Queensland Succession Duty Act" declaring

> that upon the issue of any grant of probate or administration in Queensland succession duty is chargeable in respect of all property within Queensland, although the testator may not have had his domicile in Queensland,

was retrospective and applicable to the case before the Committee, it would be conclusive in favour of the liability of the property there in question to pay the tax.

(1) 1 Ont. L.R. 511, at p. 519. (2) [1898] A.C. 769.

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It may be possible that this Ontario case of Newman's on which the learned judge in the court below so much relied can be distinguished at least in part from this appeal, and I think it very clear that Lord Hobhouse's dictum does not support the judgment here appealed against. The decision in *Newman's Case*(1) appears, from the official report of the decision in the appeal court, to have been based upon the propositions that succession duty is payable upon any property in Ontario which can properly be administered *only* there, and that as the payment of the debts there in question could *only* be enforced in Ontario *and only properly administered there*, that settled the question.

The opinions of the learned judges who decided that case in the appeal court of Ontario leave no doubt as to those propositions being the reasons for their judgment, and the decision is not authority for anything beyond that. But if, as I gather from the appeal case, the facts were that some of the deposit receipts in that case were in the same words substantially as those in this appeal, and were given by branches of banks having their head offices outside of Ontario, then, construing those receipts as I do, I would feel myself obliged to dissent from that case so far as it related to those receipts. That decision is, of course, not binding on us, but I desire not to be understood as expressing any opinion upon it beyond what is necessary for the decision of this appeal.

The debt in this appeal was a simple contract debt payable by the bank, a British corporation, with its head office in London, to Lovitt, a person domiciled in Nova Scotia.

(1) 1 Ont. L.R. 511.

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In my opinion payment of the amount could be enforced against the bank by Lovitt, or his executors after his death, either in London, Eng., where the head office was, or in Montreal, where, so far as Canada was concerned, our "Bank Act" declared it to be, or in Nova Scotia, where the creditor was domiciled at his death, and where probate of his will was taken out. Whether the money could be recovered without first giving fifteen days' notice or whether failure to give this notice operated simply to put an end to interest for that time is not necessary to decide and does not in my opinion affect this case.

By no reasonable construction of the deposit receipt can the liability of the bank to pay be limited to St. John only. The St. John agency might be closed at any time. It was the Bank of British North America, the corporate body, not the St. John agency, which had no corporate existence or entity, that accepted the deposit, created the debt by so doing and became liable for the amount. The bank declared in the receipt given by its agent that the "amount would be accounted for by the Bank of British North America," not by the agency in St. John of the bank, nor by the bank at that agency. No words of any kind are in this receipt evidencing a contract only to pay in St. John or in New Brunswick, nor is there any statement in the case respecting any bank usage or custom which could justify any such finding or conclusion; on the contrary, the liability of the bank is expressed in the broadest terms and without any limiting words beyond possibly those requiring fifteen days' notice to be given of its withdrawal. That notice could surely be given, and properly given, at the head office of the bank either in London or Montreal, and when so given the bank was liable to be sued for

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payment as well in Great Britain or in Nova Scotia, where the creditor resided, as in New Brunswick.

If that statement of the law and construction of the contract is correct the case of Newman on my understanding of its facts has no application.

Then with respect to the dictum of Lord Hobhouse when speaking for the Judicial Committee in the above cited case of *Harding* v. *Commissioners of Stamps for Queensland*(1), it should be remembered that he was speaking with reference to the facts of the case before him. Two of the debts there in question " were secured by mortgages in land, stock and goods in Queensland," while the third debt consisted of "3,000 shares in the Royal Bank of Queensland." And as Lord Hobhouse said: "As regards locality it is clear that the assets now in question have locality in Queensland; but that does not affect the beneficial interest to which succession duty is attached and which devolves according to the law of the owner's domicile." He followed that statement up with the dictum relied on which I am discussing, namely, that if the amendment there in question had retrospective action "it was calculated to meet such cases as the present one, and would be conclusive" on the there respondents, that is, speaking with regard to debts and property such as those in question in that case secured by mortgage on lands and goods in Queensland and shares in the Queensland bank.

But their Lordships held that, in the absence of the specific words of the amendment declaring "succession duty chargeable in respect of all property within Queensland, although the testator or intestate may not have had his domicile in Queensland," the statute imposing the succession duty, broad and comprehensive

(1) [1898] A.C. 769.

as its language was, must be held to include only persons *who became entitled by the laws of Queensland,* and must be confined to such persons. In other words, that in construing succession duty Acts, unless the language was specific to the contrary the principle of the maxim *mobilia sequuntur personam* should apply and the law of the domicile prevail over that of situation. The words of the section above quoted to which such a ruling was applied, were as broad and as general as one could suppose language could be made to be.

Now turning to the New Brunswick Act it cannot but be admitted that the words of the main section are as broad as they possibly could be made. They are, however, restricted by a proviso subsequently added declaring:

> The provisions of this section are not intended to apply, and shall not apply to property outside this province, owned at the time of his death by a person not then domiciled within the province, except so much thereof as may be devised or transferred to a person or persons residing within the province.

In construing this section and sub-section it is manifest that some limitations must be introduced because of the fundamental limitation contained in the "British North America Act, 1867," sec. 92, limiting the power of the provinces as regards taxation to "direct taxation within the province," etc. If the money, $90,325.75, here in dispute, was "property outside of the province" owned at the time of his death by the testator whose domicile was in Nova Scotia and had not been devised "to any person residing in the province," then it would come within the express proviso of the sub-section. It had not been so devised, and the single question remained, whether it was or was not property within the province.

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Construing this sub-section in the light of the rules laid down by Mr. Dicey in his book on the Conflict of Laws (2 ed.), pages 754 to 760, which rules I find fully supported by the authorities, and which govern in the construction of succession duty statutes, I should have no hesitation whatever on my construction of the deposit receipt in holding this debt to be property "outside the Province" of New Brunswick at the time of the testator's death, and not, therefore, subject to the succession duty. It certainly being a simple contract debt was not physically within that province whether the situs of the debt was the domicile of the testator or that of the bank, the debtor, it was alike outside of New Brunswick and the forum to administer the property was clearly that of the domicile of the testator. *Attorney-General* v. *Campbell*(1).

To my mind the proceedings subsequent to the testator's death, namely, the demand by the executors for the money at the branch of the bank in St. John; the refusal to pay until ancillary probate was taken out; the taking of such probate with the accompanying proceedings, in no wise affects the construction of the statute in question here.

The liability of the debt to pay succession duties in New Brunswick depends upon the conditions existing on the day of testator's death. No subsequent proceedings or acts of the executors could operate either to impose or impair such liability.

The whole subject of succession duties, the distinction which exists between them and estate and probate duties, and the rules which the courts in a long succession of judgments have found it necessary to lay down respecting the construction of statutes im-

(1) L.R. 5 H.L. 524, at p. 529.

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posing them are authoritatively reviewed in a late case in the House of Lords, *Winans* v. *Attorney-General* (1), at page 29. These rules are to be found restated with great clearness in the speeches of the law lords who decided that case, and foremost among the rules or principles is one that unless the statute being construed forbids such a construction the maxim *mobilia sequuntur personam* will be applied and its application will

> bring constructively the property within or carry it without the reach of the taxing statutes according as the domicile of its deceased owner is within or without the realm, colony or dominion as the case may be.

Of course all such rules based as Lord Atkinson in his speech in the case just quoted, page 34, says they are on convenience and springing "from the necessity of avoiding the difficulties almost insuperable," which would arise from their being ignored, must yield to the clearly expressed language overruling them, of a statute passed by a legislature competent to enact it.

The questions before us are whether or not with respect to this simple contract debt the legislature of New Brunswick was so competent, and secondly, if competent, has it so clearly expressed itself as to make this debt liable to the succession duties. In the view I take of the facts and of the meaning and effect of the deposit receipt I have concluded that this debt was, to use the language of the sub-section, "outside of the province" and not within it at the time of the testator's death; that the subsequent action of the executors in taking out ancillary probate in New Brunswick and withdrawing the money from the agency of the testator's debtor in St. John did not and could not have the

(1) [1910] A. C. 27.

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effect of bringing within the scope of the succession duties property which at the time of testator's death was not subject to them, and that consequently the appeal must be allowed and the judgment below reversed.

It is not necessary for me to say anything beyond what is necessary to reach this conclusion, and I desire on this difficult question of succession duties and the constitutional problems which in Canada surround it, to be understood as not expressing any opinion beyond the concrete case we have before us in this appeal. The extent to which the "British North America Act" imposes restrictions upon the taxing powers of the provincial legislatures; the liability to the tax in dispute which might have followed had this been a specialty debt charged upon lands and goods within the province or consisted of shares in a provincial company as was the case in the Queensland appeal before the Privy Council; or had even the debt been a debt recoverable only in New Brunswick and not elsewhere, are none of them questions which in my view of the facts necessarily arise for decision here, and I purposely refrain from expressing any opinion upon them.

The debt in question being a simple contract debt recoverable against the bank debtor elsewhere than in New Brunswick, and owing to a testator domiciled in Nova Scotia when it was created and when he died was outside the Province of New Brunswick, and the forum to administer it was that of the domicile.

Appeal should be allowed with costs.

IDINGTON J. (dissenting).—The late George H. Lovitt deposited in the Bank of British North America two sums of money aggregating $90,351.75, and received for one sum a deposit receipt in the following form:

Deposit Receipt.
Incorporated. Royal Charter.

BANK OF BRITISH NORTH AMERICA.

St. John, N.B., 30th December, 1898.

Received from George H. Lovitt the sum of eighty-six thousand, seven hundred and seventy-five dollars and 92-100 dollars, which amount will be accounted for by the Bank of British North America on surrender of this receipt, and will bear interest until further notice at the rate of three per cent. per annum. Fifteen days' notice to be given of its withdrawal, and no interest to be paid unless the money remains in the bank three months.

For the Bank of British North America,

$86,775.92. (Sgd.) H. A. HARVEY, Manager.

Entd. O. H. Sharp,
Accountant.

He received for the other sum a similar deposit receipt. After Mr. Lovitt's death in Nova Scotia, where he resided, the bank refused to pay his executors these moneys unless and until they had obtained ancillary letters of probate from the Probate Court of New Brunswick.

Thereupon the executors applied for and obtained such ancillary letters of probate and by virtue thereof obtained payment of the moneys secured by said receipts.

The respondent thereupon claimed succession duties had become payable by virtue of the New Brunswick Act known as the "Succession Duty Act."

The executors resisted this claim on the grounds that their testator having been domiciled in Nova Scotia, the right to such succession duties was not within the purview of the said Act, and even if so the Act in such regard was *ultra vires.*

The question raised by the latter ground must be resolved by the construction we put upon the "British

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North America Act," and the former by the construction put upon the above mentioned provincial Act.

The "British North America Act" assigns by section 92, sub-section 2, as one of the exclusive powers of the Provincial Legislature that of

> direct taxation within the province in order to the raising of a revenue for provincial purposes.

It is not disputed that the said Act imposing the succession duties it does is intended to be, and speaking generally is, a rightful exercise of this power of taxation.

It is claimed, however, that these debts due by the bank were within the maxim *mobilia sequunter personam,* and must in law be taken to have been at the death of the testator in Nova Scotia, and therefore beyond the legislative jurisdiction of the Province of New Brunswick.

What was the nature of the contract the testator made? What was the nature of the property evidenced or created thereby? Was it taxable and where?

On the face of it the contract was entirely made in New Brunswick. And the fair construction of it having regard to what is common knowledge must be that the notice it provides to be given should be given at St. John in that province and payment be made there.

It is quite irrelevant to consider what might have happened and what the legal rights of the parties might have become had things happened which have not; just as much so as if a horse or carriage held under bailment and liable to taxation in the province had been, after levy, wrongfully removed beyond it, and so remained and questions raised then as to original validity of the imposition being affected thereby.

In the latter case the rights and remedies of the

bailor might have changed their character and incidentally the possibility of actual power to enforce the tax might have vanished.

I submit we obscure the issue by complicating it with possibilities that have not arrived.

The simple question is whether or not such a contract as this which was entirely created within the province had become taxable. Can there be any question now that income is held taxable by a province? And if all the varieties of sources of income we have become accustomed to see so taxed are rightly so taxed can it be that the income derivable from such a contract as this is not? If that derivable therefrom can be taxed, how can the thing itself escape taxation if that more obviously direct method were adopted?

The incomes from somewhat similar sources of investment were declared assessable by the Ontario Legislature and the claim upheld in the case of *Re North of Scotland Canadian Mortgage Company*(1)—so long ago as 1881.

The company's head office and home was in Scotland. Its business was to lend money on real estate or public securities and act as financial agents.

The assessment was for interest on its investments payable to its agents at Toronto or "at the credit of the company at a bank or being moneys lying at the credit of the company in a bank for investment." The shareholders receiving dividends were subject to income tax in Great Britain. Of course this decision is not binding upon us, but is of long standing and illustrative of what, I submit, may be legally done, whether wisely or not.

No one would dispute the liability to assessment

(1) 31 U.C.C.P. 552.

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of a bag of gold received from a non-resident for which a receipt had been given by any one entrusted with it. Can the accompaniment of such deposit of gold by terms and conditions varying the legal liability to account therefor make it less assessable?

The case of *The Attorney-General of Quebec* v. *Queen Ins. Co.*(1), shews that the business transaction itself, that is, the mere lending or act of acquisition cannot be taxed, as doing so would be indirect and not direct taxation.

The case of *Bank of Toronto* v. *Lambe*(2) seems to go further by reason of its comprehensiveness than needed to maintain the right to tax the thing itself in question here, that is, the property in the debt of which the receipt is merely the evidence.

Perhaps this mode of presentation and analysis of the right may, the more one elaborates it, obscure the consideration of the real question to be solved here.

That has been well considered and presented in the case of *The Attorney-General* v. *Newman*(3), where the statute under consideration was in effect identical with and apparently that from which the New Brunswick statute before us was taken.

I agree generally in the reasoning of the opinion judgments in that case supporting the right to maintain the tax upon substantially the same element of fact as herein.

I need not repeat or refer to the authorities therein and on the argument herein dealt with.

There is, as result of argument here, another view presented to my mind, and I proceed to state it.

(1) 3 App. Cas. 1090. (2) 12 App. Cas. 575.
(3) 31 O.R. 340; 1 Ont. L.R. 511.

Section 25 of the New Brunswick "Succession Duty Act" enacts as follows:

> Any administrator, executor, or trustee having in charge or trust, any estate, legacy or property subject to the said duty, shall deduct therefrom, or collect the duty thereon, upon the appraised value thereof, from the person entitled to such property, and he shall not deliver any property subject to duty to any person until he has collected the duty thereon. 59 Vict. ch. 42, sec. 16.

Having regard to the terms of this statute which the executors solemnly undertook to obey upon obtaining the ancillary letters granted them by the probate court of New Brunswick, preceded by all that that grant implies it seems to me that there is an obligation resting upon them by force of the statute and the proceedings upon which the ancillary letters were got which can only be discharged by the payment of the duties claimed.

The Act provides, among other things, the giving of the bond for the express purpose of procuring the payment of these very duties.

It is to be presumed that was done. It does not appear as part of the stated case. It does not appear either whether we are at liberty to draw inferences in that regard or not.

The parties desire a decision upon the point of the liability to taxation, and if I am at liberty on this stated case to presume these things to have been done that should have been done by virtue of the "Probate Courts Act" and the "Succession Duty Act," then it seems to me it would be a travesty upon justice to permit any one to obtain possession of the proceeds of a debt receivable by them only by virtue of ancillary letters granted upon the faith of their engagement, such as must have been entered into herein, and upon the faith of their representations including, it is pos-

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sible, an oath implying that this property now in question was within the Province of New Brunswick.

I assume that the parties to this litigation desire to have the opinion of the court upon no narrow construction of the case submitted, but upon one which would take account of the circumstances and presumptions no doubt existing and which must exist in every such case when the question to be solved herein arises.

I have no doubt that the executors assuming duties such as I have assumed the executors in this case assumed in the statute just quoted, are answerable upon that statute as well as upon any undertaking they may have given pursuant to its other provisions.

I have just one word to add as to the view ingeniously presented that the ultimate beneficiaries under the will in question upon whom must ultimately fall the burthen of paying duties such as that in question lived beyond the province and that it is upon them and their receipt of their legacies that the tax is in effect imposed and hence *ultra vires* as an indirect tax as well as of property beyond the province.

If I understand the argument aright it is sought to be inferred from this that the proper construction of the "Succession Duty Act" was that the tax in such cases was not intended and should only be imposed upon legatees if within the Province of New Brunswick, and that others should escape therefrom. I can not think that any of such constructions was within the contemplation of the framers of the Act. The provisions above referred to seem conclusively to shew the intention at least to collect such a tax.

I think the appeal should be dismissed with costs.

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DUFF J. (dissenting).—The question raised by this appeal is whether the executors of the deceased George H. Lovitt are accountable for succession duties under the "Succession Duties Act" of New Brunswick, ch. 17, C.S.N.B., in respect of certain sums deposited by the deceased with the Bank of British North America at its branch at St. John. These deposits were acknowledged by deposit receipts in the ordinary form and under the authority of ancillary letters of probate granted by the probate court of New Brunswick were paid out at St. John to the executors of the deceased, who at the time of his death was domiciled and resident in Nova Scotia. The points in controversy are: First, were these deposits chargeable with succession duties by the terms of the statute; and secondly, if so, was the enactment in so far as it imposed a duty upon such deposits within the competence of the legislature?

The statute after exempting certain property and estates from the operation of it declares in broad terms (section 5) that all property ("whether situated in New Brunswick or elsewhere other than property being in the United Kingdom of Great Britain and Ireland and subject to duty whether the deceased person owning or entitled thereto had a fixed place of abode in or without New Brunswick at the time of his death") passing either by will or intestacy shall be subject to a succession duty to be levied, where the aggregate value of property exceeds $200,000, on the whole property, and in other cases upon the share in the distributable surplus passing to the respective beneficiaries according to a scale varying with the degree of relationship borne by the beneficiaries to the deceased.

This broad declaration is, however, qualified in an

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important way by sub-section 2 of the same section, which is in the following terms:

(2) The provisions of this section are not intended to apply, and shall not apply to property outside this province, owned at the time of his death by a person not then domiciled within the province, except so much thereof as may be devised or transferred to a person or persons residing within the province.

The effect of the section read as a whole seems to be that as regards persons domiciled at the time of their death in New Brunswick, the duty is leviable in respect of the whole of their property; and as regards persons not domiciled at the time of their death in that province, the duties provided for by the Act are payable in respect of all property not "outside the province" within the terms of sub-section 2. But there is a further and necessary limitation, that, namely, which is imposed by section 92, sub-section 2, of the "British North America Act," by which the provincial power of taxation is limited to "direct taxation within the province." We need not consider whether in its application to the property of persons domiciled in New Brunswick, the first sub-section can be given a construction which does not offend against the constitutional limitation. At all events in its application the property of persons dying domiciled outside the province the Act is not open to impeachment as beyond the powers of the legislature. In confining the operation of the Act in such cases to property which is not outside the province, the legislature must be taken not to have intended to impose any form of taxation which does not fall within the description "direct taxation within the province"; and there can be no difficulty in so reading the language used. The question for determination then comes to this:—Is an at-

tempt to levy duties under the provisions of the Act in respect of the deposits in question an attempt to apply the provisions of the Act to property outside the Province of New Brunswick within the meaning of subsection 2 or an attempt to impose taxation which is not "direct taxation within the province" within the meaning of the "British North America Act?"

Choses in action such as those in question here can, of course, have no actual local situation. They can have only a constructive situs—a situs in contemplation of law. The general rule, I think, is that stated by Mr. Dicey, at page 310, Conflict of Laws, (ed. 1908)—debts or choses in action are (with certain exceptions that need not be noticed) to be looked upon as situated in the country where they are "properly recoverable or can be enforced." In the case of a natural person this forum is taken to be in the absence of some special stipulation affecting the debt or chose in action, the local jurisdiction within which the debtor for the time being resides. The origin of the rule and the ground upon which it rests are stated by Lord Field in *Commissioner of Stamps* v. *Hope*(1), at p. 481, in the following passage:

> Now a debt *per se*, although a chattel and part of the personal estate which the probate confers authority to administer, has, of course, no absolute local existence; but it has been long established in the courts of this country, and is a well-settled rule governing all questions as to which court can confer the required authority, that a debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by specialty. *In the former case, the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be,* and it was held therefore to be *bonâ notabilia* within the area of the local jurisdiction within which he

(1) [1891] A.C. 476.

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resided; but this residence is of course of a changeable and fleeting nature, and depending upon the movements of the debtor, and inasmuch as a debt under seal or specialty had a species of corporeal existence by which its locality might be reduced to a certainty, and was a debt of a higher nature than one by contract, it was settled in very early days that such a debt was *bonâ notabilia* where it was "conspicuous," *i.e.*, within the jurisdiction within which the specialty was found at the time of death: see Wentworth on the Office of Executors, ed. 1763, pp. 45, 47, 60(1).

From this rule the English courts have derived the criterion for ascertaining the local situation of debts and choses in action for the purpose of determining the jurisdiction of courts of probate, and where such liability depended upon the situation of the property for the purpose of determining the liability to duties payable upon property passing in consequence of death.

The application of the rule, however, where the debtor is a corporation having a principal place of business and branch offices where it also carries on its business, presents difficulties which do not arise where the debtor is a natural person. Such a corporation, while for some purposes resident at the place where "the central management and control actually abides" (*De Beers* v. *Howe*(1)), is for other purposes (of founding jurisdiction, for example) resident at each of the places where it has a fixed place at which it carries on its business(2). "The better opinion," Mr. Dicey, p. 163, says,

> seems to be that a corporation has, following the analogy of an individual, one principal domicile, the place where the centre of its affairs is to be found, and that the other places in which it may have subordinate offices correspond as far as analogy can be carried out at all to the residence of an individual.

(1) [1906] A.C. 455, at p. 458. (2) *La Bourgogne,* [1899] A.C. 431.

I have come to the conclusion that the moneys in question were properly demandable only at the branch at St. John; and in that view there can be no doubt that so long as the branch should continue to carry on business there in such a way as to be subject to the jurisdiction of the courts of New Brunswick, that province was the proper forum for the recovery, and consequently, upon the principles above stated, the situs of the moneys deposited within the meaning of the "Succession Duty Act." There, to use the words of Lord Field just quoted,

> the assets would probably be to meet them and for the purposes of administration they must be taken to be situated there.

The principle which I think is applicable for the purpose of ascertaining the true effect of the transaction evidenced by the deposit receipts is that stated by Lord Bowen, then Bowen L.J., in *The Moorcock* (1), at page 68, in this passage:

> In business transactions * * * what the law desires to effect by implication is to give such efficacy to the transaction as must have been intended by at all events both parties who are business men;

and by Lord Watson in *Dahl* v. *Nelson, Donkin & Co.* (2):

> I have always understood that when the parties to a mercantile contract have not expressed their intentions in a particular event, but have left these to implication, a court of law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charter-party which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the

(1) 14 P.D. 64.

(2) 6 App. Cas. 38, at p. 59.

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parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

Applying these principles, can any stipulation be implied from these documents and such of the surrounding circumstances as we are entitled to consider as to the place where the moneys referred to in them should be demandable?

A similar question was raised and decided in *Attorney-General* v. *Newman*(1). In that case there were six such receipts given by six different banks, one of which was the Bank of British North America, all in the same form as those before us. The Ontario Court of Appeal, affirming the Chancellor, unanimously held that the moneys represented by them were only properly demandable at the several branches of the banks where the deposits had been made. Two years afterwards the question was raised in British Columbia, in *Re Scott McDonald*(2), concerning a deposit in the Bank of Montreal evidenced by a receipt in the same form. The full court of that province unanimously concurred in the view of the Chancellor and the Court of Appeal for Ontario. In both these cases the occasion of the litigation was an attempt by the province to exact duties under a statute similar to the new Brunswick Act. In this case the full court of New Brunswick unanimously adopted the same view. These cases appear to me to be well decided.

It is stated in the case submitted to us that the Bank of British North America had a branch office at St. John, N.B., and its head office in London. We

(1) 31 O.R. 340; 1 Ont. L.R. 511. (2) 9 B.C. Rep. 174.

must, I think, put aside for the purposes of this appeal any suggestion that the centre of the bank's affairs within the meaning of the principle stated by Mr. Dicey is at Montreal. For the purposes of applying certain sections of the "Bank Act" the bank is required by the Act to have a chief place of business there; but those sections have no relevancy to any question on this appeal, and we must, I think, take the principal place of business to be in fact where it is stated to be—in London.

Let us then apply the principle stated by Lord Bowen and Lord Watson. Is there any relevant inference or implication which upon that principle can properly be drawn from the circumstance that a customer of a Canadian bank deposits at one of its branches a sum of money upon the terms that the bank will account for the specific sum deposited with interest, upon the surrender of the receipt and upon receiving fifteen days' notice of the withdrawal of the money, and upon the terms that no interest is to be payable unless the money remain in the bank for three months ? In the first place it is clear that the parties regard the transaction as a deposit of money or a loan of money at interest. Is it possible also to treat the transaction as involving an undertaking on the part of the bank to pay at any other of its branches or at its head office across the continent or across the Atlantic, upon notice and demand by the depositor there of the precise sum of money deposited ? I do not think myself that looking at the question from the point of view indicated by the language of Lord Watson just quoted, it is possible to suppose that reasonable business men would, if such a point had been raised when the deposit was made,

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have regarded it as open for discussion. Consider for a moment what such a construction of these instruments involves. There is the very obvious inconvenience of making provision at the various branches and the head office for the verification of these documents when presented from all parts of the country. Then there is the question of time. To confine ourselves to the specific case before us, is it supposable that if the bank had contemplated binding itself to pay this money at its head office in London, some longer notice than fifteen days would not have been stipulated for in order to insure beyond failure sufficient time to make the necessary inquiries in the ordinary way? Then again there is the cost of transmission. Here is a sum of money which the depositor has at his credit at St. John. Is it to be supposed that the bank, without making some provision for the cost of transmission, and without regard to the balance of exchange, would have agreed to pay the precise sum deposited with the agreed interest in London at the option of the depositor ? Some suggestion was made that the undertaking of the bank was to "account" for the sum mentioned, and that in that word might be implied some provision for the deduction of such expenses. But surely that is to abandon the appellant's point. Upon what is the implication based? It can have no other foundation than the theory that the Bank is to account for the moneys deposited, not as moneys in London, but as moneys in St. John. In other words, you cannot imply such a stipulation, in my judgment, without going quite as far as it is necessary to go in order to imply the stipulation that the obligation of the bank is to make provision for payment and to pay at St. John, in other words, that St. John is the place of demand.

From the point of view of the honest and reasonable depositor, it is difficult to see what advantage would accrue to him from making money deposited in St. John, and intended to remain in the bank there as a deposit at interest (which is what these deposits profess to be), demandable in the ordinary course at the head office of the bank. If his purpose were under the guise of making a deposit to get money transmitted to London free of charge, one might understand it. But it is not by such assumptions that the intentions of parties to business contracts are to be arrived at. The discontinuance of the branch at St. John could not possibly affect the interests of the depositor because a condition which the bank by its own act had made it impossible for the depositor to perform would *ipso jure* cease to bind him. I come to the conclusion, therefore, that the construction placed upon these documents by the courts below is the only one which is calculated to give efficacy to them as business documents in accordance with what must be supposed to have been the intentions of reasonable men entering into the transactions evidenced by them.

This alone is sufficient to determine the appeal. But conceding the point just considered against the respondent still, I think, the appeal fails. The argument for the appellant is this. The deposit receipts embody a general and unconditional obligation to account for certain moneys. These moneys admittedly were demandable at the bank at St. John; but whether or not also demandable at other branches they certainly were also demandable at the head office. Now, it is said for the purpose of this statute the situs of a chose in action is the residence of the debtor; and for the purpose of determining the dutiability of such an

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asset under such statutes as this as between rival authorities the residence of a corporation is by construction of law deemed to be the place where its administrative business is carried on—in this case London. It follows—so it is argued—that at the date of the death of the testator the choses in action in question must, for the purpose in hand, be taken to have been situate outside New Brunswick.

Thus it is said to result from the application of Lord Field's reasoning that these choses in action (reducible into possession at the residence of the debtor because they would "probably be" there, or because they were "properly recoverable there"), are for the purpose of determining their situs regarded as properly recoverable and reducible into possession in London only, although it manifestly never entered the mind of anybody until this controversy arose that they should be demanded or recovered anywhere except at the branch office where the moneys were deposited. I am not, of course, returning to the question of implied terms. I am merely emphasizing the circumstance that this result arises purely from the application of a series of constructions of law, and is a result which imparts to the transactions in question a legal effect obviously at variance with any reasonably conceivable expectation of the parties.

I think the reasoning fails because it is based upon an assumption which I think cannot be sustained in principle, and has no countenance from authority. That assumption, underlying the argument, is that a corporation for the purpose of determining the situs of its obligations can never have more than one residence. A corporation—I have already mentioned—admittedly can have, for the purpose of founding jurisdiction,

many residences; and if a corporation be in that sense resident within a given local jurisdiction and performance of a given obligation of that corporation is properly (*i.e.*, lawfully) demandable within that jurisdiction, I do not see on what ground it can be said on the principles stated above that the obligation has its situs exclusively elsewhere. If the corporation is there so that its obligations can be enforced against it there, and if the given obligation is at the demand of the creditor enforceable there (in the sense that the creditor is legally entitled to have it performed there not merely that he may sue there for the debtor's breach of it), then for all these purposes the residence of the corporation (in the relevant sense) must be said to be there. That is really only another way of saying that if the situs of the obligation must be taken in contemplation of law to be determined by the residence of the debtor then the conditions upon which constructive residence of a corporation for this purpose depends are not necessarily to be found in one locality exclusively; and accords with the view expressed by Mr. Dicey in the passage quoted above.

Of course it is said at once that in this view a debt may be situated at one and the same time in several places; and that in practice great confusion would result. There is nothing in this last suggestion; because it must very rarely happen that an obligation is lawfully enforceable in the sense mentioned at the choice of the creditor at more than one place where the debtor can be said to be resident. It would only occur where an artificial person is the debtor, and in most cases there must be some circumstance indicating one place rather than another as the place where the obligation ought to be performed. It may be that in the con-

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ceivable case in which the sole fact should be an obligation, of which performance could at the will of the creditor be exacted from a corporation either at its head office or at another place where it should be held to be resident, it may be that (assuming it necessary to determine the question of situs on these bare facts taken by themselves), the preference ought to be given to the place where the principal business is carried on. But cases in which the question is thus baldly presented must be very rare, and this case is not one of them.

This appears to be the difficulty in which in this case the appellants are involved. The jurisdiction of the New Brunswick court having been in fact based upon the assumption that there was personal property — in other words that these choses in action were — within the province, can the executors who obtained the grant on that assumption now dispute the foundation of the court's jurisdiction to make the grant? There is a doctrine of the law that one may not approbate and reprobate, play fast and loose, gain an advantage by assuming one position and escape the correlative burden by assuming another and inconsistent position. *Gandy* v. *Gandy*(1), at p. 82; *Roe* v. *Mutual Loan Fund*(2); *Smith* v. *Baker*(3). I do not think the executors, having represented these choses in action to be New Brunswick assets and having obtained probate and authority to reduce the assets into possession on that footing and having got possession of them under that authority, could be heard to say, against that province, in order to escape this duty, that they were not assets in New Brunswick.

(1) 30 Ch. D. 57. (2) 19 Q.B.D. 347.
(3) L.R. 8 C.P. 350.

It may be argued that although the executors had a right to elect at which place the moneys should be demandable and reducible into possession — still until they had exercised their election the situs of the obligation was at the place where the head office of the bank was situated. I do not think that helps the respondent. The executors, it is conceded, had the right to determine whether they should treat these moneys as assets in New Brunswick or in the United Kingdom. Having elected to treat them as assets in New Brunswick and having acquired a full title to them as such under a New Brunswick probate (they could not otherwise acquire a right to reduce them into possession or deal with them there) their title to them must with the probate in contemplation of law have relation to the date of the testator's death; the assets must, in other words, be deemed to have been vested in them under the New Brunswick probate or, in other words, as New Brunswick assets from that date. *Ingle* v. *Richards* (1); *Whitehead* v. *Taylor* (2); Williams on Executors, p. 214. In a word, assuming that in the bald case above suggested the situs assigned by construction of law to these assets would be the place of the head office of the bank, that situs is assigned only in the absence of and subject to other controlling factors — in this case, in the absence of and subject to the election of the executors. That election once made has all its normal legal consequences and determines the situation of the assets as from the date of the testator's death.

There is some danger possibly of forgetting that we are to construe the language of an Act of the legislature with regard to the intention of which,

(1) 28 Beav. 366. (2) 10 A. & E. 210.

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it has been said, that "the common understanding of men is one main clue." It is satisfactory to think, for the reasons I have given, that the constructions of law upon which the appellants' argument rests are not sufficiently inflexible to lead us to the startling conclusion that the New Brunswick Legislature in excluding property "outside the province" from the operation of the statute intended to exempt moneys on deposit in branch banks in that province which should be reduced into possession under a New Brunswick probate.

But it is said that the duty attached (if at all) at the date of the death and that unless it can be affirmed of these choses in action that they had a fixed situs within the province at that date, this is an attempt to exceed the provincial authority to impose direct taxation within the province.

Before dealing with that question it will be convenient to mention that it is a mistake to suppose that the payment of the duties imposed is in no way a condition affecting the right of the executors to collect and administer the estate. The Act requires the executors within thirty days after the grant to enter into an obligation for the payment of the duties, and in default there is a provision for the cancellation of the grant. The executors are made personally responsible for duties leviable upon property handed over by them without first collecting the duty. Then on certain estates (over $200,000) the duty is levied on the whole estate irrespective of the ultimate destination of the surplus.

It is observable that the imposition of such duties in respect of moneys reduced into possession under a New Brunswick probate under the protection and

authority of the provincial laws seems clearly to fall within the words "taxation within the province." As respects constitutional authority it can, it appears to me, make not the slightest difference, whether at the date of the death the property was in the province or out of the province. The power of the province to impose duties upon property coming under such authority into the hands of the legal personal representatives of a deceased person wherever domiciled has, I think, never been seriously questioned. It is, moreover, direct taxation because the tax is paid by (or out of the property of) the very persons upon whom its incidence is intended to and does fall, namely, those beneficially interested in the estate. The trustees' are the hands through which it is paid, it is true, but the trustees are not (in any sense germane to this question) the persons from whom it is primarily exacted; their personal liability only arises on failure to perform the duty to collect the tax out of the beneficiaries' share or retain the property until the tax is paid.

Nor do I think any difficulty arises from the circumstance that the tax is declared to be payable at or within twelve months of the death of the deceased. On this question of constitutional validity the inquiry is this: Looking at the scope and purpose of the Act as a whole (or rather in this case at the Act as it affects to impose duties in respect of persons dying domiciled outside the province) does the enactment transcend the power to impose "direct taxation within the province?" Then, if this power of taxation within the province is sufficient to justify the exaction of this kind of impost in respect of this kind of property in the hands of the executors within the province, is the enactment vitiated because of the circumstance that

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the duties are declared to be payable at the date of the death at which time it is said this property had not a fixed situs within the province? The answer to that, according to my view of the Act, is this. If the Act applies to such assets as these, it is because they were assets constructively within the province as being choses in action which, according to the agreement of the parties, were to be demanded of the debtor within the province or because they were assets which were in fact reduced into possession within the province, and which either the executors could not be permitted to say were not assets within the province at the death of the deceased, or which were, in contemplation of law, New Brunswick assets in their hands at that date. On any one of these hypotheses these choses in action were assets which indisputably came within the sweep of the power of taxation committed to the province. The declaration (section 13) that the duties should be payable at death or within one year thereafter appears to have been intended (see section 12(2)), to afford a basis for levying interest from the date of death in default of payment when due. Such incidents of the tax appear to me, once it is clear that the legislature is aiming alone at property within the province, to be unobjectionable; and in any view I can see no difficulty in giving to every part of the provision its full application as regards assets which by legal construction are considered New Brunswick assets in the hands of the executors at the date of the testator's death.

A word as to the general character of the Act. The express language of section 5 excludes the application of the principle upon which the operation of the statutes respecting succession duty and legacy duty

have been in England limited to the estates of persons domiciled within the kingdom. I cannot in view of that language see how the question here can be affected in the least degree by the domicile of the testator. The Act (which, notwithstanding its name, is thus radically different from the English Acts bearing similar titles) in its general features resembles the statutes which under the same name are in force in Ontario and some other provinces of Canada. In view of the composite character of the legislation I do not think the decisions upon the English statutes referred to, or the observations of distinguished judges upon the broad distinctions that have been observed in the Imperial legislation respecting the different classes of death duties, can afford us very much direct aid in the construction of it.

It may, however, be proper to add that in the view of Mr. Westlake, at pages 122 and 123, Private International Law (3 ed.), there could seem to be no question that under the statutes regulating the imposition of probate duty assets such as those in question here would in the circumstances have been subject to those duties; and this although the general rule governing the application of those Acts was that stated by Mr. Dicey, p. 313, that the incidence of the duty fell only on property in England at the death of the deceased. And Mr. Dicey, at page 761, says the test was this: Was the property so situate as to give the court power to grant letters of administration or probate?

The single question open, to my mind, to discussion is that which I have discussed—very lengthily I am afraid—should these choses in action be held in the circumstances here to be "property without New Brunswick" within the meaning of sub-section 2 ? For

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the foregoing reasons I think, with great respect, the answer must be in accordance with the judgment below.

ANGLIN J.—Three questions arise upon this appeal; the first, whether upon the proper construction of certain bank deposit receipts issued from a branch office of a bank the moneys represented by them are demandable by the depositor or his representatives only at the branch office at which the deposits were made; the second, whether the debts evidenced by these documents are taxable property at the place of deposit within the purview of the "Succession Duty Act" of New Brunswick; and the third, whether, in so far as it may be held to cover such debts due to a decedent not domiciled in the province, this legislation is *intra vires* of a provincial legislature.

The deposit receipts are in the usual form. Issued and dated at St. John, N.B., where the deposits were made, but naming no place of payment, they purport to bind the Bank of British North America, after fifteen days' notice, to account to the depositor for two sums of $86,775.93 and $3,575.83 with interest, on surrender of the receipts which are non-transferable. The head office of the bank is in London, England. For the purposes of such sections of the "Dominion Bank Act" (R.S.C. ch. 29) as apply to it, its chief office is its office at Montreal (section 7). It maintains a large number of branches throughout Canada under the authority of section 76.

There are in the record no other material facts bearing upon the first question, which comes before us on a stated case without any evidence as to the circumstances in which the deposit receipts were

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issued, as to any custom of bankers in regard to their issue or payment, or as to the usual requirements as to the place at which notice is to be given or presentation made in order to payment. At what place or places the debts evidenced by these receipts are demandable must therefore be ascertained from the terms of the documents, unaffected by considerations of "course of business" or "surrounding circumstances." *Bell & Co.* v. *Antwerp, London & Brazil Line*(1).

The terms of the receipts sufficiently imply the exclusion of the general principle of English law, "that the debtor is to seek out his creditor and pay him where he lives." But excepting the fact that they are dated at St. John, N.B., where the deposits were made, they afford no indication of the place of payment. They purport to bind the bank as a body corporate. The bank as a single entity is unquestionably the debtor. *Prince* v. *Oriental Bank Corp.*(2).

Do the facts that the receipts were issued and bear date at St. John and that the debtor stipulates therein for fifteen days' notice of withdrawal and for the surrender of the receipts themselves import a condition that such notice must be given to and demand of payment made at the branch of the bank from which the receipts issued and not elsewhere? That these were implied terms of the transactions was assumed in the Supreme Court of New Brunswick, chiefly on the authority of *The Attorney-General* v. *Newman*(3).

The present record contains nothing which would exempt these documents from the operation of the ordinary rules of evidence and of construction which

(1) [1891] 1 Q.B. 103, at p. 107. (2) 3 App. Cas. 325, at p. 332.
(3) 31 O.R. 340; 1 Ont. L.R. 511.

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govern all contracts reduced to writing. If it had been intended that there should be no right to demand payment elsewhere than at the St. John office of the bank, that restriction upon the debtor's liability could easily have been stated. I am, with great respect, unable from the mere consideration of the terms of these documents to import into them such a distinct qualification or modification of the general and unconditional obligation of the bank which they express. I do not stop to inquire whether the mere statement in such an instrument of a place of payment without the addition of some words equivalent to—"and not elsewhere"—would entitle the debtor to insist upon presentation and demand at the place named. Co. Litt. 210*b*, note 1(1). But in the absence of any designation of a place of payment, while it may be questionable whether the creditor would have the right to give notice of withdrawal and to make demand for payment at some local branch of the bank other than that at St. John (see judgment of Esher M.R., in *Bell* v. *Antwerp*(1), at page 107), a right to give such notice and to demand payment at the head office of the bank in London, England, or, perhaps, at its chief office for Canada, in Montreal, as well as at the St. John branch, is, in my opinion, at all events in the absence of any evidence of custom of bankers or course of business precluding it, conferred by these contracts. *Irwin* v. *Bank of Montreal*(2).

In *Attorney-General* v. *Newman*(3), according to the statement in 31 O.R. 340, some of the banks in which the decedent had deposited his monies had head offices in Ontario. Others presumably had head offices

(1) [1891] 1 Q.B. 103. (2) 38 U.C.Q.B. 375.
(3) 31 O.R. 340; 1 Ont. L.R. 511.

elsewhere. The appeal case, which I have seen, shews that the monies in question were deposited with six different banks, two of which had, and four of which had not, their head offices in Ontario. One of the latter was the Bank of British North America. The form of the deposit receipts there in question, not given in the law reports, may be found in Mr. Bayley's book on Succession Duty in Canada, at page 50. No place of payment is named in the form there published. Neither does it appear that there was before the courts in that case any evidence of a custom of bankers or of a course of business in regard to deposit receipts or of special circumstances accompanying the deposit. The disposition of the case proceeds entirely upon the assumption, made by the learned judges, that the monies were "only properly demandable at the branches of the several banks at which the deposits represented by the receipts had been made." It naturally followed that they were "property which could be only properly administerd in Ontario," and they were therefore "property situate within Ontario" and as such taxable by the province. Unless, in some particular not stated in the reports, the facts in the Newman case are distinguishable from those of this case, I must, with all proper respect, express my dissent from the conclusion there reached that monies represented by deposit receipts issued by Ontario branch offices of banks having their head offices outside of Ontario are property which can only be properly demanded and administered in that province.

The second and third questions may be conveniently dealt with together.

The powers of taxation of a provincial legislature are restricted by section 92 of the "British North

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America Act" to "direct taxation within the province." The "taxation of property not within the province" is forbidden. *Woodruff* v. *Attorney-General for Ontario* (1), at page 513.

Section 5 of the "Succession Duty Act" of New Brunswick (C.S. [1903] ch. 17), as originally enacted, purported to render liable to succession duty

> all property whether situate in this province or elsewhere, other than property being in the United Kingdom of Great Britain and Ireland, subject to duty, whether the deceased person owning or entitled thereto had or had not a fixed place of abode in or without this province at the time of his death, passing either by will or on intestacy.

Upon the constitutionality of this legislation being challenged by the then Minister of Justice, Sir Oliver Mowat (December 17, 1896), the legislature enacted the following provision, which now appears as sub-section 2, of section 5:

> The provisions of this section are not intended to apply and shall not apply to property outside this province and owned at the time of his death by a person not then domiciled within the province, except so much thereof as may be devised or transferred to a person or persons residing within this province.

The property now in question was not "devised or transferred to a person or persons residing within this province," unless the fact that the New Brunswick administrator actually procured payment of the deposit receipts at St. John is to be deemed a transfer to him within the meaning of the exception in sub-section 2. I think the devise or transfer intended by the exception in that sub-section is a devise or transfer to a beneficiary within the province of property situate at the time of the decedent's death without the province, and that the exception therefore has no application to this case.

(1) [1908] A.C. 508.

Its presence in the statute, however, having regard to its history, serves to emphasize the intention of the legislature, perhaps otherwise sufficiently manifest, to reach by its legislation all property of a decedent which it can lawfully subject to taxation at the time of his death. To apply the language of a learned New York judge,

> the legislature intended, as I think, to repeal the maxim *mobilia sequuntur personam*, so far as it was an obstacle, and leave it unchanged so far as it was an aid to the imposition of a tax under all property in any respect subject to the laws of this state.

Re Whiting(1).

In order to reach movable property of resident decedents situate outside the province, the legislature proceeds upon this maxim; in order to reach movable property of non-resident decedents, its location in fact, or by legal fiction, is made the test of its situs.

The terms of the New Brunswick legislation clearly exclude the application to its construction of the principles upon which were decided the series of English cases, of which *Thomson* v. *The Advocate-General*(2) is perhaps the most noted. The legislature has expressed its intention not to confine its taxation to property, the title to which is obtained under the law of New Brunswick, but to subject to what it terms "succession duty," not only all property wherever situate of a decedent domiciled within the province, but also all property of a decedent domiciled elsewhere, which is not "outside" the province.

In view of the form of the restriction placed upon the provincial power of taxation by the "British North America Act," if there be any class of property which, though not "outside the province" is yet not

(1) 150 N.Y. 27, at p. 30. (2) 12 Cl. & F. 1.

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"within the province," *ut res magis valeat quam pereat*, and having regard to its history, which makes manifest the purpose of the legislature not to exceed its constitutional powers, sub-section 2 may, I think, be taken, in the case of a decedent domiciled without New Brunswick, to exclude such property from the operation of section 5. If not, as to such property the legislation would, in my opinion, be *ultra vires*.

We are not now concerned with the purview or the validity of this legislation in so far as it may affect property of a domiciled decedent, which is not within the province at his death and is not brought into the province in the course of administration, if indeed the latter fact be material. *Attorney-General* v. *Dimond* in 1831(1).

It is important and, at this point, convenient to inquire what is the nature of the tax called a "succession duty" which the New Brunswick statute imposes. Is it a tax in the nature of a probate tax, which, like probate fees, is payable as "a condition of the issue of probate" or letters of administration? Or is it in the nature of a duty on the beneficial succession to property which is ultimately paid by the beneficial recipient? Is it a tax on the succession itself, or is it imposed on the property which passes ? If on the property, is it confined to property having a situs actual or legal within the province? If on the succession, is it a direct tax and is it in the present case "taxation within the province?"

Although it contains several provisions which we would expect to find in connection with a probate tax —notably those requiring the filing of an inventory and the giving of a bond by the personal representa-

(1) 1 Cr. & J. 356.

tive (section 6), imposing on him the obligation to pay the tax (sections 15-19), making it payable at death (section 13), and its scale partly dependent upon the aggregate value (section 5), and declaring that the duty shall be "over and above the fees provided by the chapter of these consolidated statutes relating to probate courts" (section 5)—the statute does not impose payment of the duty as a condition of the grant of probate or administration, nor does it make the fact that the title to or possession of particular property can only be acquired, or has in fact been acquired, under local letters the test of liability to the tax. It is true that the duty is made collectable in the course of administration, but it differs from a probate tax in that though paid in the first instance by the executor its ultimate incidence is not on the estate, but on the beneficiary (section 15). The specific and pecuniary legatees, and not the residuary legatee, have to bear the burden (Dicey's Conflict of Laws, 2 ed., p. 747). Its rate depends in part on the residence and on the degree of relationship or the absence of relationship of the beneficiary to the decedent. This tax, therefore, partakes of the nature of a succession or a legacy duty as well as of a probate duty. If it were imposed as a condition of probate or administration, it may well be that the legislature could subject to it all property got in under the authority of a grant from a New Brunswick court. If, however, it is not a duty imposed as a condition of probate, but is a tax on the succession or on the property passing, the fact that the property in question was actually got in under the authority of letters granted in New Brunswick does not determine its liability. That depends upon whether the succession occurs in New Bruns-

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wick or the property is property within New Brunswick within the purview of the statute, and also upon the constitutional power in either case to impose the tax. The property passed from the decedent and passed to the beneficiaries in the sense that they had acquired their beneficial interest in it, subject, of course, to payment of his debts in due course of administration and, in cases of testacy, to the assent of the executor, immediately on the death of the testator. The tax attached to it, if at all, at the date of his death (section 13). Its liability to duty and its legal situs therefore cannot depend upon the fact that the executor some time afterwards, and perhaps unnecessarily, took ancillary probate in New Brunswick and got in the property at St. John. Compare *Attorney-General* v. *Hope*, in 1834(1), a case of probate tax, and *Attorney-General* v. *Forbes*(2), a case of legacy duty.

That the legislature may declare dutiable any property of a non-domiciled decedent, which, though not within the province at the time of his death, shall be received or held therein at any subsequent time and for any purpose by his personal representatives may be conceded. But, in my opinion, this it has not done. The provision of the statute that the tax shall attach at the decedent's death, is not consistent with such an intention. The property is not then within the province, and the provincial power of taxation is only "within the province."

Section 5 indicates an intention to tax the decedent's property at the time of its "passing," and subsection 2 thereof, in the case of the non-domiciled decedent, only property not outside, *i.e.*, within the pro-

(1) 2 Cl. & F. 84.

(2) 2 Cl. & F. 48.

vince at the time of his death. In other words, the statute in effect declares that the only property of a non-domiciled decedent, which is subject to the tax, is that which is within New Brunswick at the time of his death. This view of the scope of the legislation is emphasized by the exception in sub-section 2, of section 5, of "outside" property of a non-domiciled decedent, which is devised or transferred to a resident beneficiary.

But is the tax imposed on the succession, or on the property itself? The statute says (section 5) that "property * * * passing by will or intestacy * * * shall be subject to a succession duty," and it distinctly declares this duty to be payable where the property which "passes" is that of a non-domiciled decedent, whether it be movable or immovable. This latter fact would seem to raise a most serious, if not an insuperable obstacle to construing this statute as imposing a duty on the succession itself. *Winans* v. *Attorney-General*(1), at pages 32 *et seq.*, 39 *et seq.*

But it is said that we are bound by the decision of this court in *Lovitt* v. *Attorney-General of Nova Scotia*(2), to hold that the duty is imposed on the succession and not on the property. The Nova Scotia statute there under consideration declared "subject to a succession duty,"

> all property situated or being within the province of Nova Scotia and any interest therein or income therefrom, whether the deceased person owning or entitled thereto *last dwelt* within the said province or not.

If the word "dwelt," as here used, means "resided" as distinguished from "was domiciled," this statute may be construed as applicable only in the cases of

(1) [1910] A.C. 27. (2) 33 Can. S.C.R. 350.

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domiciled decedents and therefore clearly distinguishable from the New Brunswick Act; but if "dwelt," as used in the Nova Scotia Act, means "domiciled," the two Acts appear not to be distinguishable in substance, and in that case this court was probably committed by the decision in the 33rd volume to the view that the duty imposed by these Acts is a tax on the succession. Taschereau C.J., and Davies J., pointedly expressed this opinion upon the Nova Scotia Act and, while Armour J. is reported as merely agreeing in the dismissal of the appeal, on a careful examination of the case, I can find no other ground on which he could well have reached this result. Moreover, I am informed by Mr. Justice Davies that this was in fact the late Mr. Justice Armour's *ratio decidendi*. But for this decision, with the most profound respect for these three eminent judges, I would have been of the opinion expressed in that case by Mr. Justice Mills that, although the occasion of the tax is the passing or succession, and it is called a succession duty, yet it is upon the property and not upon the succession that it is fastened.

It may be questionable how far we should deem ourselves bound, if it be not distinguishable, to follow the decision of the majority of this court in *Lovitt* v. *Attorney-General of Nova Scotia*(1), in view of the opinions since expressed in the House of Lords in *Winans* v. *Attorney-General*(2), as to the scope of succession duties proper and the property on which they are imposable. But it seems to me not necessary to determine whether or not the former decision of this court is indistinguishable or whether or not it should be deemed still binding.

(1) 33 Can. S.C.R. 350. (2) [1910] A.C. 27.

If the duty in question was intended to be a tax on the succession, notwithstanding that it is payable in respect of the movable property of a non-domiciled decedent, and that its amount is made in part to depend upon the value of the whole estate, inasmuch as the succession itself to movable property depends upon the law of the decedent's domicile and the beneficiary acquires his interest under and by virtue of that law (*Harding* v. *The Commissioner of Stamps for Queensland*(1), at page 774), it would seem to have been unnecessary to provide so explicitly that the tax shall be payable in respect of property of a domiciled decedent situate without the province. In the case of a decedent domiciled elsewhere, the duty, though confined to property situate in New Brunswick, if levied on the succession would not be a taxation within the province. Moreover, if the law requires the personal representative to pay a tax on the succession, with a right either to indemnity from the beneficiary or to recoupment out of his property, the tax would savour of the indirect. An instance of an indirect tax, given by the Privy Council in *Attorney-General* v. *Reed*(2), at page 143, is where "a person who pays it may be a trustee, an administrator, a person who will have to be indemnified by somebody else afterwards." Because the statute appears to me in terms to impose what it calls a succession duty, not upon the succession, but, by reason of the succession, upon the property itself and also because, viewed as a tax on the succession, it would, in the case of a movable property of non-domiciled decedents, be *ultra vires,* unless bound by *Lovitt* v. *Attorney-General of Nova Scotia*(3), to hold

(1) [1898] A.C. 769. (2) 10 App. Cas. 141.
(3) 33 Can. S.C.R. 350.

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otherwise, I conclude that the duty is a tax upon the property itself.

If it is a tax upon the property, though payable in the first instance by the personal representative, it is his right to pay it out of, or to deduct it from, the property passing through his hands, and I therefore deem him merely the agent of the province to collect the tax from the beneficiary upon whose property it is directly imposed.

If the duty be a tax upon the succession to or acquisition of the property of the decedent, its situs at his death is in the case of movable property not material. But if it be a tax upon the property passing as distinguished from the succession to or acquisition of such property, the situs of the property becomes a matter of prime importance.

Although it is apparently well established in the United States that, as a general rule, the situs of debts for purposes of taxation is that of the domicile of the creditor (and this seems to me the more logical rule: *Re State Tax on Foreign-held Bonds*(1), at pages 318-9;) and a tax imposed by another State, in which the debtor resided, has been held unconstitutional (Wharton's Conflict of Laws, 3 ed., pp. 171-2), under the law of England which prevails in New Brunswick it is equally well established that a simple contract debt owing by an individual is property which has a local situs where the debtor resides: *Commissioner of Stamps* v. *Hope*(2), whereas the situs of specialty debts and of debts represented by documents marketable and transferable by delivery is "where the instruments happen to be." *Winans* v. *The King*(3), at pages

(1) 15 Wall. 300.
(2) [1891] A.C. 476, at pp. 481-2.
(3) [1908] 1 K.B. 1022.

1026, 1030. That the artificial situs ascribed to debts by English law rather than the situs of the domicile of the creditor is the criterion for determining the liability of such property to taxation seems to be indicated by Lord Hobhouse in delivering the judgment of the Privy Council in *Harding* v. *Commissioners of Stamps for Queensland*(1), at page 775. That this is the test in a case of probate duty is well settled. *Commissioner of Stamps* v. *Hope*(2). And as pointed out by Mr. Dicey, an English decision determining liability or non-liability to probate duty is a decision that the property affected was or was not situate in England at the time of the decedent's death. Conflict of Laws (2 ed.), at page 313.

Were the debtor in the present case resident only in New Brunswick, the debts evidenced by the deposit receipts would, I think, have been taxable in that province. Adapting language found in *Attorney-General* v. *Newman*(3), "any property which can only be properly administered in the province is property situate within the province according to the meaning which ought properly to be attributed to those words in the 'Succession Duty Act.'" But if payment of the deposit receipts held by the late Senator Lovitt was exigible as well in London or Montreal as in St. John, can it be said that the debtor's residence was sufficiently established at St. John to make the moneys represented by the receipts property "within the province" of New Brunswick?

That a corporation may for some purposes have many residences may be conceded. For instance, though its head office or chief place of business be else-

(1) [1898] A.C. 769. (2) [1891] A.C. 476.
(3) 31 O.R. 340; 1 Ont. L.R. 511.

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where, if it has a place of business, an office or an agency within a province, it may be resident there for the purpose of conferring jurisdiction upon the provincial courts. But if it be necessary to determine what, for purposes of taxation, is the seat of the corporation—what is the place at which it dwells or carries on its business—what is its residence—there are many authorities which indicate that it should be regarded "as necessarily having its seat or centre of operations in some one spot to the exclusion of all others," and that this will be "the centre where the corporation resides, while the other establishments are merely offices or agencies." See decisions collected in Foote's Int. Law (2 ed.), pages 112-121, and in Lindley on Companies (6 ed.), page 1223.

If a corporation, for the purpose of fixing the situs of its debts not otherwise determined, should be deemed resident in each province or state in which it may have an agency, or place of business, it is obvious that, as property of the creditor, every such debt might be subjected to taxation in every such province or state. It would seem unreasonable, that the mere exigibility of a debt by legal process at several places should suffice to render that debt property subject to taxation at each of such places. I should require unquestionable authority to satisfy me that this is the law. Of course it is quite competent for a sovereign legislature untrammelled by constitutional limitations to declare any property, wherever situate, taxable and to declare a corporation, for any reason or without reason, resident within its jurisdiction. The only restriction upon its power is the limitation of inability to enforce its laws. But the legislature of a British province, which is empowered to impose only "taxation within the province," cannot

by legislative declaration make anything property "within the province" which would not otherwise be such according to the recognized principles of English law. If it could, the constitutional limitation upon its power would be a mere dead letter.

The inconvenience and injustice which might result in the case of an insolvent decedent, who leaves property in several jurisdictions in each of which he also leaves creditors, from a holding that, even for purposes of administration, a debt due to him by a corporation should be deemed property having a situs wherever such corporation may have a branch, is obvious. How would the doctrine that creditors within the jurisdiction have a right to satisfaction of their claims out of local assets in priority to foreign creditors be applied? Would the accident of one ancillary administrator rather than another first demanding and obtaining payment of the debt determine the rights in regard to it of the various creditors wherever resident?

The sufficiency and the propriety of a grant of letters of administration in respect of such property by the consistorial court of the diocese within which the general and chief business of the corporation was carried on rather than by the court of another diocese within which the corporation had an office and did part of its business seems to be fairly deducible from *Ex parte Horne*(1). The same idea that in respect to money due to a decedent from a corporation its residence for the purpose of fixing the situs of the debt and thus making it *bonum notabile* is its chief place of business runs through the decisions of Romilly

(1) 7 B. & C. 632.

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M.R., and of Giffard L.J., in the case of *Fernandes' Executors*(1).

In *Willis* v. *Bank of England*(2), at page 38, it is pointed out that

> though the statute, 7 Geo. IV. ch. 46, sec. 15, requires that bank post bills issued by the branch banks shall be payable there as well as at London, yet the converse has not been enacted, and the bank post bills issued in London are not payable at the branch banks.

A not unreasonable inference from this decision is that but for the statute the post bills issued by branch banks would have been payable only at London.

There is a singular dearth of authority upon the important question as to what should be deemed, for purposes of taxation, the situs of a debt owing by a corporation and exigible at more than one of its establishments. But, in the absence of direct authority, applying the principles which seem to underlie decisions in cases somewhat cognate, and deeming that to be the law which appears most consonant with equity and natural justice, I have reached the conclusion that the situs of the debts represented by the deposit receipts in question here was not at St. John, N.B., but was either at Montreal or at London—for the purposes of this action it matters not which.

If this be not so, although their situs may not be definitely outside, neither is it so clearly within New Brunswick that these debts should be deemed subject to the provincial power of taxation. If they are property not "outside the province," within the meaning of that descriptive phrase in the New Brunswick "Succession Duty Act," so far as it includes them that statute is, in my opinion, *ultra vires*.

(1) 5 Ch. App. 314.

(2) 4 A. & E. 21.

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If the duty is imposed upon the succession itself, rather than, as I think, fastened upon the property passing, and if it attaches in respect of the debts represented by these deposit receipts, it is likewise, in my opinion, not "taxation within the province."

I would therefore allow the appeal of the defendants.

Appeal allowed with costs.

Solicitor for the appellants: *H. A. McKeown.*

Solicitor for the respondent: *William Pugsley.*

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*Feb. 18.
*March 11.

JOHN F. LEGER (SUPPLIANT) ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Construction of statute—7 & 8 Edw. IV. c. 31, s. 2—Government railway—Fire from engine—Negligence—Damages.

By 7 & 8 Edw. IV. ch. 31, sec. 2, the Government of Canada is liable for damage to property caused by a fire started by a locomotive working on a government railway, whether its officers or servants are or are not negligent, and by a proviso the amount of damages is limited if modern and efficient appliances have been used and the officers or servants "have not otherwise been guilty of any negligence."

Held, Davies J. dissenting, that the expression "have not otherwise been guilty of any negligence" means negligence in any respect and not merely in the use of a locomotive equipped with modern and efficient appliances.

Sparks from a locomotive set fire to the roof of a government building near the railway track and the fire was carried to and destroyed private property. The roof of this building had on several previous occasions caught fire in a similar way and the government officials, though notified on many of such occasions, had only patched it up without repairing it properly.

Held, reversing the judgment of the Exchequer Court (12 Ex. C.R. 389), that the government officials were guilty of negligence in having a building with a roof in such condition so near to the track, and the owner of the property destroyed was entitled to recover the total amount of his loss.

APPEAL from the judgment of the Exchequer Court of Canada(1) in favour of the suppliant, but limit-

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

(1) 12 Ex. C.R. 389.

ing the amount of damages to $5,000 to be apportioned among all the parties injured, the share of the suppliant being $3,284.67.

The claim set forth in the petition of right in this case was based on the provisions of the Act 7 & 8 Edw. VII. ch. 31, section 2, sub-section 2, which is as follows:—

"2. Whenever damage is caused to property, by a fire started by a railway locomotive working on the railway, His Majesty, whether his officers or servants have been guilty of negligence or not, shall be liable for such damages: Provided that, if it is shewn that modern and efficient appliances have been used and that the officers or servants of His Majesty have not otherwise been guilty of any negligence, the total amount of compensation recoverable under this subsection shall not exceed five thousand dollars, and it shall be apportioned among the parties who suffered the loss as the court or judge determines."

The suppliant's property was destroyed by a fire alleged, and found by the judgment appealed against, to have originated from an engine operating on the Intercolonial Railway at Bathurst, N.B., the sparks from said engine setting fire to the roof of a freight shed adjoining the track and spreading to the property so destroyed. There was evidence, and the Exchequer Court judge found, that this roof was in a defective state. It was also shewn that it had, on several previous occasions, caught fire in the same way, and on most of such occasions the government officials were notified, but only patched it up where it was burned, without repairing it properly.

The suppliant claimed $17,000, damages, but the trial judge held that the engine causing the damage

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was furnished with modern and efficient appliances; that there was no proof that the officers or servants of the government had been "otherwise guilty of negligence" within the meaning of the Act above mentioned; and that the damages should, therefore, be limited to $5,000. The suppliant appealed against this assessment of damages.

Teed K.C. and *Knowlton,* for the appellant. Under the first clause of sub-section 2 of the section in question the Crown is liable to unlimited damages in case of injury by fire from an engine operating on its railway, and must bring itself within the saving clause to get the advantage of the limitation. See *Cincinnati, New Orleans and Texas Railway Co.* v. *Barker*(1); *Red Mountain Railway Co.* v. *Blue*(2).

Any negligence of the officers or servants of the Crown contributing to the injury will deprive it of the benefit of the saving clause, and in this case there was negligence in leaving the roof of the freight shed in such a condition that it would act as a fire trap.

Chrysler K.C. for the respondent. The failure to repair the roof was mere non-feasance for which the Crown is not liable. *Leprohon* v. *The Queen*(3); *Sanitary Commissioners of Gibraltar* v. *Orfila*(4).

The term "otherwise guilty of negligence" in the sub-section means negligence in the operation of the engine and not negligence generally.

(1) 56 Am. & Eng. Rd. Cas. 106.
(2) 39 Can. S.C.R. 390.
(3) 4 Ex. C.R. 100.
(4) 15 App. Cas. 400.

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The Chief Justice.

THE CHIEF JUSTICE.—I am of opinion that the appeal should be allowed for the reasons given by Mr. Justice Duff.

GIROUARD J.—I agree to allow this appeal with costs.

DAVIES J.—This appeal turns upon the construction to be given to section 2, ch. 31 of the Statutes of Canada, 1908.

Sub-section 1 of that section declares the duty of the officers and servants of King with respect to keeping and maintaining the cleared land or right of way free from combustible materials.

Sub-section 2 relates solely to *a fire started by a railway locomotive working on the railway.* It creates first an absolute liability for damages caused thereby without limitation as to amount. The proviso introducing the limitation upon the extent of liability enacts that two things must be shewn to get the benefit of that limitation; one that "modern and efficient appliances have been used"; the other "that the officers and servants have not otherwise been guilty of any negligence." As to the first provision required, the user of modern and efficient appliances, it relates surely only to the particular railway locomotive causing the fire although those words of limitation are not inserted in the clause. No reasonable construction can extend the words beyond. Any proof offered of the user of "modern and efficient appliances" otherwise than with reference to the particular locomotive would be foreign to the question to be tried. So with regard to the second provision requiring proof that the officers and servants have not otherwise been

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Davies J.

guilty of any negligence. The word "otherwise" obviously refers to negligence in the manner of using these modern and efficient appliances. You must have the appliances called for by the statute *first*. Secondly, you must negative any negligence in their user. "Otherwise" cannot in the connection in which it is used apply to negligence of officers and servants not in any way directly concerned in seeing that only proper appliances are used or that, when supplied, they are properly used. It does not seem reasonable to extend the word to embrace negligence of officers or servants not directly concerned with the one dominant idea controlling the enactment. That idea is to impose liability upon the railway for damages caused by fires started by inefficient or negligently operated railway locomotives working on the road. The railway must in any event provide the best locomotives, and they must operate them without negligence. Even when they have so provided and worked their locomotives they must pay for damage up to $5,000 for fires started by locomotives. The damage need not be caused by sparks emitted. It may arise from ashes dropped from the fire box or grate. If carelessly so dropped the damage is unlimited as well as if caused by emitted sparks through the smoke stack.

It may be also that the section is open to the construction that negligence in the performance of the duty enjoined in section 1 of keeping the road-bed clear would entail unlimited liability in case of fire started by a locomotive on such combustible material. Mr. Chrysler seemed rather at the close of his argument to avoid combatting the contention that it was so open.

As the point is one not necessary for us to determine in this case I would not express any opinion upon it.

As I cannot agree to the construction that the negligence spoken of in the section extends to negligence arising out of the condition of the roof of the station building which caught fire I think this appeal must be dismissed.

IDINGTON J.—The appellant having brought an action in the Exchequer Court for damages sustained by reason of a fire which destroyed his buildings was awarded only the sum of $3,284.67 though the actual loss is claimed to have been $17,500.00.

The action is founded upon 7 & 8 Edw. VII. ch. 31, section 2, sub-section 2, enacted the 3rd April, 1908, which is as follows:—

2. Wherever damage is caused to property, by a fire started by a railway locomotive working on the railway, His Majesty, whether his officers or servants have been guilty of negligence or not, shall be liable for such damages: Provided that, if it is shewn that modern and efficient appliances have been used and that the officers or servants of His Majesty have not otherwise been guilty of any negligence, the total amount of compensation recoverable under this subsection shall not exceed five thousand dollars, and it shall be apportioned among the parties who suffered the loss as the court or judge determines.

The learned trial judge finds that in fact the fire was started by a railway locomotive working on the respondent's railway setting fire to the shingles on the roof of the freight shed of the said railway at Bathurst, and spreading thence to the appellant's hotel about one hundred and twenty-five feet distant.

The liability to pay, as above provided, five thousand dollars distributable amongst the sufferers is not denied save by the objection made by the respondent's counsel, that as the fire caught first on the roof and spread thence it cannot be said to have been started by the locomotive.

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This statement of the sequence of events presents all there is in the argument for such a view and seems to be met by the plain language of the Act. Such subsidiary argument in support of this objection as was attempted to be drawn from the history of cognate legislation and changes therein seems worthless when we find such changes actually remove the obscurity existent in the prior legislation which might, if at all relevant, have lent a slight colour to some such contention.

The arguable ground taken by the learned trial judge that whilst the Act clearly creates a liability on the facts he finds the damages must as a whole be limited to the sum of five thousand dollars, is, I take it, the real ground of resistance to the appeal.

But when the liability is created by the main part of the sub-section, and by words plainly unlimited, we must see if and how far the respondent is brought within the excepting proviso before we can lessen the responsibility primarily created.

There are just two things expressed as foundation for excuse or relief. Both must exist.

One is that modern and efficient appliances have been used.

I take it as tolerably clear from the language used and the common knowledge of and the history of the risks of fire from the sparks or cinders emitted from the fire necessarily incident to the use of locomotives that the appliances referred to are such as relate to the construction and use of the locomotive, and which may reduce such risks to a minimum.

It is found by the learned trial judge that such appliances were used and that factor is out of the case.

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The second requirement to ensure immunity beyond the limit named is "that the officers or servants of His Majesty have not otherwise been guilty of any negligence."

One or two observations seem necessary in regard to the purpose and effect of this requirement. I submit, with respect, it has been misapprehended by the learned trial judge.

In the first place it is, I repeat, the first part of the sub-section that alone creates the liability.

It is not negligence that is the foundation of the obligation at all.

True there may have been negligence which promoted the emission of the sparks.

But whether negligence existed or not a new liability is created, and expressly covers primarily all damages caused to property by fire started by a locomotive in use.

Previously to this enactment there was no liability on the part of the respondent for such claims as this, no matter how much due to the negligence of respondent's servants.

And this new sub-section does not attempt directly to create a new liability by directly resting it upon negligence.

Heretofore the only legal claim against the Crown for damages caused to property by negligence was that to property *on* a public work, and expressly founded upon negligence.

This sub-section was to remedy that gross evil endured so long.

It was, no doubt, intended, and I think manifestly intended to put an end to such a state of things.

It is impossible to conceive when this is rightly

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apprehended that the negligence in this sub-section referred to and had in view was some actionable negligence. The people for whom and their property in respect of which a remedy was needed were not on but beyond the pale of the public work, and absolutely without remedy. Actionable negligence in their relations to the Crown, in such regard had no existence.

To assume actionable negligence as alone that which is meant in this proviso (when and where no such thing exists) is to render the word and term of the proviso a useless absurdity. We must give it a meaning; and giving that conformable to the fundamental rule of its plain ordinary meaning is enough.

Bearing all these considerations in mind, I submit the language of this sub-section is as clear and comprehensive as when read grammatically it is, and doubtless was, intended to be.

The justice of it is manifest. If the servants of the Crown have used proper appliances and not been negligent in, or in respect of, any of these things that may have been conducive to the injury suffered from the working or use of the locomotive, he suffering must bear the inevitable result of such use which is needful for the common good.

On the other hand, if it is not the inevitable, after due care has been taken, which has happened, the consequences must fall where they in justice properly belong.

At the same time, as a matter of expediency, the loss arising from the inevitable has to the limited sum named been imposed with a view to distributing part of the burthen of the loss. As to the absolute justice of this part of the remedy, opinions may differ, but

as to the other, it embodies such absolute justice, we should see it is not weakened in any way.

Let us apply this reasoning to this case.

The roof of the freight house which caught fire that spread to the appellant's property and destroyed it was very old; of shaky and curled up shingles; precisely the sort of thing to catch fire and spread it.

It caught fire seemingly from the use of respondent's locomotive on three different occasions within the seven weeks immediately preceding that of the 25th of May occurrence, now in question. Remonstrances of a most vigorous kind were made on one or more of these occurrences with the local officers of the road, and the need for a new roof pointed out, and these representations apparently were transmitted to proper authority. Beyond patching up, once or twice, some of the holes burnt in this "fire trap" by each fire, we do not hear of a single step having been taken, to watch, to warn, to guard, or to protect property in the neighbourhood, against such manifest danger of fire being started by respondent's working locomotives.

If that is not clear negligence within the plain words used and a breach of this condition that the statute requires to be observed by the officers and servants of the Crown to procure relief from the consequences of starting a fire I am unable to understand how grossly His Majesty's servants and officers must offend before their conduct can be called negligent. Nor do I think we have to find out and accurately determine which man is to blame or what degree of authority he had.

Some one could have stopped the train if need be. Some one could have done something. No one did

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anything. Some one near at hand ought to have had the care assigned him of meeting such an emergency, and if there was not such an one, that was negligence.

I agree with Mr. Justice Cassels that there may be in law no duty to one's neighbour to keep a roof in repair.

There is, however, a duty not to set it on fire when there is a risk of the fire going to the neighbour's property. His Majesty's servants and officers have been long enough exempt from blame on that score. It was high time such a state of things should end. We must now, I submit, see to it that the scandal has ended; if possible, forever.

It was also argued that the negligence referred to in the proviso of this second sub-section must have reference to the negligence legislated against in the first sub-section.

The first sub-section stood substantially as it reads now in the Act for a long time before the second was enacted.

It gave no express right of action; and of such use as it was in the way of protecting any one in respect of his property, that was given by another Act, but confined to property on the railway.

This new sub-section is for the express purpose of protecting people in respect of property off or beyond the railway. In regard to this latter class the first sub-section was of no more use than a painted image.

It has, though accidentally brought near to the other, neither grammatical nor necessary legal relation to the subject matter most directly dealt with by the new sub-section. Yet it may hereafter be of some use in relation to the subject matters dealt with

by the latter, as for example, in a case where the facts may evoke its use to help but not necessarily to determine whether or not in a limited number of that class of cases, negligence has existed.

It is, however, entirely beyond the range of what we have to deal with in this case unless significance is to be given to the transposition of words which took place in it when the new sub-section was enacted and added meaning given by the words "other unnecessary combustible material."

It seems, I fear, impossible, having regard to the *ejusdem generis* rule, to use these added words or the *whole* sub-section, either to help or hinder the application of a unique new law, which by the second subsection is brought into force over an old barbaric field yet untouched by law, and is not and does not profess in a legal sense any amendment of old law requiring us to fit the old and new.

If, however, the added words "unnecessary combustible material" in the first sub-section can be read as substantial change then they would cover this very case, which I do not think legally possible, though perhaps intended so by some one.

Another argument suggested was that the negligence mentioned in this proviso might be something not covered by modern appliances, but yet relative to the locomotive or its use or management.

I am unable to agree in this. Indeed I am unable to quite comprehend its application or that of the nonfeasance rule to this case, for the most obvious negligence in this case is the unguarded use of the locomotive in such a place, and under such dangerous conditions as had been amply demonstrated to exist to the knowledge of the officers of the road (as the learned

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judge remarked during the trial) whilst no means taken to guard against the consequences of a fourth setting of fire, by its use. It may be possible, by calling things names to indicate passivity instead of activity, to frame an apparently logical, legal proposition that would justify running a train across a half-broken bridge or a locomotive emitting sparks beside a magazine when left wide open and filled with gunpowder. I cannot assent thereto.

I observe the learned judge anticipated a reference if any need arose to fix the amount of the damages and hence we have no other alternative then direct it.

I think the appeal should be allowed with costs, and a judgment entered accordingly directing a reference to ascertain the damages done appellant's property by the fire in question, for executing such a judgment of reference, and the findings thereon and reservation of costs of the reference to be disposed of by the judge of the Exchequer Court.

DUFF J.—I think the enactment in question was designed with a view to making the remedy against the Crown available to persons suffering loss of property by reason of fires started from locomotives on government railways co-extensive with that enjoyed by them under the "Railway Act" as against a railway company in respect of loss caused by fires started from a locomotive on a railway not a government railway.

I think "negligence" in this enactment has the meaning attributed to the word by lawyers — want of care according to the circumstances. The legislature is obviously speaking of *incuria dans locum injuriæ* — to use Lord Cairns' well-known formula; but I think the burden placed on the defence by the statute is to acquit of any such *incuria* all His Majesty's officers

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and servants who in the course of their duty are concerned with the construction or working of a Government railway.

I cannot entertain any doubt that the maintenance of the station in the condition disclosed by the evidence while engines emitting sparks were constantly passing it was negligence in the sense mentioned. Any reasonably careful person must have seen that it was in the circumstances a source of danger; and the failure to take the necessary measures to prevent that comes clearly, to my thinking, within the language used.

To say that there was no duty to repair is merely to beg the question. Nor does it help the matter to describe the default of the department as nonfeasance merely. You cannot properly confine your view to the failure to repair alone; you must take that together with the fact that the station was a part of an operating railway. Moreover, on any strict application of principle the fault charged in this case cannot be described as mere nonfeasance. A private individual or a public body erecting a structure which unless it should be kept in repair would, to the apprehension of reasonable persons, be likely to become a source of danger to property in the neighbourhood would incur an obligation to keep it in repair; and if by reason of the failure to do so the structure should become a nuisance the person or body maintaining it would be responsible as if such person or body had caused the nuisance directly. *Pictou* v. *Geldert*(1). Before the passing of the statute no such liability would have rested upon the Crown in such circumstances; but it was to remedy this grievance that the enactment was passed.

The appeal should be allowed with costs.

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(1) [1893] A.C. 524, at 531.

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ANGLIN J.—This action was brought in the Exchequer Court to recover damages from the Crown for the destruction of the suppliant's hotel premises by fire communicated from the freight sheds of the Intercolonial Railway at Bathurst. The learned trial judge found that the fire originated from sparks emitted from an Intercolonial engine, which was "equipped with all modern and efficient appliances," and that it was established that the respondent was not liable for "negligence in operating an engine defectively equipped." The learned judge further found that the roof of the freight shed was in a defective state of repair, and in such a condition as to make a fire more probable than if it were in good repair. He, however, held that the liability of the respondent was limited to a proper proportion of the sum of $5,000, that being the maximum amount recoverable where

> it is shewn that modern and efficient appliances have been used and that the officers or servants of His Majesty have not otherwise been guilty of negligence (7 & 8 Edw. VII. ch. 31, sec. 2, sub-sec. 2),

his opinion apparently being that the only negligence which the statute requires the Crown to negative is negligence consisting in the use of an engine lacking modern and efficient appliances.

Whatever right of action the plaintiff may have, whether it be for limited or for unrestricted damages, is conferred by the Dominion statute, and the jurisdiction of the Exchequer Court under section 20(*d*), R.S.C. ch. 140, to entertain the suppliant's claim, though questioned by the respondent, is in my opinion incontrovertible.

I am also of opinion that the application of the statute under which the suppliant claims is not confined to fires directly caused by a locomotive, but extends

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to fires communicated from buildings in or upon which fire has been started by a locomotive.

By this appeal the suppliant seeks judgment for the full amount of damages which he has sustained in lieu of the restricted damages awarded in the Exchequer Court. His right to full damages depends on the construction of the words in the statute —

> that the officers or servants of His Majesty have not otherwise been guilty of any negligence.

With respect, I am of opinion that the very presence of these words following the words, "if it is shewn that modern and efficient appliances have been used" makes it clear that they were meant to cover negligence other than the use of an engine lacking modern and efficient appliances. If restricted to such negligence they would have no effect whatever, and would be a wholly unnecessary provision. What other negligence are they meant to cover ? In themselves they are broad enough to cover any negligence of any officer or servant of His Majesty which occasioned the damage complained of.

While, as I now read it, I find nothing in the section which would justify restricting the application of this broad and comprehensive language to negligence in the operation of the locomotive, I desire to leave open the question whether other kinds of negligence should or should not be deemed to be included.

Assuming that the provision should be restricted to negligence in the operation of a locomotive — the narrowest construction of which it can possibly admit, — such negligence has, in my opinion, not been disproved; and the statute puts upon the Crown the burden of disproving it. The evidence shews that within four or five weeks before the occurrence of the fire

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in question three other fires were started on the roof of the same freight shed in circumstances which leave practically no room for doubt that they also were caused by sparks from passing locomotives. These fires were all duly reported to the proper railway authorities and repairs were from time to time made of the injuries done to the roof on these occasions. There is in evidence a report made by the station agent at Bathurst to the district superintendent at Campbellton that

> the roof of the shed is in a very bad condition and should be shingled at once or there will be a serious loss some day,

and it is shewn that upon this report a carpenter was sent to make some repairs. He says:—

> I found the roof—a good many shingles were loose; the wire nails had rotted off between the boards and the shingles, as they always do; and I nailed some of them down, but I did not nail the whole roof. * * * I did not nail down all that required nailing. * * * I think it was very bad.

There is no evidence that it was because there was not an appropriation for the purpose or for any other sufficient reason that the roof was not renewed or adequately repaired. Nevertheless, with the roof in this dangerous condition to the knowledge of the responsible officers of the railway, a spark-throwing locomotive was allowed to be operated in immediate proximity to it, and, so far as the evidence discloses, without any instructions being given to take any precaution whatever to prevent fire being thus caused. Not only has the Crown in my opinion failed to shew that there was not negligence in operating the locomotive in these circumstances as it was operated, but, if that be necessary, such negligence is sufficiently established by affirmative evidence.

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I would, therefore, allow this appeal and would direct judgment for the suppliant for the full amount of damages sustained by him to be ascertained by a reference in the Exchequer Court as indicated in the judgment of Mr. Justice Cassels. The suppliant should have his costs of this appeal, and of the action in the Exchequer Court including the costs of the reference.

Appeal allowed with costs.

Solicitor for the appellant: *M. G. Teed.*
Solicitor for the respondent: *E. L. Newcombe.*

1909
*Oct. 29, Nov. 2.
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*March 11.

THE ELECTRIC FIREPROOFING COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

AND

THE ELECTRIC FIREPROOFING COMPANY (PLAINTIFFS) ..... RESPONDENTS.

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

Contract—Assignment of patent rights—Implied warranty—Privity—Validity of patent—Caveat emptor—Novelty—Combination—New and useful results.

In the absence of an express agreement or of special circumstances from which warranty might be implied, an assignment of "all the right, title and interest" in a patent of invention does not import any warranty on the part of the assignor as to the validity of the patent. Judgment appealed from (Q.R. 34 S.C. 388) affirmed.

Per Idington J.—In the present case the patents were valid.

APPEAL from the judgment of the Superior Court, sitting in review(1) at Montreal, by which the judgment of Dunlop J., at the trial(2), was affirmed.

The appellants were incorporated, in Canada, for the purpose of purchasing and exploiting two Canadian patents of invention of which the respondents, an American company, were owners. The firm of Stillman & Hall, acting as brokers or agents, were the intermediaries through whom the sale of the patent

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

(1) Q.R. 34 S.C. 388.

(2) Q.R. 31 S.C. 34.

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rights was effected. They obtained an assignment of the patent rights from the American company and afterwards transferred them to the Canadian company. The consideration for which these rights were sold to the Canadian company was $100,000, of which $25,000 was paid in cash and $75,000 in first mortgage bonds of that company. The bonds were handed over to the American company, and, on default in payment, they brought an action to recover $9,870.81 for overdue interest thereon, and, by an admission subsequently filed, credited the Canadian company with $5,653.14, leaving a balance of $4,217.67 due on their claim. The Canadian company pleaded that the patents, on the sale of which the bonds were delivered, were invalid and that there was, therefore, no consideration given for the bonds. By a cross-demand the Canadian company sought to recover back the $5,653.14 which they had paid. They also instituted a separate action against the American company to have the invalidity of the patents declared and the sale and transfer of the patent rights cancelled and set aside for want of consideration; they claimed the return of the $25,000 paid in cash on account of the purchase price and that the bonds should be declared null and void and delivered up for cancellation. The firm of Stillman & Hall were made parties to the latter action, as were likewise the Montreal Trust and Deposit Company, the trustees for the bondholders, and the bonds were attached by means of a conservatory order. Stillman & Hall appeared to the action and submitted themselves to justice. The American company pleaded that there was no privity of contract between them and the Canadian company in regard to the sale of the patent rights; that they had sold direct to Still-

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man & Hall who, in turn, had sold to the Canadian company, and that there was no warranty as to the validity of the patents.

At the trial, Dunlop J. entered a judgment for the balance of $4,217.67 in the action by the American company, and dismissed the cross-demand and the action by the Canadian company. By the judgment appealed from, the Court of Review confirmed these judgments but on different grounds, the question as to the validity of the patents not being considered, and it was held that there was no privity of contract between the American and Canadian companies and that there had been no warranty as to the validity of the patents.

Atwater K.C. and *Duclos K.C.* appeared for the appellants.

J. E. Martin K.C. for the respondents.

THE CHIEF JUSTICE and GIROUARD J. were of opinion that the appeal should be dismissed with costs for the reasons given in the court below.

DAVIES J.—One of the grounds upon which Archibald J., speaking for the Court of Review, dismissed this appeal substantially was that, in the absence of special language in the assignment of a patent or of special circumstances giving rise to an implication of warranty, there is in law no such implication of warranty of the indefeasibility of the patent arising out of its assignment. There was no special language in the assignment in this appeal and no special circumstances which could give rise to any such implied warranty. On the contrary the language in the assignment from the respondents to Stillman & Hall only purports to transfer "all the right, title and interest"

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of the assignors, while the assignment from Stillman & Hall to the appellants is an ordinary one containing no special language whatever.

On this ground and for the reasons given by Archibald J. in support of it, I would, without expressing any opinion upon the validity of the patents, dismiss this appeal with costs.

IDINGTON J.—I think the patents in question herein are both valid.

It is therefore unnecessary for me to follow the several other matters dealt with at such length in argument.

Nor do I see any useful purpose I can serve by following at great length the question of the validity of these patents.

The subject can be made a wide one. The mazes we are invited in this case to follow, by some of the quotations, snatched from their surroundings in cases that had come under the adjudication of some of the highest authorities, ought to warn us.

We have, amongst others, an apparent quotation, accidentally no doubt attributed to Lord Cairns, which was not his production at all, but a deduction of Lord Davey from what Lord Cairns had said.

I am not quite sure whether or not that master mind would have adopted it as amplified and I submit extended.

Nor am I quite sure that other high authorities would subscribe to and find applicable to this case arising on our statute some of the quotations given and attributed respectively to each of them.

Our statute defines what is patentable. I am not clear that the ground it covers is identical with that

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portion of the Royal Prerogative reserved and preserved by statute as the foundation in England for grants of the like kind of rights.

Invaluable as is the long line of authority moulding the limits of the latter basis for a grant we must not forget that the basis here rests upon an express statutory limitation, not by any means quite identical with the other.

These different foundations for grants of patents are liable to produce and perhaps are producing widely different results.

Our statute provides for a patent issuing to

> any person who has invented any new and useful art, machine, manufacture or composition of matter or any new and useful improvement in any art, machine, manufacture or composition of matter which was not known or used by any other person before his invention thereof and which has not been in public use or on sale with the consent or allowance of the inventor thereof, etc.

Apply this to the Lina Schuler patent and we have to find in her specification a description of some new "manufacture or composition of matter" which will answer thereto as that is the only one of the several subjects given which may cover it.

It is admitted the composition need not be a chemical, but may be a mechanical one. Yet stress is laid on the objection that it is claimed in a solidified form. When the necessity for a chemical composition is abandoned I fail to comprehend this objection. It is explained in evidence how it operates when brought in contact with heat and how the consequent dissolution of each element varying in length of time and shape of results helps to supplement and aid the action of the other.

It is obvious that the reduction to a fluid state at that stage of its existence before use and up to a cer-

tain point of use might render or be supposed to render the composition less effective.

It is equally obvious that this reduction may be permissible in an attempt to apply the material to any substance preparatively and in anticipation of heat reaching it.

No composition of matter can of itself and without some directing intelligence avail anything.

It is objected that the mere discovery of some natural law is not patentable and the high authority of Lord Lindley is cited in one of these inapt quotations I have referred to.

When we have regard to the fact that he illustrated his meaning by reference to Volta's discovery of the effect of an electric current from the battery upon a frog's leg its relevance here is not quite apparent.

This claim to invention is not of that nature at all; yet the other alternative is with curious inconsistency put in argument against this patentee's claim that it does not disclose any discovery but uses things and principles of action therein already discovered.

That process or combination of such processes of reasoning would, if logically extended, destroy any patent for or in relation to composition of matter.

The appellant is on safer ground when attacking the claim to novelty in this case.

The allusion in the course of the trial to the chemical discoveries of Gay-Lussac fell short for want of any allusion in the report thereof to this combination claimed here.

The article in the Journal of the Society of Arts in 1859 came nearer, but for obvious reasons seems to have been abandoned before us.

The bald nature of the claim was much and rightly pressed upon our consideration.

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It seems to me we must, as in regard to all other documents of this kind, in order to understand the claim, read the whole specification.

And when we do that the claim appears clear enough I think.

Meaning is thus given to the words "in about the proportions specified."

It would have been unwise to lay down any proportionate line requiring the observance of absolute mathematical precision for mixing the composition. Indeed, it might have rendered the workability of the process an impossibility and thus have been self-destructive.

However that may be, the substantial nature of what is to be done and adhered to is clear enough I think.

The objections taken to the other patent of Bachert and O'Neill seem to be, if they mean anything, that which would logically deprive any one applying for a process patent of the right to use common knowledge in working out the design intended.

It does not seem to me that the using of all this common knowledge that appears resorted to would have enabled any ordinary man, possessed of the same and ordinarily skilled in the subject, to turn such knowledge as of course and without some inventive faculty to account in the way these patentees have done.

I think, assuming all that has been urged on us, that real inventive faculty is shewn.

What Lord Cairns in fact did say in the case of *Harrison* v. *The Anderston Foundry Company*(1), is herein helpful and most instructive, and especially so

(1) 1 App. Cas. 574.

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when we have regard to the matters to be solved relative to these objections to this latter patent.

And the amplification and extension thereof made and applied by Lord Davey relying thereon in the case of *Patent Exploitation Ltd.* v. *Siemens Bros. & Co.* (1), where he says,

> the combination itself constitutes the novelty and merit of the invention. It is sufficient for the validity of the patent if the combination, being the result of thought and experience, is new, and produces some new result or an old result in a more useful and beneficial way,

may well be applied as to both patents here in question.

I think the appeal must be dismissed with costs.

DUFF J.—In the absence of some language or some surrounding circumstances indicating a contrary intention the parties to the assignment of a patent of invention are, I think, presumed to be selling and buying such rights only as the letters patent themselves conferred upon the patentee. If, for want of novelty in the alleged invention, or upon other grounds, it should happen that the letters patent did not operate to vest in the patentee the monopoly it proposed to create, the assignor is presumed to have said *caveat emptor*. This presumption — which is really the basis of the English rule upon the subject — is no artificial rule, but arises inevitably from considering the transaction in the way in which mercantile contracts must be considered for the purpose of arriving at the intention of the parties in a particular event respecting which they have made no express stipulation, there being no specific rule of law applicable, viz.: of assuming that the parties both intended

(1) 21 Cutler 541.

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to stipulate what was fair and reasonable having regard to the character of the transaction and the subject-matter dealt with. Looking at such a transaction in this way the question is: What would the parties, as reasonable business men, be expected to stipulate as to the burden of the risk of attack if the point should be raised during the negotiations? Nobody can doubt that in the absence of special circumstances, unless the matter was not to be made the subject of a special bargain involving a special consideration moving to the vendor, the parties to the sale of a Canadian patent would agree that the risk should be borne by the vendee.

The judgment of Archibald J. demonstrates, I think, that this is the rule in force in the Province of Quebec.

ANGLIN J.—A perusal of the documents and correspondence filed as exhibits has satisfied me that it is not possible to interfere with the finding of the Court of Review that Stillman & Hall, Limited, did not act as agents for the respondents, as the appellants allege, but were in fact purchasers from the respondents and vendors to the appellants of the Canadian patents in question. If there were any agency on the part of Stillman & Hall, Limited, the correspondence, with the exception of one letter, Exhibit D1, is more consistent with their having been agents of the appellants in these transactions than with their having been, as the appellants contend, agents for the respondents. But the transactions themselves took the form of a sale from the American company to Stillman & Hall and a resale from Stillman & Hall to the Canadian company for a different and a much larger consideration, effected by a contract involving other matters

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to which the larger consideration also related. No adequate or satisfactory explanation why the transactions should have assumed this form, if Stillman & Hall acted merely as brokers, is given by the appellants or by the witnesses who assert that there was a direct sale from the American company to the Canadian company through Stillman & Hall acting as agents for the former.

Having regard to the nature of and the circumstances attending the transaction, there is nothing in the facts, that the cheque of the Canadian company in their favour was immediately indorsed over by Stillman & Hall to the American company and that the bonds in question remained in the possession of Stillman & Hall only for a few hours and were then handed over by them to the American company, inconsistent with their having been in fact purchasers from the American company and vendors to the Canadian company.

The evidence of Mr. Stillman asserting that Stillman & Hall acted as agents for the American company is flatly contradicted by Mr. Pressinger, who says that in no sense did Stillman & Hall act as agents for the American company, and, again contradicting Mr. Stillman, that no commission was paid to Stillman & Hall by the American company.

The finding of the learned trial judge that Stillman & Hall were in fact agents for the American company does not rest upon the credibility of the witnesses whose testimony he heard, but is an inference drawn by him from the admitted facts and the documents in evidence. The proper inference on this question the Court of Review was in quite as favourable a position to draw as was the trial judge. I am therefore of opinion that the finding of the Court of Review that there

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is no *lien de droit,* or privity of contract, between the appellants and the respondents, which entitles the former to plead failure of consideration or breach of warranty as a defence to the claim of the latter, should be maintained.

I also agree in the conclusion of the Court of Review that on an ordinary mere assignment of a patent, and in this case *a fortiori* having regard to the form of the respondents' contract, which imports merely a sale of "all the right, title and interest" of the vendors, the invalidity of the patents, if established, would not amount to such a total failure of consideration, or breach of implied warranty of title as would enable the appellants to resist the claim of the respondents for payment according to the tenor of the bonds held by them. Only proof of fraud would entitle the appellants in the circumstances of this case to relief on these grounds; and of fraud there is not a scintilla of evidence.

The sale and the assignments of the patents by the respondents took place in New York and were made to a New Jersey corporation. The construction of the contract of sale and of the assignments is therefore governed by the law of one or other of these States. Upon a personal examination of the authorities I find that the law in both these States in regard to the effect of an assignment of patents appears to be the same as the law of England. *Caveat emptor* is the rule which obtains. The leading American cases are collected in Walker on Patents (4 ed.), secs. 283-4. The leading English authorities will be found in Terrell on Patents (4 ed.), pp. 214 *et seq.,* and Frost on Patents (3 ed.), Vol. 2, pp. 118 *et seq.* But the fact of the similarity of the law of the States of New York and New Jersey to that of England was not proved as it should have

been by expert evidence. In the absence of such evidence, however, there is a presumption, on which the Court of Review may have proceeded, that the foreign law applicable to any contract with which the court is called upon to deal is similar to the *lex fori*.

If the question under consideration were the validity of the patents or their assignability I should have no hesitation in holding that, although this action was tried in a civil court of the Province of Quebec, the *lex fori* applicable was that of England. As pointed out by Archibald J., the patent law of Lower Canada is English in its origin. See *The Ottawa and Hull Power and Manufacturing Co.* v. *Murphy*(1), at page 231, and *Bondier* v. *Dépatie*(2), at page 237. "Patents of invention and discovery" are enumerated in the 91st section of the "British North America Act, 1867," as a subject within the exclusive legislative authority of the Parliament of Canada and that Parliament has legislated with regard to the nature and effect of patents and their assignability. Upon these matters the law is the same in my opinion throughout Canada and so far as it is not declared by Dominion legislation must be determined by the principles of English law as defined in English decisions and in those of our own courts.

We are not, however, now dealing with a question of the validity of the patents, of their assignability, or of the efficacy of the assignments executed. The matter under consideration is the proper construction to be given to contracts of sale and assignment. Although the subject-matter of these contracts happens to be patent rights it is difficult to understand on what ground in determining this question of construc-

(1) Q.R. 15 K.B. 230. (2) 3 Dor. Q.B. 233.

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tion the courts of the Province of Quebec, or we as an appellate court for that province, would be justified in disregarding the principles of the civil law.

Three Quebec cases have been cited to us in each of which it is alleged the invalidity of a patent has been held to be a good defence to an action to recover the consideration or part of the consideration for its sale. These cases are *Déry et al.* v. *Hamel*(1); *Perrault* v. *Normandin*(2); and *Almour* v. *Cable*(3). In the first case the court found in the document of assignment "une description qui équivaut à une garantie." In the second, the sale was not of a patent but of a pretended secret process. In the third case the Court of King's Bench held

> that the appellant has proved that no value was given for the promissory note sued upon in this case and that the pretended patent right sold to the appellant was not for any new or useful invention.

These appear to be two distinct findings. The court does not assign as its reason for holding that there was no value given for the note the other fact found that the patent was not for a new and useful invention. The report of the case is exceedingly meagre and it may well be that the court deemed the conduct of the respondents fraudulent. I would hesitate to regard this case as an authority for the proposition that upon a bare assignment of patent, in the absence of any evidence of fraud, its invalidity would afford a defence on the ground of a complete failure of consideration or a breach of implied warranty of title.

Turning from the jurisprudence of the Province of Quebec to that of France, there has been no doubt a considerable mass of judicial opinion in support of

(1) 11 Q.L.R. 24. (2) 31 L.C. Jur. 118.
(3) 31 L.C. Jur. 157.

the proposition that an assignment of a patent does import a warranty of its validity. But in France the doctrine of the civil law on this question appears to be in a state of mutation. According to the opinions of such distinguished modern writers as Pouillet (Brevets d'Invention, 4 ed., pp. 246-7, 250), *Allart and Pataille,* cited by Pouillet and referred to by Archibald J., in the Court of Review and by counsel for the respondents in their factum, the assignment of a patent does not *per se* import any warranty of its validity. A contract for the sale of a patent is regarded by these authors as speculative in character, the purchaser acquiring the claim of his vendor for what it may be worth and taking all chances as to its validity. This seems to me to be the true view of the nature of the contracts here in question.

Looking at the matter in the light of what should, I think, be deemed common knowledge—that upon the sale of a patent right the real subject of sale is the vendor's claim to the exclusive rights which the patent, if valid, gives to him, and that the purchaser acquires that claim knowing that it is subject to attack and that the patent itself carries no guarantee of validity—the "thing sold," in the case of the ordinary assignment of patent rights, should in my opinion be deemed to be not a patent impliedly warranted valid but the claim of the vendor, be it good or bad, for what it may be worth. That this is the true subject of sale is in my opinion indisputable where, as here, the assignment is not of the patent itself, but of all the "right, title and interest" of the assignor therein.

Moreover, it is highly desirable, inasmuch as the validity of patents, their assignability and the form in which assignments may be made are subjects of Dominion legislation, that upon such an incident of

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the assignment of a patent as the implication of a warranty of its validity the *lex fori* throughout Canada should be the same. In my opinion, in view of the opinions of French authors to which I have referred, it may be held to be the same; and, whether we look to the civil law to ascertain the proper construction of the assignments of patents here in question because this action was brought in the courts of Quebec, or to the principles of English law for the reason suggested by Archibald J., that the patent law administered in Quebec is English in its origin, the result will be the same.

I therefore agree with the conclusion of the Court of Review, that invalidity of the patents, if established, would not amount either to a failure of consideration or to a breach of warranty which would serve as a defence to this action.

In the view I have taken it is unnecessary to express an opinion upon the validity of the patents. But I do not wish it to be understood that I have formed a view adverse to the respondents on this question.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Atwater, Duclos, Bond & Meagher.*

Solicitors for the respondents: *Foster, Martin, Mann & MacKinnon.*

THE MONTREAL STREET RAILWAY COMPANY..... APPELLANTS;

AND

THE CITY OF MONTREAL.....RESPONDENT.

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*Dec. 15, 16.
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*March 11.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Tramway—Provincial railway—"Through traffic"—Constitutional law—Legislative jurisdiction—Powers of Board of Railway Commissioners—Construction of statute—R.S.C. (1906) *c.* 37, *s.* 8(*b*) *—"B. N. A. Act,"* 1867, *ss.* 91, 92.

"The Railway Act," R.S.C. (1906) ch. 37, does not confer power on the Board of Railway Commissioners for Canada to make orders respecting through traffic over a provincial railway or tramway which connects with or crosses a railway subject to the authority of the Parliament of Canada. Davies and Anglin JJ contra.

Per Fitzpatrick C.J. and Girouard and Duff JJ.—The provisions of sub-section (*b*) of section 8 of the "Railway Act" are *ultra vires* of the Parliament of Canada.

APPEAL from an order of the Board of Railway Commissioners for Canada which directed the Montreal Park and Island Railway Company to grant the same facilities in regard to passenger rates and service to the citizens of Mount Royal Ward, in the City of Montreal, as were given to the residents of an adjacent municipality, to enter into arrangements with the appellants to carry the order into effect, and ordering the appellants to enter into the necessary agreements.

The City of Montreal, on 1st February, 1909,

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

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lodged a complaint with the Board of Railway Commissioners against the Montreal Park and Island Railway Company (which operates a tramway subject to the authority of the Parliament of Canada, confined within the limits of the Island of Montreal), alleging, amongst other things, that that company refused to place the citizens residing in Mount Royal Ward, in the City of Montreal, on the same footing as those of the Town of Notre Dame de Grâce and the Town of Outremont, municipalities of which the boundaries are contiguous to the City of Montreal, and complaining of the rates charged for the carriage of passengers in the service and operation of the tramway. At the time of the complaint, and for some time previously, the Montreal Park and Island Railway was connected with the tramway of the appellants, which is a railway authorized by the legislature of the Province of Quebec and subject to its jurisdiction. On the 6th of April, 1909, the Board ordered that the appellants should be made a party in the proceedings before them upon the complaint and to shew cause why they should not join with the Montreal Park and Island Railway Company in establishing a through route and through rates for the service in the operation of their tramway. After hearing the parties upon the application, the Board, on the 4th of May, 1909, made the order now appealed from, of which the operative part was as follows:—

"It is ordered that the Montreal Park and Island Railway Company be and it is hereby directed to grant the same facilities in the way of services and operation, including the rates to be charged by it, to the people residing in the said Mount Royal Ward that it grants to the people residing in the Town of Notre-

Dame de Grâce; and that it forthwith enter into the necessary agreements for the purpose of removing the said unjust discrimination; and that, with respect to through traffic over the Montreal Street Railway, the Montreal Street Railway Company be and it is hereby required to enter into any agreement or agreements that may be necessary to enable the Montreal Park and Island Railway Company to carry out the provisions of this order."

The appellants contended that, upon the true construction of section 8 of "The Railway Act" and of sections 91 and 92 of the "British North America Act, 1867," the Board had no jurisdiction over their tramway; and that, being a provincial corporation operating a provincial tramway only in the Island of Montreal and having no connections with any railway or tramway outside the Province of Quebec, neither their company nor their tramway was subject to the provisions of the Dominion "Railway Act," nor to the jurisdiction of the Board.

Special leave to appeal was granted, under the provisions of section 56 of the "Railway Act," by Mr. Justice Duff, on the question —

"Whether, upon a true construction of sections 91 and 92 of the "British North America Act, 1867," and of section 8 of the "Railway Act" of Canada, the Montreal Street Railway Company are subject, in respect to through traffic with the Montreal Park and Island Railway Company to the jurisdiction of the Board of Railway Commissioners for Canada."

Aimé Geoffrion K.C. and *F. Meredith K.C.* (*Hague* with them), for the appellants.

Atwater K.C. and *Butler* for the respondent.

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The Chief Justice.

THE CHIEF JUSTICE.—I am of opinion that the appeal should be allowed for the reasons given by Mr. Justice Duff.

GIROUARD J.—I agree with my brother Duff.

If the incidental or ancillary rule is to be applied in a case like this, then the power of the provincial legislatures under section 92, sub-section 10, of the "British North America Act, 1867," with regard to local railways is simply wiped out. To-day the question may be only the transportation of persons, to-morrow it may involve the carriage of goods and even perishable articles and, as a consequence, the supply of refrigerators, cars, cold storage warehouses, switching and stations.

I think the appeal of the Montreal Street Railway Company should be allowed with costs.

DAVIES J. (dissenting).—Appeal from an order of the Board of Railway Commissioners respecting "through freight."

The "British North America Act, 1867," in the distribution of legislative powers between the Dominion Parliament and provincial legislatures expressly excepts, in section 92, from the class of "local works and undertakings" assigned to provincial legislatures, in addition to those undertakings which connected one of the provinces with another or which extended beyond the limits of the province and others specifically described, the following —

sub-section (*c*)—such works as *although wholly situate within the province* are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada, etc.

Section 91 confers on the Parliament of Canada exclu-

sive legislative authority over all classes of subjects so expressly excepted from section 92.

The Montreal Park and Island Railway originally constructed under a provincial charter was such a work, and, being declared by Parliament to be "for the general advantage of Canada" became a Dominion railway subject in all respects to the legislative powers of the Dominion Parliament and, as a consequence, to the "Railway Act" of 1906, ch. 37. Section 8 of that Act reads as follows: —

> Every railway, steam or electric street railway or tramway, the construction or operation of which is authorized by special Act of the legislature of any province, and which connects with or crosses or may hereafter connect with or cross any railway within the legislative authority of the Parliament of Canada, shall, although not declared by Parliament to be a work for the general advantage of Canada, be subject to the provisions of this Act relating to,—
>
> (*a*) The connection or crossing of one railway or tramway with or by another, so far as concerns the aforesaid connection or crossing;
>
> (*b*) The through traffic upon a railway or tramway and all matters appertaining thereto;
>
> (*c*) Criminal matters, including offences and penalties; and
>
> (*d*) Navigable waters;
>
> Provided that, in the case of railways owned by any provincial government, the provisions of this Act with respect to through traffic shall not apply without the consent of such government.

The Montreal Park and Island Railway at the time or shortly after it became a Dominion undertaking or work, was or became physically connected with the Montreal Street Railway, which is a provincial road operating under a provincial charter, and part of the Montreal Park and Island Railway line was leased to and other parts operated by the Montreal Street Railway Company, under a somewhat complicated traffic arrangement between the two companies, involving running rights by each company's cars over the other lines and the leasing of some of the Montreal Street Railway Company's cars to the Montreal Park and

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Island Railway Company. At the time the application was made to the Board of Railway Commissioners the physical connection of the two roads existed and passengers were carried directly over one road to and over the other under such traffic agreement and running rights. The carriage of passengers is declared by paragraph 31 of section 2 to be included in the word "traffic" whenever used in the Act.

The 317th section of the Act confers the amplest powers upon the Board of dealing with the traffic upon railways and expressly includes "through traffic" and through rates.

The question we have to decide is whether or not the Montreal Street Railway by reason of its physical connection with the Montreal Park and Island Railway and the traffic arrangements before referred to are amenable and subject to the jurisdiction of the Board with respect to "through traffic" passing from the Montreal Park and Island Railway over its line and *vice versâ*.

A distinction was attempted to be made at the argument between the Board's jurisdiction over through traffic on a federal road which was *interprovincial* and that over a road which though federal was wholly within the limits of a province.

The appellants contended that section 8 of the "Railway Act" should be limited in its application to such provincial railways as connect either directly or indirectly with lines extending beyond the limits of the province and as the Montreal Street Railway was not so connected the section could not be made applicable to them.

For myself I fail to appreciate the distinction suggested. If the physical connection of a provincial railway with a federal interprovincial railway brought the

former road under and subject to the jurisdiction of the Board of Railway Commissioners so far as through traffic passing over it and the federal railway was concerned it seems to me that the same result must follow if such federal railway happened to be itself confined within provincial limits. It is not the physical limits alone of the railway which gives Parliament legislative jurisdiction over it. If the railway connects one province with another or extends beyond the limits of a province it comes within the exception (*a*) of sub-section 10 of section 92 of the "British North America Act," and if being wholly within the limits of a province it is declared by the Parliament of Canada to be for "the general advantage of Canada" it comes within the exception (*c*) of that sub-section.

In either case and in both cases alike when an undertaking or work is brought within such exceptions it becomes subject to the exclusive legislation of the Dominion, and I fail altogether to understand how it can be held that the physical connection of a provincial road with one of such federal roads, would operate to give the Board of Railway Commissioners jurisdiction over the through traffic over it and not to do so in the case of such connection with the other federal road. The mere accident that the federal road in one case is confined to a single province and in the other runs beyond the provincial boundary cannot determine the question. That must surely depend upon whether or not it is a federal road carrying "through traffic" over a provincial one quite irrespective of its limits within or without a province.

Then it is admitted that with respect to such "through traffic" the provincial legislature has not the jurisdiction to legislate. If in such case the Dominion Parliament has not jurisdiction then such

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jurisdiction does not exist anywhere, and we would have the curious anomaly existing of an enormous class of traffic known as "through traffic" being carried over two roads, one federal and one provincial, without either Parliament or the legislature having jurisdiction over such through traffic. Such a condition is, it seems to me, in view of the construction heretofore placed upon the "British North America Act" impossible. The power to legislate with regard to such through traffic rests somewhere. So far as the federal or Dominion road is concerned it undoubtedly rests with the Dominion Parliament, but to exercise such power effectively the Board of Railway Commissioners to whom it has been given by Parliament must necessarily have some jurisdiction over the provincial road with which the federal one is physically connected. Such jurisdiction of course goes no further than the control of "through freight" renders necessary. In my opinion it goes that far. Parliament does not possess, as was suggested, a concurrent authority with the provincial legislature to control this through traffic. If as I have argued it has authority to legislate at all on the subject under the exception to sub-section 10 of section 92 of the "British North America Act" it has exclusive authority. Assuming there was a domain in which the legislation of the Dominion and of the province might overlap then if the Dominion alone has legislated or if both Dominion and province have legislated and the two legislations conflict that of the Dominion must prevail. *Grand Trunk Railway Co.* v. *Attorney-General of Canada*(1), at page 68, and *City of Toronto* v. *Canadian Pacific Railway Co.*(2), at page 58.

(1) [1907] A.C. 65. (2) [1908] A.C. 54.

In the present case it seems to me that when Parliament legislated the field with respect to "through traffic" was covered. Section 8 of the "Railway Act" clearly deals with just such a case as this and if *intra vires* must of course govern. That it necessarily deals with property and civil rights or other matters assigned by section 92 to provincial legislation is no argument against its validity. If it is legislation to the effective exercise of a power exclusively vested in the Dominion or even held to be fairly ancillary to such that is sufficient. The jurisdiction of the legislature over "local works and undertakings" as over "property and civil rights" in the province is quite consistent, as said by the Judicial Committee in *Toronto Corporation* v. *Canadian Pacific Railway Co.* (1), at page 59,

> with a jurisdiction specially reserved to the Dominion in respect of a subject-matter not within the jurisdiction of the province.

See also *Toronto Corporation* v. *Bell Telephone Co.* (2).

My conclusions therefore are that the "British North America Act" confers jurisdiction upon the Dominion Parliament under the exceptions to section 10 of section 92 to legislate on the subject-matter of "through freight." That legislation has been enacted in section 8 of the "Railway Act" in terms wide enough to reach the case of "through freight" passing from a federal to a provincial road physically connected and that the Board in assuming a jurisdiction over the provincial road for the purpose of giving effect to its order respecting such through freight was acting within its powers.

I would dismiss the appeal therefore with costs.

(1) [1908] A.C. 54. (2) [1905] A.C. 52.

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IDINGTON J.—The Board of Railway Commissioners for Canada directed, amongst other things,

> that with respect to through traffic over the Montreal Street Railway, the Montreal Street Railway Company be, and it is hereby, required to enter into any agreement or agreements that may be necessary to enable the Montreal Park and Island Railway Company to carry out the provisions of this order.

The former company now appeals on the ground that the Board had no jurisdiction to make such direction.

The appellant is a corporation created by 24 Vict. ch. 84, of the old Province of Canada for the purpose of constructing and operating street railways in the City and Parish of Montreal.

Its original powers have been many times added to by enactments of the legislature of the Province of Quebec.

The manifold details of all these legislative provisions original and supplementary need not be entered into; but we must, I think, observe that from the beginning powers were given to enter into contracts with the said city and adjoining municipalities relative to the construction of the railway, reparation and grading of the streets used, the location of the railway, the time and speed of cars, the amount of license to be paid by the company annually, the *amount of fares to be paid by passengers* and generally for the safety and convenience of passengers, and the conduct of the company relative to non-obstruction or impeding of the ordinary traffic.

Its right to fares at all and its entire existence for any useful or profitable purpose depend upon such a contract. Either the contract has been observed or not. If broken the law gives a remedy; and if persistently broken, more than one remedy. Persistent default means forfeiture.

If observed, how can Parliament venture to amend it? A step or two in its history unfolds the reason or excuse or peradventure as I conceive proves Parliament never intended such interference.

The railway has been changed from having been of the kind served with horse power to that of electric motors, but it has been operated throughout as a street railway for passengers only, since shortly after the company's incorporation. It never had power to perform other service save in recent years for carrying mails; enlarged by a permission to acquire power (which has not, so far as appears, become effective) from the municipalities, under 6 Edw. VII. ch. 57, sec. 5 (Que.), to carry freight.

The Montreal Park and Island Railway Company is a corporation originally incorporated by the legislature of the Province of Quebec by 48 Vict. ch. 74, which Act was also amended by adding further powers.

It was of a different character from the other company. It combined the features of a passenger railway with that of hauling freight, and did not depend on the use of streets or highways as the other, but chiefly acquired its rights of way over lands near or adjacent thereto. In short it was a general purpose railway. Merely noting just now these facts and this difference in the character of the roads I will later on refer to the legal results thereof.

In 1893, after it had been partly constructed and operated the fact became evident that its services could be made much more beneficial to the public by its arranging with the Street Railway Company to carry, from certain points such of its passengers as desired to reach places served by that road and to which the Montreal Park and Island Railway did not run.

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Pursuant to section 12 of its charter giving power to do so a traffic arrangement was made with the appellant by a contract between them on the 11th July, 1893, which was to endure for twenty-five years, for the conveyance of passengers through and between the City of Montreal and its surburban municipalities.

Each was bound by this contract to build and develop its system as specified and thus increase the business the other might thereby expect to reap some benefit from.

Some cars of the Street Railway Company were to be leased to the other company, but if not enough supplied thus for its own use it might build its own.

Some of these cars were to be used interchangeably by each company running them over the roads of the other.

It followed as travel increased over each road that many cars of each company would not run at all on the other road, but deliver its passengers at its own terminus, or point of junction with the other road.

From each of those who get in the cars that run over the track of the other road an extra fare, but less than the full fare, is exacted.

From each of those unfortunate enough to get on a car confined in its running to the road it belongs to and, getting off that to begin a new journey, full fare may be exacted. It is not pretended in either case that greater fares are exacted than the city contracted for in granting the franchise to run, which is the basis on which the various rights of all concerned rest.

Each company collects its own fares. The agreement provides for this. Indeed, very likely neither could lawfully do otherwise.

Some citizens found in all this a grievance, not-

withstanding the beneficent effect of the agreement in ameliorating prior conditions sanctioned by the contract of the city made on their behalf. This grievance, along with the other presently to be referred to, was ventilated before the Board.

It was the kind of grievance that has at some period or other had to be endured in I think every large city on this continent as the result of civic want of foresight in permitting, without adequate control, more than one company to use the city's streets.

It is not necessary to follow in detail, but yet better to bear in mind, in a general way, how the municipalities in the district of or about Montreal, one after another, created by the same legislature, and authorized by it to do so, each conferred franchises and made bargains to be served respectively by either of these systems.

Rates of travel in each, roughly put at five cents for passing through its own bounds, seem to have formed the basis for such bargains.

Annexations of growing suburbs to the rapidly growing city followed (possibly beyond what was expected), and thus the commercial, social and legal problems became day by day more complicated.

These companies, however, all the time were (until what I am about to advert to happened) under the control of the legislature of Quebec.

Not only were they necessarily under such control as corporations created thereby, with "provincial objects," but also by virtue of that other exclusive power conferred by the "British North America Act," sec. 92, sub-sec. 10, on that legislature.

It might also be observed that by the same Act the subject of "municipal institutions" was assigned to

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the same exclusive control; and that the purpose of the creation of the appellant was essentially to aid in street travel over highways peculiarly within the control of the respective municipalities, created from time to time by such legislature. These municipalities were also endowed thereby, as no other legislative power could, with the capacity of contracting in such manner as to each might seem meet for its own safety and convenience and for taxation of its street railway companies, being either direct or having relation to the licensing power and license of each by such municipal corporations respectively.

One might, if it saw fit, as so many do, adopt the method of exacting as a condition of its concession a *pro ratâ* share of the fares or net profits thereof, thinking (if such a word can be used in that connection) to make money thereby.

Another (perhaps thinking a little more deeply that such methods might only increase the citizen's own burdens), might forego the fancied benefit and stipulate instead for a lower fare than the other one which was possibly reaping in its treasury but a small fraction of the increase included in the higher fare.

I know not whether such varying bargains were made or not. I know that they were possible and probable results of the provincial legislation under which the conditions we have to deal with were created. These facts must not be lost sight of when we try to measure either the purpose or result of the other legislation we have to pass upon.

Can any one pretend that it is competent for the Dominion Parliament in such a case to meddle at all? The legislature may have been unwise; the municipalities may have been improvident; the condition

so created may have been, if you will, intolerable; but the power to rectify it rested in the local legislature or in the existing law governing the civil rights of the parties.

Let us now turn to see what happened legislatively to even appear to render such interference by Parliament possible. Let us also then examine this legislation now in question and in doing so have due regard to the presumptions, that Parliament can never have intended to invade the rights of any province, or violate the sanctity of any contract or amend the corporate creations of another legislature.

After entering into the above mentioned agreement the Montreal Park and Island Railway Company had itself incorporated by the Parliament of Canada by 57 & 58 Vict. ch. 84, whereby it was so declared to be a work for the general advantage of Canada. In this very legislation the validity of its then existing contracts with others is recognized and affirmed.

It got no powers by such Act of incorporation or by any Act which would constitute it one of either of the classes of works specifically excepted from the operation of sub-section 10 of section 92 of the "British North America Act"; save within sub-section (*b*) thereof, that of having been declared to be a work for the advantage of Canada.

And to clear the ground I may as well state neither company fell otherwise within any of such exceptional classes.

The relations between the two companies remained the same as fixed by the agreement.

The "Railway Act" enacted in 1903 which provided for the constitution of a Board of Railway Commissioners for Canada provided what appears now as

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section 8 of the "Railway Act" in the Revised Statutes of 1906, as follows:—

Every railway, steam or electric street railway or tramway, the construction or operation of which is authorized by special Act of the legislature of any province, and which connects with or crosses or may hereafter connect with or cross any railway within the legislative authority of the Parliament of Canada, shall, although not declared by Parliament to be a work for the general advantage of Canada, be subject to the provisions of this Act relating to,—

(*a*) The connection or crossing of one railway or tramway with or by another, so far as concerns the aforesaid connection or crossing;

(*b*) The through traffic upon a railway or tramway and all matters appertaining thereto;

(*c*) Criminal matters, including offences and penalties; and

(*d*) Navigable waters;

Provided that, in case of railways owned by any provincial government, the provisions of this Act with respect to through traffic shall not apply without the consent of such government.

It is upon this section that the Board has founded its order. It was moved thereto by the fact that in 1907 the Montreal Park and Island Railway Company had made a bargain with the municipality of Notre-Dame de Grâce, lying beyond Montreal's limits entirely, to serve its people there with transportation of passengers into Montreal at a five-cent fare, in consideration of receiving a fifty-year franchise from the municipality and exemption from taxation. This the municipality was enabled to give by special legislation of the provincial legislature. The existence of the agreement of the appellant above referred to doubtless helped by its comprehensive nature to enable the Montral Park and Island Railway Company to carry out this bargain.

It is conceded that the Montreal Park and Island Railway Company is subject to the jurisdiction of the Board.

It is attempted to maintain therefore (as if it were a matter of course) that as the result would be to give

this district better passenger rates than some other districts there is that unjust discrimination Parliament had in view.

Inasmuch as the only question we have to decide is whether or not the appellant falls within the power of the Board to make the order appealed from, which directs it to remedy this alleged unjust discrimination by abandoning its right under the agreement and entering into some other agreement, I pass no opinion upon whether there in fact is any such discrimination or not.

It is urged that as there is in fact that physical connection the agreement provides for and passengers by means thereof pass from one road on to the other there is through traffic, in fact, falling within the meaning of sub-section (*b*).

Is that the sort of thing therein meant by "through traffic" ?

Was the street railway system of any city or town in Canada supposed to have been within the range of things so legislated about in the "Railway Act" ? Was interference thereby with the charters of such roads, the terms of their contracts with the municipalities served, their rates and tolls all dependent on such contracts, and their contracts with each other ever in the contemplation of any one promoting or enacting such legislation ?

I most respectfully submit not. An omnibus line or other means of transportation might as well be held to fall within through traffic if Parliament so willed.

The right to deal with these street railways and their proprietors, as to crossings to be made either by them over roads under the jurisdiction of Parliament

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or by such latter roads over street railways, is undoubtedly vested in Parliament.

The right of such a local company, to seek when endowed by its charter with powers to do so, connection of any kind, with the creation of Parliament either physical or limited to the establishment of a through rate or route may also be well within the jurisdiction of Parliament. And I submit the words of the first part of the section and of sub-section (*a*) can become operative in such cases and thus be given a meaning without doing violence of the kind I have indicated, as obviously is involved in the giving of effect to respondent's contention.

Sub-section (*b*) it is urged means something much more than implied in either suggestion. I agree that it may be so for the first part of the section extends to or asserts a jurisdiction over every kind of railway described therein; and uses apt words to cover each class or kind. When however distributing the purpose and limit of the asserted jurisdiction it changes this; and in sub-section (*b*) relied upon by the respondent, the words "street railway" disappear. It is the through traffic upon a "railway or tramway" that alone is covered thereby. "Tramway" by its origin means a freight road. In Britain the term is very commonly extended to cover street railways, but not so here.

Besides street railways, many local general purpose railways authorized by some special Act of the legislature of a province, may have been had in view.

I am not called upon to express any opinion of whether or not it would be safe to assume that Parliament in any of these cases could, properly observing the terms of section 92, sub-section 10, of the "British North America Act," assert without the actual or implied sanction of their parent local legislature this

jurisdiction over them. I can, however, easily conceive of this legislation having an application thereto that never could have been intended to apply to or render mere street railways subject to the jurisdiction of Parliament.

Neither the appellant's origin, history or present conditions lend colour to its being of the class included in sub-section (*b*) any more than its being in any way related to sub-section (*d*).

We may now turn to section 317 so much relied upon by respondent to define traffic and to bring as a result by virtue of the words "through traffic" in sub-section (*b*) appellant within the jurisdiction claimed.

Section 317 in its whole scope, and in its very language, so clearly relates to a traffic that includes at least carriage of freight as part of the service to be considered that I fail to find therein any encouragement for me to venture to apply it in the sense of aiding the claim set up by respondent.

We have no legislative interpretation of the phrase "through traffic," but we have in this Act the following interpretation given of "traffic" by sub-section 30, of section 2, as follows: "Traffic means the traffic of passengers, goods and rolling stock."

This it is to be observed is not a definition in the disjunctive form necessary to give the effect contended for, by applying the Act to a street railway used only for passengers.

The purview of the Act as a whole seems to forbid us interpreting it as if intended to invade needlessly the subjects of either civil rights, or legislative provisions relative to municipal institutions, or the contracts of municipal corporations, or local works and undertakings all of which would be asserted and

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assisted by a maintenance of this jurisdiction now called in question. I do not deny the possible meaning claimed for these sections, but I would not impute to Parliament in any such case the intention to so enact unless I found it written in the clearest possible language.

I cannot therefore impute it when the doing so must only rest upon inferences drawn from a section or two exhibiting a general purpose of producing equality in some things relative to certain classes of dealings. Those inferences do not necessarily extend beyond these things over which Parliament has undoubted jurisdiction.

When we are referred to section 317 to find what "through traffic" means, let us observe that the section expresses or implies as essential thereto that the Board can create or define it, can insist upon it, and direct the facilities for it and I rather think the accommodations for it also.

It seems going very far to draw such extensive powers over provincial legislation and its products, from such a basis as is thus suggested in the classification of transportation, yet it is surely impossible to draw any line between that claimed specifically here and all else thus directly connected with and involved in the proposition. It is not a part but the whole of the subject-matters of and appertaining to through traffic as indicated in the Act which are covered.

Another view of this case occurs to me and that is this; assume federal relations and limitations out of the case and all the above recited legislation by both Parliament and legislature to have been enacted by one legislative body and all the contracts and acts done pursuant thereto could it be said in considering such an Act as the "Railway Act" if passed by such a

legislature of plenary capacity that it must have been intended thereby to abrogate all such preceding legislation and dissolve everything in municipal and other contracts resting thereupon in the way involved herein? I think not.

Again, it is strangely claimed as a basis for the right of interference that an agreement exists which it is claimed provides for through traffic.

Either the agreement is outside the range of or an infringement of sub-section 7 of section 317.

If it can be held to fall within that section then it may be null and void or have become so thereby, but how can that extinction of it become a foundation for the jurisdiction to enforce the making of a new contract and that regardless of the corporate powers to do so ?

But confirmed, as already pointed out, by Parliament itself, how can the "Railway Act" be held to have been meant to invade the sanctity of a contract thus affirmed?

In this regard, possibly section 3 of the Act averts such a result. Neither this view nor that section was put forward in argument.

But having regard to the nature of the legislation that takes a step for the express advantage of Canada by declaring the work removed because of that character it seems to me quite arguable and possibly conclusive on the whole issue involved.

I have thus far proceeded upon the assumption that Parliament properly regarding its constitutional limitations could never have been supposed to have intended what is claimed. I have arrived at the conclusion that its language (though susceptible of such construction) does not necessarily warrant any such

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assertion of power. Its language must always be read in light of the limits of its constitutional jurisdiction. That language used here when so read is clear, operative, effective and limited.

The case, however, was chiefly argued upon the broad question of whether Parliament could or not so deal with appellant, its charter and its contracts as is implied in the maintenance of the part of the order complained of.

I have no hesitation in saying that in my judgment such legislation by Parliament, as this is claimed to be, against the will of the local legislature creating such corporations as the municipalities, and those others for helping local street travel would be *ultra vires*, and if this must be held to have such meaning it is *ultra vires*.

The legislative power in relation to those elements of municipal government and all it implies, "local works and undertakings" and "corporations with local objects" together with "property and civil rights" has been confided exclusively to the local legislatures subject to the checks of the veto, and in regard to local works of their being declared by the Parliament of Canada for the advantage of Canada or two or more provinces thereof and then removed into the jurisdiction of and there to be dealt with by Parliament.

In passing I may remark Parliament having that power and yet not having exercised it is, I agree, as was urged, a cogent argument against any intention in the Act to found the interference asserted.

I am not oblivious of the apparent invasion already made by holding that Parliament may impose upon municipalities duties of guarding railway crossings for which the legislature may never have made pro-

vision in the capacity given its municipal creations or otherwise by delegating to them the power of direct taxation to provide therefor.

The case of *Toronto* v. *Grand Trunk Railway Co.* (1), I admit carried the matter far and was upheld in the Privy Council.

That was a case not of directing anything as incidental and ancillary to the construction of the railway or the necessities of the case, but like what is now in question; shall we call it the peace, order and good government of the people of Canada?

I respectfully submit to the authority of that decision in the wide field it operates upon but, as it so often happens principles of legal or constitutional action are not always carried to their logical conclusions, I await results before going further, and relieving, by virtue only of Dominion legislation, a municipality from a contract its provincial legislative creator enabled it to make, and thereby bound it to observe.

Legal history and especially constitutional history is full of illustrations of the recoil as it were remaining instead of that of the original force moving further forward.

It was urged here as there that the power claimed was but ancillary to the main purpose of the Act and thus being merely incidental thereto for the due efficiency thereof might well be exercised.

Amplify thus every possible exercise of each of the exclusive powers and the residuary powers committed to Parliament, to the fullest extent and if you please in the most logical manner, of the kind involved in the claim, and there would not be much left of the provincial powers; when we have regard to the doctrine

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

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that where each has a legislative power that of the local legislature must yield to the supremacy of Parliament.

Perhaps the best answer to such a reflection is that men, collectively, seldom feel bound to observe any kind of logic in any sequence of their acts; and that public opinion however illogically evoked is the only safeguard and ultimate court of appeal.

Meanwhile, we, sitting here, must so far as we can, have some regard to the meaning of these words "exclusively make laws," designed to cover such matters as we are now dealing with.

These words are used in an instrument that obviously implies some limitation upon them in order that other exclusive powers given by like words and assigned elsewhere may be effectively exercised.

Can any limits be thus or otherwise imposed than those arising out of the necessity for giving effective scope and operation to the due exercise of those other exclusive powers or as Lord Watson called it "necessarily incidental" at page 360 of *Attorney-General for Ontario* v. *Attorney-General for the Dominion*(1)? Neither phrase perhaps accurately defines everything to be considered, but in the pages 359, 360 and 361 of that judgment the subject of those limitations is comprehensively and with many needful qualifications dealt with in such a way as to be, if I may be permitted to say so, a practically safe guide in other cases as well as that there in hand. But clearly it was not followed by the draftsman of these sections as his guide.

Can desirableness or expediency or the residuary powers ever be invoked to justify imposing further limitations than that which necessity so defined draws after it?

(1) [1896] A.C. 348.

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To classify anew by such elastic, sectional, cross classifications the subject-matters of legislative jurisdiction as this "through traffic" attempt indicates, must invariably lead to trouble.

If the existence of mere relation of some kind, however remote the relation to the subject dealt with, can justify Parliament in annexing everything of that sort as ancillary to its exclusive powers it might in virtue of its power over navigation undertake in all its details the solution of the sewerage question in the cities and towns along the Ottawa River because some of them empty their sewers therein.

I do not allude to the right to prohibit that, but the assertion, instead thereof, of a right to cure the evil by regulating everything to be done in respect thereof and therefor, by these municipalities. It would be as justifiable as undertaking to manage the street railway of Montreal, because that road had some relations with another over which Parliament, legislatively speaking, had entire dominion.

I think we must in the development of what the "British North America Act" has provided ever have regard to the consequences of any decision we come to, including that of the bearing our holding may have in relation to other matters even not directly in appearance involved therein.

Instead of merely drifting, let us try to see whither we are drifting.

If it were necessary to elaborate upon the actual issue now raised a great deal might be said and more forcibly said than is suggested by a consideration of the several conditions of things I have outlined. I have throughout so outlined these to suggest the many and obvious difficulties in the way of holding as *intra*

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vires such legislation by Parliament, if assumed to be of the character claimed, and in the next place of imputing to Parliament by language which is ambiguous that which involves such a dangerous challenge of the products of legislative conditions; in this case ratified by itself.

As to the argument that the power to rectify an evil must exist wholly in one legislature, I should have thought but for its persistent reiteration that it was obviously futile.

Every one can recognize many cases where it does not exist; and also many persons fancy theoretically that if it were not for the partition of legislative powers necessarily incidental to the federal system many evils might be more speedily and more efficiently rectified, instead of sometimes being only partially cured by the effort of one legislative power.

Every intelligent man however knows, if he has watched the moulding of public opinion, how fallacious the theory is. Indeed, the converse is, I believe, the case in a large degree. Passing that, what is the argument worth?

The need of this very power sought to be exercised in relation to through traffic exemplifies how cautious we should be in assuming that the limitation of legislative power in relation to furnishing a complete remedy necessarily leaves our country entirely helpless as the argument implies. The evils incidental to the operation of that traffic were and perhaps are international in some of the ranges of its development yet must we wait for others and refrain from any amelioration because clearly the entire power does not lie with our Parliament.

In like manner and in a less degree is involved the dealing with all roads within Canada.

Parliament can by asserting its power over those roads owing existence to it and obedience to its mandates pretty effectually check any evil of the kind aimed at. Public opinion will soon bring if need be the supplementary aid of other powers.

Strong measures short of the invasion of provincial rights can easily be devised, possibly within the present Act, and made to be effectual, if there is an evil practice to be cured.

It is clear that the order is an interference with provincial legislation in relation to four of the most important subjects assigned to the exclusive legislative jurisdiction of the provinces. It is clear also that there was no necessity for Parliament to provide for such an interference. It is to my mind equally clear that the maintenance of such a pretension of power on the part of Parliament would breed infinite disorder.

I think the appeal must be allowed. The respondent's improvidence and unsuccessful effort to be relieved therefrom perhaps deserve that we should give costs against it, but for the manner the case was presented by the appellant to the Board.

Instead of merely properly presenting its respectful compliments to the Board it ought to have set forth some of the basic facts of a most complicated condition of things as reason for its protest against the jurisdiction.

With respect I hardly think the failure to do so was fair to the Board.

DUFF J.—The appeal is based upon the contention that section 8, sub-section (*b*), of the "Dominion Railway Act" is *ultra vires*. The enactment is as follows:

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8. Every railway, steam or electric street railway or tramway, the construction or operation of which is authorized by special Act of the legislature of any province, and which connects with or crosses or may hereafter connect with or cross any railway within the legislative authority of the Parliament of Canada, shall, although not declared by Parliament to be a work for the general advantage of Canada, be subject to the provisions of this Act relating to * * *

(*b*) The through traffic upon a railway or tramway and all matters appertaining thereto.

The phrase "through traffic" is, I think, used in the Act in the sense of traffic originating on one railway and terminating on another. With respect to such traffic, all railway companies to which the provisions of the Act are applicable are required by section 317, sub-section 1, —

according to their respective powers to afford to all persons and companies all reasonable and proper facilities * * * for the interchange of traffic between their respective railways and for the return of rolling stock;

and by section 317, sub-section 2, —

Such facilities to be so afforded shall include the due and reasonable receiving, forwarding and delivering by the company, at the request of any other company, of through traffic, and, in the case of goods shipped by car load, of the car with the goods shipped therein, to and from the railway of such other company, at a through rate; and also the due and reasonable receiving, forwarding and delivering by the company, at the request of any person interested in through traffic, of such traffic at through rates.

Such companies are, by sub-section 3, forbidden to

(*a*) make or give any undue or unreasonable preference or advantage to, or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever;

(*b*) by any unreasonable delay or otherwise howsoever, make any difference in treatment in the receiving, loading, forwarding, unloading, or delivery of the goods of a similar character in favour of or against any particular person or company;

(*c*) subject any particular person, or company, or any particular description of traffic, to any undue, or unreasonable prejudice or disadvantage, in any respect whatsoever; or,

(*d*) so distribute or allot its freight cars as to discriminate unjustly against any locality or industry, or against any traffic which may originate on its railway destined to a point on another railway in Canada with which it connects.

Any company having a railway connecting with another in such a way as to form a continuous line with it or which intersects another railway is required by sub-section 4 to

> afford all due and reasonable facilities for delivering to such other railway, or for receiving from and forwarding by its railway, all the traffic arriving by such other railway without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage as aforesaid, and so that no obstruction is offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommodation, by means of the railways of the several companies, is, at all times, afforded to the public in that behalf.

By sub-section 5 it is enacted that

> The reasonable facilities which every railway is required to afford under this section, shall include reasonable facilities for the junction of private sidings or private branch railways with any railway belonging to or worked by any such company, and reasonable facilities for receiving, forwarding and delivering traffic upon and from those sidings or private branch railways.

By the seventh sub-section it is provided that any agreement made between any two or more companies contrary to section 317 shall be "null and void."

The Railway Board is given very full powers to determine as a question of fact in particular cases as well as by regulation to declare, what shall constitute "similar circumstances and conditions" or "unjust and unreasonable preferences or advantages"; and to decide whether in any given case a company has or has not complied with the provisions of section 317 as well as to declare by regulation what shall constitute compliance or non-compliance with these provisions.

The Board, moreover, may for the purposes of section 317,

> order that specific works be constructed or carried out, or that property be acquired, or that specified tolls be charged, or that cars, motive power or other equipment be allotted, distributed, used, or moved as specified by the Board, or that any specified steps, systems,

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or methods be taken or followed by any particular company or companies, or by railway companies generally. Section 318(3).

There are other important provisions touching the regulation of through traffic, but it will not be necessary to refer to them specifically.

I think the question whether such enactments as applicable to provincial railways and tramways (that is to say railways and tramways subject generally to the legislative authority of the province) are within the competence of Parliament must turn upon the construction of sub-section 10, of section 92, and sub-section 29, of section 91, of the "British North America Act." I think that is so for this reason. These sections deal specifically with the division of legislative powers touching the subjects of railways and railway traffic; and although in the absence of such provisions those subjects (in the Dominion aspects of them and for general Canadian purposes) might have been held to fall within the general introductory clause of section 91 as well as within sub-section 2 of that section (Trade and Commerce), still I think a specific subsection having been devoted to the distribution of the legislative powers in regard to railways and cognate subjects between the Dominion and the provinces we must look there for the law upon that subject.

The sub-sections for consideration are as follows: Section 92:—

10. Local works and undertakings other than such as are of the following classes:—

(*a*) Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;

(*b*) Lines of steamships between the province and any British or foreign country;

(*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of

Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

Section 91, sub-section 29: —

Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

The exclusive authority to legislate in respect of a railway wholly within a province is by virtue of these enactments vested in the provincial legislature, unless that work be declared to be for the general advantage of Canada; in that case, exclusive legislative authority over it is vested in the Dominion. It is no doubt true that Dominion legislation in respect of a work of the latter class may affect directly a work of the former class and it may be that as necessarily incidental to the legislative powers of the Dominion in respect of a railway wholly within the province, but declared to be for the general advantage of Canada the Dominion might legislate directly in respect of the provincial railway upon a subject-matter in respect of which the province might have legislated in the absence of Dominion legislation. For example, two such railways intersect, the exercise of the powers of the Dominion to legislate for the protection of the public as affected by the operation of the Dominion railway might involve the passing of regulations touching the traffic through the point of intersection of the provincial railway and an area surrounding that point of intersection embracing to some extent the provincial line.

In the absence of Dominion regulations the province would be empowered no doubt in respect of its own line to make such regulations upon that subject as it should see fit. But such regulations would

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be overborne when inconsistent with Dominion legislation. It is upon this principle that the respondents seek to support the authority of the Dominion to pass the enactments of the "Railway Act" to which I have referred and to make them applicable to provincial railways intersecting and connecting with Dominion railways. It is said that the legislation is ancillary to the exercise of the Dominion powers in respect of Dominion railways; the principle relied upon is authoritatively stated by the Judicial Committee in the following passage in the judgment upon the Liquor Licenses appeal (1), at page 359: —

> It was apparently contemplated by the framers of the "Imperial Act of 1867," that the due exercise of the enumerated powers conferred upon the Parliament of Canada by section 91 might, *occasionally and incidentally*, involve legislation upon matters which are *primâ facie* committed exclusively to the provincial legislatures by section 92. In order to provide against that contingency, the concluding part of section 91 enacts that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." It was observed by this Board in *Citizens' Ins. Co. of Canada* v. *Parsons* (2), that the paragraph just quoted "applies in its grammatical construction only to No. 16 of section 92." The observation was not material to the question arising in that case, and it does not appear to Their Lordships to be strictly accurate. It appears to them that the language of the exception in section 91 was meant to include, and correctly describes, all the matters enumerated in the sixteen heads of section 92, as being, from a provincial point of view, of a local or private nature. It also appears to Their Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen sub-sections, save to the extent of enabling the Parliament of Canada to deal with matters local or private, in those cases where such legislation is *necessarily incidental* to the exercise of the powers conferred upon it by the enumerative heads of clause 91. That view was stated and illus-

(1) *Attorney-General for Ontario* v. *Attorney-General for Canada;* [1896] A.C. 348.

(2) 7 App. Cas. 96, at p. 108.

trated by Sir Montague Smith in *Citizens' Ins. Co.* v. *Parsons*(1), at pages 108 and 109, and in *Cushing* v. *Dupuy*(2), and it has been recognized by this Board in *Tennant* v. *Union Bank of Canada*(3), and in *Attorney-General of Ontario* v. *Attorney-General for Canada* (4).

I do not think the principle enunciated in this passage is sufficient to support this legislation as it stands. There is not here the slightest suggestion, and I do not think there can be found in any of the cases the slightest suggestion, that the Dominion has power of its own will to enlarge the limits of its legislative authority. These limits are fixed by the Act itself. What is and what is not within the meaning of the passage quoted

> necessarily incidental to the exercise of the powers committed to the Dominion under section 91

in such a way as to give the Dominion the power to enact it must be determined by the courts. What we have to ascertain in this case is whether in conferring upon the Railway Board the large powers over provincial railways constituted by the legislation under consideration, the Dominion has been legislating in a way that is necessarily incidental to the exercise of its legislative authority in respect of Dominion railways.

Let me observe again that the Imperial legislature has said *uno flatû*, so to speak, that the exclusive legislative authority in respect of local railways declared to be for the general advantage of Canada, shall be vested in the Dominion, while the exclusive legislative authority in respect of all other such railways shall be vested in the province. Although these respective authorities, as I have already mentioned, are not so

(1) 7 App. Cas. 96.
(2) 5 App. Cas. 409, at p. 415.
(3) [1894] A.C. 31, at p. 46.
(4) [1894] A.C. 189, at p. 200.

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delimited as to be always and in all cases mutually exclusive, that is because there must be cases in which it is impossible for the Dominion to legislate fully in respect of its railways without passing legislation touching and concerning railways which are provincial. To the extent of that necessity we are justified in implying a power in the Dominion to legislate for the provincial railways notwithstanding the circumstance that, broadly speaking, the exclusive legislative jurisdiction in respect of the provincial railways has been committed to the province; but the implication must, I think, be limited by this necessity. It is observable also we have not such a case here as those in which the scope of one of the sub-sections of section 91 has to be determined in relation to the scope of that provision of section 92 which deals with property and civil rights. This latter was the case in *Tennant* v. *Union Bank*(1), and *Attorney-General of Ontario* v. *Attorney-General for Canada*(2). In both these cases it was pointed out that it would be impossible for the Dominion to proceed a single step in legislating effectively in regard to banking or in framing a system of bankruptcy law without invading the field marked out by the broad words "property and civil rights." The legislature in conferring upon the Dominion the power to deal with banking and the power to deal with bankruptcy and insolvency, was in each case carving a field out of property and civil rights. In the present case, on the other hand, the Act is dealing with two separate subjects, the boundaries of which can cross one another only incidentally and occasionally. The provision defining the provincial power must be read together

(1) [1894] A.C. 31. (2) [1894] A.C. 189.

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with the provision defining the Dominion power, in order to ascertain the limits of either. It is little to the purpose to say that where Dominion legislation and provincial come into conflict the first prevails. That is only so where the Dominion is acting within the limits of the area in which the constitution permits it to act, and the whole question here is whether in enacting the legislation in question the Dominion was acting within or without these limits.

The effect of the legislation under consideration is that for the purposes of through traffic a provincial railway, merely because it crosses a Dominion railway, may be made part of the Dominion system, and indeed in respect of the control over it vested in the Board becomes a part of that system. It seems to me that the terms of sub-section 10 shew clearly that this is what was not to take place, unless the provincial railway be declared to be a Dominion work as a whole. I am utterly at a loss to understand how it can be contended that merely because a railway, A-B, crosses a railway, C-D, the power to legislate for A-B involves the power to legislate for C-D, to the extent of making C-D a mere adjunct to A-B for the purposes of through traffic—when the law is that the power to legislate for C-D generally is vested in another body.

How can it be said that legislation respecting such through traffic—involving the requirements that C-D shall provide facilities for such traffic, enter into agreements for joint rates, submit to the regulation of the Dominion Board in respect of such rates, and otherwise comply with the provisions above mentioned—is necessarily incidental to the exercise of the legislative powers of Parliament respecting A-B? In many cases —and the present is obviously one of them—the traffic

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over the provincial railway (assuming compulsory joint traffic arrangements to go into effect) would be the principal and that over the Dominion railway merely subsidiary. Can it fairly be said that in passing legislation which may thus change *in toto* the character of the undertaking of the provincial railway Parliament is, in substance, exercising its powers to legislate for what if the legislation become effective must be the subsidiary undertaking? Then it is argued that there must be found vested in one single authority the power to legislate wholly with regard to through traffic. But division of legislative authority is the principle of the "British North America Act," and if the doctrine of necessarily incidental powers is to be extended to all cases in which inconvenience arises from such a division that is the end of the federal character of the Union. That is not the true solution; the true solution lies as Lord Herschell said in the *Fisheries Case* (1), in the exercise of good sense by the legislatures concerned. It is obvious that with respect to through traffic upon Dominion and provincial railways the difficulty could be met by declaring the provincial railway to be a work for the general advantage of Canada (and the postulate upon which the respondent's argument rests—that such legislation in respect of the provincial railways should be necessary for the conduct of business on a Dominion railway — would surely be sufficient ground for such a declaration), or by the constitution of a joint board or separate boards authorized to act together and empowered to deal with such cases.

That it might be convenient that the Dominion and the provincial railway should have joint traffic ar-

(1) [1898] A.C. 700, at p. 714.

rangements and that these should be under a single control does not advance the argument of the respondents. The same argument would apply to the case of a provincial line of steamships having a terminus near a station or terminus of a Dominion railway or a provincial telephone line or telegraph line which it might be thought useful to link up with the railway telegraph system. Does anybody seriously think that legislative control of the railways involves (as necessarily incidental to it) under the sub-sections quoted, the legislative power to effect such amalgamations and to reorganize the provincial undertakings to suit the exigencies of the altered conditions? I am wholly unable to understand the ground upon which it can be held that merely because of physical juxtaposition such provincial undertakings so long as they remain provincial can be held (to the broad extent necessary to support such legislation as that in question here) incidental (for legislative or other purposes) to such a Dominion railway—and (in the legislative aspect) especially when it has been declared that the provincial undertaking shall generally be under the exclusive legislative control of the province.

ANGLIN J. (dissenting).—The question upon which leave to appeal has been given under the provisions of sub-sections 2 and 3, of section 56, of the "Dominion Railway Act," is expressed in the orders by Mr. Justice Duff and of the Board of Railway Commissioners in idéntic terms, as follows:—

Whether upon a true construction of sections 91 and 92 of the "British North America Act" and of section 8 of the "Railway Act of Canada," the Montreal Street Railway Company (the present appellant) is subject, in respect of its through traffic with the Montreal Park and Island Railway Company, to the jurisdiction of the Board of Railway Commissioners of Canada.

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The construction and operation of the Montreal Street Railway is authorized by special Acts of the legislature of the Province of Quebec, and it still remains a railway under provincial control. The Montreal Park and Island Railway, though originally built as a provincial undertaking, having been declared by Parliament to be a work for the general advantage of Canada, is now under federal control.

The question formulated for determination by this court involves two distinct questions — the first, whether or not an order affecting a provincial railway in respect of through traffic received by it from, or transmitted by it to a federal railway is within the purview of section 8 of the "Dominion Railway Act"; and the second, whether, if it purports to authorize the making of such an order, this legislation is or is not *ultra vires* of Parliament.

Throughout this opinion I shall for brevity and convenience use the term "provincial railway" to signify a railway not owned by a province, but subject to provincial legislative authority; and the term "federal railway," to designate a railway subject to federal legislative authority, though not owned by the Dominion.

The effect of the statutory declaration that it is a work for the general benefit of Canada has been to render the Park and Island Railway a federal railway to the same extent and as completely as if it were inter-provincial or extended beyond the limits of the Province of Quebec. Its federal character once established exists for all purposes and the jurisdiction of Parliament over it and over everything that is necessarily incidental and ancillary to its operation and to the proper carrying out of the public services which it

has been established to render is neither greater nor less than that which Parliament possesses over other federal railways such as the Canadian Pacific and the Grand Trunk.

I entirely fail to appreciate the distinction which the appellants have sought to draw between a federal railway constructed wholly within one province and having no extra-provincial connection and an inter-provincial railway. Both are alike excepted from section 92 of the Act.

A brief consideration of the form of section 8 of the "Railway Act" will make it clear that it applies equally to provincial railways connecting with each class of federal railways. The necessity for federal regulation in respect to "the connection or crossing" must be the same whether the federal railway be such because it is inter-provincial, or because it has been declared to be for the general advantage of Canada. The first paragraph of section 8, which describes the railways to be affected, applies equally to clause (*a*) dealing with "connection or crossing" and to clause (*b*) dealing with "through traffic." This description was not meant to include certain railways for the purpose of clause (*a*) and to exclude the same railways for the purpose of clause (*b*). Whatever may be its proper construction and effect, clause (*b*) applies to the Montreal Street Railway connecting with the Park and Island Railway equally with clause (*a*). I find no justification for excluding from the operation of either part of section 8 any railway (including a street railway) constructed under provincial authority which connects with a railway within the legislative authority of Parliament, however the authority of Parliament may have arisen.

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We must next inquire what is the "through traffic upon a railway or tramway" to which clause (*b*) relates. Section 8 declares that certain railways

> shall be subject to the provisions of this Act relating to * * * through traffic, etc.

There are several sections of the "Railway Act" which "relate to" through traffic. In some of them through traffic obviously means traffic carried between terminal points on the same railway as distinguished from traffic carried between intermediate stations. From others, particularly those dealing with interchange of traffic and "through rates" for such traffic (section 317) to be provided for by a "joint tariff" (section 334), it is plain that through traffic may also include traffic originating upon one railway and carried to or towards its destination on another. Section 8 deals entirely with the connection or crossing of two railways and it is intended to provide for matters arising out of such connection or crossing. It subjects every provincial railway crossing or connecting with a federal railway to federal legislation in respect to "the through traffic on the railway or tramway." Obviously it was not meant — it could not have been meant — to attempt to control through traffic on a provincial railway or tramway in the sense of traffic carried upon it between its own termini. That would be a distinct invasion of provincial rights; it would be direct and substantive legislation on a subject within the exclusive domain of the provincial legislature. Equally clearly the section does not apply to similar traffic on a federal railway; such traffic is fully provided for elsewhere in the statute. It is therefore, reasonably certain that the "through traffic" to which the section is meant to apply is traffic carried from a

point on one of the connecting railways to a point upon the other; and it matters not whether it is the point of origin or that of destination which is on the federal railway. But for the serious discussion of it at bar and doubts then expressed by some of my learned brothers, I should not have thought the meaning of "through traffic" in section 8 open to question. I should add that "traffic" in the "Railway Act" means "the traffic of passengers, goods and rolling stock," (section 3(31)) but not necessarily of all three. The carriage exclusively either of freight or of passengers is, I think, within this definition.

I am satisfied that the order in appeal deals with matters within the purview of section 8 of the "Railway Act."

I am also of the opinion that this legislation is *intra vires* of Parliament.

If it had no connection with or did not cross a federal railway, the Montreal Street Railway would, no doubt, be a "local work or undertaking" within clause 10 of section 92 of the "British North America Act," and not within any of the exceptions to that clause, and therefore under the exclusive legislative control of the province. Whether, when the railway with which it is connected became a federal railway, it ceased, as contended by counsel for the respondents, to be such a local work or undertaking as should be deemed for any purpose exclusively within the legislative control of the province it is unnecessary to determine. Assuming that, notwithstanding this connection, the Montreal Street Railway still remains a local work or undertaking within clause 10 of section 92, I am of opinion that the Dominion legislation authorizing the order now in appeal is nevertheless valid.

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The Park and Island Railway, having been declared to be a work for the general advantage of Canada, is within exception (*c*) to clause 10 of section 92. Railways expressly excepted from this clause are, under clause 29 of section 91, one of the enumerated subjects declared to be within the exclusive legislative authority and control of the Dominion. In regard to them Parliament is clothed with plenary powers of legislation, including power to enact measures which may trench upon provincial legislative authority when such enactments are truly or properly ancillary or necessarily incidental to the complete and effective control of such federal railways.

From the judgment of Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1), I extract the following passage, found at pages 359-360: —

> It was apparently contemplated by the framers of the "Imperial Act of 1867," that the due exercise of the enumerated powers conferred upon the Parliament of Canada by section 91 might, occasionally and incidentally, involve legislation upon matters which are *primâ facie* committed exclusively to the provincial legislatures by section 92. In order to provide against that contingency, the concluding part of section 91 enacts that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." It was observed by this Board in *Citizens' Ins. Co. of Canada* v. *Parsons* (2), that the paragraph just quoted "applies in its grammatical construction only to No. 16 of section 92." The observation was not material to the question arising in that case, and it does not appear to Their Lordships to be strictly accurate. It appears to them that the language of the exception in section 91 was meant to include and correctly described all the matters enumerated in the sixteen heads of section 92, as being, from a provincial point of view, of a local or private nature. It also appears to Their Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen sub-sections, save to the

(1) [1896] A.C. 348. (2) 7 App. Cas. 108.

extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91. That view was stated and illustrated by Sir Montague Smith in *Citizens' Ins. Co. of Canada* v. *Parsons* (1), at page 109, and in *Cushing* v. *Dupuy* (2), at page 415; and it has been recognized by this Board in *Tennant* v. *Union Bank of Canada* (3), at page 46, and in *Attorney-General of Ontario* v. *Attorney-General for Canada* (4), at page 200.

If the regulation of "through traffic" on a connecting provincial railway, in the sense in which that phrase is used in section 8 of the "Railway Act," is "necessarily incidental" to the effective control of the traffic of the federal railway with which the connection exists, the power of Parliament to enact section 8 appears to be strictly within and completely covered by Lord Watson's language.

In several subsequent cases the power of Parliament to pass incidental or ancillary legislation which touches one or other of the subjects assigned by section 92 to the provincial legislatures has been recognized.

Thus its right to prohibit contracts whereby railway companies seek to relieve themselves from liability to employees for injuries sustained through negligence or breach of statutory duty, though involving an interference with the civil right of freedom of contract, was upheld in *Grand Trunk Railway Co.* v. *Attorney-General for Canada* (5). Lord Dunedin, in delivering the judgment of the Judicial Committee, says, at page 68: —

> The true question in the present case does not seem to turn upon the question whether this law deals with a civil right—which may be conceded—but whether this law is *truly ancillary to railway legislation*. It seems to Their Lordships that, inasmuch as these railway

(1) 7 App. Cas. 96.
(2) 5 App. Cas. 409.
(3) [1894] A.C. 31.
(4) [1894] A.C. 189.
(5) [1907] A.C. 65.

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corporations are the mere creatures of the Dominion legislature—which is admitted—it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation. It is true that, in doing so, it does touch what may be described as the civil rights of those employees. But this is inevitable and, indeed, seems much less violent in such a case where the rights, such as they are, are, so to speak, all *intra familiam*, than in the numerous cases which may be figured where the civil rights of outsiders may be affected. As examples may be cited provisions relating to expropriation of land, conditions to be read into contracts of carriage, and alterations upon the common law of carriers.

And the law in question was upheld as "properly ancillary to through railway legislation."

The right of Parliament in the exercise of its ancillary power to subject to its statutes creatures of a provincial legislature so far as "reasonably necessary," although in regard to the particular subject-matter dealt with there should be inconsistent provincial legislation, is established in *Toronto Corporation* v. *Canadian Pacific Railway Co.*(1), at pages 58, 59; *City of Montreal* v. *Gordon*(2).

Not only is Parliament empowered incidentally to control corporate bodies owing their existence to a provincial legislature, but the very property of a province itself has been held to be subject to the control and disposition of Parliament in the exercise of its jurisdiction to provide for the construction and operation of federal railways. *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.*(3).

The same principle was also illustrated in an early decision that Parliament has the power to impose upon provincial courts duties in connection with the carrying out and enforcement of its laws. *Valin* v. *Langlois* (4).

(1) [1908] A.C. 54.
(2) Cout. Cas. 343.
(3) [1906] A.C. 204.
(4) 5 App. Cas. 115; 3 Can. S.C.R. 1.

In cases of conflict between Dominion legislation and provincial legislation otherwise valid, the subordination of the latter is again recognized in the last pronouncement of the Judicial Committee upon the subject. *La Compagnie Hydraulique de St. François* v. *Continental Heat and Light Co.*(1).

But while this incidental or ancillary jurisdiction of Parliament is fully established, no definition of what should be deemed "necessarily incidental" or "truly ancillary" is found in any decision binding on this court. No doubt this is partly due to the difficulty of framing a definition which would be at once sufficiently comprehensive and sufficiently restrictive, because what is incidentally necessary must vary in each case with the circumstances, and partly to deference to the advice given in *Citizens' Insurance Co.* v. *Parsons*(2), at page 109, and approved of by the Judicial Committee in later cases, not to enter

> more largely upon the interpretation of the statute (the "British North America Act") than is necessary for the decision of the particular question in hand.

But in considering whether certain legislation should be deemed necessarily incidental, or truly or properly ancillary, we receive some assistance from expressions of judicial opinion in regard to particular matters.

Thus in a comparatively early case the right of Parliament to interfere with many matters, otherwise exclusively within provincial jurisdiction, as incidental to bankruptcy legislation was recognized. *Cushing* v. *Dupuy*(3), at page 415. Interference with executions is instanced as a legitimate exercise of this

(1) [1909] A.C. 194. (2) 7 App. Cas. 96.
(3) 5 App. Cas. 409.

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ancillary power in *Attorney-General for Ontario* v. *Attorney-General for Canada*(1), and the Lord Chancellor (Herschell) says, at page 200, that

> a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated.

As ancillary to its control of the banks and banking system of Canada, Parliament has the power to legislate in regard to the negotiability of warehouse receipts for banking purposes, although in such legislation an interference with civil rights is clearly involved. The authority to legislate in respect to banking transactions is plenary and

> may be fully exercised, although with the effect of modifying civil rights in the province. *Tennant* v. *Union Bank of Canada*(2), at p. 47.

In *Re Railway Act*(3), at page 142, Mr. Justice Davies says:

> Exclusive legislative authority on railways, such as are here enumerated, being vested in the Dominion Parliament, that Parliament has, as a consequence, full and paramount power so to legislate upon such matters as fully, properly and effectively to carry out the construction, management and operation of these railways. In so legislating it matters not that they infringe upon the powers of legislation with regard to property and civil rights assigned to the provincial legislatures. Such invasion is admittedly necessary to enable the Parliament properly and effectively to legislate. The main and controlling question is, therefore, whether the legislation in question can be said to be fairly and reasonably within the plenary and exclusive powers of the Dominion Parliament enabling it effectively to control the construction, management and operation of the classes of railways excepted from sub-section ten of section ninety-two and embraced within sub-section twenty-nine of section ninety-one. I think it may be fairly so held.

In *City of Toronto* v. *Grand Trunk Railway Co.*

(1) [1894] A.C. 189. (2) [1894] A.C. 31.
(3) 36 Can. S.C.R. 136.

(1), the same learned judge quotes as the equivalent of "necessarily incidental and ancillary" the phrase used by Osler J.A., in *Re Canadian Pacific Railway Co. and Township of York*(2), at page 72, "eminently germane, if not absolutely necessary."

In the latter volume, at page 407, is reported a unanimous decision of the Ontario Court of Appeal(3) that Dominion legislation declaring a federal railway company liable "for the full amount of damages sustained" by reason of a breach of statutory duty is *intra vires* and entitles an employee, or, if he be killed, his relatives to recover such damages where the breach of duty is that of a fellow-employee, notwithstanding the limitation imposed by the provincial "Workmen's Compensation Act." Burton C.J.O., says, at page 411: —

> I think such a power is incident to the general legislation entrusted to them (the Dominion Parliament) to construct and deal with such undertakings and ought not to be restricted in the way suggested.

In *McArthur* v. *Northern and Pacific Junction Railway Co.*(4), Burton J.A., says, at page 111: —

> It must be clear, apart altogether from authority, that when power is given to the particular legislature to legislate on a certain subject, such power includes all the incidental subjects of legislation which are necessary to carry it into effect;

and Osler J.A., says, at page 125, that legislation conferring a right of action for damages arising from the cutting of timber upon a plot of land of limited width, on either side of a federal railway, owned by the Crown in right of the province, but under timber license, is

> well within the competence of Parliament to pass in order to legislate generally and effectually on a subject within its exclusive powers,

(1) 37 Can. S.C.R. 232.
(2) 25 Ont. App. R. 65.
(3) *Curran* v. *Grand Trunk Railway Co.*, 25 Ont. App. R. 407.
(4) 17 Ont. App. R. 86.

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even though it may to some extent trench upon the subject of property and civil rights.

In *Citizens' Insurance Co.* v. *Parsons*(1), Ritchie C.J., said, at pages 242-3: —

The Dominion Parliament would only have the right to interfere with property and civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada.

The learned Chief Justice repeated this statement in *The Queen* v. *Robertson*(2), at page 111, and at page 139, Fournier J., said: —

dans une cause assez recente, j'ai eu occasion de dire, et je le répéte, que le gouvernement federal a, sans doute, le pouvoir de toucher incidemment à des matières qui sont de la jurisdiction des provinces. Mais dans mon opinion, ce pouvoir ne s'étend pas au-dela de ce qui est raisonnable et nécessaire à une législation ayant uniquement pour but le légitime exercice d'un pouvoir conféré au gouvernement fédéral.

I extract the following passage from the judgment of Rose J., in *Doyle* v. *Bell*(3), at page 335: —

I do not understand by the use of the word necessary, as found in various decisions and text-books, that it is meant to lay down the doctrine that to bring within the powers of the Dominion legislature any provision of an enactment respecting a subject within the exclusive jurisdiction of such legislature, and which provision might affect civil rights, it must necessarily appear that without such provision it would be impossible to carry into effect the intentions of the legislature, or that probably no other provision would be adequate. On the contrary, it seems to me that if such provision might, under certain circumstances, be beneficial and assist to more fully enforce such legislation, then it must, at all events on an appeal to the courts, be held to be necessary, that is, necessary in certain events. Surely the legislature must be allowed some and, in my opinion, a very wide discretion as to the mode of enforcing its own enactments. It cannot be that the courts are to sit in judgment on the exercise of such discretion and dictate to the legislature whether they shall adopt this or that mode, because in the opinion of the courts one mode is the more convenient or better, or at least as well adapted to effect the purpose of the legislature.

(1) 4 Can. S.C.R. 215. (2) 6 Can. S.C.R. 52.
(3) 11 Ont. App. R. 326.

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In delivering the judgment of the Court of Queen's Bench in *McDonald* v. *Riordan*(1), the late Mr. Justice Würtèle expressed views which would restrict the incidental jurisdiction of Parliament within very narrow limits. The judgment of the Court of Queen's Bench that Parliament had the right to legislate as to the disqualification of the directors of federal railway companies was affirmed in this court(2), and, as the decision is reported, "for the reasons given in the court appealed from." But I cannot think that this court meant to adopt or to indorse the views of the learned Quebec judge upon the limitations of the ancillary legislative jurisdiction of Parliament.

I fully recognize that, as stated by Palmer J., in *Attorney-General for Canada* v. *Foster*(3), at page 164:—

> Where the line of necessity is to be drawn in each particular case is the great difficulty that lawyers have to contend with when expounding our constitution. It must, I think, be determined by a consideration of the general scope of the legislation called in question. There must be a reasonable limitation of its encroachment upon subjects that are exclusively within the power of the other legislature.

Nevertheless, Lord Hobhouse says in the *Parsons Case*(4), at pages 108-9:—

> In these cases it is the duty of the courts, however difficult it may be, to ascertain in what degree and to what extent authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them, the limits of their respective powers.

Having regard to the general tenor of the authorities to which I have referred, it is clear that when, in order to make effective and to fully carry out the object of substantive legislation upon one of the sub-

(1) Q.R. 8 Q.B. 555.
(2) 30 Can. S.C.R. 619.
(3) 31 N.B. Rep. 153.
(4) 7 App. Cas. 96.

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jects enumerated in section 91, it becomes necessary to assert and exercise ancillary powers which trench to some extent upon the domain assigned to provincial legislation, Parliament possesses these powers. In determining whether particular legislation is or is not within them, "absolute necessity" is not the test; it is rather "reasonable necessity." Is the authority to pass such legislation requisite "to prevent the scheme of the (substantive) act from being defeated"; to permit of a "plenary" exercise of a power expressly conferred; to allow Parliament to exercise "its full and paramount power so to legislate upon the railways enumerated "as fully and effectively to carry out the * * * operation of these railways"; to provide for matters "eminently germane, if not absolutely necessary" to legislation upon an enumerated subject; to cover "incidental subjects" of legislation upon an assigned subject; to ensure that Parliament may "legislate generally and effectually on a subject within its exclusive powers"; to make provisions "just and reasonable and necessary" in legislating for a purpose within "the power conferred on the federal government" ? Can this legislation be said

> to be fairly and reasonably within the plenary and exclusive powers of the Dominion Parliament enabling it effectively to control the * * * operation of the classes of railways

under its jurisdiction ? — These are criteria indicated in the cases to which I have referred by which the reasonable necessity and the truly ancillary character of incidental legislation may be tested.

The late Mr. Justice Rose would have supported such legislation if beneficial and of assistance in more fully enforcing legislation respecting a subject within the exclusive jurisdiction of Parliament. The legisla-

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tion now before us, however, appears to answer the more conservative judicial tests which I have mentioned.

In considering the necessity for federal control of "through traffic," it is well to have in mind that section 8 of the "Railway Act" applies to the great railway systems of Canada and the local lines connecting therewith, as well as to such railways as those now before the court; and that "traffic" includes freight as well as passenger traffic. One legitimate purpose of the "Railway Act" of Canada is to prevent undue discrimination in rates in respect of traffic upon railways under federal control when carried under similar conditions and between points similarily situated. If federal railway companies may, indirectly and through the instrumentality of distinct provincial corporations operating local connecting railways, defeat the purpose of this federal legislation against undue discrimination, it would seem that, in respect of through traffic, such local railways should be subject to federal control in order to "prevent the scheme of the Act being defeated."

For instance, point A is on "The Transcontinental" —a through federal railway connecting at point B with "The Dominion," a federal branch line controlled by an entirely independent company, upon which is situate point C; at point B "The Transcontinental" also connects with "The Provincial," a local railway operating under provincial incorporation, but controlled by the interests which control "The Transcontinental." On "The Provincial" is situate point D, equi-distant with point C from point B. If this provincial railway should not be subject to federal control in respect to "through traffic," the rate between points A and D

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might, without any direct discrimination on the part of "The Transcontinental," be considerably greater than the rate between points A and C in respect of the same class of traffic. A "through rate" might be refused between the former points because the provincial company would not make a "joint tariff"; or an uncontrolled charge by the provincial company between points B and D might result in a gross case of discrimination in rates between point A and the equidistant points C and D.

It may not be absolutely necessary to the existence and operation of federal railways that such discrimination should be prevented, but it is certainly reasonably necessary to the satisfactory management and control of traffic upon them that such matters should be subject to efficient regulation. Otherwise, as in the illustration given, the interests controlling a federal railway might be in a position, through the medium of a connecting provincial railway also under their control, to thwart the purpose of unquestionably valid Dominion legislation against unfair discrimination. The plenary exercise of the power to legislate in regard to federal railways would therefore seem to embrace the control of provincial railways in respect of "through traffic" and it can scarcely be gainsaid that legislation for the regulation of such "through traffic" is "eminently germane, if not absolutely necessary," to legislation in regard to federal railways themselves.

Again, for certain classes of through perishable freight traffic, *e.g.:* fish, fruit, dairy products and meat — it may be essential that there should not be trans-shipment *en route* and specially constructed cars may be required. Should "The Provincial," under control independent of "The Transcontinental," refuse to

haul to their destination on its line cars of "The Transcontinental," this traffic to and from points on "The Provincial" might be seriously interfered with, if not destroyed. Morover, refusal by "The Provincial" to co-operate at the point of connection with "The Transcontinental" in the transfer of such cars from one road to the other might create difficulties and inconveniences which would unduly impede the traffic. Cars specially constructed for certain kinds of traffic and of which the supply may be limited might be improperly detained upon "The Provincial" and grave delay and inconvenience be thus caused to shippers as well as loss of business to the federal railway.

Cars employed for the traffic in fish, meat, dairy products and fruit require to be "iced" efficiently and at regular intervals. By slight neglect in this connection serious damage might be caused. Yet, unless the Dominion Railway Commission has some control over "through traffic" after it leaves the federal railways and before it reaches them, it might be extremely difficult, if not impossible, to secure satisfactory regulation in regard to such matters as "icing."

Many other difficulties, with which nothing but a single controlling power can be relied upon to cope effectively and satisfactorily, might, no doubt, be suggested by experienced railwaymen. But these illustrations suffice to demonstrate the reasonable necessity of federal control in respect to "through traffic" over provincial railways which connect with federal railways.

It may be suggested that the same purpose could be accomplished by joint or concurrent legislative action by Parliament and the provincial legislature. There is no such legislation; and if an attempt were made

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to arrange for it, there is no certainty that the views of the two legislative bodies would be the same. Again, if the Dominion Railway Commission and a provincial railway commission were each empowered to deal with such matters in regard to federal and provincial railways respectively, there would be no assurance that the standards of both would be alike or that joint action would be practicable; and if the authority were divided only joint action could be effective. At all events, the existence or non-existence of federal legislative jurisdiction cannot depend upon these considerations.

Again it is urged that such power on the part of Parliament or its creature, the Dominion Railway Commission, would be open to abuse and that, in the guise of regulations in respect of "through traffic," a provincial railway might be subjected to interference in regard to its rolling stock, its time schedules, its very rails themselves, their gauge and their weight, such as would virtually remove the undertaking from provincial control, or would render it extremely difficult for the provincial authorities to exercise in regard to it that supervision to which they are entitled. Meeting a similar objection in the *Fisheries Case*(1), Lord Herschell said, at page 713: —

> The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected.

And in *Bank of Toronto* v. *Lambe*(2), Lord Hobhouse, speaking of the exclusive legislative powers of the provinces, said, at page 586: —

(1) [1898] A.C. 700. (2) 12 App. Cas. 575.

To place a limit upon it because the power may be used unwisely, as all powers may, would be an error and would lead to insuperable difficulties in the construction of the "Confederation Act."

And again, at page 587: —

If * * * on the due construction of the Act a legislative power falls within section 92, it would be quite wrong * * * to deny its existence because by some possibility it may be abused, or may limit the range which would otherwise be open to the Dominion Parliament.

The Commission created by Parliament for the administration of its railway legislation should be relied upon to have due regard to the fact that the authority of Parliament to enact such provisions as are contained in section 8 of the "Railway Act" is restricted by the rule of reasonable necessity; and "it must be assumed that" it

will exercise the judicial powers which have been entrusted to it in a just and reasonable manner,

per Osler J.A., in *Re Canadian Pacific Railway Company and Township of York*(1), at page 73. If it be open to inquiry here, I find nothing in the order now in appeal which indicates disregard by the Railway Board of this moral restriction upon its powers. The learned Ontario judge of appeal also says: —

I do not think that questions of *ultra vires* can be decided by unreasonable or extravagant suppositions.

Finally it was objected that the "British North America Act" provides a means by which Parliament can assume control over the Montreal Street Railway, viz.: by declaring it to be a work for the general advantage of Canada, and that, the statute having provided this means for acquiring control, no other is open. But to declare a railway to be a work for the general advantage of Canada involves the assumption

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

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of complete and entire control of it by Parliament and in the case of many local railways which connect with federal railways that may be undesirable. Moreover, if this be a good ground of objection to the Dominion legislation in regard to "through traffic" it is equally applicable to the legislation in the same section in regard to control of the physical crossing or connection. It is inconceivable that whenever Parliament desires to compel a provincial railway crossing or connecting with a federal railway to conform to federal legislation in regard to the actual physical crossing or connection it must assume complete control of the provincial railway by declaring it to be a work for the general advantage of Canada.

It should be noted that the section of the "Railway Act" now under consideration deals only with cases in which provincial railways actually connect with or cross federal railways. By this legislation Parliament does not purport to empower the Railway Commission to order a provincial railway to establish such a connection and it is not necessary now to consider whether Parliament could or could not confer such authority.

Counsel for the respondents contended that Parliament is empowered by the residuum clause of section 91 of the "British North America Act" to deal with "through traffic" as a subject not covered by any of the several clauses of section 92. I think it must be admitted that, in the absence of federal legislation dealing with it, provincial legislation in regard to the carriage on a provincial railway of "through traffic" received from or destined for a federal railway would be *intra vires* under clause 10 of section 92. If so, the right of Parliament to subject a provincial railway to

federal legislation in respect of "through traffic" cannot arise under the residuum clause of section 91. The Judicial Committee has said that legislation under this clause may not

encroach upon any class of subjects which is exclusively assigned to provincial legislatures by section 92. *Attorney-General for Ontario* v. *Attorney-General for Canada*(1).

Effective legislation in regard to the through traffic dealt with by section 8 of the "Railway Act" must trench upon the legislative authority of the provinces over provincial railways. *Ex hypothesi* legislation which does so encroach would seem to be *pro tanto* not within the residuum clause, which only confers power

to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

Moreover, the "subjects" of railway legislation assigned respectively to Parliament and the provincial legislatures by the "British North America Act" appear to be, to the former federal railways, as described in the exceptions to clause 10 of section 92, and to the latter local railways not within such exceptions. The division of jurisdiction seems to be according to the character of the railways and not according to the nature of the traffic carried or the business done. I therefore agree with Mr. Geoffrion that "through traffic" can scarcely be regarded as a distinct subject of legislation not covered by any of the enumerated classes of either section 91 or section 92 and therefore within the legislative power of Parliament under the residuum clause.

But, if not within the residuum clause, and if, as seems clear, it be a matter requiring legislative regu-

(1) [1896] A.C. 348, at p. 360.

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lation, since the provisions of sections 91 and 92 exhaust the entire legislative field, except as to matters specifically covered by other sections of the Act — *e.g.*, section 93, *Bank of Toronto* v. *Lambe*(1), at page 587 — it follows that "through traffic" must be within the legislative jurisdiction either of Parliament or of the local legislatures or of both.

It seems clear that a provincial legislature cannot alone deal with this subject, because in no circumstances can it legitimately enact "railway legislation" affecting a federal railway. *Madden* v. *Nelson and Fort Sheppard Railway Co.*(2); *Canadian Pacific Railway Co.* v. *The King*(3). Joint or concurrent legislative control, or joint or concurrent control by two bodies of Commissioners, deriving power respectively from Parliament and the local legislature, would be so uncertain and subject to so many difficulties and contingencies that it might often result in failure to make provisions necessary for the regulation of such traffic. It seems to follow that only legislative jurisdiction vested exclusively in Parliament can effectually provide for "through traffic." This consideration confirms the conclusion that such jurisdiction has been conferred by the "British North America Act."

I am, therefore, of opinion that the provisions of the eighth section of the "Railway Act" should be held to be *intra vires* of Parliament as "truly ancillary to (federal) railway legislation" and "properly ancillary to through railway legislation" and as

necessarily incidental to the exercise of the powers conferred by (one of) the enumerative heads of clause 91,

(1) 12 App. Cas. 575. (2) [1899] A.C. 626.
(3) 39 Can. S.C.R. 476.

namely, the jurisdiction given by clause 29 of section 91 over railways excepted from clause 10 of section 92.

The appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Campbell, Meredith, Macpherson, Hague, & Holden.*

Solicitors for the respondent: *Ethier & Co.*

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*Dec. 16.
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*March 11.

THE MONTREAL PARK AND ISLAND RAILWAY COMPANY } APPELLANTS;

AND

THE CITY OF MONTREAL..... RESPONDENT.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Board of Railway Commissioners—Consideration of complaints—Evidence—Rejection—Agreement as to special rates—Unjust discrimination.

A company operating, subject to Dominion authority, a tramway through several municipalities adjacent to the City of Montreal, and having connections and traffic arrangements with a provincial tramway in that city, entered into an agreement under statutory authority with one of the municipalities whereby, in consideration of special privileges conceded in regard to the use of streets, etc., lower rates of passenger fares were granted to persons using the tramway therein, for transportation to and from the city, than to denizens of the adjoining municipality with which there was no such agreement. On the hearing of a complaint, alleging unjust discrimination in respect to fares, the Board of Railway Commissioners for Canada refused to take the agreement into consideration when tendered in evidence to justify the granting of the special rates and ordered the company, appellants, to furnish the service to persons using the tramway in both municipalities at the same rates of fare. On an appeal, by leave of the Board, in respect of the propriety of overlooking the contract, submitted as a question of law:—

Held, Davies and Anglin JJ. dissenting, that, as the existence of the contract was one of the elements bearing upon the decision of the question of substantial similarity in circumstances, the Board should have admitted the evidence so tendered in regard to the agreement in consideration of which the special rates of fares had been granted.

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

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APPEAL by leave of the Board, under section 56(3) of "The Railway Act," from an order of the Board of Railway Commissioners for Canada, dated 4th May, 1909.

The circumstances of the case are shortly stated in the head-note and more fully set out in the judgments now reported. The appeal was in respect of the same order as was brought in question in the case of *The Montreal Street Railway Co.* v. *The City of Montreal*(1); and the order granting leave to appeal, on the question submitted, was as follows: —

"It is ordered that leave be granted to The Montreal Park and Island Railway Company to appeal to the Supreme Court of Canada from the said order, dated the 4th day of May, 1909, upon the following question, which is hereby declared to be, in the opinion of the Board, a question of law, namely, whether it is right or proper for the Board, in making the said order, to overlook the contract bearing date the 7th day of November, 1907, and made between the said Montreal Park and Island Railway Company and the Municipality of Notre-Dame de Grâce ?"

The contract mentioned is the agreement referred to in the head-note.

Aimé Geoffrion K.C. and *F. Meredith K.C.* (*Hague* with them) for the appellants.

Atwater K.C. and *Butler* for the respondent.

THE CHIEF JUSTICE.—In order that justice may be done it is necessary for the Commissioners to consider the agreement under which the appellants obtained permission from the Municipality of Notre-Dame de

(1) 43 Can. S.C.R. 197.

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Grâce to enter upon its streets. We are not now called upon to decide what effect, if any, is to be given to that agreement in the consideration of the complaint made as to unjust discrimination; but it may serve to explain or justify the alleged difference in treatment complained of by the respondents and should therefore in that view not be overlooked. To meet the charge of unjust discrimination as between the two adjoining municipalities, the railway company attempted to shew that the circumstances were not substantially similar by producing the agreement under which they had been permitted to enter and are now allowed to operate their railway upon the streets of Notre-Dame de Grâce; but the Commissioners apparently were of opinion that the question was to be decided upon a bare consideration of the money fares charged. It is manifest, in my opinion, that the cost of construction and of operation are essential elements to be considered in the determination of the question as to whether the circumstances in which the company operated its road in the adjoining municipalities are substantially similar.

The appellants were required by the Parliament of Canada (6 Edw. VII. ch. 129, sec. 6) to obtain the consent of the municipality before they could enter upon its streets and the Quebec legislature (8 Edw. VII. ch. 97) approved of the by-law under which the railway company occupies those streets. To justify the charge of unjust discrimination between two adjoining municipalities on the ground of difference of treatment it is necessary that all the circumstances connected with the cost of construction and operation of the railway should be considered and the conditions under which the railway obtained the permission from

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the municipality to enter upon the streets should be taken into account in this case as any other item in the cost of construction. If in the absence of an agreement the company had been obliged to make a large money payment to obtain the consent of the municipality to enter upon its streets, it is possible that the charge to the passengers to or from that municipality would have been the same as in the case of Mount Royal and the reasonableness of the charge made to the residents of the latter municipality is not to be determined by a mere comparison with the charge made in the adjoining municipality without any knowledge of the circumstances under which the lesser fare is collected.

I am also of opinion that the Board had no power or authority to compel the Montreal Street Railway, a provincial corporation, to enter into an agreement for the purpose of enabling the appellants to carry out the order made against them with respect to transfers to all points on all lines operated by the Montreal Street Railway in the Town of Westmount or the City of Montreal. The passenger in possession of a transfer goes from one train to another, that is to say, passes from a railway owned or operated by a corporation under the control of the Dominion Parliament to a railway owned or operated by a corporation under the control of a provincial legislature, and the conditions under which the latter company is to carry its passengers from one point to another upon its own railway is not to be determined by the Dominion Board of Railway Commissioners.

GIROUARD J.—It is admitted that the rate charged for railway transportation on the Island Railway and

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The Montreal Street Railway to passengers from Mount Royal Ward, in the City of Montreal, was greater than that charged to passengers from Notre-Dame de Grâce. The railway company met this complaint by tendering in evidence a contract with the Town of Notre-Dame-de Grâce by virtue of which passengers from that municipality became entitled to some favourable treatment. The Board, however, declined to consider this contract, holding that it was not proper for them to do so, being a private agreement, and ordered the stopping of the differential rates as amounting to "unjust discrimination" and finally ordered that the railway company do enter into an agreement with the Montreal Street Railway for the purpose of removing the said discrimination.

The question is: Was the Board justified in refusing to take consideration of said contract?

In my humble opinion I think it was the duty of the Board to consider that contract. The contract was legal, being in fact expressly provided for by section 18 of the "Cities and Towns Act," 3 Edw. VII. ch. 38 (Que.). That statute empowers cities and towns to grant, under certain conditions, rights, franchise and privileges as may be agreed upon, such as running rights over streets, exemption from taxation and exclusive franchise. The Island Railway was therefore bound to get the consent of the municipality before acquiring these rights which were granted by the above contract. How can it be said that in such a case there can be "unjust" discrimination ?

Moreover, I do not understand how the Board can lawfully order the Island Company, true a federal railway, to obtain from the Montreal Street Railway, a provincial railway, an agreement to remove the said

discrimination. In my humble opinion railways like the Street Railway Company are entirely out of the jurisdiction of the Railway Board.

I would therefore allow the appeal of the said Island Railway Company with costs against the City of Montreal.

DAVIES J. (dissenting).—Appeal *re* "unjust discrimination" in traffic.

This appeal from the order of the Board of Railway Commissioners arises out of an application made by the City of Montreal to the Board for an order directing the Montreal Park and Island Railway to grant the same facilities in the way of services and operation, including the rates to be charged by it to the people residing in Mount Royal Ward of the city, that it grants to the adjoining Town of Notre-Dame de Grâce, which adjoins but is outside of the city limits.

After a lengthy hearing (the Montreal Street Railway, a provincial road, having been made a party to the proceedings) the Board made the desired order, and further directed that with respect to "through traffic" over the Park and Island Railway and the Montreal Street Railway the latter road should enter into the necessary agreements with the Park and Island Road to ensure the carrying out of the order.

Both railway companies have appealed to this court, the street railway on the ground of want of jurisdiction in the Board to deal with "through traffic" over its lines, and the Park and Island Road, on the ground that in determining whether or not the rates charged by them to and from the Town of Notre-Dame de Grâce and those charged to and from Mount Royal Ward unjustly discriminated against the latter, the

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Board refused to consider an agreement made between the railway and Notre-Dame de Grâce fixing for certain considerations in the agreement expressed rates to and from that town.

On the appeal relating to the jurisdiction of the Board to deal with the question of through rates(1) I have already given my opinion affirming the Board's jurisdiction, to which I need do no more than refer.

The question now for decision is a narrow though most important one.

The form in which it is put by the Board in granting leave to appeal on a matter of law is "whether it is right or proper for the Board in making the said order to *overlook* the contract bearing date the 7th November, 1907, and made between the Montreal Park and Island Railway Company and the Municipality of Notre-Dame de Grâce."

The contract in question was put in evidence at the hearing and is printed in the appeal case before us, but it is perfectly plain from the reasons given by Chief Commissioner Mabee that the Board refused to consider that contract or give weight to it in making their order. I interpret the question of law we are asked to answer to mean as if put in this form: Was the Board justified in refusing to consider that contract in determining the question of "unjust discrimination ?" And I would answer that it was. Mr. Geoffrion in his argument before us contended that it was a piece of evidence they were bound to consider and could not ignore, though, of course, he admitted that the weight they should give it was entirely for the Board and could not be considered by us.

In order to determine then whether or not the Board could ignore the agreement we must look at its terms

(1) 43 Can. S.C.R. 197.

and the conditions existing at the time it was entered into. The contention was that the right of the company to run its railway or tramway along the streets of any municipality was by the express terms of its charter made to depend upon the consent of the municipality being first obtained by by-law (see section 6 of 6 Edw. VII. ch. 129), and that in order to obtain such consent the company had been obliged to stipulate for the carriage of the passengers between Notre-Dame de Grâce and the City of Montreal at a certain rate. Such being the case it was argued that while there might be discrimination between that agreed rate and the rate charged to and from the adjoining ward of the city, such discrimination was not "unjust" and that it was "unjust discrimination" alone which the statute provided against.

I am not prepared to say that even if the company was obliged in order to obtain the privilege of running its railway along the streets of a municipality, to pay for the privilege, they could adopt such a mode of payment as would enable them to discriminate against an adjoining municipality in the matter of rates. They could pay for the privilege in cash or in any other way they agreed with the municipality, but they could not, in my opinion, adopt a mode of compensation for the concession of the right which they could afterwards invoke to excuse or justify, either directly or indirectly, discrimination. So far as the municipality discriminated against and those using the railway to and from it were concerned the discrimination was not the less unjust because the company chose to adopt this mode of payment for the privilege of laying down their rails in the streets and operating their road. The 315th section of the "Railway Act" which governs

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the case was enacted to secure so far as might be possible equality of rates under "substantially similar circumstances and conditions." The 4th sub-section is peremptory, "no toll shall be charged which unjustly discriminates between different localities." Does the fact that instead of paying a round sum in cash or otherwise to one locality for the privilege of running its road over certain streets the company for reasons of its own agrees instead to charge a low toll or rate to and from that locality, justify it in refusing to give to an adjoining locality, other conditions being equal, the same rate, and in this way create a discrimination which as between the two localities is unjust. If cash was paid for the privilege could they plead that in justification of the discrimination? If the cost of the building of the road to one locality exceeded that of the cost to another, could such excess in cost be advanced to justify the discrimination and prove it not to be unjust? Are these elements and facts which the Board have to inquire into and weigh when determining what is "unjust discrimination"? If they are there is no end to the discrimination which companies might create and not contravene the Act. If it was otherwise held and if a company could refuse to one locality rates which they had conceded to another under substantially similar circumstances and conditions and make the granting of the lower rates dependant upon the locality granting concessions to them it seems to me it would amount practically to a transfer to the company of the powers now vested in the Board of determining rates as between localities. I agree with the Chairman when he says "we cannot take into consideration matters of that sort in the administration of this law."

But apart from all that, I fail to find in the agreement put in evidence any such consideration paid by the company for the privilege of using the streets of Notre-Dame de Grâce. The agreement as to rates with the municipality of Notre-Dame de Grâce was not for the privilege simply or for that privilege at all. It was for an exclusive franchise for operating its road on the ground surface for passengers, freight and mails within the limits of the town for fifty years, and also for *exemption forever* from payment of municipal taxes, which the town might at any time have power to levy on the company, its movable or immovable property or franchises, with certain limited and specified exceptions.

It was this *exclusive* privilege for half a century, and this *exemption forever* from taxes, which the company was buying from the town which formed the consideration for the rate or toll of five cents agreed upon. It was not the mere purchase of the consent required by statute for the laying of the rails. That statutory permission to use the streets simply for the running of the tramway does not appear on the face of the agreement to be part of the consideration at all (see section 7 of the agreement). It was the *monopoly* and the *exemption* the company was buying, something the "Railway Act" certainly was not passed to encourage and neither of which could be held to be a "circumstance or condition" which the Board should consider in determining the question of "unjust discrimination."

The municipalities which would grant similar monopolies and exemptions would, I presume, get in return the lower rates. Those that would refuse would have to pay the higher and so the unjust

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discrimination clause would be practically defeated. The Railway Board brought into existence to prevent amongst other things unjust discrimination was asked practically, by giving weight to the agreement in this case, to sanction the practice.

I do not stop to inquire as to the legality of such an agreement by a municipality. It is said the agreement was subsequently validated by the local legislature. But if it was that would not justify it being invoked and given weight to by a Dominion Board acting under a Dominion Act in a proceeding to determine what was or was not "unjust discrimination" in rates or tolls upon railways as between different localities. Such validation if it took place goes no further than confirming an act of the municipality which certainly without express legislative authority would be *ultra vires* the municipality.

Under the 77th section of the Act the burden of proving that the lower toll was not unjust discrimination rests upon the company and is not, in my opinion, discharged in any degree by shewing that the lower rate was a consideration for a monopoly of railway privileges and an exemption from taxation purchased by the company from the locality to which they had granted such lower rate. It is, to my mind, impossible to conceive how the purchase of such a monopoly and exemption could operate to make that discrimination just which otherwise would be unjust. Neither the monopoly nor the exemption were necessary to the operation of the road. They were merely incidents the possession and enjoyment of which would make those operations more profitable for the company, but at the expense of the public, and the destruction of any possible competition.

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My brother Idington has called my attention to the case of *Holwell Iron Co., Ltd.* v. *Midland Railway Co.*(1). It was an appeal from a decision of the Railway and Canal Commissioners(2), and being a decision by the Court of Appeal, confirming that of the Commissioners, is of course entitled to the greatest respect. The facts of that case were such as to make the decision of little service to us on this appeal. There an agreement was attacked which had been entered into forty years previously between the Railway Company and the Stavely Hill Iron Co. The railway at that distant period wanted to acquire a strip of land running right through the property of the Stavely Co. on which a private line was laid and also other lines of the Stavely Co. It was obvious, as the Master of the Rolls said, that the claim for severance would be enormous unless provision was made for conveying coal and iron and other materials to and from the company's property on each side of the line. Accordingly the railway company, acting under special powers, purchased from the Stavely Co. the land and railways in question, and all locomotives, engines, etc., belonging to the railways and used for the purposes of the company's business. The consideration was £29,788 plus an agreement on the railway company's part to continue to efficiently work the whole of the traffic of or connected with the Stavely Company's business as it had previously been worked by the latter company. It was these terms which it was contended amounted to the railway company granting exceptional terms to the Stavely Company to the prejudice of the appellants. The question there determined involved the proper construction of section 27 of the

(1) 26 Times L.R. 110. (2) 25 Times L.R. 158.

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"Railway and Canal Traffic Act, 1888," providing against "undue preference" being given by a railway company to one *rival trader* as against another trader. The Court of Appeal held that the inequality of rates complained of might be explained and accounted for by a fair and honest bargain, the consideration for which had been duly conveyed to and enjoyed by the railway company. The Master of the Rolls was of the opinion that the only question of law open to the appellants was that the agreement was one which the Commissioners could not look at because it was illegal and void, and that when once this point of law was decided in the negative the Commissioners should give it consideration. He winds up his opinion, however, with the following pregnant words: "Nothing that I have said is intended to apply except to a case *where land is taken and arrangements are made for what is to be done on and with reference to the land so taken.*" As he had previously said: "It (the agreement) only provides for certain services to be rendered by the railway company on land the subject-matter of the agreement. It in no way resembles an agreement to purchase goods in return for future gratuitous services to be rendered by the purchaser to the vendor."

Looking at the statute the court was there construing and the special facts of the case on which the decision turned, I cannot say that it is an authority for one or other of the rival contentions in this appeal, though I think the principle underlying the decision to be gathered from the last few sentences of the opinion of the Master of the Rolls quoted by me above supports the ruling in the case before us of the Board of Commissioners.

For the reasons I have given I would dismiss this appeal with costs.

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IDINGTON J.—The decision in the Montreal Street Railway Company's appeal from the same order as made herein renders the question submitted rather of an academical character.

I should have preferred this decision postponed until the judgment passed upon by the court above in review of said decision if to be appealed.

We may assume that the Board has jurisdiction over this appellant, but until we know whether or not our decision in the other case is to stand the conflicting considerations bearing upon the question asked are somewhat perplexing.

At the threshold stands the question of the validity of the contract between the two companies.

We have not had it argued in all its bearings and much less so in the new light our decision presents it.

For the reasons I have given in the other case I think it is valid. Amongst other reasons I have given is that which I find in an Act cited confirming this company's contract, but the view I have presented as derived therefrom was not touched in argument, if I remember correctly.

Yet the Board held or assumed it invalid or to be ended in some way.

If ended how can appellant, having doubtless contracted with Notre-Dame de Grâce on the faith of that contract continuing, be dealt with justly without an examination of the contract now in question and all that upon which it is founded ?

Is the contract valid or is it invalid by reason of infringing the policy of the "Railway Act" ? Or is sub-section 7, of section 317, of the "Railway Act," which in terms does not include contracts like this, to be taken as the boundary of that policy and compre-

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hending everything of a contractual nature which is to be held prohibited and void ?

The appellant is surely entitled to know on what ground the Board proceeds and if it declares the contract a violation of the Act, and hence invalid and the franchise gone as an obvious result of illegality, the appellant may when directed to equalize its rates or fares prefer equalizing by levelling up rather than a general lowering.

Indeed, it may be a financial impossibility to do otherwise.

The power given by 8 Edw. VII. ch. 97 (of Quebec), validating the by-law of Notre-Dame de Grâce had, so far as that legislature could, authorized the contract with the appellant to grant the franchise.

The appellant had been given by 6 Edw. VII. ch. 129 (of the Dominion), the right to run upon the streets of a municipality, but only by and with the latter's consent.

Is there any implication therein that the terms contained in such consent are authorized? In solving such a question the well-known practice of engrafting on such consents specific contracts can hardly have been overlooked by Parliament.

I express no opinion. I merely suggest. Is there not an implication that Parliament has sanctioned what is now complained of?

Many other views occur to me but, in any way I can look, I see no escape from a consideration of the agreement in order that justice be done.

It could never have been the purpose of Parliament to remove all inequality by violating manifest principles of justice.

Certainly the powers of the Board given in some

cases to sanction inequality do not indicate that anything but justice, and not mere inequality, is to be the sole guide.

The case of *The Holwell Iron Co.* v. *Midland Railway Co.*(1), of which the report has come to hand since argument herein, suggests the way the Court of Appeal in England looked at an analogous case and statute, where the court was confined, as we are, to the mere issue of jurisdiction. With what inference of fact the Board may draw we have nothing to do.

I would allow the appeal without costs for the same reasons as in the other case(2) so far as applicable.

DUFF J.—I agree in the opinion stated by the Chief Justice.

ANGLIN J. (dissenting).—By an order of the Board signed by the Assistant Chief Commissioner of the Board of Railway Commissioners for Canada, No. 7975, leave was granted to the Montreal Park and Island Railway

to appeal to the Supreme Court of Canada from the order (No. 7405) dated the 4th of May, 1909, upon the following question, which is hereby declared to be in the opinion of the Board a question of law, viz.: whether it is right or proper for the Board in making the said order to overlook the contract bearing date the 7th day of November, 1907, and made between the said Montreal Park and Island Railway Co. and the Municipality of Notre-Dame de Grâce.

The "Railway Act" (section 56, sub-section 3) makes conclusive the opinion of the Board that any question, in regard to which leave to appeal is granted by it, is a question of law; and upon such leave being given the right of appeal is conferred.

The question, stated in the order granting leave above quoted, considered merely in itself, appears to

(1) 101 L.T. 695. (2) 43 Can. S.C.R. 197.

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be susceptible of more than one interpretation. It might refer to an entire exclusion of the contract as evidence, so that the Board would not be apprised of its nature and purport, or it might refer to a refusal by the Board, though fully apprised of the nature and terms of the contract, to treat its existence or the consideration upon which it is founded or the rights and obligations to which it gives rise as facts which should influence the Board in determining the issue of unjust discrimination with which they were dealing. I exclude accidental or inadvertent omission to take the contract into consideration as something which it cannot have been intended to submit, although the expression "to overlook" is more often used to cover such a case than any other. An entire exclusion of the contract — in the sense of a refusal to receive it in evidence, based upon its inadmissibility — would raise a question of law. But upon a determination by the Board, with the contract before it and full knowledge of its purport and effect and of the circumstances in which it was entered into, that no weight should be given to these facts or conditions in deciding whether there had or had not been unjust discrimination, a question of law cannot, I venture to think, arise, in view of the provisions of section 318 that

> the Board may determine as questions of fact whether or not traffic is or has been carried under substantially similar circumstances and conditions and whether there has in any case been unjust discrimination, etc.

Nevertheless, if the question upon which the Board intended to give leave to appeal be whether or not it has the right so to determine, the statute apparently precludes our treating it as a question of fact notwithstanding that, under section 318, an issue of unjust discrimination is to be disposed of as a question of fact.

Upon an examination of the record I find that the agreement referred to was admitted in evidence. I find that its terms were discussed and the report of the proceedings leaves no doubt in my mind that the Board was fully apprised of those terms and of the circumstances in which the contract was made. The remarks of the learned Chief Commissioner in disposing of the complaint of unjust discrimination make it abundantly clear to me that he was cognizant of all these matters. It is equally clear that he determined that proof of the existence of these facts and conditions would not aid the railway company in establishing to the satisfaction of the Board that the discrimination which had been shewn or admitted was not unjust within the meaning of the "Railway Act." It would, therefore, seem that the question upon which it was really intended to give leave to appeal was not whether the contract and the circumstances surrounding it should be excluded as inadmissible evidence, but was in reality whether, having before it the contract and all necessary and proper information and evidence in regard thereto, it was right and proper for the Board to decide that no weight or effect should be given to these facts and circumstances in the determination of the question whether the discrimination is or is not unjust in this particular case.

That the evidence in question was admissible, if for no other reason, to enable the Board properly to consider whether or not the special rates accorded by the appellants to passengers to and from Notre-Dame de Grâce are in the interests of the public, I entertain no doubt. If the giving of these special rates was not "necessary for the purpose of securing * * * the traffic in respect of which" they are given, so as to

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bring this case within section 319—it seems obvious that there may be cases covered by that section which closely resemble this case. It is, I think, impossible to say that in no circumstances and under no conditions can an agreement for special rates be in the public interest, or be something which may affect the justice or injustice of a discrimination. But the admissibility of such evidence is one matter; the weight to be attached to it, or whether it is entitled to any weight in any particular case are very different matters; and it is because of the disregard of the contract by the Board in determining not to give it any weight in this case, that, if at all, the appellants may have ground for complaint.

Again, the words, "whether it is *right* or proper, etc.," present an ambiguity and a difficulty. If they mean whether the Board had the right, in the sense of the power, to disregard these matters as not entitled to weight in determining the justice or injustice of the particular discrimination (which may perhaps be regarded as a question of law) in view of the provisions of section 318 that question must, I think, be answered affirmatively. But if, as was argued, it was intended that this court should be asked to say whether, having the power so to deal with this evidence, the Board properly exercised that power and properly determined that these matters were not entitled to weight in disposing of the issue before it, I am, with respect, unable to conceive how that can be regarded as a question of law. The weight and effect which should be given by the Board to any evidence adduced before it upon an issue of unjust discrimination must in view of the provisions of section 318 be always a question of fact. I think we should therefore assume that the Board did

not intend to give leave to appeal upon this possible aspect of the question stated in the order.

To summarize: If, notwithstanding that the contract was in fact admitted in evidence and its terms and the circumstances in which it was made were apparently placed fully before the Board and were considered by it for the purpose of determining whether any weight should in the circumstances of this case be attached to them, the question for our determination is whether this evidence was or was not admissible, and if I thought that what had taken place was really an exclusion of the evidence as irrelevant, I would be of opinion that this appeal should be allowed. But, having regard to the proceedings before the Board and to the remarks of the learned Chief Commatter. I therefore conclude that the real question submitted is whether or not, as a matter of law, the Board submitted is whether, as a matter of law, the Board in dealing with this evidence, which was before it, had the right "to overlook" or disregard it, in the sense of putting it out of consideration, because it was in their opinion, in the circumstances of this case, not entitled to weight; and to that question, in my opinion, having regard to section 318 of the Act, the answer must be that in so doing the Board was within its rights.

As already stated I cannot conceive that the Board intended to submit for our consideration the question — what weight, if any, should be given by it to such a contract as a circumstance affecting an issue of unjust discrimination; and as this is apparently not necessarily the construction of the question as stated, I think we should not assume that this was the question upon which the Board gave leave to appeal as a ques-

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tion of law. Neither do I understand that we are asked to determine, as an abstract question, whether or not, under any or all circumstances, the policy of the "Railway Act" requires that the Board should refuse to attach any weight to an agreement between a railway company and a municipality which provides for special rates, on the ground that its existence can in no circumstances have any bearing upon an issue of unjust discrimination. We are dealing with an appeal in a concrete case and I confine my expression of opinion entirely to that case.

For these reasons I would dismiss this appeal with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Campbell, Meredith, Macpherson, Hague & Holden.*

Solicitors for the respondent: *Ethier & Co.*

THE NIAGARA, ST. CATHARINES AND TORONTO RAILWAY CO. APPELLANTS;

AND

JAMES DAVY ..... RESPONDENT.

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*Feb. 15, 16.
*March 11.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railways—Carriers—International through traffic—Reduction of joint rate—Jurisdiction of Board of Railway Commissioners—Practice—Parties—Costs.

On a complaint in respect to a joint tariff, between the appellant company and The Michigan Central Railroad Company, under which a rate of three cents per hundred pounds was charged on pulpwood in car-lots for carriage from Thorold, in Ontario, to Suspension Bridge, in the State of New York, the Board of Railway Commissioners for Canada decided that the rate should be reduced and ordered the appellants to restore a joint rate which had previously existed of two cents per hundred pounds for carriage of such goods between the points mentioned. The Michigan Central Railroad Company, over whose railway the goods had to be carried from the point where the appellants' railway made connection with it at the international boundary to the foreign destination, was not made a party to the proceedings before the Board. On appeal by leave of a judge to the Supreme Court of Canada,

Held, per Fitzpatrick C.J. and Idington and Duff JJ., that the Board had no jurisdiction to make the order.

Per Girouard, Davies and Anglin JJ.—As the Michigan Central Railroad Company was not a party to the proceedings, it was not competent for the Board to make the order.

The appeal was allowed without costs.

APPEAL, by leave of the Chief Justice of the Supreme Court of Canada, from that portion of an order

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

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of the Board of Railway Commissioners for Canada, dated 2nd December, 1909(1), which directed that a joint rate of two cents per hundred pounds of wood-pulp, in carloads, from Thorold, in Ontario, to Suspension Bridge, in the State of New York (which had previously existed and been superseded), via the appellants' railway and the Michigan Central Railroad, should be restored.

The appellants are a railway company declared by the Parliament of Canada to be a work for the general advantage of Canada, and have power to construct and operate certain lines of railway in Canada, but not outside of the Dominion. The respondent is a manufacturer and shipper of wood-pulp carrying on business at Thorold, in Ontario, and the traffic in question was the carriage of wood-pulp in carloads from Thorold to Suspension Bridge, in the State of New York, one of the United States of America.

Such freight is carried by the appellants from Thorold over a line owned and operated by them under their charter powers to Niagara Falls, in Ontario, where their tracks join the tracks of the Michigan Central Railroad Company. Between Niagara Falls, in Ontario, and Suspension Bridge, in New York, the appellant company does not and is not authorized to operate any line of railway nor have they any other line of railway by which they can or do operate to Suspension Bridge, New York. Suspension Bridge is a station a short distance east of the Niagara River in the State of New York, on a line of railway operated by the Michigan Central Railroad Company, a company incorporated outside of the Dominion of Canada, but having the right to operate a railway in certain

(1) 9 Can. Rway. Cas. 493.

parts of Canada, as provided for by the statute 4 Edw. VII. ch. 55, and the freight in question, from Niagara Falls, Ont. (where the appellants' tracks connect with tracks operated by the Michigan Central Railroad Company), is carried by the Michigan Central Railroad Company over lines operated by the latter company to Suspension Bridge in the State of New York.

For some time prior and up to 1st February, 1908, there was in effect a tariff providing for a through rate of two cents per hundred pounds on such traffic from Thorold to Suspension Bridge, such traffic having been made effective by concurrence therein by the appellants and the Michigan Central Railroad Company. On 1st February, 1908, by a tariff concurred in by these companies, the rate was changed to three cents per hundred pounds, but a reduction was made again to two cents per hundred pounds from 25th April, 1908, to 14th November, 1908. On 15th November, 1908, a tariff came into effect by concurrence of the companies fixing the rate on such traffic at three cents per hundred pounds, and cancelling the former tariff which provided a rate of two cents per hundred pounds. Shortly after the last mentioned tariff came into effect the respondent applied to the Board of Railway Commissioners for Canada for an order for a refund of one cent per hundred pounds on freight shipped under the three-cent-rate and for an order directing the appellants to restore the rate of two cents per hundred pounds on such freight. The Michigan Central Railroad Company was not made a party in the proceedings.

The order made by the Board was as follows:—

"It is ordered that that part of the application directing the Niagara, St. Catharines and Toronto

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Railway Company to refund to the applicant the said sum of $219.83, being the additional one cent per 100 pounds paid on forty-two carloads shipped from November 15th, 1908, when the three-cent-rate went permanently into effect, to September 29th, 1909, the date of this application, be, and it is hereby, dismissed.

"And it is further ordered that the joint-rate of three cents per 100 pounds at present in force on wood-pulp in carloads, from Thorold, Ontario., to Suspension Bridge, New York, via the Niagara, St. Catharines and Toronto Railway and the Michigan Central Railroad, be, and it is hereby, disallowed, and the Niagara, St. Catharines and Toronto Railway Company is hereby required, by the 15th day of January, 1910, to restore the joint-rate of two cents per 100 pounds which was in effect on the said traffic prior to February 1st, 1908, and November 15th, 1908."

Chrysler K.C. and *George F. Macdonell* for the appellants.

Strachan Johnston for the respondent.

THE CHIEF JUSTICE.—The appeal should be allowed. The Railway Commissioners are without jurisdiction to make the order complained of.

GIROUARD J.—The appellants complain that the Railway Board had no jurisdiction to make an order directing the appellants to restore a joint-rate of two cents per hundred pounds on wood-pulp in carloads from Thorold, in the Province of Ontario, to Suspension Bridge, in the State of New York, via The Niagara, St. Catharines and Toronto Railway and the Michigan Central Railroad, an American railway oper-

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ating in this country. The Michigan Central Railroad is not in the case and I cannot see how the said order could have been made. When the proper parties are before us it will be time to decide the question for our decision, but, in my humble opinion, not before that time.

The appeal should be allowed.

DAVIES J.—The order of the Board of Railway Commissioners in this matter, so far as this appeal is concerned, directed

> that the joint-rate of three cents per hundred pounds at present in force on wood-pulp in carloads from Thorold, Ontario, to Suspension Bridge, New York, via the Niagara, St. Catharines and Toronto Railway and the Michigan Central Railroad be disallowed,

and that the former railway company (appellants), by a certain date, should restore the old rate of two cents.

The Michigan Central Railroad Company, a foreign corporation, rates over whose road the Board's order thus assumed and exercised jurisdiction, were not cited before the Board or in any way made parties to the proceedings.

Very interesting and important questions arising out of the proper construction of sections 335 and 336 of "The Railway Act," purporting to confer powers on the Board for the regulation of international joint-traffic, were discussed at length and ably by the counsel for the parties to the appeal before us.

I cannot understand how it was that the Michigan Central Railroad Company, whose interests were so directly involved in the order under review, were not made parties to the proceedings.

It is clear to my mind that the omission to make them parties is fatal to the validity of the order as

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made and I, therefore, feel myself compelled to concur in the allowance of the appeal *on that ground* alone. Under the circumstances, I do not think that costs should be allowed.

IDINGTON J.—This is an appeal from an order of the Board of Railway Commissioners for Canada, directing, amongst other things, the appellants to restore a joint-rate for carriage of freight from Thorold, in Ontario, to Suspension Bridge, in the State of New York, via the railway of the appellants and the Michigan Central Railroad.

The appeal is made on the ground that, inasmuch as part of the latter road needed to effect the service in question runs through a part of New York State, and the company which owns or operates it is not a Canadian creation and only subject to the jurisdiction of Parliament in respect of that part of its road within Canada, the Board had not the power to make the order.

I have no doubt that the road in the United States is absolutely beyond the jurisdiction of the Board and that the company operating it is, in respect of the part within the United States, also as completely beyond the jurisdiction of the Board.

I am also clear that this is not one of those cases in which, by specified indirect means, the sanction of a foreign company was intended by the Act to be indirectly coerced into submission to the order of the Board.

It is equally clear that the part of that company's road in Canada and its operation therein are subject to the Board as other roads over which it is given jurisdiction.

It has been rightly conceded by submitting to the

part of the order disallowing the joint-tariff that had been for a time in force that the Board had power to so disallow that joint-tariff.

If the order had expressly on its face made its enforcement of the part objected to conditional upon the other company, which is not a party to the proceedings, filing upon request or notice a joint-tariff or a tariff of its own, that would have clearly enabled the appellants to carry freight on the terms indicated could such a conditional direction have been said to be beyond the jurisdiction of the Board ? Is that form of conditional direction not implied in the order as it stands ? We should bear the history of the tariff in mind and should not run away too readily with the idea that the whole case lies in the bald statement that the foreign road is supposed against its will to do something the Board has not power to compel.

No such power is now pretended. And it is conceded on both sides that this is not a case where the old order of things revives *ipso facto* upon the new being abolished.

However, having fully considered, as well as many others, these suggestions which I have stated in order that it cannot be assumed they were overlooked, I fear the express terms of the order are too explicit to admit clearly of the implications which I have suggested as possible. The order probably took the form it appears in through inadvertence.

It does not appear whether anything was done to suggest this to the Board.

I think we should not encourage mere captious objections which might be overcome by an application to the Board to vary what may only have been, as I suggest, inadvertence.

I would, therefore, allow the appeal without costs.

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DUFF J.—I agree that the appeal should be allowed for the reasons given by Mr. Justice Idington.

ANGLIN J.—The Niagara, St. Catharines and Toronto Railway Company, a corporation subject to the legislative authority of the Parliament of Canada, operates a line of railway between the Town of Thorold, Ont., and the Town of Niagara Falls, Ont. At the latter town it connects with the Michigan Central Railroad Company's system. This company operates a line of railway a portion of which lies between Niagara Falls, Ont., and the Town of Suspension Bridge, in the State of New York.

Prior to the first of February, 1908, there was in force a joint-tariff under which these two railways carried products of the respondent from Thorold, Ont., to Suspension Bridge, N.Y., at the rate of 2 cents per 100 pounds. On February 1st, 1908, the two railways raised this rate to 3 cents; they again reduced it to 2 cents on the 25th April, 1908; but on the 15th November, 1908, they again advanced it to 3 cents. The application before the Railway Board was for the disallowance of the 3 cent rate and the restoration of the 2 cent rate; and also for an order that the appellant railway company should refund to the respondent the sum of $219.83, the extra amount paid by him between November 15th, 1908, and September 29th, 1909, by reason of the increase in rates. He was refused the relief of a refund because in the opinion of the Board the 3 cent rate was legally in force from November 15th, 1908.

The Board however ordered

"that the joint-rate of three cents per 100 pounds at present in force on wood-pulp in carloads, from Thorold, Ontario, to Suspension Bridge, New York, via the Niagara, St. Catharines and Toronto Railway and

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the Michigan Central Railroad, be, and it is hereby, disallowed, and the Niagara, St. Catharines and Toronto Railway Company is hereby required, by the 15th day of January, 1910, to restore the joint-rate of two cents per 100 pounds, which was in effect on the said traffic prior to February 1st, 1908, and November 15th, 1908.

From the first part of this order which disallows the 3 cent tariff there is no appeal. By leave of the Chief Justice of this court an appeal has been permitted in respect of that portion of the order which requires the defendants to restore the joint-rate of 2 cents per 100 pounds in force prior to November 15th, 1908.

The Michigan Central Railroad Company were not parties to the application before the Railway Board and are not before this court. The appellants rely upon this fact as an objection to the order in appeal; and they also maintain that, had the Michigan Central Railroad Company been before the Railway Board and had the order been made against both companies, it would nevertheless be beyond the jurisdiction conferred on the Board by the "Dominion Railway Act," inasmuch as the Board thereby assumed to prescribe a tariff or rate for traffic carried beyond the international boundary to a point in a foreign country.

If the order exceeds the jurisdiction of the Board because the Michigan Central Railroad Company was not before it, it is unnecessary and it would probably be unwise to pass upon the larger question raised by the appellants.

The order requires the respondent company alone "to restore" the *joint* rate or *joint* tariff existing before the 15th November, 1908. This tariff had ceased to be effective by reason of its having been legally superseded by a later joint-tariff which the Board itself has found to have been legal and effective. (See

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section 328(4).) The order for restoration, therefore is, in reality, an order requiring the company to make and file a new joint-tariff. This, in my opinion, it cannot do without the concurrence of the Michigan Central Railroad Company; and there is, and upon the present record there could be, no order of the Board requiring the Michigan Central Railroad Company to concur in the making of such a tariff. Section 333, applicable to Canadian companies, indicates that where a joint-tariff is to be made by the companies themselves both must agree and the only action which the initiating company is enabled to take without the concurrence of the other company is the filing of the joint-tariff after it has been so agreed upon. Although there is no express provision in section 335 regarding agreement of the companies, it is obvious from the very nature of a joint-tariff that there must be such an agreement if the tariff is to be the act of the companies and not of the Railway Board. I am therefore of opinion that the order as drawn requires the appellant company to perform what may be an impossibility and it is for that reason, in my opinion, in its present form beyond the jurisdiction of the Board.

An order might probably have been drawn prohibiting the appellants from taking the traffic in question for continuous carriage from Thorold, Ont., to Suspension Bridge, N.Y., at a rate exceeding that which the Board thought proper, which would not have been open to this objection. If the effect of disallowance of a joint-international-tariff is — under the operation of the "filing" sections made applicable by section 338 — that, until a new tariff is filed or a new toll prescribed, the railways affected cannot charge any tolls for the traffic covered by the disallowed tariff

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— *i.e.*, in the case of joint-tariff traffic by the continuous route, I see no reason why such an order as that indicated might not be made. But such an order would not accomplish what the present order, if valid, would have effected.

Mr. Johnston stated that the Board, in his opinion, did not intend to make an order having any greater effect than such a prohibitive order. But it is, I think, not possible to place upon the order actually before us such a limited construction.

I am not to be understood as expressing any view upon the powers of the Board to make such an order as that in appeal were the Michigan Central Railroad Company before it as well as the present appellants.

Because it purports to impose upon the appellant company unconditionally an obligation which it can only fulfil with the concurrence of another railway company, which it may not be able to obtain, I think the present order transcends the jurisdiction of the Board and that for this reason this appeal should be allowed.

In the peculiar circumstances of this case there should, in my opinion, be no costs of this appeal.

Appeal allowed without costs.

Solicitor for the appellants: *George F. Macdonell.*

Solicitors for the respondent: *Thomson, Tilley & Johnston.*

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*Feb. 17, 18.
*March 11.

SAINT MARY'S YOUNG MEN'S TOTAL ABSTINENCE AND BENEVOLENT SOCIETY (PLAINTIFFS) ..... APPELLANTS;

AND

EDWARD F. ALBEE AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Lease—Construction of covenant—Taxes—Partial exemption.

A society owned a building worth about $20,000 which, by the statute law of the province, was exempt from municipal taxation so long as it was used exclusively for the purposes of the society. A portion of the building having been used at intervals for other purposes, it was assessed at a valuation of $1,000 and the society paid the taxes thereon for some years. Such portion was eventually leased for a term of years to be used for other purposes than those of the society, and the valuation for assessment was increased to $10,000. The lease contained this covenant:—

"The said lessees * * * shall and will well and truly pay or cause to be paid any and all license fees, taxes or other rates or assessments which may be payable to the City of Halifax, or chargeable against the said premises by reason of the manner in which the same are used or occupied by the lessees hereafter, or which are chargeable or levied against any property belonging to the said lessees (the said lessor, however, hereby agreeing to continue to pay as heretofore all the regular and ordinary taxes, water rates and assessments levied upon or with respect to said premises, and the personal property thereon belonging to the lessor)."

The society was obliged to pay the taxes on such increased valuation and brought action to recover the amount so paid from the lessees.

Held, Fitzpatrick C.J. and Anglin J. dissenting, that the taxes so paid were "regular and ordinary taxes" which the lessors had agreed to pay as theretofore and the lessees were not liable therefor on their covenant.

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

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APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment of the trial judge dismissing the plaintiffs' action.

The material facts are sufficiently stated in the above head-note.

O'Connor K.C. for the appellants.

Newcombe K.C. for the respondents.

THE CHIEF JUSTICE (dissenting).—I am of opinion that the appeal should be allowed for the reasons given by Mr. Justice Anglin.

DAVIES J.—For the reasons given by Chief Justice Townshend when delivering the majority judgment of the Supreme Court of Nova Scotia, I am of the opinion that this appeal should be dismissed with costs.

I think the trial judge, Longley J., neatly and fairly stated the true meaning of the covenant in question in the following words:

> It means that the lessor is to pay the regular city assessment on the property demised and that the defendants are to meet any special impositions which the city shall by law impose upon them on account of their business. For instance, if the city should impose a license fee upon public shows then the defendants must pay it. If by special legislation they should obtain the right to levy a special tax or assessment upon all moving picture shows then defendants must bear all of these even if they should be made a lien on the building in which such shows were carried on.

IDINGTON J.—The City of Halifax has to assess property according to its value but must exempt that of such benevolent societies as the appellant when exclusively used by the society.

The charter, by section 505, enables the city council to pass ordinances relative to entertainments and

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licenses for or in respect of same. This, coupled with other sections, is wide enough to enable a fee tax or rate to be imposed in respect of such entertainments either per period of time of occupancy, or number of exhibitions.

Licenses for such purposes, it was admitted in argument, must be taken out not by the lessees, but by the owner of the building in which the entertainments are held and hence there are secured thereby to the city the payment of the license fees and obedience to all city ordinances regarding the manner of carrying on such business.

The following covenants were inserted in the three year lease in question to carry on theatrical exhibitions—

> The lessees will well and truly pay, or cause to be paid, any and all license fees, taxes or other rates of assessment which may be payable to the City of Halifax, or chargeable against the said premises by reason of the manner in which the same are used or occupied by the lessees hereafter, or which are chargeable or levied against any property belonging to the said lessees (the said lessor, however, hereby agreeing to continue to pay as heretofore all the regular and ordinary taxes, water-rates and assessments levied upon or with respect to said premises, and the personal property thereon belonging to the lessor).

Much confusion has been created in the interpretation of these covenants by entirely overlooking the power of the city to impose such fees or other like taxes, by the means above referred to.

The first covenant above quoted, obviously referred to this power, and its past exercise as well as its future possible exercise and extension.

The very words used, "license fees," etc., "chargeable," etc., "by reason of the manner in which the same are used" seem attributable to the possibilities under the powers I refer to for imposing license fees which are certainly a form of tax.

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Inasmuch as the appellant by virtue of the city ordinance had to apply for and get the license, yet according to the bargain was not to bear the tax therefor, it was necessary for it to protect itself in regard to repayment of that or any like imposition, and did so by this indemnifying covenant.

At the same time the words might be wide enough to cover other rates, and the lessors having agreed to pay the ordinary taxes it was necessary to see that the indemnity did not cover too much, and hence the second part binding appellants to pay the ordinary rates.

A mere minute verbal analysis such as put forward in argument without having due regard to the business the parties had in hand is, I submit, of little value.

The lessees agreed to pay all taxes incidental to their business and the lessors all incidental to their ownership.

It was an incident of such ownership that, unless exclusively occupied or as interpreted so far as not exclusively occupied, their property was subject to taxes. This interpretation by the assessing power of this exemption may or may not have been the correct one.

It certainly was the equitable one. And I have no doubt it was when so interpreted properly applied.

The hall that only brought in rental for a dozen nights in a year was in truth not worth more than a thousand dollars.

The hall that brought in ten times as much per year was worth ten thousand dollars.

Such rates as a varying assessment fixed from time to time were the ordinary taxes the lessor had to pay, and the word "heretofore," if reasonably applied,

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means no more than this; as we have paid in the past according to current assessable value we will pay in the future.

It may not be quite accurate according to all the rules of law and logic for people so to think and so to speak.

It accurately represents, I am convinced, the sound common sense of the assessor and Court of Revision of Halifax.

We have not to decide the question of law for them, but we have to try and understand what they were about, and what being their method of doing things must have been in the minds of the contracting parties hereto who would in adjusting their business accept and act upon the well-known understanding of these authorities relative to the law, and the measure they were likely to apply in assessing in the ordinary way this piece of property.

This was not the only property of the kind in Halifax concerning the use of which the like questions arose and had to be solved, for the Masonic Hall and Oddfellows' Hall the assessor says were dealt with by a similar method.

I have no doubt that what the parties intended has been carried out by the judgments of the courts below.

And if I had to treat the matter in the way of trying to give to each word its literal meaning and give effect to every word the result would be the same.

It would be impossible in any way one can try to give such an interpretation or apply such a construction not to leave a doubt of whether or not the exact shade of meaning of each word had been properly assigned.

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The strain put upon one or two words by the appellants' method destroys the proper meaning of others.

But of one thing I feel sure and that is, that if taxes upon an assessment of only one thousand dollars a year had been deliberately agreed upon it should have been inserted, and, I think, would have been inserted.

Those dealing with the business of finding a clear mistake made in this regard should, on its discovery, have taken steps to rectify the mistake rather than their method of settling it.

I think the appeal should be dismissed with costs.

DUFF J.—I concur in the opinion of Mr. Justice Davies.

ANGLIN J. (dissenting).—The plaintiffs claim indemnity from the defendants in respect of certain taxes levied by the City of Halifax on a building owned by the plaintiffs and leased to the defendants. The alleged right to indemnity arises upon the following covenant contained in the lease:

> The said lessees for themselves, etc., covenant, promise and agree to and with the said lessor, etc., that the said lessees, etc., shall and will well and truly pay or cause to be paid to the said lessor, its successors and assigns * * * any and all license fees, taxes or other rights or assessments which may be payable to the City of Halifax or chargeable against the said premises by reason of the manner in which the same are used or occupied by the lessees hereafter, or which are chargeable or levied against any property belonging to the said lessees (the said lessor, however, hereby agreeing to continue to pay as heretofore all the regular and ordinary taxes, water-rates and assessments levied upon or with respect to said premises, and the personal property thereon belonging to the lessor.

In the special Act incorporating the plaintiff society it is provided that

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all real and personal property exclusively used for the purposes of the society shall be exempted from taxation.

It has been established by evidence admitted at the trial that prior to the making of the lease to the defendants the plaintiffs were assessed upon the sum of $1,000 in respect of the building in question, the value of which is said to be about $20,000. The reason for this partial taxation of the property, notwithstanding the exemption provision, was that the society occasionally let a part of their building for other purposes and the assessor in respect of such user deemed the property liable to assessment. Upon appeal from a larger assessment made by the assessor, the amount for which the property should be assessed, having regard to such occasional user by other persons, was fixed at the sum of $1,000. After the lease in question had been made the assessment of the building was increased from $1,000 to $10,000 and the assessor in giving evidence says that this increase was because part of the building

was let out for a large rent and occupied permanently and continuously.

Whether or not the fact that a portion of the building was used for other purposes entirely disentitled the plaintiffs to any exemption from taxation under their charter is a question not before us. The only question for determination upon this appeal is whether in respect of the taxes on the increased assessment, amounting to $9,000, the plaintiffs are or are not entitled to indemnity from the defendants, and that question must be determined upon a proper construction of the covenant above quoted.

Much attention has been given, and properly, to the meaning and effect of the words

by reason of the manner in which the same are used or occupied by the lessees hereafter.

If these words affect and qualify the entire covenant of the lessees it is, I think, obvious that they undertook by that covenant to pay only taxes imposed by reason of something peculiar in the manner of their use or occupation of the premises. It is, therefore, essential to determine whether this adverbial phrase modifies merely the verb "may be chargeable," or modifies also the earlier verb, "may be payable."

The two clauses in the covenant descriptive of the taxes of the lessors which the lessees agree to pay are separated by the disjunctive "or." Having regard to this fact and to the grammatical rule—*ad proximum antecedens fiat relatio*—the adverbial phrase would *primâ facie* qualify only the verb, "may be chargeable." Otherwise there would appear to be no reason for the use of "or" and the clauses would be read as if "and" rather than "or" had been used, which should not be done without some cogent reason. *Mersey Docks and Harbour Board* v. *Henderson Brothers* (1), at p. 603.

If, however, the ordinary grammatical rule of construction to which I have referred be disregarded, it certainly cannot be said that the adverbial phrase "by reason of, etc.," unquestionably qualifies both the members of the covenant which precede it; at most it would be doubtful whether it should be deemed to apply to and modify one or both of the preceding clauses.

If it be taken to modify both clauses and if, as I have indicated, the result of such an application of the adverbial phrase would be that the lessees covenanted to pay only special taxes levied by reason of

(1) 13 App. Cas. 595.

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something peculiar to the manner of their use or occupation of the premises, it is clear that they would thereby assume no liability for "regular or ordinary taxes." Upon that construction of the covenant the excepting parenthetical clause at the end would have no application. That the draughtsman of the lease thought that he had by the earlier part of the covenant imposed upon the lessees some obligation in respect of "regular and ordinary taxes" seems clear; otherwise he would not have deemed it necessary to make the exception contained in the concluding parenthetical clause. The suggestion that this exception was inserted solely *ex majori cautelâ* and is mere surplusage does not commend itself to my judgment as a sufficient explanation of its presence in the covenant. Only in the absence of any other satisfactory explanation of its *raison d'être* would I deem this explanation sufficient. *Ditcher* v. *Denison*(1), at p. 337. Craies' Statute Law, 101 *et seq.*

If, on the other hand, the adverbial phrase,

> by reason of the manner in which the same are used or occupied by the lessees,

relates only to the particular clause in which it is found and modifies only the verb, "may be chargeable," and not the earlier verb, "may be payable," it would follow that by the earlier member of the lessees' covenant they undertook to pay taxes generally, *i.e.*, regular and ordinary taxes, and that by the second member of their covenant, they undertook also to pay any taxes specially levied by reason of their peculiar user or occupation of the premises. So read the lessees' covenant would impose upon them an obligation which might require that the lessors'

(1) 11 Moore P.C. 324.

liability as to some portion of the regular and ordinary taxes should be saved by express exception, if that were the intention of the parties, and the presence of the parenthetical proviso or exception is thus satisfactorily accounted for. That a proviso may be used as a guide in the selection of one or other of two possible constructions of the covenant in which it occurs is well established. *West Derby Union* v. *Metropolitan Life Assurance Society*(1), at pp. 653, 655.

It is, however, objected that the exception in favour of the lessees is of *all* regular and ordinary taxes and that it is therefore inconsistent with and repugnant to a construction of the lessees' covenant which would impose upon them any obligation of indemnity in respect of regular and ordinary taxes. This argument overlooks entirely the important words in the exception, "as heretofore." The meaning of these words requires to be elucidated by evidence of the circumstances antecedent to the making of the lease, because the exception is of regular and ordinary taxes "as heretofore" paid. For this purpose the evidence to which I have above referred was, I think, clearly admissible, and that evidence shews that before the lease, *i.e.*, "heretofore," the lessors were paying in respect of regular and ordinary taxes, an amount levied on an assessment of $1,000. It is, in my opinion, reasonably clear, reading the whole covenant in the light of the evidence of the circumstances in which it was made, that what the lessors intended to continue to pay in the future, was a portion of the regular and ordinary taxes levied on an assessment equivalent to that upon which they had theretofore paid, and

(1) [1897] A.C. 647.

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that the purpose of the exception was to take out of the general obligation assumed by the lessees in respect of taxes so much of the future regular and ordinary taxes as should represent what had been theretofore paid on account of such taxes by the lessors.

It is a fundamental canon of construction that effect must, if possible, be given to every clause and to every word of an instrument. By no other construction except that which I have indicated can due effect, in my opinion, be given to the parenthetical exception and to the words "as heretofore" found in that exception. If the covenant of the lessees imposes no liability for regular and ordinary taxes upon them the exception serves no purpose; if the exception itself is construed as including all regular and ordinary taxes the words "as heretofore" are given no meaning or effect.

For these reasons I am of opinion that the construction placed on the covenant in question by Mr. Justice Meagher and Mr. Justice Laurence in the Supreme Court of Nova Scotia was correct and that this appeal should be allowed with costs and judgment entered in the court below for the appellants also with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *T. J. N. Meagher.*
Solicitor for the respondents: *W. H. Fulton.*

THE UNION BANK OF CANADA (PLAINTIFFS) ..... APPELLANTS;

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*March 3, 4.
*March 11.

AND

JANE E. CLARK AND ALEXANDER GRAY FARRELL, EXECUTORS OF THE LAST WILL OF JAMES MAITLAND CLARK (DEFENDANTS) .... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Suretyship—Simple contract—Discharge of one surety under seal—Confirmation of original guarantee—Death of surety—Powers of executors—Continuance of guarantee.

C. and others, by writing not under seal, agreed to guarantee payment of advances by a bank to a company. Later, by writing under seal, all the sureties but one consented to discharge the latter from liability under the guarantee, the document providing that the parties did in every respect "ratify and confirm the said guarantee and consent to be bound thereby as if the said Ogle Carss had never been a party thereto."

Held, that the last mentioned instrument did not convert the original guarantee into a specialty and C. having died an action thereon by the bank against his executors instituted more than six years after his death was barred by the Statute of Limitations.

Held, per Davies, Idington and Duff JJ., that the executors had no power to continue the guarantee terminated by C.'s death by consenting to an extension of time for payment of the amount then due notwithstanding the provision in the guarantee that it was to be continuing and that the doctrines of law and equity in favour of a surety should not apply thereto.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial by which the action of the plaintiff bank was dismissed.

The material facts are stated in the above headnote.

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

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Raney K.C. and *J. A. Hutcheson K.C.* for the appellants.

Watson K.C. and *Lavell* for the respondents.

GIROUARD J.—I concur in the opinion of Mr. Justice Anglin.

DAVIES J.—The question in this appeal is as to the liability of the estate of the late James Clark for the sum of $28,450 due to the bank by the Perrin Plow Co., Ltd., at the time of Clark's death and for which he was liable as guarantor.

The guarantee was given by Clark and four other shareholders of a company called the Perrin Plow Co., Ltd., to the bank, in the year 1898. It is very loosely and carelessly drawn and it is exceedingly difficult to determine just what it means. But it was a continuing guarantee for advances made to the Plow Co. by the bank either by discounting negotiable securities or by overdrafts. It contained this sentence:

> This is a continuing guarantee intended to cover any number of transactions, and agree (sic) 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.

There was nothing to indicate that the guarantors were to be or become primary debtors, and the only meaning I can put upon the above sentence read in conjunction with the other parts of the guarantee is that in dealing with or compounding with the parties to the negotiable securities they discounted for the Plow Co. they could "deal or compound" and take from and give up to them again security of any kind in their discretion, and that in so doing or acting the law or equity in favour of a surety should not apply

to discharge the surety. But I cannot construe the sentence to have any such wide meaning as the appellant contends for, namely, that it absolutely disclaimed the application of all rules of law or equity to the dealings between the bank and its guarantors and gave the bank plenary powers of extending the times for payment without prejudice to its rights as against the guarantors. Subsequently to the giving of this guarantee one of the guarantors desired to be released, and a document was drawn up and signed by the other guarantors "ratifying and consenting" to his discharge and

confirming the said original guarantee and consenting to be bound thereto as if the said Ogle Carss had never been a party thereto.

The obvious and only intent and purpose of this document which had seals attached was to discharge one of the original guarantors from and retain the liability of the other guarantors upon the original guarantee. It was not to create any new or extended or varied guarantee and whatever object there may have been in attaching seals to it I cannot assent to the proposition that its effect was to transform the original guarantee into a specialty or otherwise to vary or alter it further than discharging Carss might have such effect.

In January, 1900, Clark died having made a will appointing the respondents executors and trustees. On the 28th February, 1900, an agreement was entered into under seal between the executors of the first part, Brodie, Lavell and Patterson, the surviving guarantors of the second part, and the Union Bank of the third part, by which the executors agreed *inter alia* to:

consent to renewal from time to time as may be desired of all notes of the Perrin Plow Company, Limited, in existence at the time of the death of the said James Maitland Clark, deceased, given under the

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aforesaid guarantee and to an extension of time for the payment of same and the interest thereon, and *to the carrying on of the same according to the requirements of the business of the said company* until six months after notice in writing withdrawing consent to further extension is given to said bank by said executors.

The bank evidently assuming and, from the correspondence put in evidence, construing this agreement as a continuing guarantee, not only for advances made to the Perrin Plow Company, Limited, in Clark's lifetime, but for further advances to be made after his death, until his executors called a halt by "giving six months' notice withdrawing consent to further extension," went on advancing to the Plow Company from $28,500, which amount that company owed the bank at Clark's death, up to $298,334 in March, 1907, when it was wound up.

The question on this agreement for our purposes is whether or not the executors had any power whatever to bind the estate in the way they attempted to do by agreeing to the continuance of the business of the Perrin Plow Company and the continuance of Clark's guarantee and liability for the notes in existence at his death guaranteed by him, and to an indefinite extension of time for payment of such notes until they should by six months' notice put an end to such extension.

They had no power as executors to bind the estate by agreeing to "the carrying on of the same," that is of the negotiable securities guaranteed by the testator, *"according to the requirements of the business of the company."* Such a delegation of powers to third parties to extend the liabilities of the estate was of course illegal. It practically placed the estate at the mercy of the Perrin Plow Company. It attempted not only to continue and extend the liability of the estate practically for an indefinite time, but made that

continuance and extension dependent "upon the *requirements of the business of the company.*" It was not an attempted exercise of the reasonable but limited powers executors may possess of extending time for payment of debts due the estate. It was a delegation of their judgment as executors as to the propriety of giving an extension of time for payment of a debt guaranteed by the testator to the primary debtor to be exercised by such primary debtor as the requirements of its business called for. The liability of the estate as guarantor for the payment of the $28,500 was attempted to be pledged as a credit asset of the Plow Company to the bank in the interest and for the benefit of that Plow Company, and to be used "according to the requirements of that company." It was not the interests of the estate but of the primary debtor and its creditor the bank that were considered.

There was no power of any kind in the will to enable the executors to carry on Clark's business or to enter into any arrangement for the continuance of his guarantee and the extreme stretch of the reasonable common law powers of executors entitling them where the business of the deceased is a valuable asset to carry it on for such reasonable time as may be necessary for them to sell it as a "going concern," per Lord Herschell *Dowse* v. *Gorton*(1), could not be invoked to support any such extraordinary and unreasonable agreement as that made in this case. Williams on Executors (10 ed.), pp. 1430-1433, 1554; *Farhall* v. *Farhall*(2); *Re Evans*(3).

The executors' duty was to wind up the testator's business and estate, not to enter into an agreement to

(1) [1891] A.C. 190, at p. 199. (2) 7 Ch. App. 123.
(3) 34 Ch. D. 597.

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continue a business in which the testator only had a collateral interest or to continue indefinitely their testator's guarantee of a debt owed by a limited business company to a bank. Such an agreement was quite beyond their powers and, as against the estate, void. Its disastrous consequences are of course apparent now, but they might well have been anticipated. The bank, strangely enough, without appearing to have taken proper advice went on enlarging enormously their advances to the Plow Company, and treated as an asset of that company under the executors' agreement the testator's guarantee for at any rate the amount of the company's indebtedness at his death, however many extensions were given in the interests of the primary debtor for its payment.

To hold valid and binding on the estate such an agreement as that by which the executors of the estate of a deceased party could put the estate into the melting pot of a precarious and speculative business would be indeed to add a new terror to death.

My conclusions are that the judgment of the Court of Appeal is right; that the original guarantee was not altered in form or character by the document entered into subsequently, releasing one of the guarantors; that the agreement signed by the executors while good to the extent of the admission of the amount of the debt existing at Clark's death, was bad in so far as it attempted to bind the estate in the carrying on of the business of the company with the aid of the continued and continuing liability and guarantee of the estate; that these varied and prolonged extensions discharged the estate from any further liability on the testator's guarantee, and that in any event and whether they did or not so discharge the estate the

Statute of Limitations is a bar to the recovery of the only claim the bank seeks to enforce, namely, the payment of the $28,500 due on Clark's guarantee at the time of his death as admitted by the executors.

The appeal should be dismissed with costs.

IDINGTON J.—This appeal should be dismissed with costs.

The guarantee given by the late Mr. Clark ended upon his death and notice thereof to the appellant.

Its language never was intended to meet any later liability.

It never was intended by the instrument under seal executed by him and others assenting to the withdrawal of one of the sureties to do more than signify such assent and to continue the original liability on the part of the remaining sureties notwithstanding such withdrawal.

The only apparently conceivable purpose of putting that instrument under seal was possibly to avert any question of want of consideration for assenting to the change. It cannot and does not pretend, otherwise than by the withdrawal of one surety, to enlarge the original liability.

The later instrument between the respondent and the appellant as well as other parties represents a breach of trust and a further contemplated breach of trust on the part of the respondents, who were by the will to become trustees of the remainder of the estate, when realized, and liquidated by them as executors, to invest it in the manner specified for the benefit of the testator's family.

The sum of $28,480, which was the total liability of the testator's co-sureties at his death under the

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original guarantee, was taken, regardless of the then solvency of the principal debtor, and of its assets answerable for such liability, and of the then solvency of his co-sureties, and without the slightest regard to the dangers of these assets being lost and these co-sureties becoming insolvent, and without the slightest measure of protection in either regard, as a proper basis to fix as the measure of an indemnity to be met by this testator's estate in future years after incurring all these risks and also those incidental to the business of the principal debtor; and the respondents entered into an agreement on such basis to bind the testator's estate to appellant for the continuation of the primary debtor's liability, the renewal of its notes therefor from time to time, an extension of time for their payment, and the carrying on of the same according to the requirements of its business and confirming and ratifying the liability of the estate for the payment of said sum.

Nor is that all for the same agreement, so far from providing for a charge upon the primary debtor's estate of the said earlier liability of $28,450, expressly provides for the primary debtor assuming a further liability of $15,000 and giving the creditors advancing that sum a priority over any rights respondent might have to indemnity out of the primary debtor's assets.

The $15,000 referred to does not appear to have been anything for which the testator had incurred any legal liability but, as the recital indicates, what might have become a joint liability with others if certain "contracts and arrangements had been completed."

He died suddenly. The project had not ripened and did not concern his estate. But the hopes of some of the parties to this agreement and concerned in that

project no doubt were disappointed, and to prevent their disappointment would seem to have been one of the moving causes of this peculiar agreement.

And not satisfied with a liability such as the testator had incurred by virtue of a simple contract and from which he could have withdrawn at any time, the actors, as often happens in such cases, tried to consecrate a vicious purpose by means of a solemn form, and put it under seal as if to make it endure thereby, and attempted to restrict the original right of revocation.

In short the scheme was not one for the protection or interests of the estate which, so far as the evidence shews, required nothing therefor beyond the plain ordinary method of its realization and investment, as expressly directed by the will, but to enable other men interested in the operations of the primary debtor to carry on its business with a credit based on the entire capital of the testator's estate thus attempted to be given over for the security of appellant to the extent of the sum of $28,450 and interest compounded in the renewal notes.

The comparatively small business, only about two years and a quarter old at testator's death, had not likely involved much if any loss, if the estate and no other interest had been looked at, as was respondent's duty.

True it was terminable on six months' notice in writing which might, if given, be extended months beyond the expiration of that period, by reason of the currency of the renewal notes at such length of time as appellant saw fit to make them.

The respondents evidently had been misled, or for want of due care acted improvidently, and forgot all

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about this precious document, preserved however by appellant as a thing of value upon which periodically its officers looked and always rested upon to save the master from loss.

One wonders what they were thinking about, but each shifted the weighty burden of thinking on to the other.

Such an indefensible method of administering an estate has not in any court below received the slightest countenance.

To aid in the diversion of trust funds by such means as this agreement provides for is no part of the function of a court of justice.

If the funds had been, under colour of such an instrument, appropriated to meet the future losses incurred by appellant, knowing the contents of the will as the learned trial judge has found, it might have become the function of a court to see the same restored by the appellant to the children.

If on the death of the testator there was by virtue of the original guarantee a liability, which the estate was answerable for, it was the duty of the executors to have it ascertained as soon as the assets of the primary debtor could have been realized, and that estate liquidated, if need be, at the earliest possible date, if the primary debtor was unable to adjust affairs otherwise.

No excuse appears for any departure from this simple method of procedure.

No power was given by the will to cover such an extraordinary agreement. It cannot be upheld.

It was necessary to examine it fully in order to pass upon the further question of the claim having been barred by the Statute of Limitations.

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Once the agreement out of the way there is absolutely no answer to the plea of the statute most righteously invoked as against a plaintiff so forgetful of the rights of children who could not speak for themselves.

Coming to this conclusion as to the nature of the agreement relied on and its invalidity I have not felt it necessary to examine fully the numerous other grounds of defence, but may say that the argument for appellant seemed to me to misapprehend the learned trial judge's position which was not, as I take it, that a surety may be released by reason of the unexpected growth and magnitude of what the principal debt or business has become, although within the language of the guarantee, but that the comparatively small liability of testator and risk to his estate thereunder was sought to be changed by the parties to this suit to something beyond the scope of the guarantee or any reasonable implication therein.

DUFF J.—I concur in the opinion of Mr. Justice Davies.

ANGLIN J.—I am of the opinion that neither the late J. M. Clark nor his personal representatives ever became bound otherwise than as sureties by simple contract with such of the ordinary rights of suretyship as were not explicitly renounced in the original instrument of guarantee. This instrument was not under seal.

The sole purpose of the document executed by Mr. Clark and others in September, 1899, was to prevent the release of Mr. Carss, one of the co-sureties, operating as a discharge of the others. The original guar-

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antee was merely confirmed "as if the said Carss had never been a party thereto." This document does not import a covenant to pay and did not convert the existing simple contract obligation into a specialty.

There is no evidence whatever of any payment or acknowledgment by the defendants subsequent to the 28th February, 1900. Payments or acknowledgments by the principal debtor did not affect them. *Re Wolmerhausen*(1). Except perhaps as an acknowledgment, the agreement of 1900 was not, in my opinion, in the circumstances of this case, within the power of the executors, and the bank is chargeable with notice of that fact. This action was not brought until 24th August, 1907. I therefore agree that as against the defendants the claim of the plaintiffs is barred by the Statute of Limitations. Without expressing any opinion upon other grounds taken in the courts below, I would for this reason dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Hutcheson & Fisher.*
Solicitor for the respondents: *H. A. Lavell.*

(1) 62 L.T. 541.

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

AND

THE BRITISH AMERICAN OIL COMPANY..... RESPONDENTS.

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*Feb. 24, 25.
*May 3.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railways—Construction of statute—R.S.C. 1906, *c.* 37, *ss.* 335, 336—*Through traffic—Joint international tariffs—Filing by foreign company—Assent of domestic company—Tariffs "duly filed"—Jurisdiction of Board of Railway Commissioners.*

Under section 336 of "The Railway Act," R.S.C. 1906, ch. 37, tariffs filed by foreign railway companies for rates on through traffic originating in foreign territory, to be carried by continuous routes owned or operated by two or more companies from foreign points to destinations in Canada, are effective and binding upon all Canadian companies participating in the transportation, although not expressly assented to by the latter, and may be enforced by the Board of Railway Commissioners for Canada against such Canadian companies. Anglin J. contra.

Per Anglin J. (dissenting).—"The Railway Act" requires concurrence by the several companies interested as in other joint tariffs on through traffic mentioned in the Act.

APPEAL from an order of the Board of Railway Commissioners for Canada(1), declaring that the legal rate on crude oil shipments in carloads from Stoy, in the State of Indiana, one of the United States of America, to the City of Toronto, in Canada, is twenty cents per hundred pounds, being the joint tariff fifth-class rate under the "Official Classification" published and filed with the Board by the

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

(1) 9 Can. Ry. Cas. 178.

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Indianapolis Southern Railroad Company; that the said tariff, upon such filing, became effective and binding on Canadian railway companies under the provisions of the "Railway Act" and was still in force, and ordering the appellants to refund to the respondents the difference in the amount of tolls charged in excess of the rate mentioned upon certain shipments specified in the complaint.

The respondents complained of the rate charged them by the appellants for the transportation of crude oil shipped in carloads from Stoy, in Indiana, and carried over the appellants' railway from the international boundary between the United States and Canada to its destination at the City of Toronto, in Ontario; they applied to the Board of Railway Commissioners under sections 317, 321, 323, 333, 334, 336 and 338 of the "Railway Act," R.S.C. 1906, ch. 37, for an order declaring the legal rate of tolls chargeable on such shipments and for a refund of overcharges.

In December, 1906, the Indianapolis Southern Railroad Company (on the line of which Stoy is a station) filed with the Board, under the provisions of section 336 of the "Railway Act," a joint tariff, known as the "Interstate Joint Freight Tariff, No. B-58," making the joint fifth-class rate on such shipments from Stoy to Toronto twenty cents per hundred pounds. Prior to 1st January, 1907, crude oil had no classification, but, on that date, the "official classification" coming into force in the United States placed it in the fifth class and this classification was made use of by the appellants, on certain occasions, although they had, on 30th November, 1906, issued and filed with the Board an "exception" refusing to accept the fifth-class rate tolls on petroleum and its products shipped from

points in the United States for transportation over their line of railway to destinations in Canada, and providing that, on such traffic, from the international boundary or junction points their local or special commodity rates should govern.

The order appealed from was as follows:

"Order No. 7093.

"The Board of Railway Commissioners for Canada.

"Wednesday, the 19th day of May, A.D. 1909.

"IN THE MATTER OF the complaint of *The British American Oil Company of Toronto,* complaining that *The Grand Trunk Railway Company of Canada* unjustly discriminated against crude oil shipments from Stoy, Indiana, in the United States of America, to Toronto, Canada, by refusing to carry it at the published and filed joint tariff fifth-class rate, in accordance with the "Official Classification"' and at the same rate as animal and vegetable oils, in carloads; and that The Grand Trunk Railway Company refused to deliver to the complainants at Toronto cars containing crude oil ex Stoy, Indiana, except upon payment of twelve and one-half (12½) cents per one hundred pounds, which additional rate had been paid under protest and which the company refused to refund.

"UPON hearing the application, the evidence adduced, the argument of counsel for the complainants and The Grand Trunk and Canadian Pacific Railway Companies, and what was alleged —

"IT IS DECLARED that the legal rate chargeable upon the shipments complained of was twenty cents per one hundred pounds, the joint tariff fifth-class rate, under the "Official Classification," published and filed with the Board, which rate is still in force.

"AND IT IS FURTHER ORDERED that The Grand

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Trunk Railway Company be, and it is hereby authorized to refund to the complainants the difference between the said rate of twenty cents per one hundred pounds and the rate of thirty-two and one-half ($32\frac{1}{2}$) cents per one hundred pounds charged and collected by it on the said shipments.

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

Chrysler K.C. for the appellants.
Strachan Johnston for the respondents.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs for the reasons given by Sir Louis Davies.

GIROUARD J. agreed with Davies J.

DAVIES J.—It might have been possible to dispose of this appeal from the Board of Railway Commissioners on the ground that the Board had found as a fact that the joint tariff for the continuous route in question from Stoy to Toronto filed December 19, 1906, by the Indianapolis Southern Railroad Company, to take effect January 20th, 1907, was an agreed joint-tariff as between the foreign company filing it and the Grand Trunk Railway Co., and so binding until superseded or disallowed by the Board.

If there had been such a finding on the evidence before us I would not have been disposed to interfere and would have been glad to avoid the very delicate and difficult questions which arise upon the construction of the clauses of the "Railway Act" relating to joint international traffic.

After several careful readings of the reasons of the Chief Commissioner for the making of the order of the Board I am not, however, able to say that any such finding of fact was reached and certainly none has been expressed.

We are, therefore, obliged to dispose of the appeal on its legal merits.

The order complained of was one declaring that the legal rate chargeable upon shipments of crude oil from Stoy to Toronto was 20c. per 100 lbs. and directing a refund of certain overcharges beyond that rate.

The validity of the order depends upon the construction placed upon section 336 of the "Railway Act" and specially upon the words or phrase "joint tariff" as used in that section.

The section deals (*inter alia*) with traffic carried from a foreign country into Canada by any continuous route owned or operated by any two or more companies whether Canadian or foreign, and provides that "a joint tariff for such continuous route shall be duly filed with the Board."

The section does not say expressly by whom it shall be filed, but a consideration of the previous sections dealing with traffic originating in Canada and carried into a foreign country, over any continuous route operated by two or more companies, and the sections dealing with "traffic passing over any continuous route within Canada operated by two or more companies," called by the Chairman "domestic traffic," satisfy me that the construction placed upon section 336 by the Board is the only reasonable and fair construction of its language and the only one which will enable the obvious intention of Parliament as expressed in the Act to be carried out.

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The construction contended for by the appellants that the term "joint tariff" as used in the section 336 means necessarily only a joint *agreed upon* tariff and does not mean a joint tariff for the continuous route filed by the foreign company initiating the traffic would have the result of paralyzing the control of the Board over such international traffic into Canada. The Board could not interfere with any rates charged on such international traffic whether they were just or unjust, reasonable or unreasonable, unless and until a jointly agreed upon tariff had first been filed. Now, when it is remembered that the foreign company initiating this traffic is not subject to the jurisdiction of the Board unless it submits in some way to that jurisdiction the object of Parliament in passing the section as it did will be apparent. Unless the foreign company submitted to their jurisdiction the Board was powerless. Once it submitted to the Board's jurisdiction then so far as the Act gave them power of control over the rates for this traffic the Board had authority to act. It was not necessary to have the agreement of the Canadian line to give the Board jurisdiction over it. The Board already had that jurisdiction by virtue of the railway being within Canadian territory. Parliament did not intend to make the consent of the Canadian railway a necessary condition of the Board obtaining jurisdiction over this special through traffic originating in a foreign country.

Let us compare the language of the sections regulating domestic continuous traffic and also international traffic *originating in Canada.*

The regulation of the former, that is domestic traffic, is to be found in section 333, which provides that the several companies may agree upon a joint

tariff and the initial company shall file it and the other companies promptly notify the Board of their assent. Then section 334 goes on to provide for cases where there is a *failure to agree* and vests in the Board the amplest powers of control. Read in conjunction with section 333 the Board has therefore the amplest powers to deal with domestic tariffs and rates and secure them to be just and reasonable. But the section 333 properly leaves it to the companies interested to agree in the first instance to a tariff and file it with the Board. If unjust the Board can at once take steps to remedy the injustice and the statute specially provides them with power to act effectively.

So in dealing with the international traffic *originating in Canada,* section 335 expressly provides that the "several companies" foreign as well as Canadian, "shall file with the Board a joint tariff for such continuous route." Agreement is here again made expressly necessary and the reason is apparent. The Board could not exercise jurisdiction over the foreign corporation except where it submitted to their jurisdiction. With respect, therefore, to international traffic originating in Canada the willingness of the Canadian company initiating the traffic was not considered sufficient. The foreign company not subject to the Board's jurisdiction must file its agreement with such joint tariff. That being done the Board then would have jurisdiction to allow it. The ground upon which Parliament apparently legislated with respect to this special international traffic originating in Canada was in order to give the Board full control over it; the tariff filed must be so filed not only with the consent of the Canadian company originating the traffic, but with the foreign company intended to be bound by it.

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But in dealing with traffic *originating in a foreign country* (section 336) the language is entirely changed. All words indicating the necessity of specific agreement by all interested roads before filing such a tariff are omitted and the simple fact required to give the Board jurisdiction over an international traffic obviously not within their jurisdiction was the due "filing of a joint tariff for such continuous route." Such joint tariff was not necessarily to be one agreed to beforehand by the Canadian company to be effected by it because, I assume, of the fact that such company was already within the jurisdiction of the Board. But whatever the reason was the several agreements were not required as they were in the two previous cases. What was essential to get was control over the initiating foreign company and that was obtained, as I construe the section, by providing that they should file the joint tariff. It was obviously the company initiating the traffic that should in the first instance file the proposed tariff and that being done and jurisdiction so gained then the Board could at any time at the instance of the Canadian company or any one else interested either allow or disallow the tariff proposed or, possibly, supersede it. On the latter point of superseding it and imposing another of its own I offer no opinion as the question does not arise here.

If the phrase "joint tariff" was used in reference to a matter over which Parliament had jurisdiction I would suppose it to refer to a joint agreed tariff, but reading it with reference to the subject-matter dealt with in section 336 and in connection with the two previous sections relating to domestic traffic and international traffic *originating in Canada* in both of which Parliament expressly enacted that the agreement of

the interested companies should be required, and finding all words requiring agreement on the part of the several roads interested omitted when dealing with traffic originating out of Canada, I conclude that such agreement was not deemed necessary for the purpose in view and that it was sufficient when the joint tariff required was filed by the foreign originating company.

This being in my opinion the proper construction of the section, I think that the order appealed from was within the powers of the Board and that the appeal should be dismissed with costs.

IDINGTON J.—This appeal raises questions as to the power of the Board to declare that a joint tariff, formulated by a freight traffic association representing roads in both countries, and providing for through rates from points in the United States to points in Canada, over specified roads in each country, when filed with the Board, is obligatory, or whether it can by the order of the Board be made so, upon the Canadian company or companies respectively named therein.

Much confusion arises from founding arguments herein upon the sections or parts of sections clearly applicable only to roads entirely within the jurisdiction of Parliament, and hence irrelevant as regards those beyond.

There is a pretty clear line (though possibly it might have been made clearer), of demarcation throughout the Act between the latter provisions and those bearing upon international traffic.

Obviously Parliament cannot, in the widest sense, command the foreign company, and accompany its commands with sanctions, such as it can impose in

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regard to the obligations which it may define relative to the dealings of home companies with each other, and their dealings with those they were created to serve.

It has not attempted any such thing.

It is, however, quite competent for Parliament to legislate in respect of contracts and business relations of an international character, and well known and recognized methods of forming such contracts and relations; to facilitate the same and the execution of their purposes, promoting thereby trade and all implied therein; and to define the terms and conditions under which such contracts and relations as well as the methods thereof may and shall become obligatory upon those absolutely subject to the power of Parliament.

Acting within these lines Parliament has, to my mind, in sections 336 and others and parts of others of the "Railway Act," provided for many emergencies likely to arise in the course of such international traffic.

Powerless to command a foreign company to do in its own country anything but what it will, or to enforce its doing in this country what it cannot within its corporate power legally do, Parliament has not attempted such things.

It has, however, recognized the long existing practice of companies contracting to carry freight beyond their own roads, and the auxiliary practice of their framing either by mutual contracts, or mutual understandings not taking contractual form, or customary observances of sharing in the burthens and benefits of such contracts as made by the contracting company first accepting the freight thus to be carried, and in the result evolving what is in effect the joint tariff.

In dealing with domestic companies it enjoins concurrence and in default thereof gives the entire power to the Board to make and enforce a joint tariff.

In regard to international joint tariffs, though concurrence is recognized as expedient and a thing the Act encourages and provides for, it does not make the existence of such joint tariff depend upon the concurrence or will of any company entirely within the power of Parliament. Legislation entirely dependent for its maintenance on the will of those subject to the power of Parliament would be useless and hence absurd.

It has been provided by section 336 as follows:

> 336. As respects all traffic which shall be carried from any point in a foreign country into Canada, or from a foreign country through Canada into a foreign country by any continuous route owned or operated by any two or more companies, whether Canadian or foreign, a joint tariff for such continuous route shall be duly filed with the Board. 3 Edw. VII. ch. 58, sec. 269.

We must give some effect to this legislation.

The Act does not contain a single word as to how the tariff has to come about or who is to file it. In the next preceding section dealing with the converse case of the starting points being in Canada "the several companies" are to file the joint tariff with the Board.

In the latter case the whole contract is formed in Canada and the legality or illegality of it may depend upon what Parliament enacts.

In the former, the converse case, the legality or illegality of it may depend upon the law of the foreign State.

Whether some such consideration moved to the making of this marked difference or not need not be examined here.

All I wish to point out here is the difference and a

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probable reason therefor, which indicates what the basis of legislative action might be in order that it be effective.

It certainly is quite competent for Parliament to declare that one or more foreign railway companies may frame a joint tariff applicable to their roads and any other road or roads in Canada and upon the filing of same with the Board that it shall be obligatory upon the roads in Canada covered thereby.

Is this what section 336 says or implies?

If it is there is an end of the question raised for the foreign companies have so adopted and filed a joint tariff covering the very ground in question.

It is not so clear as might be that the case I put as within the power of Parliament of adopting a joint tariff to be proposed by one or more foreign companies, and when filed to become obligatory upon the Canadian road, is exactly what Parliament had in view. The language may bear such interpretation.

I rather think, however, when we learn that tariffs and especially joint tariffs have been the product of the associated labours of those engaged in the management of the business in question Parliament intended to legislate in relation rather to the condition of things thus created and known to exist than in or with the view of executing what I have indicated as quite competent for it to do.

Then coming to this condition of things legislated upon or about we have a joint tariff framed in this case in the usual way and filed. The appellant, a member of the body so framing it, after it was formulated, dissented from this item now in question. Just at what stage and by what method it did so or was entitled to do so, and all relative thereto, including the powers

of this foreign association to bind the appellant and the means that the latter has (within the constitution of such association) of release from such *primâ facie* binding of it, are questions of fact with which we have nothing to do. We are bound by the facts as the Board has found them.

It has found as fact a joint tariff so arrived at to have been filed with it under section 336.

It ignores the appellant's dissent. It may or may not be the only or any sound reason for doing so that the "Railway Act" makes no express provision for such dissent. It may well be by the terms of the constitution of the association which framed this joint tariff that its authority was limited and conditional upon unanimity. I cannot infer so as a clear and undisputed fact. Indeed, I repeat I have no authority as to the facts to guide me but what the Board has accepted and found as such.

It clearly implies in its finding that this exception taken to the classification has to be passed upon by some foreign body before becoming effective.

Meantime there is found to be in fact a joint tariff.

The argument of the appellant treats what has been done, by Parliament or by the Board, in the construction it puts upon the Act, as if an invasion of the foreign jurisdiction and hence void in law.

The matter seems to me entirely the other way round. This whole business of the making in a foreign state of an international tariff; the limits of authority in those binding each other or trying to do so; the questions of the binding nature of such attempts, whether within or violating the law of the country where made, must of necessity (in the absence of a clear and definite contract *primâ facie* enforceable

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everywhere that the comity of nations will carry it), be each and all matters of fact.

And until the appellant produces an entirely different finding, by the Board, upon the fact, in relation to which we are to aid in determining the law to be passed upon, than that we have, I cannot see how we can entertain as arguable any other.

But divested of all needless complications including the maze of classification and rates, and their relation to each other and this foreign law, and the custom or usage of these foreign bodies, and their manifold relations, and the assemblage of legal results derivable therefrom, what is involved herein is simply the power of the Board to fix a rate from Windsor to Toronto.

This net result is what the respondent seeks. It is admitted that the net result, reached satisfactorily to it, could have been reached directly by the Board putting in figures a fixed rate to cover the appellant's share of the service performed.

All this has been fixed as definitely by the process adopted and the order as if it had been put in words and figures.

The railway men clearly understand exactly how much each company is to get. The appellant is under no trouble in that regard as to other places than Toronto. Counsel at first professed to put forward the theory that his client did not know how much it was to get, or how long it was to continue. Yet he later frankly admitted the power of the Board to fix the rates within Canada. Manifestly, from their acting upon the new tariff the officers of his client knew how much its rate gave appellant.

If the power exists to produce that result and the result is what the Board could by any proper method

reach, does it matter three straws here whether or not we would have proceeded by an entirely different process of thought in attacking the problem?

Again, the Board has found as a fact a joint tariff which it thinks the appellant, clearly subject to its powers, ought to have obeyed in duty to the law and the policy thereof in regard to facilities and equality of treatment relative to rates, and has ordered it accordingly to obey.

The whole purview of the Act in relation to carriage of freight is of such a nature as to indicate that what the appellant has been doing was in violation of the law governing it and defining its duties in the premises.

The order is but a declaration in effect that the rate appellant chooses to give for equal or greater service elsewhere shall be the rate.

If through the association it has agreed to act upon the lower rate between other points and to refuse the like to those concerned herein it contravenes section 317, sub-sction 7 of the Act.

The determination of the subject has been confided to the Board to adjudicate upon and see this equality of treatment executed, and when the Board on the facts it finds has declared that the charge made, though under the guise of a local rate, is illegal as infringing the policy of the law, its colour of right ceases to exist.

Let us brush away the cobwebs, get to the substance of the matter and see if there is aught else in the order complained of than an establishment or a restoration of that equality of treatment which it has become the legal duty of appellant to observe and which

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was one of the chief purposes of Parliament in creating the Commission to bring about.

If the rate given effect to or proposed to be given effect to by the filing of a joint tariff without the concurrence of the Canadian company affected does not allow it a proper share of the tolls or provide a stable and continuous purpose and policy, or for any other reason is unjust, the Board can relieve the Canadian company if and when shewn to suffer thereby.

I think the appeal should be dismissed with costs.

DUFF J. agreed with Davies J.

ANGLIN J. (dissenting).—The order in appeal directs a refund of freight rates, which in the opinion of the Board were illegally charged, and declares a certain tariff filed by the Indianapolis Southern Railroad Company to have been a joint tariff binding on the appellants, the Grand Trunk Railway Company, and to be "still in force."

The reasons given by the learned Chief Commissioner make it manifest that the adjudication was wholly based on the assumption that the tariff filed by the foreign railway company bound the appellants because, having been filed by one participating company, though without the concurrence of the other, in the opinion of the Board it became in due course binding on the latter by reason of its failure to apply for disallowance under section 338. This is apparent in the following excerpts from the reasons:

> First, as to the joint tariff. If a foreign road, without the approval of the Canadian, files a joint tariff which the latter does not desire to participate in, its course is to apply to the Board, under section 338, to have it disallowed, and if this course is not taken, the tolls provided in such joint tariff become, by virtue of section 338, the only tolls that can be charged.
>
> * * * * * *

Section 336 of the "Railway Act," which gives rise to the trouble here, is silent as to concurrence, but of course it is not to be assumed that any foreign railway company would file a joint tariff naming participating carriers, without, before filing, having obtained their concurrence, and if such were done, inadvertently or otherwise, under our Act it seems the only course open to the objecting carrier would be to apply for its disallowance.

There is a finding that the Grand Trunk Railway Company did not concur either in the making or in the filing of this tariff. That he was of opinion that they did not concur at any other stage seems to be the proper inference from the judgment of the learned Chief Commissioner. It is true that reference is made to the acceptance by the appellants of payment for some freight at the rate specified in the so-called joint tariff in question. But the facts, as stated by the Chief Commissioner, would not suffice to found an estoppel, and he does not rest his judgment on that ground. Moreover, in a memorandum, which has been made part of the appeal case, it is stated that a question of law for our decision is whether or not, without its concurrence, the Grand Trunk Railway Co. is bound by the tariff filed by the Indianapolis Southern Railroad Co. If the Grand Trunk Railway Co. should be held bound either by concurrence in fact or by estoppel, the legal question of the necessity of its concurrence would be purely academic. We should not so regard a question submitted by the Board unless its order and judgment compel us to do so; and in my opinion they do not.

It is, I think, clear that the Board did not intend to, and did not in fact, exercise any power (which it may have) to prescribe rates for the traffic in question as upon a refusal or neglect by the companies, or one of them, to concur in or file a joint tariff. It intended

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to, and did in fact determine that the tariff filed by the Indianapolis Southern Railroad Co., although not concurred in by the Grand Trunk Railway Co., became binding on the latter company merely because it did not move for its disallowance under section 338. I regard the entire order as based on this adjudication and I shall deal with it accordingly.

But before doing so I desire to state explicitly that I express no view upon the existence or the scope of the powers of the Board in regard to rates to be charged by foreign companies in respect of international traffic or as to the application to such traffic, either directly or by analogy, of the provisions of sections 323 *et seq.* of the "Railway Act," including section 334. I pass no opinion upon the existence or the extent of the jurisdiction of the Board in any particular over foreign railway companies handling international through traffic. Interesting as these matters undoubtedly are, it is desirable that they should be dealt with judicially only when necessary.

I merely remark in passing that if, as appears to be the view of the Railway Commissioners, Parliament intended that sections 323, 328, 332 and 334 should apply to the traffic and tariffs dealt with by sections 335 and 336, that intention might very easily have been more clearly expressed. Whether it is desirable that the application of these sections to such traffic should be made unmistakable by declaratory or substantive legislation is a matter for the consideration of Parliament.

As the "Railway Act" now stands it leaves open many awkward and troublesome questions. No distinction is made between foreign railway companies which operate exclusively in foreign territory and

those which operate partly in Canada. Both classes of foreign companies are subject to the control of a foreign legislature and of a foreign tribunal and any attempt to enforce the orders of the Canadian Railway Board against them in regard to the carriage of traffic in foreign teritory might lead to a serious conflict of jurisdiction. With the orders of which of the tribunals, if they are not in accord, should the foreign company comply?

But while, in the case of a foreign company operating a part of its system within Canada, under sections 398, 404, 430 and 431 sanctions and methods of enforcement which would secure obedience to the orders of the Board may be provided, it is difficult to perceive how, under the existing legislation, such orders could be enforced or disobedience to them punished in the case of a railway operating wholly in foreign territory. Without committing myself to this view, it may not be amiss to say that, as at present advised, concurrent action by the Canadian and United States tribunals, authorized by concurrent legislation of both countries, or action by an international tribunal to be established under such concurrent legislation would appear to me to be the only practical and effective means of dealing with many of the difficulties incident to the regulation of international through traffic.

Whether on a careful consideration of the "Railway Act" (sections 314 to 339 inclusive) the provisions as to the consequences of disallowance in the case of domestic tariffs, including those which confer power on the Board to prescribe rates in lieu of tolls disallowed, may or may not be held applicable to the traffic dealt with by sections 335 and 336, I express no opinion. If this power exists it has not been exercised in the present case.

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Section 336 requires the filing of a "joint tariff." The very name implies a tariff which is the product of joint or concurrent action by the companies interested. That this is the meaning of the term "joint tariff" is made clear in the case of domestic joint tariffs by section 333: agreement of Canadian companies must precede the filing of the tariff. It is only after such agreement, not necessarily evidenced in any particular form, that the "initial company" is to file the tariff; it is only a tariff so agreed upon and filed which is binding apart from an order of the Board itself prescribing rates.

It is natural to expect to find in the first of the group of sections dealing with joint tariffs an exposition of the idea which Parliament intended the term "joint tariff" to convey. That idea is distinctly expressed in section 333, and it is most improbable that, while the "joint tariff' provided for in sections 333 and 334 must be the result of agreement, that dealt with in sections 335 and 336 may be something wholly and essentially different.

An analysis of sections 335 and 336, I think, confirms this view. In the case of a continuous route in Canada operated by two or more companies, the Act prescribes filing only by the initial company. But, in the case of a joint tariff for international through traffic originating in Canada, section 335 directs that the tariff shall be filed by "the several companies"—probably in order that the concurrence of all may be evidenced by their participation in the act of filing which takes place with the Board itself. Filing by "the several companies" clearly does not mean filing merely by any one of them. It can only mean either the filing of the tariff by all as a joint act, or the filing

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of the same tariff by each of the participating companies severally. When we come to section 336, which deals with joint tariffs in respect of international through traffic originating in foreign territory, we find that the statute directs that the tariff "shall be duly filed with the Board." The word "duly" must have some meaning in this section; it is an important word; it should neither be entirely rejected nor given no effect. *Doe d. Lloyd* v. *Ingleby*(1). The recurrence of this word in section 338 indicates that it is not used inadvertently. Read without it section 336 does not in terms prescribe that the filing shall be by the participating companies or by either or any of them. But, if the word "shall" indicates the imposition of a duty, *primâ facie* that duty is imposed upon the "two or more companies" owning or operating the continuous route. If filing by one of the participating companies would suffice, on the assumption that section 333 is not to be looked to for guidance as to the nature or the incidents of tariffs for international traffic, the filing under section 336 may be by either or any of the participating companies, not necessarily by the initial company. If the filing be by a Canadian company, the foreign company or companies interested will have done nothing to indicate submission to the jurisdiction of the Board. While the Canadian company, which alone files the tariff, may be bound thereby (and the jurisdiction of the Board over this company does not depend upon the filing) what possible basis could there be for the exercise by the Board of jurisdiction over the foreign company or companies if not operating at all in Canada?

But the word "duly," I think, obviously refers to

(1) 15 M. & W. 465.

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some manner or method of filing already prescribed by the statute. *Hobbs* v. *Cathie* (1). Applying the ordinary rule — *ad proximum antecedens fiat relatio* — and looking as well to the most cognate section for the prescribed method, we find that in section 335, which likewise deals with joint tariffs for international through traffic, the requirement as to filing is that it shall be by "the several companies." This, I take it, is the method of filing to which the word "duly" has reference. I can discover no reason why in respect of the traffic dealt with in section 335 the several companies interested should be required to concur in the filing of a joint tariff which does not apply equally to the tariffs dealt with in section 336. If Parliament meant to prescribe filing only by the foreign company or companies interested it could easily have so stated. It has not done so. In the case of international through traffic originating in Canada it has prescribed filing by the several companies participating; in the case of international through traffic originating in foreign territory it has prescribed that joint tariffs shall be not merely filed, but that they shall be duly filed. I find nothing in section 336 which warrants the construction that filing by the foreign participating company or companies suffices to make the tariff binding on all the companies interested — nothing to justify the view that a due filing under section 336 differs from a due filing in compliance with section 335.

The provisions of section 339 tend to confirm the conclusion that in regard to both classes of international joint tariffs concurrence by the Canadian companies interested, as well as by the foreign companies, is requisite. Referring clearly to a Canadian company,

(1) 6 Times L.R. 292.

the section speaks of these international joint tariffs as "*its* tariffs." Clause (*f*) certainly pre-supposes possession by the participating Canadian companies of copies of all international joint tariffs by which they are affected, since they are thereby required to keep a copy of every such tariff on file and open for inspection "at each freight station or office in Canada to which such tariffs extend." Yet, if neither its co-operation in the making, nor its concurrence in the filing of it is requisite, the statute does not provide that the Canadian company shall receive any notice of this joint tariff by which it is to be bound, and of which it is directed to keep copies on file.

It seems to me to be reasonably clear that, in order to secure, if possible, for international through traffic, whether originating in Canada or in foreign territory, tariffs which all the participating companies should be bound to respect — the foreign companies as well as the domestic companies — Parliament intended to prescribe that these tariffs should be filed by all the participants, *i.e.*, by "the several companies."

A comparison of the several sections which deal with joint tariffs, I think, puts it beyond doubt that, so far as such a tariff is intended to be the result of action by the participating companies, in order that it shall be binding either all the participating companies must agree to it before it is filed, as is required in the case of through traffic over a continuous route wholly within Canada operated by two or more companies, or they must all concur in a joint act of filing the tariff or must each severally file it on its own behalf.

I am respectfully of opinion that the Board erred in treating the tariff here in question as binding on the Grand Trunk Railway Company without its concur-

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rence merely because it had been filed by the Indianapolis Southern Railroad Company and the Grand Trunk Railway Company had not moved for its disallowance.

For this reason and on this ground alone I would allow this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Biggar.*
Solcitors for the respondents: *Thomson, Tilley & Johnston.*

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*May 3, 4.

BING KEE AND LUNG CHUNG (PLAINTIFFS) ..... } APPELLANTS;

AND

YICK CHONG (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Fixtures—Lessor and lessee—Buildings placed on leased land—Evidence—Onus of proof.

In a dispute as to the degree and object of the annexation of buildings erected upon leased land by the tenant in occupation under the lease, the onus of shewing that in the circumstances in which they were placed upon the land there was an intention that they should become part of the freehold lies upon the party who asserts that they have ceased to be chattels. *Holland* v. *Hodgson* (L.R. 7 C.P. 328) followed.

APPEAL from the judgment of the Supreme Court of British Columbia reversing the judgment of Hunter

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

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C.J., at the trial, and dismissing the plaintiffs' action with costs.

A tract of land, in Nanaimo, B.C., on which were situate a number of small buildings, known as "China-town," was sold, in March, 1908, to the plaintiffs. The defendant was, at that time, and for some years previously had been, tenant of a town lot, part of the land purchased by the plaintiffs, at a yearly rental and had constructed thereon the building in respect of which the present dispute has arisen and commenced to remove it from the locality to a new site at some distance therefrom. The plaintiffs obtained an injunction to restrain him from demolishing or removing the building and the defendant moved to set it aside. Affidavits were filed on behalf of both parties in support of their respective contentions, the plaintiffs alleging and the defendant denying that the building formed part of the freehold. On the return of the motion it was agreed that the application should be converted into a motion for judgment upon a stated case to be filed by consent, or, failing agreement, upon the material filed or to be filed by the parties, supplemented by photographs or a view of the premises. The parties failed to agree upon a stated case and His Lordship Chief Justice Hunter, after hearing the arguments of counsel for the parties upon the affidavits and photographs produced, viewed the premises and delivered judgment as follows: —

"HUNTER C.J.—In this case the defendant was a tenant of the vendor of a town lot bought by the plaintiffs, and claims the right to remove a building erected by him on the lot.

"I have had the advantage of a view, and find that

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the building practically covers the lot; that it is two stories in height; that it rests on rocks placed on the soil. The chimneys are supported on stout poles, which in turn rest on rock. There is a stoop along the front supported by wooden posts, which are firmly attached to a wooden-block sidewalk. The building was used as a store and dwelling house. In my opinion it is a fixture, as it was evidently put there for the purpose of better enjoying the use of the freehold, and the fact that it could no doubt be removed without materially injuring the freehold is immaterial. If that were so, a large number of dwelling houses and shops in the province which are mostly constructed of wood and built on wooden posts, could be treated as chattels.

"Judgment for the plaintiffs with costs."

By the judgment now appealed from, the Supreme Court of British Columbia reversed the judgment of the Chief Justice and entered a judgment in favour of the defendant.

W. L. Scott for the appellants.
Travers Lewis K.C. for the respondent.

The judgment of the court was delivered by

DAVIES J. (oral).—The recognized rule for the determination of cases where constructions have been placed upon leased land is stated by Lord Blackburn, in delivering the judgment of the court, in *Holland* v. *Hodgson*(1), at pages 334-335, where he says:

> There is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must

(1) L.R. 7 C.P. 328.

depend on the circumstances of each case and mainly on two circumstances as indicating the intention, viz., the degree of annexation, and the object of the annexation. When the article in question is no further attached to the land than by its own weight it is generally to be considered a mere chattel (see *Wiltshear* v. *Cottrell* (1), and the cases there cited). But even in such a case if the intention is apparent to make the articles part of the land they do become part of the land. See *D'Eyncourt* v. *Gregory* (2). * * * Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances are such as to shew that they were intended to be part of the land, *the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels* and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel.

This case, like all others of its kind, depends upon the special circumstances and intentions under and with which the constructions were made, and the facts as to their being affixed to the soil.

In the record before us, we have not sufficient evidence of what the circumstances were in which the building was placed upon the land, nor are we able from the evidence to reach a conclusion that the building in question was affixed to the freehold or placed there with the intention that it was to become part of the freehold. In the circumstances of this case we think there was an onus on the plaintiff to shew that the building was intended to be part of the land, which he failed to discharge, and having failed the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Russell, Russell & Hannington.*

Solicitors for the respondent: *Eberts & Taylor.*

(1) 1 E. & B. 674.

(2) L.R. 3 Eq. 382.

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*March 1.
*June 15.

THE ONTARIO BANK.....APPELLANT;

AND

CHARLES B. McALLISTER AND JANE B. McALLISTER.....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Banking—Security for debt—Assignment of lease—Transfer of business—Operation of bank—R.S.C. [1906] *c.* 29, *s.* 76, *s.s.* 1(*d*) *and* 2(*a*), *s.* 81.

By section 76, sub-section 1(*d*) of "The Bank Act" (R.S.C. [1906] ch. 29), a bank may "engage in and carry on such business generally as appertains to the business of banking"; by sub-section 2(*a*) it shall not "either directly or indirectly * * * engage or be engaged in any trade or business whatsoever"; section 81 authorizes the purchase of land in certain cases of which a direct voluntary conveyance by the owner is not one.

Held, affirming the judgment of the Court of Appeal (17 Ont. L.R. 145), Duff and Anglin JJ. dissenting, that these provisions of the Act do not prevent a bank from agreeing to take in payment of a debt from a customer an assignment of a lease of the latter's business premises and to carry on the business for a time with a view to disposing of it as a going concern at the earliest possible moment.

APPEAL from a decision of the Court of Appeal for Ontario(1), reversing the judgment of a Divisional Court and restoring that at the trial in favour of the respondent.

The respondents carried on business in Peterborough as millers under the name of The McAllister Milling Co., leasing their premises from the Peterborough Hydraulic Power Co. at a rental of $3,000 per

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

(1) 17 Ont. L.R. 145; sub nom. *Peterborough Hydraulic Power Co.* v. *McAllister.*

annum. The McAllister Co. was heavily indebted to the Ontario Bank, and being unable to pay the following agreements were entered into.

MEMORANDUM OF AGREEMENT entered into the 19th day of September, 1905.

BETWEEN:

THE MCALLISTER MILLING COMPANY, hereinafter called the Company, of the one part, and:

THE ONTARIO BANK, hereinafter called the Bank, of the other part.

Whereas the Company are indebted to the Bank in the sum of $69,200 as part security for which sum the Bank hold a lien under section 74 of the "Bank Act" upon the goods and merchandise of the Company, and also an assignment of all the Company's book debts and other claims, as well as an assignment of a policy on the life of Charles Balmer McAllister, and the Company are unable to pay the Bank in full;

And whereas it has been agreed that upon payment by the Company to the Bank of the sum of $10,000 and the absolute surrender of all its assets, the Bank assuming payment of certain liabilities as set out in the memorandum attached, the Bank shall release the Company and the individuals thereof from all further liability in respect of said indebtedness.

Now, therefore, it is mutually agreed between the parties hereto as follows:

1. The Company hereby surrender to the Bank all their right, title and interest in the assets of the Company as well as in the said policy on the life of Charles Balmer McAllister and agree to assign to the Bank their lease of the Otonabee Mills as well as all claims to damages which they have against The Peterborough

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Hydraulic Power Company and The American Cereal Company and they authorize the Bank to bring such action or actions in their names as may be necessary to recover said damages, the Bank agreeing to indemnify them in respect of all costs relating to the same.

2. The Company shall forthwith pay to the Bank the sum of $10,000, the Bank assuming the payment of certain of the Company's liabilities as particularly set out in the memorandum hereto attached, and will honour the Company's cheques when issued in payment of such liabilities, the intention of this arrangement being that the settlement should be so carried out as not to injure the credit of the said Company or members thereof.

3. The Company and the individual members thereof agree to execute to the Bank such further assignments and assurances as may be necessary to vest in the Bank all of the said assets and policy of assurance.

4. It is hereby expressly agreed that the interest of Jennie B. McAllister in the Lakefield Milling Company is not intended to be transferred or pass to the Bank under this agreement and is not part of the assets of the said Company.

5. In consideration whereof the Bank shall forthwith release the Company and the individual members thereof from all further liability in respect of their said indebtedness to the Bank, and in the event of the said business being hereafter carried on in the name of the said Company as provided in the agreement bearing even date herewith between the Bank and Charles Balmer McAllister or in any similar way the Bank hereby agrees to indemnify the said Company and the

individual members thereof against any and all liabilities then or thereby incurred.

IN WITNESS WHEREOF the said parties have hereunto set their hands.

THE MCALLISTER MILLING CO.,

C. B. McAllister,

J. B. McAllister.

ONTARIO BANK,

John Crane, *Manager.*

Witness:

A. P. POUSSETTE.

MEMORANDUM OF AGREEMENT entered into the 19th day of September, 1905.

BETWEEN:

CHARLES BALMER MCALLISTER, of the McAllister Milling Company, hereinafter called the Company, of the one part, and:

THE ONTARIO BANK, hereinafter called the Bank, of the other part.

Whereas the Company are indebted to the Bank in the sum of $69,200 as part security for which sum the Bank hold a lien under section 74 of the "Bank Act" upon the goods and merchandise of the Company, and also an assignment of all the Company's book debts and other claims, and the Company are unable to pay the Bank in full.

And whereas it has been agreed between the Company and the Bank that for the consideration of $10,000 to be paid to the Bank and the absolute assignment to the Bank of all the Company's assets, the Bank shall release the Company and the individuals thereof from all further liability.

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And whereas for the more convenient liquidation of the said assets and with a view to disposing of the Company's business as a going concern, it has been deemed advisable and has been agreed to enter into the arrangement hereinafter expressed.

Now therefore it is mutually agreed between the parties hereto as follows:

1. Mr. C. B. McAllister shall continue to carry on the said business under the name of the McAllister Milling Company and to manage the same as a going concern, curtailing expenses as far as possible, and collecting the book debts and other claims so that within a short period the amount due to the Bank may be reduced to the lowest dimensions, having in view the intention to dispose of the Company's business as a going concern at the earliest date possible.

2. For his services in this behalf Mr. McAllister shall be allowed out of the business a salary at the rate of one thousand dollars per annum, payable weekly, and he shall not draw any larger sum out of the business.

3. The business shall be under the supervision of Mr. John Crane, manager of the Bank, who shall have constant access to the Company's books and to whom Mr. McAllister shall be accountable for all transactions, but the said McAllister shall not be responsible for any error of judgment in the management of the said business or for any loss or losses incurred thereby.

4. And the said Bank agrees to indemnify the said Company and the members thereof against any liabilities incurred while the business is being continued in the Company's name, as hereinbefore provided.

5. The said Charles B. McAllister agrees that at any time the Bank may desire, he will, if possible, effect an insurance or insurances upon his life in some company or companies selected by the Bank to such extent as the Bank shall name and will from time to time absolutely assign the policy or policies therefor to the Bank—the said Bank being alone responsible for all premiums in respect of same.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands.

C. B. MCALLISTER,
ONTARIO BANK,
John Crane, *Mgr.*

Witness:
A. P. POUSSETTE.

THIS INDENTURE. made the nineteenth day of September, in the year of our Lord one thousand nine hundred and five.

BETWEEN:

THE ONTARIO BANK, of the first part; and

CHARLES BALMER MCALLISTER and JENNIE B. MCALLISTER, trading in co-partnership under the style of the "McAllister Milling Company" as well in their individual as in their partnership capacity, of the second part.

Whereas the parties of the second part are indebted to the parties of the first part in the sum of $69,200 and being unable to pay the full amount of their indebtedness have by instrument bearing even date herewith surrendered to the parties of the first part all their firm assets and have also paid to the parties of the first part the sum of $10,000 in consideration that

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the parties of the first part would release them individually as well as their said firm from all liabilities.

And whereas, there have been divers accounts, dealings, and transactions between the said parties hereto respectively, all of which have now been finally adjusted, settled, and disposed of. and the said parties hereto have respectively agreed to give to each other the mutual releases and discharges hereinafter contained in manner hereinafter expressed.

Now, therefore, these presents witness, that in consideration of the premises and of the sum of one dollar, of lawful money of Canada to each of them, the said parties hereto respectively paid by the other of them at or before the sealing and delivery hereof (the receipt whereof is hereby acknowledged), each of them the said parties hereto respectively, doth hereby for themselves, their successors and assigns, and for himself and herself respectively, his and her respective heirs, executors, administrators, and assigns, remise, release, and forever acquit and discharge the other of them, their successors and assigns, his and her heirs, executors, administrators and assigns, and all his her and their lands and tenements, goods, chattels, estate and effects respectively whatsoever and wheresoever, of and from all debts, sum and sums of money, accounts, reckonings, actions, suits, cause and causes of action and suit, claims and demands whatsoever, either at law or in equity, or otherwise howsoever, which either of the said parties now have, or has, or ever had, or might or could have against the other of them, on any account whatsoever, of and concerning any matter cause or thing whatsoever between them, the said parties hereto respectively, from the beginning of the world down to the day of the date of these presents.

IN WITNESS WHEREOF, the said parties hereto of the first part have hereunto affixed their corporate seal as testified by the hands of their proper officers in that behalf.

Signed, Sealed and Delivered in the presence of

For the Ontario Bank,
C. MCGILL,
General Manager.
[Seal.]

The respondents also executed a power of attorney to the local manager of the bank to execute for them an assignment of the lease which, however, was never acted upon.

The milling business was carried on under said agreements until the bank became insolvent in 1906, when the stock in hand was sold and the premises abandoned. The lease had then over six years to run and the lessors brought action against the respondents for a gale of rent accruing due after such abandonment of possession, and the bank, which had paid it up to that time, was called in as a third party to indemnify respondents. The lessors obtained judgment and an issue was tried between respondents and the bank, the latter setting up several defences against the claim to indemnity, especially the following.

That the said agreements, except the release, not being under its corporate seal were never executed by the bank.

That if executed the indemnity by the bank only covered existing liabilities and did not extend to future rent for which the bank was not otherwise liable having never accepted an assignment of the lease.

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That the agreement to accept an assignment of the lease and carry on the business was contrary to the provisions of the "Bank Act" and void.

That the respondents' claim for rent was barred by the mutual release executed by them and the bank.

The Chancellor who tried the issue gave judgment against the bank which was reversed by the Divisional Court, but restored by the Court of Appeal.

Morine K.C. and *McKelcan* for the appellant. The McAllister Co. agreed to assign the lease but the bank did not agree to accept an assignment, and none having been executed the bank is not bound. See *Dawes* v. *Tredwell*(1); *Ramsden* v. *Smith*(2).

An agreement to assign is not equivalent to an assignment, nor does it necessarily mean to assign the legal title. *Manchester Brewery Co.* v. *Coombs*(3), at page 617, commenting on *Walsh* v. *Lonsdale*(4).

The effect of the judgment of the Court of Appeal is to enforce specific performance of part of a contract which is not permissible and of an unlawful contract which is still less permissible. See *National Bank of Australasia* v. *Cherry*(5); *Small* v. *Smith*(6).

Nesbitt K.C. and *D. O'Connell* for the respondents. Under section 76 of the "Bank Act" the Ontario Bank had power to enter into this agreement. And see *First National Bank of Charlotte* v. *National Exchange Bank of Baltimore*(7); *Royal Bank of India's Case* (8); *Exchange Bank of Canada* v. *Fletcher*(9).

(1) 18 Ch. D. 354.
(2) 2 Drew. 298.
(3) [1901] 2 Ch. 608.
(4) 21 Ch. D. 9.
(5) L.R. 3 P.C. 299, at p. 307.
(6) 10 App. Cas. 119.
(7) 92 U.S.R. 122.
(8) 4 Ch. App. 252.
(9) 19 Can. S.C.R. 278, at p. 286.

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As to the agreement to assign see *Hanson* v. *Stevenson*(1).

THE CHIEF JUSTICE.—I would dismiss this appeal with costs for the reasons given by Mr. Justice Osler in the Court of Appeal.

The intention of the parties as evidenced by the three agreements was to substitute an assignment of all the assets of the McAllister Co. for the lien which the bank then held. The bank undertook in consideration of this assignment and of the money payment of $10,000 to discharge the company from all liability and in addition assumed the payment of certain disclosed accounts due to third parties, which apparently included all the business liabilities of the respondents. To liquidate these assets, or to dispose of the business as a "going concern" to advantage, as the bank then contemplated doing, it was necessary to secure the use of the premises in which the milling business was being carried on; and not content with the assignment of the lease which in the circumstances should be considered as included in the assignment of the assets, it was specially stipulated that the company should surrender or assign the lease. It was further found as a fact by the trial judge that the bank entered into possession of the premises, paid the rent for the period of their occupation and obtained, through the company, the lessor's consent for the assignment of the lease for its full term. In these circumstances, I do not understand how the bank could hope to escape liability.

With respect to the alleged violation of the section of the "Bank Act" which prohibits trafficing in or carrying on the business of buying and selling goods,

(1) 1 B. & Ald. 303.

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wares and merchandise, this was an isolated transaction entered into to enable the bank to realize the amount of an indebtedness which had been legally contracted and anything done for that purpose cannot affect the legality of the transaction under which the bank acquired the assets of the company and assumed its obligation under the lease.

DAVIES J.—Two main questions were argued upon this appeal. One was that an agreement to assign the lease in question to the bank without any actual or legal assignment of the lease did not involve an obligation on the bank's part to indemnify McAllister from liability for future rent. We are all of the opinion, however, concurring in that of the Appeal Court of Ontario and of the Chancellor, as stated during the argument, that considering the real nature of the transaction and the actual facts which were intended to occur and did occur, such an agreement to indemnify McAllister against any liability for future rent on the covenants of the lease would be implied.

The principal contention of Mr. Morine, however, was that the bank could not legally take or agree to take an absolute assignment of this lease of the McAllister milling property and the assets of the milling firm because the transaction as evidenced by the several agreements entered into by the parties contemplated expressly the carrying on of the milling business by the bank as a "going concern" for an undefined period, or as expressed in the documents "until the bank could sell and dispose of it as such going concern"; that any such transaction was *ultra vires* of the bank, and in fact a direct violation of the specific provisions of the "Bank Act."

I confess that I have had great difficulty in making

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Davies J.

up my mind whether or no the transaction now impeached as *ultra vires* of the bank was so or not. I am even yet by no means free from doubt, but my conclusion is that, considering its real nature, object and purpose, the impeached transaction may be held to be one of those which may be fairly and reasonably implied as being within the general powers given to the bank by sub-section (*d*) of section 76 of the "Bank Act," and as not being within the excepted prohibitions contained in sub-section 2 (*a*) of that section.

The section reads:

The bank may * * * * * * * * * *

(*d*) engage in and carry on such business generally as appertains to the business of banking.

(2) Except as authorized by this Act the bank shall not, either directly or indirectly,—

(*a*) deal in the buying or selling, or bartering of goods, wares and merchandise, or engage or be engaged in any trade or business whatsoever.

I concede that in order to sustain my conclusion of law I am bound to bring the impeached transaction within the enabling clause and to exclude it from the prohibitory clause of the section.

But I am not bound to shew express words in the statute conferring upon the bank all the powers which it may lawfully use to carry out its legitimate objects or purposes. It is quite sufficient if I can shew they may be derived by fair and reasonable implication from the provisions of the Act and have not been expressly prohibited or excluded from the general powers conferred. That is the law, as I understand it, as laid down in *Ashbury Railway Carriage and Iron Co.* v. *Riche*(1); *Attorney-General* v. *Great Eastern Railway Co.*(2), and *Baroness Wenlock* v. *River Dee Co.*(3).

(1) L.R. 7 H.L. 653. (2) 5 App. Cas. 473.
(3) 10 App. Cas. 354, at p. 362.

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In agreeing to take over the lease and milling business as a "going concern" for a limited time in order to dispose of it to some advantage the bank may be said to have violated in a literal sense the prohibition in the latter part of sub-section 2 (*a*) against engaging in any business whatever. But if the general powers of the bank of engaging in and carrying on "such business generally as appertains to the business of banking" given by sub-section (*d*) are large enough and broad enough to cover such a transaction as that now under discussion, of course it would not come within the prohibitory clause even though the words of that clause literally applied might cover it.

Banks, from the very nature of the business they are expressly authorized to carry on, must necessarily loan to customers and others large amounts of money and frequently find themselves with debts owing to them by persons who are insolvent or unable to pay. The assets of such debtors may, in this country at any rate, consist in part of a "going concern," valuable as such, but of little value if wound up by sale under execution or mortgage, or they may consist of perishable goods on the way to a market or logs cut on timber limits ready to be floated down the river to market or mill, or in process of such flotation.

Such debtors may be quite willing to hand over all their assets to the bank absolutely in compromise or settlement of their indebtedness. To compel the parties to resort in every case to the strict statutory methods permitted of taking security and afterwards realizing on it in due legal form, might in many cases cause great loss without any apparent reason. Perishable goods might not be disposable while on the way to a market except at ruinous loss, and the same may be

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said of logs being floated to their mill or market. If the "Bank Act" means that the bank may not take over and accept absolutely in payment of its debt the real and personal property of its debtor, but must in all cases first take security upon it and realize afterwards on such security, there is an end to the argument. No possible loss which may follow the prescribed course can avail the parties. But it does not appear to me the "Bank Act" does say so. There is nothing in the Act which says that though all parties may agree that

> the simplest and least costly way of closing out a hopeless account is to give the debtor an immediate release in consideration of a direct transfer of his property,

such a settlement must necessarily be declared *ultra vires*.

It seems to me that in all such cases it must be a question of fact to be determined by the court on the special circumstances of each case whether there was or was not a violation of the prohibition of sub-section 2 (*a*) against dealing in the buying or selling, or bartering of goods or being engaged in any business whatever; or whether the substance of the transaction was not rather and really a *bonâ fide* compromise or settlement of a debt due the bank, although such settlement or compromise might incidentally involve, in one sense, a buying or selling or an engaging in business. But where the substance of the transaction is found to be a *bonâ fide* compromise or settlement of a past due debt, as under the facts and circumstances I would hold the transaction in question in this case to be, then it seems to me it might fairly be claimed as impliedly authorized by the sub-section (*d*) of section 76, even though

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solely to avoid enormous loss it may involve, as in this case it did, the running of the mill as a "going concern" for what would be deemed a reasonable time in order to dispose of it without ruinous loss.

A strong argument was made against the legality of such an absolute assignment of the milling property and assets of the McAllister Company as was taken by the bank in this case arising out of the 80th, 81st and 82nd sections of the Act, which authorize the bank to take mortgages and hypothecs of realty and personalty as *additional security* for past due debts, and enable it to purchase any real or immovable property offered for sale under execution, etc., or by a prior mortgagee, or by the bank itself under a power of sale, and so enable the bank to acquire an absolute title in lands mortgaged to it either by release or sale or foreclosure of the equity of redemption.

These sections are enabling ones and are intended to confer upon the bank reasonable and necessary powers to take mortgages and hypothecs from their debtors by

> way of *additional security* for debts contracted to the bank in the course of its business,

and to realize upon such mortgages by foreclosure or sale, and acquire and hold the absolute title "either by obtaining a release of the equity of redemption" or otherwise. Their purpose and object was to enable the banks to take and realize *securities* for debts contracted to them. They did not relate to cases where the bank was compromising its debt and accepting something from the debtor in absolute discharge. They should not be construed as being exhaustive of the bank's powers or methods of realizing payment or satisfaction from its debtor's property of the debt due

to the bank, or as taking away from the banks by implication any powers which they might reasonably be held to have arising out of the power to

engage in and carry on such business generally as appertains to the business of banking.

They are not prohibitive sections in any way, but enabling only, and while I recognize the strength and force of the argument as to the intention of the legislature to be derived from them, I am not, on my construction of sub-section (*d*) of section 76 and the powers reasonably to be implied from it, able to say that real or personal property may not be taken by the bank in *absolute payment and discharge of its debt* from an impecunious or defaulting debtor, notwithstanding those sections which provide for the manner in which additional *security* may be taken and realized upon for debts due the bank not by way of compromise and discharge. Banking business in Canada must from the very circumstances of the case, I should imagine, be conducted upon a broader and somewhat more elastic basis than in fully developed business communities such as Great Britain, and in construing the powers conferred upon banks to carry on

such business generally as appertains to the business of banking

it is fair that Canadian conditions should be fully considered and allowed for. Large advances must be made from time to time to lumbermen, fishermen and traders of different kinds to enable them to cut, catch, win and market the natural products of the country and debts and risks necessarily incurred possibly greater than the more conservative systems of Great Britain would approve. It might in many circumstances be unjust and cause unnecessary and unrea-

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sonable loss to confine the banks to the "additional securities" clauses as the only way or means open to them to realize their debts.

In the case at bar I am not able to agree with one at least of the reasons upon which some of the judges of the Court of Appeal support their judgment, namely, that the carrying on of the milling business by the bank after it took over the property from Mr. McAllister was severable from the rest of the transaction between the parties. I think the transaction, as a whole, must stand or fall together. It was a substantive part of the agreement from the first that it should be carried on by the bank as a "going concern" under the management of Mr. McAllister, and it was so carried on. If that part of the agreement which, in my opinion, was substantive and essential is *ultra vires* of the bank, then I do not see how the other part can be upheld. In my judgment, however, as I have attempted to shew, the transaction as entered into by the parties and carried out by them can reasonably be supported by the implied powers arising out of their general banking business (sub-section (*d*), section 76), and as these implied powers are not controlled by any prohibitive section of the Act they are to be given effect to.

I would therefore dismiss the appeal with costs.

IDINGTON J.—The many phases of this case have been so fully and carefully dealt with in the court below that I do not feel as if I could add anything to the symposium of law it has given rise to.

It seems to me to have been the undoubted purpose of the parties that all the assets of the company, of which the lease in question no doubt was at one time a

highly valued part, should be transferred to the appellant, and in consideration of such transfer and an added sum of ten thousand dollars from respondents' friends given expressly to secure the release of respondents from the embarrassments in which they had got themselves involved the appellant was to see them effectually released.

It would be a most melancholy legal result if the law by its necessary operation should defeat the plain purpose of all concerned.

I cannot agree in any interpretation of the contract that would exclude the implication which the entire scope of the whole arrangement indicates to have been part and parcel of the bargain, irrespective of some considerations of minor import and the provisions there anent relied on to exclude the implication of liability in question herein.

The judgment of Mr. Justice Osler seems to me to cover so fully the views I hold and the whole of the matters necessary to be dealt with in the case that I cannot do better than assent thereto.

Since writing the foregoing, shortly after the argument, conflicting views in the court having been presented for consideration, I have re-examined the case. In the result I still agree with Mr. Justice Osler, but to guard against misapprehension of the range of his opinion as I conceive it (though his words may bear another meaning) I may add that I desire to reserve the right to review the question of *ultra vires* when, if ever, presented under different conditions of pleading but similar conditions of fact. I think the *ultra vires* aspect is not open to our consideration here.

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Paragraph 6 of appellant's defence, being the only part thereof that suggests any such questions as *ultra vires* or illegality, does not raise either point as distinctly as it should.

Every act or contract that is *ultra vires* is in a sense illegal. Every illegal act or contract is in a sense *ultra vires.*

Yet something done upon the faith of its being *intra vires* and proving *ultra vires* and hence failing of legal effect, merely for that reason, may be attendant with entirely different results from the same sort of thing done in violation of some legal prohibition either statutory or by virtue of the common law.

In the former case either party may, according to circumstances, have some right to relief; or to ask that conditional relief only be given to him setting up the *ultra vires* plea.

In the latter case neither can have relief if the defence of illegality be set up or has so developed in the trial of the case that the court must take notice of it.

Again, the wilful disregard of the limitations of the power of a corporation may render absolutely illegal that which, if entered into in good faith, might have been merely held and treated as *ultra vires.*

It is difficult to be quite sure what the defence as pleaded aimed at.

But the case is pre-eminently one wherein the plaintiffs were entitled if mere *ultra vires* is relied upon to have it so appear of record in order that they might seek such relief as the justice and facts of the case demand.

The pleading is followed in this late stage by the appellant in its counsel's factum in effect discarding

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mere *ultra vires* by relying only upon the acquisition of the land or lease as and for the express purpose of carrying on a flour milling business.

This interpretation of the pleading I am entitled to take as covering all there is to complain of in the judgment below under the head of that plea.

Hence, I think mere *ultra vires* out of the case by this interpretation of the plea set up.

I think the issue as thus raised in the factum is all that is now open to the appellant and that Mr. Justice Osler's reasoning clearly disposes thereof.

It may be that these questions are identical in this case, but I think that is not so clear.

In such a case as we have here a most valuable term might be the only asset and so subject to conditions of assignment as only to be acquired by the will of the debtor.

I doubt if the "Bank Act" stands in the way of a bank, in such dire necessity, accepting a transfer of such an asset, to save a loss arising from a past due debt.

It seems to me that position can only be tenable if at all by construing the Act as prohibitive of any absolute transfer of property in consideration of discharge from the obligation due the bank.

There is enough in the language of the sections dealing with the subject in its various phases to make a plausible argument for such a contention. But it has not been pleaded or argued and possibly is not worthy of notice.

It seems to me as possibly the case that it can only be under some such necessity as arises, in cases like that before us, calling forth what may be called the reserve powers to be implied that the acquisition of

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absolute ownership, in consideration of discharge, can be tolerated, if at all; except in the way and under the circumstances expressly provided for.

I do not in this case think I am under the pleading and all other things that appear, either called upon or expected to decide the point.

I still adhere to Mr. Justice Osler's finding an implied power in a bank to grapple with such a condition of things as arose here and accept, as a solution thereof, the terms proposed, coupled with the acceptance of the transfer of a lease; and I accept his view of the severability of what was done from that which was a necessary part of the contract.

DUFF J. (dissenting).—In my view of this case the main question raised by the appeal is whether the transaction of September, 1905, was or was not *ultra vires* of the Ontario Bank. That bank is one of those named in Schedule A to the "Bank Act," R.S.C. 1906, and the following provision of that Act applies to it:

4. The charters or Acts of incorporation, and any Acts in amendment thereof, of the several banks enumerated in Schedule A to this Act are continued in force until the first day of July, one thousand nine hundred and eleven, so far as regards, as to each of such banks:

(*a*) the incorporation and corporate name;

(*b*) the amount of the authorized capital stock;

(*c*) the amount of each share of such stock; and

(*d*) the chief place of business;

subject to the right of each of such banks to increase or reduce its authorized capital stock in the manner hereinafter provided.

2. *As to all other particulars this Act shall form and be the charter of each of the said banks until the first day of July, one thousand nine hundred and eleven.*

The principles therefore which govern the construction of the powers of statutory corporations are those which must be applied for the determination of the question at issue. These principles are stated in

two judgments in passages I will quote *in extenso;* the first from the judgment of Bowen L.J., in *Baroness Wenlock* v. *The River Dee Co.*(1), is as follows:

At common law a corporation created by the King's charter has *primâ facie*, and has been known to have ever since *Sutton's Hospital Case*(2), the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to; and even if by the charter creating the corporation the King imposes some direction which would have the effect of limiting the natural capacity of the body of which he is speaking, the common law has always held that the direction of the King might be enforced through the Attorney-General; but although it might contain an essential part of the so-called bargain between the Crown and the corporation, that did not at law destroy the legal power of the body which the King had created. When you come to corporations created by statute, the question seems to me entirely different, and I do not think it is quite satisfactory to say that you must take the statute as if it had created a corporation at common law, and then see whether it took away any of the incidents of a corporation at common law, because that begs the question, and it not only begs the question, but it states what is an untruth, namely, that the statute does create a corporation at common law. It does nothing of the sort. It creates a statutory corporation, which may or may not be meant to possess all or more or less of the qualities with which a corporation at common law is endowed. Therefore, to say that you must assume that it has got everything which it would have at common law unless the statute takes it away is, I think, to travel on the wrong line of thought. What you have to do is to find out what this statutory creature is, and what it is meant to do, and to find out what the statutory creature is, you must look at the statute only, because there, and there alone, is found the definition of this new creature. It is no use to consider the question of whether you are going to classify under the head of common law corporations. Looking at this statutory creature one has to find out what are its powers, what is its vitality, what it can do. It is made up of persons who can act within certain limits, but in order to ascertain what are the limits, we must look to the statute. The corporation cannot go beyond the statute, for the best of all reasons, that it is a simple statutory creature, and if you look at the case in that way you will see that the legal consequences are exactly the same as if you treat it as having certain powers given to it by statute, and being prohibited from using certain other powers which it otherwise might have had.

(1) 36 Ch. D. 674, at p. 685. (2) 10 Rep. 1, at p. 13.

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The second from the speech of Lord Macnaghten in *Amalgamated Society of Railway Servants* v. *Osborne* (1), at p. 94:

It is a broad and general principle that companies incorporated by statute for special purposes, and societies, whether incorporated or not, which owe their constitution and their status to an Act of Parliament, having their objects and powers defined thereby, cannot apply their funds to any purpose foreign to the purposes for which they were established, or embark on any undertaking in which they were not intended by Parliament to be concerned.

The principle, I think, is nowhere stated more clearly than it is by Lord Watson, in *Baroness Wenlock* v. *River Dee Co.*(2), in the following passage: "Whenever a corporation is created by Act of Parliament with reference to the purposes of the Act, and solely with a view to carrying those purposes into execution, I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions." "That," adds his Lordship, "appears to me to be the principle recognized by this House in *Ashbury Railway Carriage and Iron Co.* v. *Riche* (3), and in *Attorney-General* v. *Great Eastern Railway Co.* (4)."

And again at page 97:

The learned counsel for the appellants did not, as I understood their argument, venture to contend that the power which they claimed could be derived by reasonable implication from the language of the legislature. They said it was a power "incidental," "ancillary," or "conducive" to the purposes of trade unions. *If these rather loose expressions are meant to cover something beyond what may be found in the language which the legislature has used, all I can say is that, so far as I know, there is no foundation in principle or authority for the proposition involved in their use.* Lord Selborne no doubt did use the term "incidental" in a well-known passage in his judgment in *Attorney-General* v. *Great Eastern Railway Co.*(4). But Lord Watson certainly understood him to use it as equivalent to what might be derived by reasonable implication from the language of the Act to which the company owed its constitution; and Lord Selborne himself, to judge from his language in *Murray* v. *Scott*(5) could have meant nothing more.

(1) [1910] A.C. 87.
(2) 10 App. Cas. 354, at p. 362.
(3) L.R. 7 H.L. 653.
(4) 5 App. Cas. 473.
(5) 9 App. Cas. 519.

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The provisions by which are defined the business that a bank subject to the "Bank Act" is permitted to carry on and the powers exercisable by it in doing so, are found in the series of sections beginning with section 76 and headed "The Business and Powers of a Bank." The principal section is 76, which I quote verbatim:

The business and powers of a bank.

76. The bank may,—

(*a*) Open branches, agencies and offices;

(*b*) Engage in and carry on business as a dealer in gold and silver coin and bullion;

(*c*) Deal in, discount and lend money and make advances upon the security of and take as collateral security for any loan made by it, bills of exchange, promissory notes and other negotiable securities, or the stock, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, provincial, British, foreign and other public securities; and

(*d*) Engage in and carry on such business generally as appertains to the business of banking.

2. Except as authorized by this Act, the bank shall not, either directly or indirectly,—

(*a*) Deal in the buying or selling, or bartering of goods, wares and merchandise, or engage and be engaged in any trade or business whatsoever;

(*b*) Purchase, or deal in, or lend money, or make advances upon the security or pledge of any share of its own capital stock, or of the capital stock of any bank; or

(*c*) Lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements or immovable property, or of any ships or other vessels, or upon the security of any goods, wares and merchandise.

The question before us conveniently subdivides itself into two: 1st: Does the transaction fall within the prohibition found in sub-section 2(*a*); and 2ndly: Can it, having regard to the provisions of the Act as a whole, be brought within sub-section 1(*d*)?

The relevant features of the transaction are these. The respondents owed the bank certain moneys which they were unable to pay. They were, however, engaged

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in grain buying and milling, holding their mill under a lease having some years to run; and they proposed to the bank that the bank should take over the business (assuming the existing liabilities) that the respondents should pay $10,000 and that they should be released from their liability. It was objected that the bank had no means of carrying on the business until a purchaser should be found when the respondents proposed that C. B. McAllister should carry it on for the bank for six months if necessary, and on that understanding the proposal was accepted. The substance of the completed arrangements was that the whole of the beneficial interest in the assets of the business should be vested in the bank and accepted by it in full payment; that the business should be carried on by C. B. McAllister for the bank in the old firm name in order to enable the bank to sell it as a going concern; and that the bank should indemnify the respondents in respect of all liabilities to which they might become subject by reason of the use of their names. No formal transfer of the lease was executed. It seems to me, however, to be too clear for argument that the respondents holding this lease for the benefit of a natural person *sui juris* under a like agreement would be entitled to indemnity in respect of their liability on the covenants of the lease; the sole question here being, as I have indicated, that concerning the effect of the provisions of the "Bank Act" as touching the powers of the bank in respect of such a transaction.

I think the applicant entitled to succeed on both branches of the question above stated.

The power of the bank to make the purchase and enter into the obligations entailed by it were chiefly

rested in the court below upon section 30, sub-section (*a*) of the "Interpretation Act" (R.S.C., 1906, ch. 1), which provides that

30. In every Act unless the contrary intention appears, words making any association or number of persons a corporation or body politic and corporate shall,—

(*a*) Vest in such corporation power to sue and be sued, to contract and be contracted with by their corporate name, to have a common seal, to alter or change the same at their pleasure, to have perpetual succession, to acquire and hold personal property or movables for the purposes for which the corporation is constituted, and to alienate the same at pleasure,

and upon an authority said to be implied in the express grant of authority to carry on such business generally as "appertains to the business of banking." As to the first of these grounds I think it clear that the power to take and hold personalty and to sell it again is a power which can be exercised only in the course of and for the purpose of carrying out the objects of the corporation as defined in the Act from which it derives its powers, and that in its application to the "Bank Act" the clause just quoted adds nothing whatever to the powers expressed by or implied in section 76. Does then the authority to

engage in and carry on such business generally as appertains to the business of banking,

as conferred by section 76, include the authority to take over a mercantile or other trading business in payment of a debt with the *bona fide* expectation that by carrying it on and selling it as a going concern a loss may be avoided?

Nobody argues that it is a part of the ordinary business of banking to buy a mercantile business either for cash or upon the consideration of the release of a debt. The question is whether such a transaction is justifiable by reason of the ex-

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ceptional circumstance that the debtor is unable to pay and that by taking over his business and carrying it on the bank may ultimately, by selling it, get more than it otherwise could get. I do not think in this case we are concerned with the question whether the belief of the bank's officers was well founded; there is nothing to indicate that the real object and purpose of the transaction was other than what the parties professed it was and its validity must be examined on that assumption.

Now, it is of course a part of the business of banking to make loans on personal security and to take steps to get them repaid. Does the authority to do this which by section 76(*d*) is, I think, expressly conferred as an integral part of the business of banking imply the authority to take specific property (of a kind the bank is not authorized to trade in) in payment in such circumstances as to involve the bank in the necessity of carrying on a distinct business in order to enable it to realize that property? Here let me recall the words of Lord Macnaghten quoted above from *Amalgamated Society of Railway Servants* v. *Osborne*(1), at page 97. The question then is: Can you derive the last mentioned power by reasonable implication from the first mentioned power? The test is not whether the second might be reasonably held to be convenient or conducive to the objects of the bank, but whether it is so necessary for the accomplishment of these objects that the legislature in conferring the first is to be held thereby to have conferred the second. (See last mentioned case at page 96.)

The statute itself provides specially for the taking of security as the normal course where debts already

(1) [1910] A.C. 87.

contracted are not paid; and for giving full effect to the security by taking over the property comprised by it where necessary. But the assumption of the debtor's property in satisfaction in the first instance does not appear to be contemplated; and since the same result might be accomplished through the taking of security (which is specially provided for) it is difficult to see how the power to take over such property except in cases where it is held as security can be said to be necessarily implied. It is not unimportant to observe that the power to take over mortgaged property in payment of the mortgage debt is not confined (as Garrow J. appears to have thought) to real property but is expressly made applicable to personal property as well.

Whatever might have been said respecting the effect of the sub-section standing alone it seems to me to be impossible to give it this effect when read together with the second subsection (*a*).

The only express exception is confined to cases which are "authorized by the Act" itself. It is, I think, an unwarrantable extension of the meaning of those words to say that such transactions as this — though not necessary — are convenient in the exercise of the business of banking and therefore "authorized by the Act."

The history of the legislation and of the judicial decisions confirms this view. Section 7 of 13 & 14 Vict. ch. 21, reads as follows:

> And be it enacted, that the business of banking shall, for the purposes of this Act, mean the making and issuing of bank notes, the dealing in gold and silver bullion and exchange, discounting of promissory notes, bills and negotiable securities, and such other trade as belongs legitimately to the business of banking, but any company or party who may lawfully exercise the business of banking under this Act, shall also have power to take and hold any property

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which shall have been *bonâ fide* mortgaged, hypothecated or pledged to such company or party, as security for debts previously incurred in the course of their lawful dealings as aforesaid, and sold under any writ, order or process of any court of law or equity and bought at such sale by the company or party, and to re-sell or otherwise alienate or dispose of the same; but except as aforesaid, no such company or party shall deal in the buying, selling or bartering of goods, wares or merchandise, or engage or be engaged in any trade whatever; and the word "bank" in this Act shall mean and include any company or party carrying on the business of banking under this Act, unless such meaning be inconsistent with the context.

Such transactions as the present were evidently not intended to make part of the business of banking under this definition. An Act passed in the same year, chapter 22, for the first time gave a general authority to incorporated banks to take security on personal as well as real property and thereafter to acquire the rights of the debtor in such property. But from the year 1840 to the present I have found not the slightest indication on the part of the legislature that such transactions as that under consideration were regarded as forming a part of the ordinary business of banking. In *Radford* v. *Merchants' Bank* (1), it was held that it was *ultra vires* for a bank to take over unfinished goods, finish them, and then sell them, with a view of preventing a loss in respect of a loan. Since the date of that decision (1893) the "Bank Act" has been several times re-enacted, but its relevant provisions have remained the same.

I cannot agree with the view that (for the purpose of determining the competence of the bank to enter into the transaction) you can separate the taking over of the business from the object and purpose of taking it over. The ultimate purpose was to realize the debt; but to do so by carrying on the business until it could be sold as a going concern. The

(1) 3 O.R. 529.

taking over of the business as a going concern for that purpose was plainly in my opinion an infringement of the prohibition against "dealing in buying and selling" unless as I have said it can be justified as a mere subsidiary transaction. That point I have just dealt with; but looking at the purchase as distinct from the arrangement to carry on, then (if I am right in the view that the prosecution of the business contemplated by the parties would, even in the special circumstances of this transaction, be within the prohibition) the transaction is clearly within that class of bargains which have been held to be invalid as entered into with the purpose by the one party known to the other of accomplishing an illegal object. Transactions entered into in contravention of section 76, sub-section 2(*a*), are of course not only *ultra vires*, but illegal in the narrower sense.

The rule is stated,—I venture to think correctly—in Pollock on Contracts (3 Am. ed.), at pages 485, 487, in these words:

Intention to put property purchased, etc., to unlawful use. We have in the first place a well marked class of transactions where there is an agreement for the transfer of property or possession for a lawful consideration, but for the purpose of an unlawful use being made of it. All agreements incident to such a transaction are void; and it does not matter whether the unlawful purpose is in fact carried out or not. The later authorities shew that the agreement is void, not merely if the unlawful use of the subject-matter is part of the bargain, but if the intention of the one party so to use it is known to the other at the time of the agreement. Thus money lent to be used in an unlawful manner cannot be recovered. It is true that money lent to pay bets can be recovered, but that, as we have seen, is because there is nothing unlawful in either making a bet or paying it if lost, though the payment cannot be enforced. If goods are sold by a vendor who knows that the purchaser means to apply them to an illegal or immoral purpose, he cannot recover the price; it is the same of letting goods on hire. If a building is demised in order to be used in a manner forbidden by a building Act, the lessor cannot recover on any covenant in the lease. * * * It does not matter whether the seller or lessor does or does not expect to be paid out of the fruits of the illegal use of the property.

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Here the illegal purpose to carry on the business was not only known, but was participated in to this extent at least that, under the agreement, the bank acquired authority to carry on the business under the name of the vendors. There can be no doubt, I think, that for the purpose of applying this rule the distinction between *malum prohibitum* and *malum in se* has, to use the words of Best J., in *Bensley* v. *Bignold* (1), been long since exploded.

ANGLIN J. (dissenting).—The Ontario Bank having been found liable as a third party to indemnify the defendants, the original lessees, against the payment of rent, under a lease which they had agreed to assign to the bank, appeals to this court for relief on three grounds:

(*a*) That in the absence of an express undertaking the bank is not under any obligation to indemnify the defendants;

(*b*) That it is *ultra vires* of a bank to take from its debtor in payment or part satisfaction of his debt an assignment of leasehold premises; and

(*c*) That its agreement with them is illegal because it contemplates that the bank shall carry on a trade or business.

(*a*) By intimating to counsel for respondents that we did not desire to hear them on the first point, we expressed our concurrence in the judgment of the Court of Appeal for Ontario on that part of the case;

(*b*) The question as to the legality of the acquisition by the bank of the lease of their debtors has occasioned me some difficulty. The argument against it, based on the provisions of sections 79, 80(2), 81 and

(1) 5 B. & Ald. 335.

82 of the "Bank Act," is somewhat formidable. The statute confers upon banks, in respect of personal or movable property mortgaged to them the same rights, etc., as they are by the Act declared to have in respect to real or immovable property mortgaged to them (section 80(2)). They are expressly given special powers to purchase real or immovable property of their debtors sold under execution, in insolvency, under order or decree of a court, or by a prior mortgagee or by themselves under a power of sale (section 81). They are also expressly given power to take releases of equities of redemption and to foreclose mortgages held by them (section 82). The inquiry naturally suggests itself — if banks have the right to acquire such property directly from their debtors in satisfaction of debts due to them, why are these special powers conferred? The sections containing them appear to contemplate that, except

> for its actual use and occupation and the management of its business (section 79)

a bank shall acquire an absolute title only to real property which has been already mortgaged or hypothecated to it as security. Does this implication extend to personal or movable property?

In several of the authorities relied upon by the respondents in support of their contention that it does not so extend, we find that the banks there before the courts had express powers given them to take their debtors' property in payment. Thus in the case of the *First National Bank of Charlotte* v. *The National Exchange Bank of Baltimore*(1), the statute provided that real estate might be accepted in good faith as security for, or in payment of debts previ-

(1) 92 U.S.R. 122.

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ously contracted (p. 127); and in *Bank of New South Wales* v. *Campbell* (1), the banking company had the power to take, hold, etc., any lands, etc., in satisfaction, liquidation or discharge of, or in security for any debt due, or to become due (p. 192). Again in the *Royal Bank of India's Case* (2), much relied upon by the respondents, the bank merely took over the shares which had already been pledged to it as security. The only case cited at Bar in which, without express statutory authority, a bank was held entitled to take in payment of a debt due to it property upon which it had not previously held a mortgage or lien as security, is *Sacket's Harbour Bank* v. *Lewis County Bank* (3).

Counsel for the respondents also rely upon the provision of section 30(*a*) of the "Interpretation Act," R.S.C., ch. 1, that a corporation shall be vested with power

> to acquire and hold personal property or movables for the purposes for which the corporation is constituted, and alienate the same at pleasure.

Having regard to the words "for the purposes for which the corporation is constituted," I incline to the view that this statutory provision was not intended to enable a body corporate to acquire its debtor's property in payment of a debt, but was rather designed to enable it to take and hold personal property for purposes similar to those for which a bank is by section 79 of the "Bank Act" enabled to acquire real estate. At all events this provision of the "Interpretation Act" can add nothing to the powers conferred by the "Bank Act" itself, which defines the purposes for which banks

(1) 11 App. Cas. 192. (2) 4 Ch. App. 252.
(3) 11 Barb. (N.Y.) 213.

are constituted and the powers which Parliament intended they should possess and exercise.

The special provisions of sections 79, 81 and 82 relate, however, only to the acquisition of real or immovable property.

The defendants' leasehold was personalty; and as such the mortmain laws would not prevent the appellant bank acquiring it. Grant on Corporations, pages 127 *et seq.* and 614. All that is provided in the "Bank Act" with regard to personal property is that the bank shall have in respect of personal or movable property mortgaged or hypothecated to it the same rights, powers and privileges which it is by the Act declared to have in respect to real or immovable property mortgaged to it (section 80(2)). Except the inhibitions against dealing in the buying or selling or bartering of goods, wares and merchandise or engaging in any trade or business and against lending upon or dealing in the shares of its own capital stock or in the capital stock of any other bank, there is no express prohibition in the "Bank Act" against a bank acquiring personal or movable property. The express prohibition against dealing in goods, wares or merchandise, affords a cogent argument in support of the bank's right to acquire such property in a manner and under circumstances which do not constitute such a dealing, or to acquire other personal property in any manner.

Moreover, by first taking a mortgage from its debtors and then a release of their equity of redemption, the Ontario Bank could undoubtedly have acquired their property without departing from the very letter of the provisions of the "Bank Act," assuming that, by virtue of section 80(2), all that is expressed and implied in sections 79, 81 and 82 applies to per-

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sonal or movable property as well as to real property and that the presence of these sections in the Act (apart altogether from the provisions of the mortmain statutes) by implication excludes the right of a bank to acquire real or immovable property of its debtors in satisfaction or payment of their debts. The Ontario Bank has only done directly that which it might thus have done indirectly.

The good faith of its advances to the defendants not having been questioned and the honesty of its avowal that in acquiring their business and leasehold premises its sole purpose was, if possible, to avoid a loss and to endeavour to realize its claim against them by selling the business as a going concern not having been challenged, I am not prepared to hold that in the mere acquisition of the defendants' lease the bank violated the letter or the spirit of the "Bank Act." I should have been better satisfied, however, had I found in our "Bank Act" a provision explicitly conferring on our banks power to acquire their debtors' property in satisfaction of the banks' claims similar to that given to other banks mentioned in some of the cases to which I have alluded.

(*c*) The documents in evidence and the oral testimony admissible for that purpose, make it quite clear that the intent of the officers of the bank when acquiring the defendants' business and leasehold term, was to carry on the business for a time in order to sell it with the benefit of the lease as a going concern, and that this intention was well known by the defendants. It is too well established in English jurisprudence to admit of question that illegality of purpose on the part of one party to an agreement, known at the time it was made to the other party, is a fatal bar when the

latter seeks to enforce the agreement or any part of it, or any claim arising out of it. *Pearce* v. *Brooks*(1). The test of his right to recover is whether or not, in the presentation of his case, he must rely upon the tainted agreement as the basis of his claim. If so, he cannot succeed, because

> no court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is clearly brought to the attention of the court, and if the person invoking the aid of the court is himself implicated in the illegality. *Scott* v. *Brown, Doering, McNab & Co.*(2).

By section 76(2) of the present "Bank Act" (section 64 of the Act of 1890) it is enacted that

> except as authorized by this Act, the bank shall not, either directly or indirectly,—
>
> (*a*) deal in the buying or selling, or bartering of goods, wares and merchandise, or engage or be engaged in any trade or business whatsoever.

It is suggested that, as subsidiary to the realization of its claim against the McAllisters, which was incurred in due course of banking, and under the power to

> engage in and carry on such business generally as pertains to the business of banking (section 76(1)(*d*)),

notwithstanding the explicit prohibition of sub-section 2 of section 76, it was lawful for the bank to carry on for a reasonable time the milling business acquired from the defendants, in order to dispose of it to the best advantage as a going concern. Had there been no prohibition such as that in clause (*a*) of sub-section 2 of section 76, I should doubt the sufficiency of such general words as those of clause (*d*) of sub-section 1 to authorize a bank to carry on any mercantile or manufacturing business. But having regard to the very drastic

(1) L.R. 1 Ex. 213. (2) [1892] 2 Q.B. 724, at p. 728.

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and comprehensive language in which the prohibition in clause (*a*) of sub-section 2 is couched, it would in my opinion require terms much more pointed and specific to bring the carrying on of such a business within the words of exception by which the prohibitory clause is introduced. If a bank might carry on a mercantile business to save itself from a loss where money loaned by it is in jeopardy, the prohibition of sub-section 2(*a*) would be practically removed from the statute. With respect, I am unable to concur in the view that engaging in a mercantile business for a reasonable time in order to prevent or minimize a loss is something which "appertains to the business of banking" and is permissible as subsidiary to the legitimate purpose of realizing a valid banking claim. Apart from the objection that this suggestion involves the introduction of the unsatisfactory test of "a reasonable time" for the determination of the legality or the illegality of engaging in any trade or business which a bank might deem it desirable to carry on, there is the still more formidable objection that in order to hold legitimate the bank's carrying on of the business for any period, however reasonable, we must qualify the absolute prohibition of section 76, (2) (*a*) by the addition of a proviso excluding from its operation a case which, as the prohibitory clause reads in the statute, is clearly within it. For this I can find no justification whatever its consequences — and in the present case I fully appreciated the hardship. I see no escape from the conclusion that the carrying on of the milling business of the bank was a prohibited engaging in trade or business.

Then it is suggested that the provisions made for carrying on the business are severable from the agreement to transfer the business and the lease. It is true

that the actual engagement of C. B. McAllister by the bank for this purpose is evidenced by a separate document. But the reference to this document in the instrument of transfer itself sufficiently establishes the existence of the intent of the bank's officers to carry on the business and the knowledge of it by the defendants. McAllister's evidence shews that the provision for carrying on the business was part and parcel of the arrangement for taking it over, and was an inducement held out to the bank and practically a condition on which the McAllisters' offer was accepted. But if a case of actual participation in the illegal purpose is not made out — if upon the evidence this should be regarded merely as a case of illegal intent of one party known to the other, I am, with respect, unable to concur in the view that any real severability exists which would justify the court in holding that the agreement for the transfer of the lease and the consequent implied undertaking of the bank to indemnify the assignors against payment of future rent to accrue due thereunder were not affected by the taint of illegality infused into the entire arrangement by the known intent with which the bank officials entered into it. It matters not that the contemplated disregard of the prohibition of the "Bank Act" was merely a means to a lawful end — the realization of a valid claim. The legality of the end never hallows the use of illegal means to attain it.

If the contract were still wholly executory on the part of the bank, as parties not in *pari delicto,* because the prohibition of the statute is directed against the bank and it alone is penalized (section 146), the McAllisters might possibly have recovered the $10,000 paid the bank and have got their business and pro-

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perty back. *Williams* v. *Hedley* (1). But the fact that the contract is in its most substantial parts an executed contract, that the contemplated illegality has been consummated and that rescission is now impossible would prevent the granting of this questionable relief if it were sought. *Kearley* v. *Thomson* (2).

Again, if the right to indemnity, which the defendants assert, flowed simply from the fact that the leasehold term had become vested in the bank, as it probably had, *Ayers* v. *South Australian Banking Co.* (3); *Exchange Bank of Canada* v. *Fletcher* (4); the defendants' claim might be entertained because they would then not require to invoke the illegal transaction to make out their case. *Taylor* v. *Chester* (5). But it is, I fear, impossible for the defendants to escape from the position that their claim to indemnification rests entirely upon an implied term of the very contract by which the bank acquired the lease and business. As part of their case against the bank they must set up and prove that contract. As an integral part of that contract the implied stipulation for indemnification is vitiated as to the McAllisters by the illegality of the use to which the officials of the bank contemplated putting the property which formed the subject of the contract, because the McAllisters were fully cognizant of the purpose, if, indeed, they did not, as a term of the bargain, pledge their active assistance to the bank in accomplishing it.

Neither may the court refuse to give effect to the bank's plea of illegality on the ground that public policy will be advanced by refusing to permit it to take

(1) 8 East 378.
(2) 24 Q.B.D. 742.
(3) L.R. 3 P.C. 548, at p. 559.
(4) 19 Can. S.C.R. 278.
(5) L.R. 4. Q.B. 309, at p. 314.

advantage of its own misdeed. The hardship of the present case is that, having had the full benefit of the illegal contract, the bank now escapes liability and leaves the defendants to bear an incidental burden, its assumption of which was a material part of the consideration for which they transferred to it their business and paid $10,000 in addition. But this is a situation with which the court is confronted very frequently, when a plaintiff, who has wholly executed his part of an illegal contract, seeks to enforce performance by the defendant of that for which he has received full consideration. It is of greater importance to maintain intact the rule of the court that it will never lend its aid to the enforcement of an illegal contract than to endeavour to do complete justice in favour of suppliants who are themselves without fault. And the rule is the same in equity as at law.

Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks; but as to any claims sought to be actively enforced on the footing of an illegal contract, the defence of illegality is as available in a court of equity as it is in a court of law. *Per* Giffard L.J. in *Re Cork and Youghal Railway Co.*(1).

Because they require the aid of the court to compel the complete execution of an agreement vitiated by illegality of purpose, of which they were fully cognizant, if they did not in fact agree to aid in carrying it out, the defendants cannot, in my opinion, maintain their claim against the third party, and on this ground

(1) 4 Ch. App. 748, at p. 762.

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the appeal of the latter should be allowed and the third party proceeding should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Bicknell, Bain & Strathy.*
Solicitors for the respondents: *O'Connell & Gordon.*

THE CALGARY AND EDMONTON RAILWAY COMPANY ..... } APPELLANTS;

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*May 6, 12.
*June 15.

AND

DANIEL H. MACKINNON..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Arbitration and award—Expropriation—Form of award—Evidence—View of property—Proceeding on wrong principle—Disregarding evidence.

In expropriation proceedings, under the "Railway Act," the arbitrators in making their award stated that they had not found the expert evidence a valuable factor in assisting them in their conclusions and that, after viewing the property in question, they had reached their conclusions by "reasoning from their own judgment and a few actual facts submitted in evidence." On appeal from the judgment of the Supreme Court of Alberta setting aside the award and increasing the damages,

Held, that it did not appear from the language used that the arbitrators had proceeded without proper consideration of the evidence adduced or upon what was not properly evidence and, therefore, the award should not have been interfered with.

APPEAL from the judgment of the Supreme Court of Alberta setting aside an award of arbitrators with costs.

In proceedings under the "Railway Act" for the expropriation of lands required for the use of the railway the evidence adduced was contradictory and the arbitrators made a personal inspection of the property in question. In making their award, the majority of the arbitrators said:

"We regret very much that the evidence submitted

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consisted so largely of personal opinions of values and produced so little of authentic fact in confirmation. The expert evidence submitted varied so widely in difference of opinion as to land values that we have not found it a valuable factor in assisting our conclusions, and we have been thrown very considerably upon our own judgment in arriving at this decision.

"Reasoning from our own judgment and a very few actual facts submitted in evidence we are convinced that the sum of two thousand nine hundred dollars ($2,900.00) is a fair and just valuation of the land under dispute."

The third arbitrator gave his opinion as follows:

"In view of the testimony of three of the witnesses who swore that they were prepared to pay five thousand dollars ($5,000.00) for this property I dissent from the above finding, and consider the award should be five thousand dollars for the property less three hundred dollars for the fraction remaining, making a net total of four thousand seven hundred dollars ($4,700.00)."

By the judgment appealed from, the Supreme Court of Alberta took the view that the arbitrators could not substitute their personal inspection of the property for the other evidence adduced and that it appeared that the majority of them had reached their conclusions from their own opinions as to the value of the lands and not from those of the witnesses.

Hellmuth K.C. and *Curle* for the appellants.

Chrysler K.C. and *Travers Lewis K.C.* for the respondent.

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GIROUARD J.—This is an appeal from the Supreme Court of Alberta *en banc* setting aside an award of arbitrators fixing the compensation to be paid to the respondent for land expropriated under the "Railway Act." The reason given by the court below was that the majority of the arbitrators, who awarded a smaller amount, substituted their own opinion for the testimony of the witnesses. As usual in these cases, the evidence is contradictory. Personal opinions as to the value of the land are also given. The arbitrators decided to view the premises and judge for themselves. After having done so, they came to the conclusion

> from their own judgment and a few actual facts submitted in evidence,

as they observe, that $2,900 was a fair and just valuation. One of the arbitrators dissented

> in view of the testimony of three witnesses who swore that they were prepared to pay $5,000 for the property.

I do not think that this evidence is of much value. The Supreme Court of Alberta thinks otherwise and goes so far as to hold that the opinion of the arbitrators based upon their personal examination of the premises cannot control or override the opinions and the statements of these witnesses. I entirely disagree from this view. The arbitrators are bound to give proper weight to the evidence adduced and accept only that which seems to them to be correct; and, to help them to reach this result, they are empowered by law to view the locality. Are all the judges in appeal in as good a position as they were to consider properly all the circumstances of the case? I would long hesitate to set

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aside an award so rendered by arbitrators selected with the consent of the proprietor, as they were in this case, he approving in writing their appointment by the judge, especially as no irregularity, or informality, or illegality, or partiality is alleged.

I would, therefore, allow the appeal with costs.

DAVIES J.—I concur in the opinion of Mr. Justice Anglin.

IDINGTON J.—The expressions in the award of the majority are certainly unfortunate.

They seem almost to exclude the expert evidence and then say:

> We have been thrown very considerably upon our own judgments in arriving at this decision. Reasoning from our own judgment and a few actual facts submitted in evidence, etc.

The presumption must, I think, be in favour of the arbitrators having acted properly.

There is nothing else in this case to lead one to the conclusion they did otherwise unless it is implied from these ambiguous expressions.

Being ambiguous, how can I affix to them the definite meaning needed to prove their authors had proceeded upon a wrong principle?

After much consideration and hesitation I rather think them capable of being construed, and to have been intended to be used, in such a way as to exclude the implication of impropriety found by the court below.

It is quite right for arbitrators to use their own judgment in determining the value or want of value of evidence put before them by experts or others. If it

shocks their common sense or common knowledge of affairs, for possessing which they may have been chosen as arbitrators, they are not bound to accept it simply because sworn to.

They are often by reason of extreme conflict of evidence driven to exercise that same common sense and knowledge of affairs, in sifting and estimating, so as to get out of the conflict some sufficient grain of truth upon which to proceed properly in the business they have been chosen for.

Can I fairly say these gentlemen meant any more ? Can I impute to them by virtue of these expressions the substitution of their own personal opinions (apart from such as derivable from the view they had) for the evidence ? I think not.

I would allow the appeal with costs.

DUFF J.—With great respect I cannot agree with the view of the court below as to the grounds upon which the arbitrators proceeded. I think it is rather a forced construction of the language used to say that they must have discarded the evidence entirely. After examining the record carefully I am disposed to think there was some reason for regarding the specific opinions as to value put forward by the so-called expert witnesses as of very little weight. There was some evidence, not very much it is true, of sales in the neighbourhood; but sufficient, I think, taken together with the knowledge of the locality gained by the actual examination made by the arbitrators and such general evidence touching the elements of value and the circumstances affecting it as was given by the witnesses to enable them to pass upon the question before them without resorting to the opinions mentioned. It is,

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I think, to these specific opinions given by the expert witnesses rather than to their evidence as a whole that the arbitrators refer in the passage which appears mainly to have led the court below to the view that the arbitrators had constituted themselves valuers, and had proceeded upon their own personal views without regard to the evidence adduced.

The appeal should, I think, be allowed.

ANGLIN J.—The ground on which the Supreme Court of Alberta allowed the appeal to them from the award herein was that, the arbitrators having made an inspection of the property in question, the majority wholly discarded the evidence which they had taken and proceeded solely upon their own opinions of the value of the property based on such skill and knowledge as they had independently of the evidence adduced and upon such information as their own inspection gave them. If the award made it apparent that the majority of the arbitrators had in fact pursued this course in reaching their conclusion, I should not have been prepared to disturb a judgment setting aside their award, although it by no means follows that I would have upheld the increase in the amount of the award made by the Supreme Court of Alberta.

But while the award of the majority may not be happily worded and might, on cursory perusal, give the impression that, in reaching their conclusion, they had wholly disregarded the evidence, a careful consideration of the award makes it reasonably clear that what they intended to state was that the inspection of the property had satisfied them that certain parts of the evidence adduced could not be relied upon while

other parts might safely be made the basis of their adjudication. A proper appreciation of the value of the evidence is always a legitimate object of a view and, if it leads to the discrediting and the consequent rejection of certain portions of the testimony, I am not prepared to say that undue weight or effect has therefore been given to the result of the view. The impeached award states that, while the majority of the arbitrators "have not found" the expert evidence "a valuable factor in assisting (their) conclusions," they have reached those conclusions by

> reasoning from their own judgment and a few actual facts submitted in evidence.

This language does not, in my opinion, shew that the arbitrators gave no weight or consideration to the evidence before them. On the contrary, it rather establishes that they acted upon such of it as they deemed credible and trustworthy. I am therefore unable to agree with the opinion of the Supreme Court of Alberta that the majority of the arbitrators proceeded on a wrong principle and made an award "on what was not properly evidence."

Weighing the evidence itself and giving due effect to the fact that the arbitrators had the advantage of a view, it is, I think, impossible for an appellate court to say that the award is clearly erroneous—still less that it should be increased to the amount allowed by the Supreme Court of Alberta.

I am, therefore, with respect, of the opinion that the Alberta Court erred in interfering with the award, that the appeal from their judgment should be allowed with costs here and below and that the award should be reinstated.

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Appeal allowed with costs.

Solicitors for the appellants: *Dawson, Hyndman & Hyndman.*

Solicitors for the respondent: *MacKinnon & Cogswell.*

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

AND

THOMAS D. ROBINSON AND W. E. ROBINSON (PLAINTIFFS) ..... RESPONDENTS.

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*May 11.
*June 15.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Action—Damages—Denial of traffic facilities—Injury by reason of operation of railway—Limitation of actions—"Railway Act," 3 Edw. VII. c. 58, s. 242—Construction of statute.

Injuries suffered through the refusal by a railway company to furnish reasonable and proper facilities for receiving, forwarding and delivering freight, as required by the "Railway Act," to and from a shipper's warehouse, by means of a private spur-track connecting with the railway, do not fall within the classes of injuries described as resulting from the construction or operation of the railway, in section 242 of the "Railway Act," 3 Edw. VII. ch. 58, and, consequently, an action to recover damages therefor is not barred by the limitation prescribed by that section for the commencement of actions and suits for indemnity.

Judgment appealed from (19 Man. R. 300) affirmed, Girouard and Davies JJ. dissenting.

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

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

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

(1) 19 Man. R. 300.

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Chrysler K.C. and *George F. Macdonell* for the appellants. The action is based upon section 294 of the "Railway Act" of 1903. No action lies under that section because the proper remedy, if any, is given section 253 of that Act. Craies' Hardcastle, 212, 213. Neither does the remedy in the case arise under the latter section because the Board's order to restore the connection was a power exercised under section 214.

The judgment appealed from should be set aside upon the following grounds: (1) The court had no jurisdiction to entertain the action: (2) It is wrong in holding that the order of the Railway Board was a finding of fact conclusive upon the court in this action: (3) There is error in the finding that the respondents were entitled to recover damages arising prior to the 19th February, 1906, the date of the first order of the Board: (4) There is error in the finding that the respondents were entitled to recover damages for the period subsequent to the 19th February, 1906, while the appeal from said order to the Supreme Court of Canada was pending: (5) It should have been determined that the cause of action sued upon was *res judicata:* (6) There is error in giving effect to the order of the Board of the 19th February, 1906, because that order was superseded and abrogated by the Board, and was waived and abandoned by the respondents by the application and proceedings which were concluded by the second order, on 22nd September, 1906: (7) The action should have been dismissed upon the ground that the claim of the respondents was barred by the limitation prescribed by section 242 of the "Railway Act" of 1903.

The following authorities are referred to as to the

enforcing of section 253 in respect to affording reasonable facilities: *South Eastern Railway Co.* v. *The Railway Commissioners*(1); *Darlaston Local Board* v. *London and North Western Railway Co.* (2); *Cowan & Sons* v. *North British Railway Co.* (3); Macnamara on Carriers, 346; *Lancashire Brick and Terra Cotta Co.* v. *Lancashire and Yorkshire Railway Co.*(4); *Perth General Station Committee* v. *Ross* (5); *Grand Trunk Railway Co.* v. *McKay*(6); *Grand Trunk Railway Co.* v. *Perrault*(7).

The claim is barred by limitation of time: See R.S.C., ch. 37, secs. 284, 306, 427; 2 Can. Ry. Cas. 383-389; *McArthur* v. *Northern and Pacific Junction Railway Co.*(8).

Construction and operation include all actions upon the statute for breach of any duty in regard to either construction or operation. Rights arising under contract are excluded. *Levesque* v. *New Brunswick Railway Co.*(9); *McCallum* v. *Grand Trunk Railway Co.*(10); MacMurchy & Denison, Railway Act, p. 480; see also cases collected in, *Zimmer* v. *Grand Trunk Railway Co.*(11); *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric Railway Co.*(12).

Nesbitt K.C. and *Hudson* for the respondents. The grounds upon which the plaintiffs rely generally are: (*a*) That an action lies for breach of a statutory duty

(1) 6 Q.B.D. 586.
(2) [1894] 2 Q.B. 694.
(3) 11 Ry. & Can. Tr. Cas. 96.
(4) [1902] 1 K.B. 651.
(5) [1897] A.C. 479, at p. 489.
(6) 34 Can. S.C.R. 81, at p. 97.
(7) 36 Can. S.C.R. 671, at pp. 677, 679.
(8) 17 Ont. App. R. 86.
(9) 29 N.B. Rep. 588.
(10) 31 U.C.Q.B. 527.
(11) 19 Ont. App. R. 693, at pp. 702-703.
(12) 10 Ont. L.R. 419, at p. 426.

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and this right is not limited by the provisions of the "Railway Act" giving the Board of Railway Commissioners jurisdiction to make orders for the performance of specific acts; (*b*) That the finding of the Board that there was a breach of this statutory duty, is conclusive; (*c*) That the plaintiffs suffered damage; (*d*) That their claim was not barred by section 242 of the "Railway Act," 1903; (*e*) That the plaintiffs' claim for damages had not been dealt with by the Board of Railway Commissioners nor by the arbitrators.

An action lies for the breach of a statutory duty. *Groves* v. *Wimborne*(1); *Lancashire and Yorkshire Railway Company* v. *Gidlow* (2); *Davis & Sons* v. *Taff Vale Railway Co.*(3); *Crouch* v. *Great Northern Railway Co.*(4).

The plaintiffs rely on sections 253 and 294 of the "Railway Act," 1903. The Board had no power to award damages, therefore the court can entertain the action. *Duthie* v. *Grand Trunk Railway Co.*(5). If the Board could not entertain claims for damages for a breach of section 214 of the "Railway Act" of 1903, it is evident that its powers are no greater in respect of section 253. The Board is a tribunal possessing only the powers conferred upon it by statute. It was not created to supplant or even to supplement the provincial courts in the exercise of their ordinary jurisdiction, but to exercise an entirely different jurisdiction.

The cases relied on by the respondents are: *Grand*

(1) [1898] 2 Q.B. 402.
(2) L.R. 7 H.L. 517.
(3) [1895] A.C. 542.
(4) 9 Exch. 556.
(5) 4 Can. Ry. Cas. 304.

Trunk Railway Co. v. *Perrault*(1); *Perth General Station Committee* v. *Ross*(2); *Balfour* v. *Malcolm* (3), *per* Lord Campbell, at page 500. The jurisdiction of the court to award damages in the present case is not ousted.

The Board has found that there was a breach of the statutory duty, it had jurisdiction to do so, and that finding is conclusive. *Canadian Northern Railway Co.* v. *Robinson*(4). Apart from the provision of section 42(3) of the "Railway Act," 1903, the decision of the Board is that of a court of record (section 8, "Railway Act," 1903), and, on a matter once litigated between the same parties, it is conclusive. *Shoe Machinery Co.* v. *Cutlan*(5); *Lea* v. *Thursby*(6).

The plaintiffs suffered damage by reason of the defendants' refusal to supply reasonable facilities. This finding of Mr. Justice Metcalfe has not been questioned by the defendant.

The plaintiffs' action is not barred by section 242 of the statute. The provision of that section being a special limitation should be construed strictly. Abbott's Railway Law, 269; Maxwell on Statutes, 429; *Anderson* v. *Canadian Pacific Railway Co.*(7). The breach of statutory duty of which the plaintiffs here complain would not appear to be within the above section if the words therein are given their ordinary and proper meaning. The injury was not caused by construction nor by operation of the railway.

Under the old railway Acts where the words of the

(1) 36 Can. S.C.R. 671.
(2) [1897] A.C. 479.
(3) 8 Cl. & F. 485.
(4) 37 Can. S.C.R. 541.
(5) [1896] 1 Ch. 667.
(6) [1904] 2 Ch. 57, at p. 64.
(7) 17 O.R. 747.

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corresponding section were "by reason of the railway," it was held in a number of cases that the provisions referred only to acts of commission and not to omissions. *Reist* v. *Grand Trunk Railway Co.*(1), *per* Robinson C.J.; *North Shore Railway Co.* v. *McWillie* (2), at page 514; *Findlay* v. *Canadian Pacific Railway Co.*(3), where all the authorities are collected.

In dealing generally with actions (sec. 294, "Railway Act," 1903; sec. 427, Act of 1906) Parliament has been careful to provide for acts of omission as well as of commission. When the "Railway Act" was recast in 1903, it was divided into headings. The sections in Part VII. were put under the heading of "Construction of Railway," and of Part IX. under the heading of "Operation of Railway." Section 242 is placed at the end of the latter group. Section 253, which gives the plaintiffs their right of action, is grouped under a subsequent heading, namely, Part XI., "Tolls." The words "construction" and "operation" used in section 242, would seem to be properly applied only to rights of action arising in matters dealt with under these headings. The court should regard these headings as furnishing a key to the clauses ranged under them: *Hammersmith and City Railway Co.* v. *Brand*(4); *City of Toronto* v. *Toronto Railway Co.*(5).

The plaintiffs' claim for damages has not been dealt with before.

We also rely on: *City of Dublin Steam Packet Co.* v. *Midland Great Western of Ireland Railway Co.*(6);

(1) 15 U.C.Q.B. 355.
(2) 17 Can. S.C.R. 511, at p. 514.
(3) 2 Can. Ry. Cas. 380.
(4) L.R. 4 H.L. 171.
(5) [1907] A.C. 315.
(6) 8 Ry. & Can. Tr. Cas. 1.

Pickering, Phipps et al. v. *London and North Western Railway Co.*(1); *Charrington, Sells, Dale & Co.* v. *Midland Railway Co.*(2).

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GIROUARD J. (dissenting).—The Railway Board has found in this case and this court has declared on a previous occasion(3), that the respondents have been deprived of reasonable railway facilities and ordered the same to be restored.

In a case like this the "Railway Act" of 1903, section 242, gives an action against the railway company to the proprietor who has been injured by its action. This action is entirely based upon this statute and I cannot conceive that it has any existence outside of its provisions. I quite agree with Mr. Justice Davies that it is outlawed or prescribed by the limitation of one year of that section.

I would, therefore, allow the appeal with costs.

DAVIES J. (dissenting).—After a great deal of consideration I have reached the conclusion that the contention of the appellants with respect to the effect of the 242nd section of the "Railway Act," 1903, prescribing a limitation for the bringing of actions for damages must be given effect to in this action.

The appellant company and its predecessors in title of the railway operated the same so far as the plaintiffs in this case were concerned by supplying them with spur-track facilities for the carriage to and from their premises adjoining the railway line of goods consigned to them and from them to others.

(1) 8 Ry. & Can. Tr. Cas. 83. (2) 11 Ry. & Can. Tr. Cas. 222.
(3) 37 Can. S.C.R. 541.

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In the autumn of the year 1904, after giving them notice of its intention to withdraw these spur-track facilities, the company tore up the spur-line and thus effectually discontinued the facilities.

In September, 1905, the respondents applied to the Railway Board for an order directing the appellant company "to replace the siding wrongfully taken up from petitioners' property," and in February, 1906, the Board made an order

> that the railway company be, and it is hereby directed to restore the spur-track facilities formerly enjoyed by the applicants for the carriage, despatch and receipt of freight in car-loads over, to and from the line of the said railway company, and the connection between such spur-track and the railway siding on the land of the applicants.

The company appealed to this court, which held that the Railway Board had, in the circumstances, jurisdiction to make the order of 1906.

In the meantime, pending the appeal, Parliament had amended the 253rd section of the "Railway Act," providing that the reasonable facilities which every railway company was required to afford under that section should include reasonable facilities for receiving, forwarding and delivering traffic upon and from those sidings or private branch railways, etc.

This amending statute came into force on 13th July, 1906, and, immediately thereafter, without waiting for the decision of this court on the appeal from the jurisdiction of the Railway Board to make the order of 1906, the respondents made a new application to the Railway Board, dated 28th July, 1906, for a restoration of their former siding track facilities. The appellants had already made an application to the Board for leave to expropriate the lands of the respondents, and the two applications were heard by the

Board simultaneously on the 22nd September, 1906, and an order granted allowing the railway company to expropriate respondents' lands, but *making it a condition of such allowance or authority* that it should, before a date in October, connect its tracks with a siding then existing on respondents' lands, and until possession should be acquired by them of respondents' lands

should operate such siding and furnish such facilities in connection therewith as are usual in the case of a private siding connection with a railway.

The railway company, on the 29th day of September, 1906, that is within one week from the making of the order, constructed the siding ordered and made the connection constructed on the private siding upon respondents' lands; and the lands of respondents were expropriated by the railway company pursuant to the leave granted.

The present action was brought on the 27th October, 1908, to recover damages by reason of respondents being deprived of reasonable and proper facilities for the receiving, forwarding and delivery of traffic between the month of November, 1904, when the sidings were removed, and the 29th September, 1906, when they were restored pursuant to the order of the 22nd September, 1906.

Many important questions were raised and argued as to the right of the plaintiffs (respondents) to recover those damages, but in view of the construction I place upon the limitation clause of the "Railway Act," 1903, section 242, it is unnecessary for me to refer to any other of them than the effect of this section.

It reads as follows:

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ACTIONS FOR DAMAGES.

All actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, or if there is continuation of damage within one year next after the doing or committing of such damage ceases, and not afterwards; and the defendants may plead the general issue and give this Act and the special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by the authority of this Act or of the special Act. 51 Vict. ch. 29, sec. 287.

Nothing in this section shall apply to any action brought against the company upon any breach of contract, express or implied, in the carriage of any traffic nor to any action against the company for damages under any section of Part XI. of this Act, respecting tolls.

The acts complained of, the removal in 1904 of the siding track facilities and the continued operation of the railway without those siding facilities until September, 1906, when they were restored by order of the Board, are the wrongful acts of which the plaintiffs (respondents) complain.

They are acts which, in my opinion, are covered by the language of the section above quoted. They are "damages sustained by reason of the operation of the railway." I construe the words to mean and include not only the actual physical operation of the railway causing injury or damage, but the manner of operation, wrongful, illegal or improper. There can perhaps be no better example of my meaning than the concrete case we have before us.

The railway was operated at the point in question in connection with a private siding on plaintiffs' lands over which their goods were carried to and from their warehouse. The appellant company removed that siding and for nearly two years refused to restore it. They operated the road during those two years without giving the plaintiffs that which they had a right to

have, namely, the track-siding facilities. The plaintiffs applied to the Railway Board to have the siding facilities restored which, as they allege, had been "wrongfully taken away." The Railway Board having, as was maintained by this court, jurisdiction in the matter held that such sidings and connections

> and the privilege of loading cars and delivering goods for carriage on such sidings, and of receiving and unloading goods by means thereof, were facilities within the Act,

and, after reciting the circumstances connected with their removal, held that

> under all these circumstances the discontinuance of the former service seems to the Board to have been unreasonable.

They accordingly ordered their restoration.

"The discontinuance of the former service" was, to my mind, a change or alteration in the manner of operating their road by the company, and was held by the Board to have been "unreasonable." It was, as contended by the plaintiffs, a wrongful and unjustifiable change and one for which they now seek to recover damages. Damages caused by this wrongful removal of, and this wrongful refusal to restore, these siding facilities, appear to me to be clearly within the words of the section "damages sustained by reason of the operation of the road." The road was operated for years with these facilities. They were, as was held, wrongfully withdrawn, and the road continued to be operated for nearly two years without them. The plaintiffs (respondents) claim damages sustained by them by reason of these wrongful acts, the removal of the facilities and the operation of the road without them.

I agree that to deprive the plaintiffs of their right

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of action the words of the limitation clause should be so plain and unambiguous as clearly to embrace the cause of action sought to be included within them. The several cases called to our attention and which I have examined do not put the argument higher than that. They are not of much assistance further than as laying down the general rule of construction which ought to be applied to such sections.

Every case must necessarily depend upon the precise language of the statute being construed. We have no right either to limit or extend the fair, clear and reasonable meaning of the language used by any rule of construction. After all what we must do in each case is to determine what the fair, clear and reasonable meaning of the words used really is, and if we find it includes the action before us we cannot allow any supposed rule of construction to defeat the obvious and clear meaning of the language Parliament has used. In endeavouring to ascertain the scope and meaning of this 242nd section, we must not lose sight of sub-section 2, which excludes from the operation of the section

> actions brought against the company upon any breach of contract, express or implied, in the carriage of any traffic, and actions against the company for damages under any section of Part XI. of this Act relating to tolls.

It is not contended, of course, that this action falls within any of these excepted causes of action, but they afford a very good key or guide to the construction of the main section. The contention is that the words of the main section do not cover the action or conduct of the railway company in cutting off the plaintiffs' siding-track facilities, which for years they had enjoyed as part of the operation of the appellant com-

pany's railway, and in continuing to operate their road for nearly two years while withholding such facilities from the plaintiffs and thereby causing them damage. The mere withholding of their facilities unless they formed a part of the operation of the road, would not have caused any damage to plaintiffs. That damage was caused because the facilities withdrawn did form part of the general operation of the road.

For these reasons I am of opinion that these side-track facilities did form part of the operation of the railway within the meaning of those words in the section above quoted, and that the action is barred by this statute, not having been begun within one year next after the doing or committing of the damage ceased when the siding facilities were restored.

I would, therefore, allow the appeal with costs and dismiss the action.

IDINGTON J.—The facts not expressly proven but necessary to establish the respondents' right of action were all relevant to the question of jurisdiction of, and necessary to have been found as a fact by, the Board of Railway Commissioners in order to establish that jurisdiction, which we held they had to make the order relied upon by the respondents.

It seems to follow as a necessary implication beyond doubt that the facts in question have been so found within section 42 of the "Railway Act" of 1903 as between the parties hereto and hence, for the purposes of this case, conclusively established.

As to the time limit in the Act relied upon to bar this action I do not think it falls in any way one may

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look at it within the class of cases for which the limitation is provided.

The scope and purpose of the provision seem to forbid and the language does not cover it.

A long line of authorities upon many statutes establish the substantial distinction between acts of commission and omission when similar language has been used.

A suggestion put forward, by way of drawing from the exception in sub-section 2, of section 242, an argument to support the alleged bar, seems to me entirely out of harmony with the generally received idea that a statute of limitations must be clear and express, and its operation not dependent on nor to be built upon fine-spun theory or speculation.

Besides, to give full effect to the suggestion would render much of the section as a whole ridiculous when applied to other things its language covers.

The appeal should be dismissed with costs.

DUFF J.—The effect of the finding of the Board of Railway Commissioners in *The Canadian Northern Railway Co.* v. *Robinson & Son*(1), was that the removal of the spur-track in 1904 constituted a denial to the plaintiffs of their rights under section 253 of the "Railway Act" of 1903. I think, moreover, that section 427 confers a right of action for such a breach of duty on the part of the railway company.

The question remaining is whether section 306 of chapter 37 R.S.C. [1906] applies.

That section, in its present form, appeared first in the Act of 1903. The pre-existing section which this

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

provision replaced had been the subject of much judicial discussion and of much difference of opinion. The legislature doubtless hoped by the change effected in 1903 to remove some at least of the prevailing uncertainty respecting the state of the law; but I think it a very profitless speculation to inquire into the existing state of the decisions with a view to getting light upon the meaning and effect attributed by the legislature to the language introduced in that year. We must, I think, take the section as it stands and construe its words in the light of other relevant provisions of the statute.

The view put forward by the appellants is that the section applies to any action based upon an alleged violation of any duty by the railway company in course of or in relation to the construction or operation of its works — saving, of course, the exceptions specified in the section itself. The difficulty about this construction is that there appears to be no explanation why if the legislature had meant to pass an enactment having that effect it did not use plain words to express its meaning. The words actually used suggest, I think, that the legislature was trying to express something short of this. The section provides that an essential element in the causes of action to which it applies is that the damage sued for has arisen by reason of the construction or operation of the railway. The fault of the company may be a positive act or omission but unless the action is brought in respect of damage arising by reason of such construction or operation it is outside the scope of the section.

The damages claimed here are made up of the expenses incurred and loss of business occasioned through the absence of specific facilities for shipment.

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I do not think it can be affirmed that in respect of these things the respondents would have been any better off if the railway had never been constructed or had never been in operation; and, that being so, it seems to follow that the damage in question does not strictly fall within the description

> damages or injury caused by reason of the operation or construction of the railway.

If it be said that this interpretation adheres too literally to the grammatical sense of the words used, the answer is that there appears to be no middle ground between a strict literal construction of the section and that put forward by the appellants as indicated above. To adopt the last mentioned construction would appear to be very much like rejecting words which the legislature seems to have deliberately chosen to express its meaning and substituting therefor others which it appears to have deliberately discarded.

ANGLIN J.—Three questions are raised by the appellants: the first, whether in adjudicating upon the right of the plaintiffs to the restoration of a spur-line or siding, which the defendants had removed, the Board of Railway Commissioners determined, as a question of fact, under sub-section 2 of section 253 of the "Railway Act" of 1903, that the railway company had not complied with the provisions of sub-section 1 of section 253 requiring them to

> afford all reasonable and proper facilities for the receiving, forwarding and delivering of traffic upon and from their railway;

the second, whether, if the Board in fact so determined, its finding was binding upon the Court of King's

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Bench of Manitoba under section 42 of the "Railway Act" of 1903, and, upon proof or admission thereof, entitled the plaintiffs to a judgment for such damages as they suffered by reason of the failure of the company to fulfil this statutory duty in regard to them; and the third, whether the plaintiffs' action for such damages is or is not within section 242 of the same statute.

A perusal of the order of the Railway Board, which bears date the 19th February, 1906, with the reasons given for making it, which accompany it as part of the record in the present case, makes it clear that the Board found that the railway company had deprived the respondents of reasonable facilities; that the siding or spur, as a means of shipping and unloading goods, should be regarded as "facilities" within the meaning of the "Railway Act"; and that such facilities were reasonable and proper and such as the company should afford. The discontinuance of the facilities was further found to have been unreasonable; and on these grounds the company was ordered to restore spur-track facilities to the applicants.

The jurisdiction of the Board to make this order having been questioned, it was affirmed by this court (1). I have no doubt, having regard to the fact that the statute, 6 Edw. VII. ch. 42, section 23, which did not become law until the 13th July, 1906, that the Board intended to determine, and did in fact determine that the railway company had failed to comply with the provisions of sub-section 1, of section 253, and that its refusal of the applicants' request for the restoration of the spur-line had been wrongful.

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

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Unless such a finding of the Railway Board is conclusive in a subsequent action brought to recover damages sustained by reason of the very fact so found, I am unable to appreciate the meaning or effect of the provisions of section 42 (now section 54 of R.S.C. ch. 37). Section 253(2) (now section 318 of R.S.C. ch. 37) expressly provides that the Board may determine as a question of fact whether the company has or has not afforded reasonable and proper facilities; and section 42 declares that the

> finding or determination of the Board upon any question of fact within its jurisdiction shall be binding and conclusive upon all courts.

The jurisdiction of the Board to make the order which it pronounced having been affirmed by this court, the findings of fact upon which the Board based its adjudication must be held to have been made within its jurisdiction and they were properly accepted in the provincial courts as conclusive.

There remains the question of the applicability of the limitation provision contained in section 242 of the "Railway Act" of 1903 upon which counsel for the appellants relied in argument. This action for damages was not brought until the 27th of October, 1908. At that time the revised statute of 1906, ch. 37, which had replaced the "Railway Act" of 1903, was in force and, as a provision relating to remedies and procedure, section 306 of the later Act, which corresponds substantially with section 242 of the Act of 1903, would, if otherwise applicable, govern this action, notwithstanding the fact that the major part of the damages sued for was sustained before the date when it became law.

The spur-track facilities were restored to the plaintiffs on the 29th September, 1906, and service was

thereafter supplied to them. The order of the Board for the restoration of the spur had been made on the 19th February, 1906, and its jurisdiction was affirmed by this court (1) on the 10th of October, 1906. Whether the plaintiffs' cause of action was complete and the statutory limitation, if applicable, commenced to run from the date when the damage sustained by the plaintiffs ceased (the 29th September, 1906), or, as argued by counsel for the respondents, a conclusive finding by the Railway Board of the fact that there had been a violation of the statute should be deemed a condition precedent to the plaintiffs' right to sue and their cause of action should therefore be deemed not to have been complete until the final adjudication in this court on the 10th of October, 1906 — considerably more than a year had elapsed from either date before this action was begun. Therefore, if section 306 of the revised statute applies, it affords a defence to the plaintiffs' claim.

So far as material it reads as follows:

306. All actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, or, if there is continuation of damage, within one year next after the doing or committing of such damage ceases, and not afterwards.

2. In any such action or suit the defendants may plead the general issue, and may give this Act and the special Act and the special matter in evidence at the trial, and may prove that the said damages or injury alleged were done in pursuance of and by the authority of this Act or of the special Act.

3. Nothing in this section shall apply to any action brought against the company upon any breach of contract, express or implied, for or relating to the carriage of any traffic, or to any action against the company for damages under the following provisions of this Act, respecting tolls.

During the argument I was somewhat impressed by the contention that the exceptions in sub-section 2, of

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section 242, of the "Railway Act" of 1903 (now sub-section 3, of section 306) — particularly that in regard to actions

for damages under any section of Part XI. of this Act respecting tolls

— indicate that sub-section 1 should receive a construction which would make it applicable to this case. But a closer study of the excepting sub-section has satisfied me that it does not support this view. The exception in regard to actions founded on contract is merely declaratory of the construction put upon a corresponding provision of the earlier railway Acts in a long series of decisions. There may have been some fear that any actionable injury or damages occasioned by breach of any duty imposed by the sections respecting tolls might possibly be deemed to have been sustained by reason of the operation of the railway notwithstanding that those sections are not found under the heading "operation." It may, for this reason, have been thought advisable to make an express exception, so that there could be no room to question the intention of Parliament to exclude from sub-section 1 claims arising from breaches of the sections respecting tolls. The presence of these exceptions, therefore, does not, in my opinion, suffice to justify giving to the language of sub-section 1 a wider effect than its literal meaning imports.

In answer to the plea of the statute counsel for the respondents urged —

(1) That because their claim for damages arose under section 253, which was contained in Part XI. of the "Railway Act" of 1903, this case falls within the latter exception in sub-section 2, of section 242;

(2) That by reason of the words, "after the *doing*

or *committing* of such damages ceases," and of the words,

may prove that the same *was done* in pursuance of and by the authority of this Act or of the special Act,

failure to perform a duty imposed by the statute, being a mere act of omission, should be held to be not within the section;

(3) That damage or injury sustained through failure to provide spur-line facilities is not

damage or injury sustained by reason of the construction or operation of the railway.

(1) The first answer made depends upon whether the adjectival phrase "respecting tolls" in sub-section 2, of section 242, should be regarded as qualifying the words "Part XI." (Part XI. is headed "Tolls") or the word "section." If it was intended to include all the provisions of Part XI. within the exception, the words "respecting tolls" were clearly superfluous. Upon an examination of Part XI. it will be found that it contained provisions respecting other matters, for instance, those in section 253 regarding facilities and those in section 272 regarding continuous carriage. Upon a proper reading of sub-section 2, of section 242, of the "Railway Act" of 1903, the phrase "respecting tolls" must, I think, be taken as qualifying the word "section," and it was actions for damages under those sections of Part XI. which respect tolls that were excepted from the limitation imposed by sub-section 1. The substitution in the present Act of the words "for damages under the following provisions of this Act, respecting tolls" — for the words "for damages under any section of Part XI. of this Act, respecting tolls" makes it quite clear that it is only actions for breaches

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of sections relating to tolls that are excepted from the operation of sub-section 1 of section 306.

(2) Although there is authority for the view that, owing to the presence of the words "doing or committing" in sub-section 1 and "was done" in sub-section 2, of section 306, the limitation should be confined to acts of commission as distinguished from acts of omission — notably the opinions of Moss C.J.A., and that of Burton J.A., in *Kelly* v. *Ottawa Street Railway Co.*(1), particularly at the foot of page 619, and the judgments of Robinson C.J., in *Reist* v. *Grand Trunk Railway Co.*(2), and of Richardson J. in *Findlay* v. *Canadian Pacific Railway Co.*(3); there are other cases such as *Brown* v. *Grand Trunk Railway Co.*(4), which seem opposed to this view. Such English cases as *Wilson* v. *Mayor and Corporation of Halifax*(5), and *Poulsum* v. *Thirst*(6), appear to establish that the better opinion is that, notwithstanding the presence of such words as "committed" or "done," and the absence of any words equivalent to "not done," or "omitted to be done" acts of omission in breach of statutory duty might be within the protection of section 306. See also *Jolliffe* v. *Wallasey Local Board*(7); *Holland* v. *Northwich Highway Board*(8). I am, therefore, unable to accede to the view that merely because it contains the words to which I have alluded, without the addition of such words as "not done" or "omitted to be done," the application of section 306 should be confined to cases of commission as distinguished from cases of omission.

(1) 3 Ont. App. R. 616.
(2) 15 U.C.Q.B. 355.
(3) 2 Can. Ry. Cas. 380.
(4) 24 U.C.Q.B. 350.
(5) L.R. 3 Ex. 114.
(6) L.R. 2 C.P. 449.
(7) L.R. 9 C.P. 62.
(8) 34 L.T. 137.

(3) But have the plaintiffs sustained damages or injury "by reason of the construction or operation of the railway?" I have given to these words much thought and study. Read literally and according to their ordinary use they do not cover the plaintiffs' cause of action. If it had been found that they were entitled to the facilities in question because similar facilities had been accorded by the defendants to rival traders and that the latter had thereby obtained an undue or unreasonable preference or advantage over the plaintiffs (section 253) a stronger case would be made for holding that damages or injury thus sustained by the plaintiffs were caused by the operation of the railway. But that is not the case presented. Upon the order and findings of the Railway Board the case before the court is purely one of refusal or neglect of the defendants to provide for the plaintiffs facilities found to be reasonable. To say that injury thus occasioned "is caused by reason of the construction or operation of the railway" would be to construe these words as including every case of omission to fulfil a duty, the performance of which would constitute part of the construction or operation of the railway. I incline to the opinion that to so read sub-section 1, of section 306, involves an unwarranted extension of a limitation provision.

Moreover, the "Railway Act" (R.S.C. ch. 37) contains one fasciculus — sections 150-259 inclusive — of which the heading is "construction," and another set of sections — 264 to 305 inclusive — under the heading "operation." Section 306 immediately follows the latter group. This arrangement of the statute is entitled to some weight in determining the purview of sub-section 1, of section 306. The authorities upon

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this point are collected in Craies' Hardcastle, pages 189 *et seq.* See also *City of Toronto* v. *Toronto Railway Co.* (1), at page 324. In the "Railway Act" of 1903 the relative positions of the sections corresponding with these provisions and of section 253 (now section 317) was the same. This classification affords another argument of some cogency in support of the view that actions for damages sustained through breaches of section 317 (formerly section 253) are not governed by section 306.

The exception of actions "for damages under the following provisions of this Act respecting tolls" casts some doubt on the soundness of this argument. But when we recall that such exceptions find their way into statutes often quite unnecessarily and because of sheer excess of caution, it seems obvious that too much weight may easily be given to their presence in determining the proper construction of the principal member of a section.

Parliament could so easily have expressly declared the limitation of section 306 applicable to all actions for injury or damages sustained by reason of a breach of any duty imposed by the statute, if that were its intention, that the deliberate restriction of its application to matters of "construction or operation" seems to afford a strong indication that the purpose was to confine it to matters which in the same statute are classified as matters of "construction" and of "operation." The contrast between the terms of section 306 and those of section 427 (formerly section 294), which declares, if it does not confer, the right of action, confirms this view of the proper construction of the earlier section.

(1) [1907] A.C. 315.

For the foregoing reasons I conclude that section 306 does not apply to this action.

I have reached this conclusion with some doubt, due to respect for the opinions of some of my learned brothers to the contrary and founded also upon the series of English decisions above referred to — especially upon *Holland* v. *Northwich Highway Board* (1), in which an omission to discharge a statutory duty was held to be within the protection of a limitation section restricting the right of recovery in proceedings for "anything *done* in pursuance of or under the authority of" the Act. But

> the court before holding a claim to be barred by lapse of time must see clearly that the statute applies.

Lightwood's Time Limit on Actions, 1909, page 3. Doubts, however serious, do not justify a reversal.

I reserve for further consideration the applicability of section 306 to actions to recover damages for breaches of the provision introduced by 3 Edw. VII. ch. 42, sec. 23, as an amendment to section 253 of the "Railway Act" of 1903 which has been transferred in revision and is now found as sub-section 2, of section 284 (formerly section 214) within the fasciculus headed "operation." This provision does not apply to the present case.

With some hesitation, I concur in the dismissal of this appeal.

Appeal dismissed with costs.

Solicitors for the appellants: *Clark & Sweatman.*
Solicitors for the respondents: *Hudson, Howell, Ormond & Marlatt.*

(1) 34 L.T. 137.

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*May 3.
*June 15.

THE GRAND TRUNK PACIFIC RAILWAY COMPANY AND THE CANADIAN PACIFIC RAILWAY COMPANY..... APPELLANTS;

AND

THE CITY OF FORT WILLIAM, CERTAIN LANDOWNERS IN THE CITY OF FORT WILLIAM, AND THE FORT WILLIAM LAND INVESTMENT COMPANY ..... RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS OF CANADA.

Board of Railway Commissioners—Jurisdiction—Municipal streets—Railway upon or along highway—Leave to construct—Approval of location—Condition imposed—Payment of damages to abutting landowners—Construction of statute—R.S.C. (1906) *c.* 37, *ss.* 47, 155, 159, 235, 237.

Having obtained the consent of the municipality to use certain public streets for that purpose, the G. T. P. Ry. Co. applied to the Board of Railway Commissioners for Canada for leave to construct and approval of the location of the line of their railway upon and along the highways in question. None of the lands abutting on these highways were to be appropriated for the purposes of the railway, nor were the rights or facilities of access thereto to be interfered with except in so far as might result from inconvenience caused by the construction and operation of the railway upon and along the streets. In granting the application the Board made the order complained of subject to the condition that the company should "make full compensation to all persons interested for all damage by them sustained by reason of the location of the said railway along any street." On appeal to the Supreme Court of Canada,

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

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Held, Davies and Duff JJ. dissenting, that, under the provisions of section 47 of the "Railway Act," R.S.C. (1906) ch. 37, the Board had, on such application, the power to impose the condition directing that compensation should be made by the company in respect of the damages which might be suffered by the proprietors of the lands abutting on the highways of the municipality upon and along which the line of railway so located was to be constructed.

APPEAL from an order of the Board of Railway Commissioners for Canada granting leave to the Grand Trunk Pacific Railway Co. to locate the line of their railway upon and along certain streets in the City of Fort William, in Ontario, subject to conditions imposed by the Board in respect of the payment of damages to the owners of lands abutting on the said streets.

Leave to appeal from the order in question was granted by order of the Chief Commissioner upon all questions of law arising thereunder.

The order appealed from, dated 6th October, 1909, was as follows:

"IN THE MATTER OF the application of the Grand Trunk Pacific Railway Company, hereinafter called the 'applicant company' under section 159 of the 'Railway Act,' for approval of the location of its line of railway through the Town of Fort William, in the Province of Ontario, as shown on the plan, profile and book of reference on file with the Board under file No. 1519.

"UPON the hearing of counsel for the applicant company and the Canadian Pacific Railway Company; and upon the consent of the City of Fort William by agreement dated the 29th March, 1905, and of the Canadian Pacific Railway Company by agreement dated December 1st, 1908, copies of which are on file

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with the Board; and upon the report of the chief engineer of the Board:—

"IT IS ORDERED that, subject to the terms and conditions contained in the said agreements, and subject to the condition that the applicant company shall do as little damage as possible, and make full compensation to all persons interested for all damage by them sustained by reason of the location of the said railway along any street in the said City of Fort William, as provided in the said agreement of 29th March, 1905, the location of the applicant company's line of railway through the City of Fort William, as shown upon the plan filed with the Board on the 4th day of June, 1906, be and the same is hereby approved.

"PROVIDED that this order shall not prejudice the rights if any, for the reimbursement of the amount of the said damages, if any, which the applicant company may have against the City of Fort William under the said agreement of 29th March, 1905, nor shall it prejudice the right, if any, which the Canadian Pacific Railway Company may have under the said agreement between that company and the applicant company, to be relieved of the payment of any portion of the compensation required to be paid persons interested for damages sustained by reason of the location of the said railway along the said streets, in the City of Fort William as hereinbefore provided.

"AND IT IS FURTHER ORDERED that the orders of the Board Nos. 7620 and 8231, dated respectively July 15th and October 6th, 1909, be and the same are hereby rescinded.

"J. P. MABEE, *Chief Commissioner*,
"Board of Railway Commissioners
for Canada."

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Part of the location sanctioned is along certain streets in Fort William where the city gave the Grand Trunk Pacific Railway Company authority to construct its line at grade. The appellants seek to be relieved from this condition on two grounds: first, that the Board, in directing the Grand Trunk Pacific Railway Company to make compensation to the abutting landowners, exceeded their jurisdiction and invaded the province of Parliament by attempting to extend the liability of the railway company beyond what is contemplated by section 155 of the "Railway Act"; and secondly, that the said condition is contrary to law as where a company is constructing a railway along a street at grade the abutting property-owners are not entitled to compensation.

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

D'Arcy Tate and *W. L. Scott* for the appellants.

Chrysler K.C. for the respondent, the City of Fort William.

Sinclair K.C. for certain landowners, in Fort William, respondents.

G. F. Henderson K.C. for the Fort William Land Investment Company, respondents.

GIROUARD J.—The appeal should be dismissed with costs. Section 47 of the "Railway Act" empowers the Railway Board to authorize the construction of a railway on a public street upon such terms as may be determined. The condition of compensation to the riparian proprietors comes under this section and I am not prepared to limit the scope of its provisions beyond its plain terms and meaning.

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DAVIES J. (dissenting).—I find it extremely difficult to determine the meaning of the order here in question.

It professes to approve of the location of the Grand Trunk Pacific Railway Company's line through the Town of Fort William in accordance with the plan filed

> subject to a condition that the applicant company shall do as little damage as possible, and make full compensation to all persons interested for all damage by them sustained by reason of the location of the said railway along any streets in the said city.

If this means that while approving of the location of the line as submitted to them for approval, they are making such approval subject to an imposition upon the company of greater obligations as to making compensation than those which are imposed by the "Railway Act," then, I think, the order to that extent is erroneous and beyond the jurisdiction of the Board.

I have said that I am unable to determine what the language of the order means. But the case was argued before us on the assumption that it did mean to impose such additional obligations, and I incline to think that may be its meaning as I understand that was its purpose. The difficulty of determining just what the condition means may make its enforcement, even if held *intra vires,* to be very great and the extent of the obligation it seeks to impose on the company is something which no one could now estimate. With that, however, we have nothing to do now.

Accepting the construction placed upon the order I think the condition referred to is *ultra vires.*

The statute has expressed in the 155th section the extent of the company's obligations with regard to

compensation payable by them by reason of the exercise of their powers.

I think the attempt to add to those obligations others which Parliament did not impose, but on the contrary excluded, is an attempt to legislate on the part of the Board and beyond its powers.

I cannot think that Parliament, in vesting in the Board the great and extensive powers it did, intended to vest in them powers without any limitation.

My construction of the sections now before us is that the conditions which the Board may legally make their order subject to must be such conditions as are not inconsistent with the provisions of the statute.

This order purports to be made under section 159, which requires the plan, profile and book of reference of the railway generally to be submitted to the Board which, if satisfactory, "may sanction the same." But the same section places specific limitations upon the Board's powers in giving such sanction, and in addition expressly declares that such sanction shall not "relieve the company from otherwise complying with the Act." It would seem to me a reasonable interpretation of the section and one logically following from such declaration that the Board cannot in giving its sanction attach any condition

relieving the company from otherwise complying with the Act;

that it cannot attach a condition imposing an obligation on the company *inconsistent with the Act.* In other words the Board cannot legislate so as to amend or change the Act itself while it may attach conditions to its sanction of the location not inconsistent with any of the provisions of the Act.

Much reliance is naturally placed upon section 47

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of the Act which it is contended confers absolutely arbitrary and uncontrolled powers upon the Board.

My construction of that section is that when it is invoked it must be read in conjunction with the special section or sections of the Act under which the Board for the time being is asked to make or on its own initiation makes an order.

The order now before us is one in point. It professes to be made on an application of the Grand Trunk Pacific Railway Company, under section 159 of the "Railway Act" (to which I have already referred)

> for approval of the location of its line of railway through the Town of Fort William, as shewn on the plan, profile and book of reference on file.

But clearly in construing the order and determining the bounds, if any, of the Board's jurisdiction in making it, reference must be had to section 237 which deals with the specific subject-matter of

> granting leave to construct the railway upon, along or across an existing highway

as well as to section 155, which deals with the compensation payable by the company in the exercise of its powers under the Act.

Construing the three sections together so far as this or analogous applications to the Board are concerned I would read section 47 as being controlled and limited by sections 155 and 237, so far as orders sanctioning the location and construction of railways upon, along or across existing highways are concerned.

The former section, 155, defines and limits the obligations of the company with respect to the compensation payable by them in the exercise of the powers granted to them

> to all persons interested for all damage by them sustained by reason of the exercise of such powers.

It would on the one hand clearly, to my mind, be *ultra vires* for the Board in any way or by any condition of the order it might make to limit the extent of the company's obligations under this section, or to attempt to defeat the right of any one entitled under the Act to such compensation. It would, in my judgment, be equally *ultra vires* for the Board in its order by any condition to extend or add to the statutory obligations of the company respecting compensation.

The case before us was argued on the assumption that the condition to which the order was made expressly subject, imposed upon the company accepting it an obligation to pay to the property owners fronting on Empire Avenue and Hardisty Street, along which the railway was located, compensation for all damage by them sustained by reason of the location of the railway along such streets. It was hardly questioned at the argument and could not, I think, be successfully questioned that such property owners not having had, as admitted, any of their lands taken or their rights of access interfered with, or sustained any structural damages are not under the statute, as construed by the authorities, entitled to recover any damages. The condition of the order of the Board, if it means anything at all, means to impose an obligation upon the company greater and larger than that imposed by the statute. In my opinion that cannot be done under the guise of a condition because the conditions the Board are authorized to make in granting their order must not be inconsistent with the Act, and this condition unless treated as surplusage must be held to be so.

Then, as to section 237, it seems to me that the general character and nature of the conditions which

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the Board may lawfully impose as a part of its order sanctioning the construction of a railway "upon, along or across a highway" are limited to those which relate to the "protection, safety and convenience of the public." The section expressly so declares. It says:

> The Board may by order *grant such application* upon such terms or conditions as to protection, safety and convenience of the public as it may deem expedient.

As to the kind and character of such terms, they are entirely for the Board. Whether any additional condition not inconsistent with the other provisions of the Act might be imposed I need not stop to inquire. What, in my opinion, is *ultra vires* in this case is the imposition of an obligation upon the company inconsistent with section 155 of the Act. This construction of the Act makes any reference to the fact that the applicants had the authority of a by-law of the municipality duly ratified by its ratepayers and confirmed by the legislature of the province for the location of its line along those streets unnecessary.

The Board in approving of the location acted within its powers, and to that extent of course its order is good. In making its order subject to a condition inconsistent with the statute it acted *ultra vires,* and such condition is bad and void.

I would therefore allow the appeal.

IDINGTON J.—This is an appeal from an order of the Board of Railway Commissioners for Canada approving of the location of the appellants' line of railway along streets in Fort William on the conditions specified in the order. One of these conditions is that compensation be made to all persons interested for all

damage by them sustained by reason of the said location along any street in said town.

It is against this condition the appeal is made. We are asked to declare it *ultra vires* the Board and that the order thus deleted of this condition be maintained.

Listening to the argument for appellants and hearing it urged that this condition is "in violation of the Act" and "in violation of the judicial construction of the Act" and "a contravention of the provisions of the Act in respect of compensation," one wonders when the Act was so amended as to prohibit or by what organic law anything had been enacted prohibiting owners of lands and houses fronting on a street from being legally compensated for such injuries.

These notions of the Act and this appeal it turns out spring from a strange misconception of the true import of the decisions in such cases as *Hammersmith and City Railway Co.* v. *Brand*(1), and in *Re Devlin and The Hamilton and Lake Erie Railway Co.*(2), and the principles of law upon which they properly proceeded.

When a person or corporation is given by Act of Parliament the power to take possession of another's land or invade his rights therein or depreciate its value by the execution of some work thereby authorized to be done he has no legal right to damages or compensation for anything arising from the due execution of such work and the due carrying on of the business so authorized unless Parliament has seen fit to provide for his being compensated.

That is all these cases mean. The owners may have suffered, but Parliament had given no remedy therefor.

(1) L.R. 4 H.L. 171.

(2) 40 U.C.Q.B. 160.

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The appellants have not yet acquired any such right over the streets in question and hence the cases have no application.

Parliament has delegated its authority in that regard to the Board and given it by section 47 ample power to see that the exercise of such authority shall be so guarded that injustice shall not be done.

It is the bounden duty of the Board to see that the iniquity of transferring to any one another's property or destroying its value merely to enrich the other at his expense is not done by means of the great powers Parliament has given.

It was to obviate wrong and injustice in the execution of the powers given by railway legislation and the abuse thereof that Parliament mindful of its own weaknesses committed to the Board the high trusts and wide powers it enjoys.

It is urged that the municipal council has agreed to the use of the streets. It was quite right and proper the council's consent should be got.

It may be quite right and proper the council should get the power if it has it not to levy upon the ratepayers the compensation necessary to equalize the condition of things a few are expected to suffer for the benefit of all.

If this had been provided for the consent of the council might have carried more weight with the Board.

Counsel seemed unwilling to say that a school might not have been an object of the Board's protection.

If the school, the church, the hospital, why may not the dweller in the narrow street ? It is all a question of degree. Society is just as much interested in seeing

that no section or class of people suffer injustice at its hands as in keeping these institutions free from harm.

Of course when the best that is practicable has been done there will accrue to some more than others incidental suffering arising from the growth of the social and commercial structure.

Where to draw the line is the duty and within the power of the Board.

I think the appeal should be dismissed with costs.

DUFF J. (dissenting).—Upon an application to the Board for leave to construct a railway upon, along or across a highway under the provisions of sections 235 *et seq.*, the Board has power to refuse the application and it has power to grant the application. It has also unquestionably the power to impose terms and conditions touching the "protection, safety and convenience of the public." With respect to any order of the Board falling within any of these three classes, the parties are without any redress in this court. The authority of this court is limited to considering such questions of jurisdiction as are brought before it under the provisions of the Act and such questions of law as may be referred to it by the Board. The Board further has power under section 47 to suspend the operation of its orders; but it is not material to consider that section because the order now under consideration is very obviously not an order made under a suspensive condition or one to which section 47 can have any application. The order embodies a presently operative leave to the appellant company to construct its railway in certain streets and superadds certain terms, the validity of which is now in question.

The meaning of all these terms is on their face not

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very clear. But counsel on all sides agreed that the intention was that the railway company should be obliged to compensate a certain class of persons who might be injuriously affected by the construction of the railway, but who under the provisions of the "Railway Act" itself apart from any order of the Board would have no right to such compensation. It has been held that where a railway is constructed in a street the grade of which is not altered the owners of land and buildings abutting on the street have no right of compensation, as not being persons within the purview of the compensation clauses of the "Railway Act." In *Re Devlin and Hamilton and Lake Erie Railway Co.*(1); *Powell* v. *Toronto, Hamilton and Buffalo Railway Co.*(2). The soundness of these decisions was not impeached by the respondents, and I think that having regard to the circumstance that the provisions of the "Railway Act" in question have been repeatedly re-enacted without relevant alteration since these cases were decided it is too late now to question them.

It was to give such persons not otherwise entitled to compensation a right to compensation that the provision in question was inserted in the order of the Board. The point to be decided is: Was it within the power of the Board to impose such a term when granting the leave asked for? The contention of the respondents appears to rest upon the proposition that since the Board has power to grant or to refuse leave the whole field between these opposite poles is open to them. Whether that is so or not is, of course, purely a question of the intention of the legislature as disclosed by the language of the enactment. Comparison of the language

(1) 40 U.C.Q.B. 160. (2) 25 Ont. App. R. 209.

found in the sections with which we are more immediately concerned and that used in other parts of the Act convinces me that the contention of the respondents cannot be sustained. There are many sections of the Act in which the power to impose terms and conditions where an application is made to the discretion of the Board is expressly given without any limitation. Section 233, sub-section 3(*a*), is one example; section 253, sub-section 20 another. Section 250, sub-section 3 is a third. In other cases the power to provide for payment of compensation in the discretion of the Board is conferred; (see section 249, sub-section 3). In other cases the discretion of the Board with regard to terms and conditions is limited to a particular subject-matter such as public protection and safety; see section 227, sub-section 3(*a*). The Board again in the exercise of some of its most important functions acts under sections which make no reference whatever to terms or conditions; see sections 158 and 159, and sections 222 and 223. I have great difficulty in understanding why we should find this diversity of language on the point of the power of the Board to impose terms and conditions if the principle of the respondent's argument — that the authority to grant or refuse involves an authority to impose an unlimited range of conditions and terms — be a principle of construction safely or properly applicable to the "Railway Act." I think it cannot be so. I think we are justified in assuming in view of the provisions I have mentioned that when, for example, in section 159 the Board is empowered to sanction the plan, profile and book of reference mentioned in the preceding section and in section 168 the company is forbidden to commence the construction of the railway

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or any part of it until such sanction has been obtained — I think we are justified in assuming that the legislature did not intend to confer upon the Board the authority to impose as a term of its sanction a condition (let us say) that the compensation to be paid to persons entitled to it should be estimated as from a date earlier or later than that provided for in the Act. The same observation may be made upon sections 222 and 223, which relate to the construction of branch lines.

It is not necessary to consider whether or not in applications such as those last mentioned the Board have some implied power to impose terms. I do not say they have not. It is sufficient for the purposes of this case to say, and my opinion is, that the company's obligations in respect of compensation have been specially dealt with in the other provisions of the Act, and those obligations the Board have no authority to add to except in cases in respect of which such authority is given by Parliament, either expressly or by necessary implication, and, moreover, that no such implication arises from the authority given *simpliciter* to grant or refuse leave.

Coming to the sections immediately under consideration we find the Board expressly authorized in section 237 to impose terms in respect of one subject-matter. But we find a further provision, subsection 3 of that section. That provision was not discussed in the course of the argument, and I should not desire to express an opinion as to the precise meaning of it; but it shews that the subject of compensation was before the legislature when dealing with the subject of highway crossings and while leaving to the Board expressly a discretion to exact

conditions in relation to another subject-matter no such discretion is in terms confided to them in respect of the subject of compensation. As regards section 159, it is true the order purports to be made under that section. But it was treated at the argument as, in substance, an order made under section 237; and the reasons given above, with the exception of the observation just made on the special provisions of section 237, apply in their full force to section 159.

All these reasons convince me that in professing to exercise the discretion it did the Board exceeded its authority. I think it is really not much to the purpose to say that the company need not act upon the order. The effect of the order is to give the sanction of the Board to the line provided for. The company may, of course, abandon the construction of its line. But it cannot construct its line except upon a route sanctioned by the Minister and the Board. The order of the Board may, of course, be changed and the route altered; but in the meantime the only lawful route is that prescribed by the order.

ANGLIN J.—As a condition of approving the location of the appellant's railway ("Railway Act," sec. 159) upon and along Empire Avenue and Hardisty Street in the City of Fort William, the Board of Railway Commissioners has imposed the term that the company shall

> make full compensation to all persons interested for all damages by them sustained by reason of the location of the railway along any street in the said City of Fort William.

The argument of this appeal proceeded on the assumption that the Board has by its order also given the company leave to construct its line of railway upon

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these highways pursuant to sections 235-243 of the "Railway Act." It should be noted, however, that the order in appeal does not purport to be made under, or in the exercise of the powers conferred by these sections.

At bar counsel agreed that the purpose and effect of the term which I have quoted from the order is to require the company to compensate owners of lands abutting on the two highways for depreciation in the value of their properties owing to interference with access thereto and with the use of the streets as a means of ingress and egress and for any other loss which the construction and operation of a railway in such streets may entail.

The appellants maintain that the imposition of such a term as a condition either of approving of the location of a railway or of granting leave to construct it upon highways is *ultra vires* of the Board. They allege that the Board has required the company to make compensation for injuries from liability for which it is exempt under the "Railway Act," and also that the Ontario legislature has, by confirming an agreement made by the company with the City of Fort William, in effect, declared the landowners not entitled to the compensation which the company is required to allow them.

The statute confers upon the Board extensive powers and wide discretion in dealing with applications for sanction of the proposed location of railways or for leave to construct them upon highways. By subsection 3 of section 159, unless the Minister of Railways otherwise specifically directs (and in this case he has not given any such direction), the Board is empowered to sanction a deviation of not more than one

mile from the general location approved by him under section 157. By section 237 the Board is expressly authorized to impose certain terms — including the providing of a substitutional highway — as a condition of granting leave to construct a railway upon an existing highway. Under section 28 it may of its own motion determine any matter which under the Act it may determine upon application; and under section 26(2) it may order that which it may authorize the company to do. By section 47 the Board is empowered to direct in any order that it shall come into force only upon the performance of any terms which the Board may see fit to impose.

In considering whether a proposed location of a railway along a highway should or should not be approved, the Board, in the exercise of its discretion, must necessarily take into account all the surrounding circumstances, including the effect of the construction and operation of the railway upon the interests of the owners of lands abutting on the highway. Having power to grant or to refuse its approval or to direct a deviation in the location of the railway, the Board must determine whether, having regard to all the interests involved and affected, it should sanction the proposed location, unconditionally, conditionally, or not at all. If it is satisfied that neither the exigencies of the railway company nor the interests of the public warrant the practical destruction of the highway and the cutting off of abutting properties without compensation, yet that the interests concerned taken as a whole will be best served and justice effectually done by permitting the railway company to use the highway with compensation to the property owners, rather than by refusing its application or ordering a deviation, I see no

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reason why the Board may not, having regard to the discretion which it must necessarily possess in giving or withholding its approval, exercise the power conferred by section 47 and impose upon the railway company the making of such compensation as a term of the order granting its application for approval or leave.

The Board has in fact determined in the present case that neither the interest of the public in the construction of the appellants' railway nor the necessities of the railway company itself warrant its sanctioning, without providing for compensation, a scheme entailing the injury which the private property owners must sustain as a result of the construction and operation of a steam railway along Empire Avenue and Hardisty Street. It has, therefore, in effect decided that the application of the company should be refused unless it is prepared to accept the conditional approval which has been given. Though in form an approval of the location upon terms, those terms being in the nature of a condition precedent, the order is in substance tantamount to a refusal of approval unless the company should accept the terms prescribed. Instead of ordering a deviation the Board has allowed the company an opportunity to avail itself of the highways upon these terms. It would perhaps have been better had the order taken the form of a refusal to approve the location unless the company should assent to the terms which the Board thought it proper to impose. But that, in my opinion, is in substance, though not in form, what the Board has done; and I think that in so doing it has neither erred in law nor exceeded its discretionary powers.

A railway company has not the right or power to locate and construct its line upon a highway without

the sanction and leave of the Board. It may be that when that leave or sanction has been obtained the obligation of the company to make compensation for damages caused by the exercise of the powers thus conferred is, under section 155 of the "Railway Act," as judicially interpreted, so restricted that it excludes liability for injuries sustained by owners of land adjoining a highway along which the railway is carried at grade. But it does not follow that the tribunal in which is vested the authority to determine whether the company shall or shall not be granted this power may not impose the making of such compensation as a condition of granting it. In my opinion section 155 of the "Railway Act" has no application at this stage of the matter, and the order of the Board, whether it should be regarded as confined to a sanction of location under section 159, or should be deemed also to include leave to construct under sections 235 *et seq.*, is within the powers conferred by section 47, and is not inconsistent with or in contravention of section 155 or any other provision of the statute to which our attention has been directed.

Having regard to the terms of section 237, the Board may possess a wider discretion when acting under section 159 than in cases to which sections 235 *et seq.* alone are applicable. But as the present order is certainly made under section 159, it is unnecessary to consider this question.

It is true that the municipality of Fort William has undertaken by agreement with the appellants to grant them "free of all costs and liability" the right to build and operate in perpetuity a double track line of railway on Empire Avenue and Hardisty Street. This agreement was ratified by a by-law submitted to the

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ratepayers of the city and the by-law was subsequently confirmed by the legislature. 5 Edw. VII. (Ont.), ch. 48. The words "free from all costs and liability" in the agreement *primâ facie* relate to rights of the municipality to be affected by the construction of the railway. They do not purport, and should not be taken to have been intended to affect the interests or claims of others not parties to the agreement. As I understand that document, the municipality thereby undertook to relieve the railway company from all claim on its part and all liability to it in respect of the actual right of way which the company should acquire upon and over the highway named. The private property owners were not parties to the instrument and their rights could not be affected by it. If it should be deemed to manifest an intention that the municipality shall save the railway company harmless in respect of all rights or claims which these property owners might have by reason of its occupation and use of the streets in question, the agreement might perhaps be construed as meaning that the municipality will indemnify the company against payment of such compensation as that now in question. But such an undertaking by the municipality would in nowise destroy or diminish any claims of the property owners against the railway company, whatever right over it might have against the municipality. The confirmation of the agreement by by-law and by legislation has not altered its meaning or effect. It remains a private agreement between the municipality and the company. All that the legislature has done is to put beyond question the power of the municipality to make the agreement. The rights of the respondents, other than the municipality itself, remain entirely unaffected by it.

For these reasons I am of opinion that the appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *D'Arcy Tate.*

Solicitors for the Canadian Pacific Railway Co., appellants: *Curle & Bond.*

Solicitors for the City of Fort William, respondents: *Morris & Babe.*

Solicitor for certain landowners, respondents: *R. V. Sinclair.*

Solicitors for the Fort William Land Investment Company, respondents: *Hunter & Hunter.*

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*May 16.
*June 15.

IN RE CRIMINAL CODE.

IN THE MATTER OF AN ORDER IN COUNCIL RESPECTING SECTION 873 (A) OF THE CRIMINAL CODE AND SECTION 17 OF THE LORD'S DAY ACT.

REFERENCE BY THE GOVERNOR-GENERAL IN COUNCIL.

Criminal Code—6 & 7 Edw. VII. c. 8—Procedure—Alberta and Saskatchewan—Indictable offence—Preliminary inquiry—Preferring charge—Consent of Attorney-General—Powers of deputy—"Lord's Day Act," s. 17.

Section 873 (*a*) of the Criminal Code (6 & 7 Edw. VII. ch. 8) provides that, "In the Provinces of Alberta and Saskatchewan it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any person charged with a criminal offence shall be commenced by a formal charge in writing setting forth as an indictment the offence with which he is charged.

2. "Such charge may be preferred by the Attorney-General or an agent of the Attorney-General or by any person with the written consent of the judge of the court or of the Attorney-General or by order of the court."

Held, Idington J. dissenting, that a preliminary inquiry before a magistrate is not necessary before a charge can be preferred under this section.

Held, also, that the deputy of the Attorney-General for either of said provinces has no authority to prefer a charge thereunder without the written consent of the judge or of the Attorney-General or an order of the court.

Section 17 of the "Lord's Day Act" provides that "no action or prosecution for a violation of this Act shall be commenced without the leave of the Attorney-General for the province in which the offence is alleged to have been committed * * * ."

Held, that the deputy of the Attorney-General of a province has no authority to grant such leave.

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

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SPECIAL QUESTIONS OF LAW referred by the Governor in Council to the Supreme Court of Canada for hearing and consideration.

The following are the questions so submitted on the report of His Majesty's Privy Council for Canada, dated 6th April, 1910.

"The Committee of the Privy Council, on the recommendation of the Minister of Justice, advise that, pursuant to section 60 of the 'Supreme Court Act,' the following questions be referred to the Supreme Court of Canada, for hearing and consideration, viz.:

"1. Is a preliminary inquiry before a magistrate necessary before a charge can be preferred under section 873(*a*) of the Criminal Code ?

"2. Has the lawful deputy of the Attorney-General, appointed by competent provincial authority in the Province of Alberta, authority to prefer a charge under section 873(*a*) of the Criminal Code of Canada, without the written consent of the judge of the court or of the Attorney-General in person and without an order of the court ?

"3. Has the lawful deputy of the Attorney-General, appointed by competent provincial authority in the Province of Saskatchewan, authority to prefer a charge under section 873(*a*) of the Criminal Code of Canada, without the written consent of the judge of the court or of the Attorney-General in person, and without an order of the court ?

"4. Has the lawful deputy of the Attorney-General, of a province of the Dominion of Canada, appointed by competent provincial authority, authority to grant the leave of the Attorney-General of his province, under section 17 of the 'Lord's Day Act' ?"

"F. K. BENNETTS,
"Asst. Clerk of the Privy Council."

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The above mentioned sections of the Criminal Code and "Lord's Day Act" are set out in the head-note.

Newcombe K.C., Deputy Minister of Justice, appeared for the Government of Canada.

Forde K.C., Deputy Attorney-General, for the Province of Saskatchewan.

C. A. Grant for the Province of Alberta.

The court answered the first question in the negative, Idington J. dissenting. The other three questions were unanimously answered in the negative. Their Lordships delivered the following reasons to support their answers.

GIROUARD J.—I think that the observations made by this court in *Re Legislation respecting Abstention from Labour on Sunday*(1), applies more strongly in a case like this. I have serious objection to sit in a case which looks very much as if it were an appeal from provincial courts in a criminal matter where the statute says there is no appeal to this court. However, as our advice has no legal effect, does not affect the rights of parties, nor the provincial decisions, and is not even binding upon us, I have no objection to express my concurrence in the answers prepared by this court.

DAVIES J.—The questions one, two and three referred to this court respecting section 873(*a*) of the Criminal Code practically ask us to sit as a court of appeal on the judgment delivered by the Supreme

(1) 35 Can. S.C.R. 581.

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Court of the Province of Saskatchewan, in the case of *The King* v. *Duff* (1). As no such appeal is allowed in criminal cases where the judgment of the provincial court is adverse to the Crown, I felt strongly that the better course would be for this court to refer the questions back to His Excellency in Council, pointing out the fact that the questions substantially though indirectly involved such an appeal and ought not to be answered by us.

In addition I may add that we have not had the benefit of an argument on both sides of the questions. Counsel representing the Crown alone submitted their contentions. In giving my answers to the questions I do so with reluctance and solely in obedience to the imperative provisions of the statute, "Supreme Court Act," section 60, and out of deference to the order of His Excellency in Council. At the same time I do not think this court or its members would feel bound in any concrete case which might arise hereafter by any expression of opinion we may now give on these questions.

I am strongly inclined to the opinion that the sub-sections (*l*) and (*m*) of section 31 of the general "Interpretation Act" of the Dominion, which were strongly relied upon by Mr. Forde as clearly settling questions two, three and four in the affirmative, do not apply to them at all. The expression "Minister of the Crown," in sub-section (*e*) refers, I think, to a Minister of the Crown of the Dominion of Canada only, and not to the ministers of the several provinces. It is difficult to imagine the Parliament of Canada "directing" a provincial minister to do a specific act

(1) 2 Sask. L.R. 388.

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or thing. They might "empower" as it is put in the alternative in the sub-section. But it seems to me Parliament never intended that a "lawful deputy" of a provincial minister, whose duties as such are limited and defined by the several provincial legislatures as they respectively may from time to time determine, and may and probably are in many cases very far from co-ordinate with those of the provincial minister, should have and exercise all the powers conferred from time to time by Dominion statute upon the minister himself. These considerations would not apply to the cases of Dominion Ministers of the Crown and their deputies the relative powers and duties of whom are defined by Dominion statutes, and are subject, of course, to its directions and supposed to be well known to Parliament when legislating. Following this reasoning sub-section (*m*) when it refers to "any other public officer or functionary" means, on my construction, any other public officer or functionary of the Dominion, and does not relate to provincial officials.

This construction, if correct, would effectually dispose of questions two, three and four, in the negative. Even if not correct, I would still be of the opinion that the Deputy Attorney-General of the Provinces of Saskatchewan and Alberta are not entitled as such to prefer a formal charge in writing against any person under section 873(*a*) of the Criminal Code, as enacted by the "Criminal Code Amendment Act" of 1907, ch. 8. That section permits the charge to be preferred by "the Attorney-General or an agent of the Attorney-General." I agree with Chief Justice Wetmore that the Deputy Attorney-General is not *ex officio* such an agent, and this quite apart from the special limitation upon his powers placed by section 10 of "The Act re-

specting the Public Service of Saskatchewan," 6 Edw. VII. (1906) ch. 5, and the similar statute of the Province of Alberta. At the time when section 873 (*a*) of the Code was passed, there were persons in each of these Provinces of Albert and Saskatchewan appointed by the Departments of the Attorneys-General respectively to act for the Crown law officers at the respective courts to which they were appointed and who were styled "agents of the Attorney-General." These were, in my opinion, clearly the persons and the only persons referred to by the section in question as "an agent of the Attorney-General," and their special mention would, even if sub-sections (*l*) and (*m*) of section 31 were held applicable to the construction of section 873 (*a*) of the Code, exclude Deputy Attorneys-General. These sub-sections of section 31 are only to be invoked when (as the section says) a contrary intention does not appear. Here by specifically naming a special well-known class of persons as "agents of the Attorney-General" for the performance of a special judicial function or duty, the general deputy head of the department, not being within the class, is excluded. "The contrary intention" does appear and excludes the application of the sub-sections.

The 10th section of the provincial Act, 1906, to which I have above referred, limits and defines the powers of the deputy heads of the several departments as follows:

> In the absence of any head the deputy head of the department shall perform the duties of such head unless an acting head of the department is appointed or the performance of such duties is otherwise provided for by the Lieutenant-Governor in Council; and the deputy head so acting during such absence shall exercise all the powers vested in the head as to the control of the other employees of the department.

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In the *ex parte* argument addressed to us this section (no doubt inadvertently) was not called to our attention, but it seems to me conclusive, even if the sub-sections of section 31 of the general "Interpretation Act" did apply, against the contention submitted that the Deputy Attorney-General was *ex officio* an agent of the Attorney-General within the meaning of the terms in section 873 (*a*) of the Criminal Code.

After examining the criminal legislation of the Dominion with respect to the North-West Territories, and the Provinces of Alberta and Saskatchewan carved out of them, and also the section of the Code (873 (*a*)) applicable to those provinces alone, I am of opinion that the true construction of that section does not require that there should have been any preliminary examination before a magistrate before a charge could be preferred under that section. For the reasons I have given I would therefore answer questions one, two and three in the negative.

Section 17 of the "Lord's Day Act," to which question No. 4 relates reads as follows:

> No action or prosecution for a violation of this Act shall be commenced without the leave of the Attorney-General for the province in which the offence is alleged to have been committed, nor after the expiration of sixty days from the time of the commission of the alleged offence.

Here there is no mention of "an agent of the Attorney-General" exercising the functions and powers conferred on the latter officer. The leave of the Attorney-General himself must be obtained. In my view of the construction of sub-sections (*l*) and (*m*) of section 31 of the general "Interpretation Act," there can be but one answer and that in the negative. Even if the sub-sections are applicable, I would greatly doubt whether the "leave of the Attorney-General" required by sec-

tion 17 could be given by the Deputy Attorney-General. The high official named is called upon to exercise a judicial or at the very least a quasi judicial function in granting or refusing leave to commence an action or prosecution under the Act, and I think the case of *Abraham* v. *The Queen* (1) a strong authority for the position that it is a function which he must personally discharge and which he cannot delegate, and which is of a character and nature not covered by sub-sections (*l*) and (*m*) even if applicable.

I answer that fourth question in the negative.

IDINGTON J.—The creation of this court has been generally supposed to have been intended as an exercise of the powers given by the "British North America Act," section 101, which is as follows:

> The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance and organization of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada.

It was constituted as a court of law and equity. It was given an appellate and other jurisdiction.

In consequence of doubts expressed in *In re Legislation respecting Abstention from Labour on Sunday* (2) the "Supreme Court Act" was amended by 6 Edw. VII. ch. 50, now section 60 of the Act.

I must be permitted to doubt if it can as such be made a court or commission of general inquiry, as the amendment seems to read.

The words used in section 101, *i.e.*, "the better administration of the laws of Canada," may, however,

(1) 6 Can. S.C.R. 10.

(2) 35 Can. S.C.R. 581.

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cover a pretty wide field. If this inquiry extends beyond that field it probably is *ultra vires.*

Assuming but doubting if, in some such way the inquiry falls properly within the second part of the above section 101, it becomes pertinent thereto at the threshold to try to understand what Parliament was about when amending the Criminal Code, by section 873(*a*).

It is to be observed that though procedure falls within the power of Parliament subject to that

> the administration of justice in the province including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction and including procedure in civil matters in these courts

is assigned by section 92, sub-section 14, to the authority of the legislature.

Parliament saw fit to amend the Criminal Code by enacting as follows:

> 873(*a*). In the Provinces of Saskatchewan and Alberta, it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any person charged with a criminal offence be commenced by a formal charge in writing setting forth as in an indictment the offence with which he is charged.
>
> 2. Such charge may be preferred by the Attorney-General or any agent of the Attorney-General, or by order of the court.

The question raised thereupon is: Has either the lawful Deputy Attorney-General of Saskatchewan or of Alberta within his province the power of the Attorney-General thereof under this section ?

The creation of a Deputy Attorney-General and the definition of his powers are entirely within the power of the legislature and may be so regulated as to vary as directed from day to day. Certainly Parliament is not to be supposed to have intended to meddle therewith.

Nor can I imagine it was intended to entrust the duty to one whose power to execute it varied from day to day.

The question of what power Parliament has to assign to and enforce the performance of a given duty by any one holding a particular office created by and under another autonomous power suggests an interesting inquiry not easy of definite solution.

For that, if no other reason, its nominee by such a method of designation ought in reason to be holding an office that has some relation to the subject-matter being dealt with; and the more intimate the better.

Though the authority of the Attorney-General of a province is also subject to legislative limitations, custom, tradition and constitutional usage, having charged him with the administration of justice within the province as his primary duty, also pointed him out as the proper one to have assigned to him such a duty as this section assigns.

Parliament was constituting in a new country an authority to discharge the duties which the ancient institution of the grand jury had elsewhere so long performed.

I would assume that Parliament had regard to the history of that body and to such conditions of law and custom as governed and guided it and in confiding to any officer the delicate duty of placing a man on trial without the slightest notice beforehand as contended for here it might be supposed to have had some regard to the responsible character of his position as well as to the kind of person it was entrusting with such duties.

It might well be observed that the Attorney-General is a person generally known to the public and

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so much in the public eye as to be probably responsive to such just criticism for neglect of duty as his deputy clearly might not be.

An admirable deputy attorney-general within the sphere of duties the legislature had assigned him might be quite unfitted to discharge such functions as this new condition of affairs required.

The evident purpose of the whole enactment was to throw the responsibility directly upon one man.

He might if he saw fit name his agents for discharging, indeed, for the special purpose of discharging, such onerous duties. Yet he should remain the responsible head for such delegations of power to enable the duty to be properly discharged.

The express power of delegation thus given seems to exclude the idea of any other being substituted.

A deputy attorney-general is not necessarily the agent of the Attorney-General in any sense. He fills, as said already, whether nominated or removable by the Attorney-General, an office generally created by local statute and discharges duties thereby assigned.

Much less can it be the case that he can be said to fall within the special description given in the Act.

On the other hand the deputy might be merely the nominee of the Attorney-General. In such case, inasmuch as the Act implies clearly that the Attorney-General should select special agents for this purpose, it on this assumption excludes any one else and thus also the strained meaning sought to be placed on the "Interpretation Act."

That meaning is not only inconsistent with the purview of the amended Code and the very words of the section in question, but with the interpretation clause of the Code assigning the meaning to be given the words "Attorney-General" in the Code.

How could Parliament more pointedly shew the inconsistency that the "Interpretation Act" recognizes as possible and fully provides against than this?

Are we *primâ facie* to assume Parliament had the intention in every case wherein it assigns a power to a provincial officer and implies a duty to execute it that it must of necessity mean thereby as of course to include any and every kind of deputy he may have ? The clause relied on in the "Interpretation Act" is hardly to be stretched so far.

But in principle, as it seemed to me from the very first, this case is within the case of *Abrahams* v. *The Queen*(1). It also is almost within the very language of the statute there in question.

A Crown counsel is but the deputy of the Attorney-General and the lawful deputy for the time and place named.

This was a case where an indictment had been preferred for an offence within the meaning of the "Vexatious Indictments Act" as it stood in section 28 of "An Act respecting Procedure in Criminal Cases," etc., 32 & 33 Vict. ch. 29.

It prohibited the grand jury unless certain preliminary steps described had been taken from finding any bill of indictment

> unless the indictment for such offence is preferred by the Attorney-General or the Solicitor-General for the province or of a judge of a court having jurisdiction to give such direction or try the offence.

No special efficacy can be attached to the word "bill" as suggested in the factum herein to distinguish it from this case especially in view of the new meanings given contemporaneously with the enactment of

(1) 6 Can. S.C.R. 10.

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section 873(*a*) to the word "indictment." See section 2, sub-section 16, of the Code.

The substance of the thing was looked at by this court following the English courts. And the power of any one, save and except him specially and specifically designated by his office to perform the judicial act of giving legal sanction to the proceeding of putting a man on his trial, was properly repudiated.

The second sub-section of the section of the "Interpretation Act" now relied upon stood then just as it does now. No one seems to have had the courage to try it on the court. In a sense the Crown officers might have been urged there as deputies and even lawful deputies.

In substance and in language it is seldom we can get cases so nearly alike. Substitute the word "charge" now included in the word "indictment" and the cases seem almost on all fours.

It was the judicial quality of the act required to be done that was held to render substitution impossible. It is that which renders it inconsistent here with the meaning in the "Interpretation Act."

Moreover, in this case the question involved is not the comparatively trifling one there as to half a dozen or so specified crimes, but it is the operation of the whole Code.

The deputies attorney-general not only claim that the right and duty of putting any man on his trial has devolved upon each of them, but also that of doing so without any need of a preliminary proceeding of any kind.

If such be the import of the amendment so much more significant is the designation by Parliament of one man and his agent specifically delegated to discharge his appointor's duty in that regard.

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But is that the case ? At first blush it seemed so. However, when I find the interpretation section of the Code amended to make the Act as amended by this section 873(*a*) workable, it is evident it is not intended this new section should be as it were an entirely new code of procedure in itself.

If we interpret section 871, sub-section 2, in light of these amendments, we find some curious results possible.

It seems to imply that where a man has been prosecuted and some one bound over to prosecute him the charge may have to be confined within the limits of the original prosecution.

Of course all this, it may be said, is to be discarded and a new prosecution, as it were, instituted by the Attorney-General within section 873(*a*).

On the other hand is section 872 entirely inoperative ? Are all the provisions relative to preliminary examination and inquiry and need therefor in the Code as it stood up to this amendment 873(*a*) revoked ?

Or is the said section only intended to substitute the Attorney-General or agent or judge for the grand jury ?

It is necessary in order to properly appreciate all this and answer the first question submitted to bear in mind the history of legal development relative to criminal prosecutions.

Originally the grand jury had the right to entertain any complaint and present any offender without any preliminary inquiry. In practice I think this was in later times not always or unrestrictedly adopted.

In the old Province of Canada the law was changed

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in 1861 by the "Vexatious Indictments Act" expressly taking away the power in seven named cases of misdemeanour unless with the consent of certain designated officers or judges.

With some changes in 1869 the law stood as above indicated till the Criminal Code was enacted in 1892.

Section 641 thereof expressly prohibited indictments being preferred unless there had been the preliminary examination followed by a prosecutor being bound over or a committal; or the Attorney-General or any one by his direction or a judge permitted.

This was again amended by 63 & 64 Vict. ch. 46, and again by the Revised Statutes of Canada and stood as it now stands in the Criminal Code sections 870 to 873 inclusive.

These sections are plain. They require, except in specified cases left to the discretion of an Attorney-General or a judge of a court of record or of criminal jurisdiction, preliminary proceedings.

The amendment section 873(*a*) does not in the slightest degree imply any intention to repeal them beyond the obvious necessity arising from the substitution of the officers above named for the discharge of the functions of the grand jury relative to placing a man on his trial.

It deals only with the case of "the trial of any person charged with a criminal offence." How charged? Is it confined to those who have been judicially so charged, by virtue of the provisions of the law for committing the accused for trial?

How can it mean aught else? The word "charged" is the apt one to designate a person accused and in charge. Doubtless it has another meaning, but it

may well be argued that it is in this restricted sense that the Act applies it.

It is true the Attorney-General by this interpretation may either have the power given him under the Code in two ways, or deprived of that he had already been given by section 872 of the Code.

It is equally true and significant that in one place he alone is given the power and in the other place he or his agent, and in reading these sections and giving each its full force the object is fully accomplished of substituting some one else for the grand jury without bringing about a revolution in the later principles upon which the administration of criminal justice proceeded.

I am sure such a thing never was intended. I am sure it would end in evil. The principle acted upon of not permitting any one to be put on trial without preliminary examination had been carried so far as to discard a coroner's inquisition. See section 940.

It may be said that merely rendered going before a grand jury necessary.

I am satisfied from the practice of such a thing, though possible in law, never having been attempted, it was of set purpose to bring about a definite preliminary examination, as the key-note of criminal prosecution save where an Attorney-General or judge directed otherwise.

The result was in the plainest possible case the hearing had to be repeated before a magistrate to ensure committal for trial.

The policy of the law that there should be a preliminary examination was thus clearly settled and so settled in order that on grounds of humanity and justice that examination might, as so often happens, en-

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able one accused, without perhaps the slightest foundation, by cross-examination of his accusers or by his own explanations to dispel the false appearances against him and save him the pain and indignity of being improperly placed on his trial.

The differences between that and the system of placing a man on his trial without being given such opportunity is most radical. The tendency in the one method is towards a humane administration of justice and in the other towards the vicious reverse thereof.

There are cases arise as, for example, prosecutions of municipal or other corporations in respect of such nuisance as the maintenance of unwholesome jails or court houses or for non-repair of roads where such considerations might not operate; but where the Attorney-General might properly, if inconvenience unlikely to arise, authorize on his official responsibility the trial of what after all savours of the trial of a civil proceeding.

It seems to me the question cannot be answered as if beyond doubt, and when answered here and thus *ex parte* can bind no one.

But I am quite sure of one thing relative to the administration of justice, and that is that no one entrusted therewith or any part thereof should ever jeopardize or prejudice by the adoption of a doubtful course of procedure, when a safer one was at hand, either the administration of justice or the standing, reputation or freedom of another for a single hour.

I therefore answer the first question, "yes," and each of the others, "no."

These answers are relative to the acts to be done under 873(*a*) for obviously the answer must be so qualified.

DUFF J.—To all the questions submitted I answer "no." For my reasons I refer to the opinion of my brother Davies. I desire, however, to add one or two observations upon the legal quality and effect of these answers and the opinions upon which they rest. The practice of asking the extra judicial advice of the judges upon questions of law is an ancient practice. Seemingly the last recorded instance in England in which without statutory authority such advice was sought by the Crown occurred in 1760, when a question arising out of the proceedings against Lord Geo. Sackville was submitted through Lord Mansfield and answered. In that case, as in many previous cases, the judges expressly declared that if the question should afterwards be brought before them judicially they should be ready "without difficulty to change" their opinion(1). It has long been settled that the House of Lords is entitled to require the answers of the common law judges upon questions as to the existing state of law whether arising out of litigation pending before the House or not. But in such cases the opinions of the judges have not in themselves the authority of judicial precedent. In *Head* v. *Head*(2), at page 140, Lord Eldon said:

> The answers given by the judges, therefore, although entitled to the greatest respect as being their opinions communicated to the highest tribunal in the kingdom, are not to be considered as judicial decisions.

Lord Eldon is here speaking of opinions given in answer to questions arising out of contentious litigation actually pending before the House and given after full argument. The view of a very able and experi-

(1) 2 Eden (Appendix), pages 371-372.

(2) T. & R. 138.

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enced judge touching the value of such opinions where there is no cause and no argument may be gathered from the following passage in the opinion by Maule J. in *McNaghten's Case*(1), at page 204:

> I feel great difficulty in answering the questions put by your Lordships on this occasion: First, because they do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts, not inconsistent with those assumed in the questions; this difficulty is the greater, from the practical experience both of the bar and the court being confined to questions arising out of the facts of particular cases; Secondly, because I have heard no argument at your Lordships' bar or elsewhere, on the subject of these questions; the want of which I feel the more, the greater are the number and extent of questions which might be raised in argument; Thirdly, from a fear of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges may embarrass the administration of justice, when they are cited in criminal trials.

In more recent times it has been held that the jurisdiction of the High Court of Justice upon questions submitted to it under section 29 of the "Local Government Act" is consultative only and not judicial. *Ex parte County Council of Kent and Council of the Borough of Dover*(2).

With regard to questions submitted under the Dominion statute the course of the Judicial Committee has, I think, been very instructive. The authority conferred by the statute has been sometimes used for the submission of specific points in controversy between the Dominion and the provinces upon the construction of the "British North America Act" which, as bearing upon the validity of specific statutes, it was thought desirable to have determined; both sides to

(1) 10 Cl. & F. 200. (2) [1891] 1 Q.B. 725.

the controversy having accepted the issue and the tribunals having the benefit of the fullest argument upon it. Even in such cases the Board has usually refused to pass upon questions touching private interests not represented [the question relating to the rights of riparian proprietors for example(1)], or to answer questions the replies to which might properly be influenced by the circumstances in which the questions should arise for actual judicial decision. *Attorney-General for Ontario* v. *Hamilton Street Railway Co.* (2), at page 529.

The questions submitted in this case relate to the construction of statutes governing criminal procedure and the answers to them could not well be affected by the circumstances of any particular case in which they might arise; and they are therefore not open to the same objections as may be taken to purely hypothetical questions. But the court is called upon to answer them, having heard argument from one point of view only; and in these circumstances it is clear that the opinions expressed in the answers given cannot have the weight attached either to a judicial deliverance or to an extra-judicial opinion pronounced after hearing the possible diverse views of the question presented in argument. Indeed, there is not a little danger that such answers may, as Maule J. said in the passage already quoted, tend "to embarrass the administration of justice," (not only in this court, if, as is most likely we should hereafter be called upon to answer the same questions when raised litigiously), but in

(1) *Attorney-General of Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia;* [1898] A.C. 700, at p. 717.

(2) [1903] A.C. 524.

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other courts also, which may naturally feel greater delicacy than this court on a proper occasion would feel in treating the questions passed upon as *res novæ*, notwithstanding such opinions.

ANGLIN J.—Parliament has advisedly denied to the Crown the right of appeal to this court in criminal cases from judgments of provincial courts in favour of defendants. Because a review of the judgment of the Supreme Court of Saskatchewan in *The King* v. *Duff* (1), is unavoidably involved in the disposition of the present case and also because of the strong disapprobation expressed by the Judicial Committee of the Privy Council of the practice of procuring judicial opinions upon abstract questions (*Attorney-General for Ontario* v. *Hamilton Street Railway Co.*(2); *The Brewers' Case*(3)) the court answers the questions now submitted with reluctance and diffidence, solely in obedience to the imperative provisions of the statute ("Supreme Court Act," section 60), and in deference to the order of the Governor-General in Council. It must be understood that as this opinion is given without the advantage of argument except on behalf of the provincial Attorney-General, it would not be proper that it should be deemed binding in any case which may hereafter arise, whether in this court, or in any provincial court.

In the absence of any provision in the Criminal Code that there should be a preliminary magisterial inquiry before a charge is preferred under section

(1) 2 Sask. L.R. 388.
(2) [1903] A.C. 524.
(3) *Attorney-General for Ontario* v. *Attorney-General for Canada;* [1896] A.C. 348.

873(*a*), the right to commence proceedings in the Provinces of Saskatchewan and Alberta against persons accused of offences by preferring charges as provided in that section would appear to be unqualified.

Under sub-section 1, of section 873, of the Criminal Code, applicable to the other provinces, a bill of indictment may be preferred in respect of a charge as to which there has been no preliminary inquiry. This section is the legitimate successor of part of section 28 of 32 & 33 Vict. ch. 29 — other parts of which are replaced in a modified form by sections 871 and 872. Under section 28 the preferring of an indictment by the Attorney-General or Solicitor-General was in certain cases an alternative to its being preferred by a person who had been bound over to prosecute (section 871 of the Code) or to its being preferred by a Crown prosecutor (section 872 of the Code), or by the grand jury *suâ sponte* against a person who had been committed for trial. Section 28 provided that "no bill of indictment" for certain specified offences

> shall be presented to or found by any grand jury unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless the indictment for such offence is preferred by the Attorney-General or Solicitor-General for the province.

Under this section it cannot, I think, be questioned that a preliminary investigation before a magistrate was not a pre-requisite to the preferring of an indictment by the Attorney-General or the Solicitor-General. It must not be forgotten that these provisions were restrictive of the former absolute and unqualified right

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of grand juries *proprio motû* to present indictments against any person whomsoever.

While the territory now included in the Provinces of Alberta and Saskatchewan was, as part of the North-West Territories, subject in all matters to the legislative jurisdiction of the Dominion Parliament, the statute in force provided that "no grand jury shall be summoned or sit in the Territories." R.S.C. (1886) ch. 50, sec. 65. The courts of criminal jurisdiction of the Territories were constituted without grand juries. The provincial legislatures of these two provinces have seen fit to continue this constitution of their courts.

Having to deal with courts so constituted, Parliament found itself obliged to provide some substitute for the methods of commencing criminal trials prescribed for other parts of Canada in which grand juries form part of the criminal courts as constituted by the provincial legislatures. In the North-West Territories trials were begun

> by a formal charge in writing setting forth as in an indictment the offence * * * charged (54 & 55 Vict. ch. 22, sec. 11).

When the Provinces of Alberta and Saskatchewan were created Parliament thought proper to make a more formal and definite provision, and for this purpose enacted in 1907 what is now clause 873(*a*) of the Criminal Code. This provision is a re-enactment of section 11 of chapter 22 of 54 & 55 Vict. and an application of sub-section 1, of section 873, of the Criminal Code to the criminal courts as constituted in these provinces. Parliament does not assume to deal with the constitution of these courts; it merely provides, as it is its duty to do, a procedure suited to the courts as it finds them constituted. Parliament having for that purpose adapted to the existing local conditions the

provisions of sub-section 1, of section 873, of the Code, I see no sufficient reason for holding that a preliminary proceeding, not requisite when a charge is preferred by bill of indictment under section 873(1), should be deemed necessary when a similar charge is preferred under section 873(*a*). In the former case, with or without preliminary investigation by a magistrate the grand jury may present a bill of indictment preferred by the Attorney-General or by any one by his direction or by any one with his written consent. In the latter the proceedings are commenced by a formal charge in writing setting forth as in an indictment the offence charged, which is preferred not before a grand jury, but directly to the court and petty jury by the Attorney-General or an agent of the Attorney-General or by any person with the written consent of the Attorney-General.

For these reasons I am of the opinion that the answer to the first question propounded should be, "no."

The power and duty of the Attorney-General under sub-section 2, of section 873(*a*), is statutory and quasi-judicial. Action by him is substituted for that of the grand jury under section 873. It is well established that such statutory powers and duties can be delegated only under, and in strict conformity with statutory authority. In *Abrahams* v. *The Queen*(1) this court so determined in regard to the functions of the Attorney-General under section 28 of 32 & 33 Vict. ch. 29, the prototype in part of section 873(*a*), sub-sec. (2). *The Queen* v. *Hamilton*(2); *The Queen* v. *Townsend*(3).

(1) 6 Can. S.C.R. 10. (2) 2 Can. Cr. Cas. 178.
(3) 3 Can. Cr. Cas. 29.

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Two sorts of delegation are expressly provided for in sub-section 2, of section 873(*a*), viz., to an agent of the Attorney-General — and by "the written consent of the Attorney-General."

Agents of the Attorney-General were well known in the North-West Territories before the constitution of the Provinces of Alberta and Saskatchewan. They were then agents of the Attorney-General of Canada. It was stated at bar by counsel for the provincial Attorneys-General that there are to-day in these provinces similar agents of the provincial Attorneys-General. These agents have no general authority to act for the Attorney-General. They carry out specific instructions given in particular cases. They probably correspond to persons acting by the direction of the Attorney-General in other provinces under section 873(1). The Deputy Attorney-General is not in my opinion an agent of the Attorney-General within the meaning of sub-section 2, of section 873(*a*). The form of the questions referred to us renders it unnecessary to consider delegation by "written consent." The fact that these two methods of delegation are specified in section 873(*a*) is in itself a cogent argument that Parliament did not intend that any other delegation should be permitted.

Looking for other statutory authority to support the delegation of the powers in question to the deputies of the provincial Attorneys-General, counsel invoke clauses (*l*) and (*m*) of section 31 of the "Interpretation Act." Although at first inclined to think that clause (*m*) might apply, I am now satisfied that it does not. In clause (*l*) the words "Minister of the Crown" mean a member of the Dominion Government — one of the ministers mentioned in R.S.C. ch. 4, sec.

4 — and not provincial ministers of the Crown. The scope and nature of the "Interpretation Act" and the purpose of clause (*l*) of section 31, seem to me to require that its application should be so restricted. Counsel seemed rather disposed to concede this idea of the purview of clause (*l*) to be correct. If it be so, the word *other* in clause (*m*) preceding the words "public functionary or officer" indicates that the application of this clause is likewise confined to Dominion appointees to the exclusion of provincial functionaries or officers. We would, I think, give to these clauses of the "Interpretation Act" a much wider and more sweeping effect than it is at all safe to assume Parliament contemplated were we to hold that by virtue of them such a quasi-judicial power as is by section 873(*a*) conferred on the Attorneys-General of Alberta and Saskatchewan is vested in their deputies. This power is of such a nature — so personal and so discretionary — that nothing but specific legislation unmistakably applicable can justify its delegation. If the deputies of the Attorneys-General of these two newer provinces are by virtue of the general provisions of the "Interpretation Act" clothed with this power, the deputies of the Attorneys-General in all the other provinces must have the like power under section 873(1). No one has yet been bold enough to prefer such a claim. The history of section 873(1) is wholly inconsistent with its existence. Having regard to the intimate connection between section 873(*a*) and section 873(1) already alluded to, and to the history of the latter in the courts and in Parliament, I think I am justified in saying that the language in which section 873(*a*) is couched affords sufficient evidence of that inconsistency in intent and object which suffices

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to render the provisions of clauses (*l*) and (*m*) of section 31 of the "Interpretation Act" inapplicable to it. (R.S.C. ch. 1, sec. 2.)

I therefore conclude that for lack of statutory authority their deputies are not, as such, clothed with the powers conferred by section 873(*a*) on the Attorneys-General for the Provinces of Alberta and Saskatchewan.

Many of the same considerations apply with even greater force in the case of the powers conferred on provincial Attorneys-General by section 17 of the "Lord's Day Act."

The answer to each of the three questions referred, numbered respectively 2, 3, and 4, should, in my opinion, be "no."

If the powers in question should be held to be vested in a deputy attorney-general *virtute officii*, having regard to the provisions of section 10, of chapter 4, of 6 Edw. VII. (Alberta), and of section 10, of chapter 5, 6 Edw. VII. (Saskatchewan), the occasions on which the deputies of the Attorneys-General in those provinces could exercise them would probably be comparatively rare.

THE SYDNEY POST PUBLISHING COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

ARTHUR S. KENDALL (PLAINTIFF) .. RESPONDENT.

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*May 16, 17.
*June 15.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Libel—Election contest—Withdrawal of candidate—Allegation of improper motives—Trial of action—Verdict for defendant—New trial.

K. was a member of the House of Commons prior to the election in 1908 and in August of that year a letter was published in the *Sydney Post* which contained the following, which referred to him:

"The Doctor had a great deal to say of the elections in 1904. Well, I have some recollections of that contest myself, and I ask the Doctor: Why did you at that time withdraw your name from the Liberal convention? The majority of the delegates came there determined to see you nominated? Why did you not accede to their request? Doctor Kendall, what was your price? Did you get it? Take the good Liberals of this county into your confidence and tell them what happened in those two awful hours in a certain room in the Sydney Hotel that day?

"The proceedings of the convention were held up for no reason that the delegates saw, but for reasons which are very well known to you and three or four others whom I might mention. One speaker after another killed time at the Alexandria Hall while you were in dread conflict with the machine. Finally the *consideration* was fixed and you took off your coat and shouted for Johnston. What was that *consideration?*"

On the trial of an action by K. against the proprietors of the *Post* the jury gave a verdict for the defendants.

Held, Davies and Duff JJ. dissenting, that the publication could only be construed as charging K. with having withdrawn his name from the convention for personal profit, and was libellous. The verdict was therefore properly set aside by the court below and a new trial ordered.

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

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APPEAL from a decision of the Supreme Court of Nova Scotia setting aside a verdict for the defendant and ordering a new trial.

The facts appear in the head-note.

W. B. A. Ritchie K.C. for the appellants.

Mellish K.C. and *D. A. Cameron K.C.* for the respondent.

GIROUARD J.—I agree with Mr. Justice Anglin. The article complained of is libellous upon its face and the appeal should be dismissed with costs.

DAVIES J. (dissenting).—The question in this action is solely whether the words in question charged as being defamatory and libellous are necessarily so, and admit of no other construction, and whether the jury having found a verdict for the defendants, this court is justified in setting it aside and granting a new trial. The trial judge thought the article complained of meant to charge the plaintiff with the offence of violating a particular sub-section of the 265th section of the "Elections Act," while the Chief Justice of the court below thought it meant to charge a violation of a different sub-section of that section of the Act. It is admitted now that neither of these contentions can be maintained. The sole question remaining is whether the words used are susceptible of any interpretation other than a defamatory one, and whether that question is for the jury to determine or for the court. It is not by any means a question as to the meaning the members of the court would attach to the words if acting as jurymen, but simply whether or not the finding of the jury on a question pre-eminently for them to decide

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was such as no jury of reasonable men could fairly reach.

I have said the question of libel or no libel is one pre-eminently for the jury, and no case appears to be reported in England for the last 50 years and more in which a verdict for the defendant in a libel suit has been set aside upon the ground that the jury should have found the publication to be a libel. The verdict must in cases to justify its being set aside be manifestly wrong, and the alleged libel one admitting of no other construction than a defamatory one. In the present case the contention is that the words complained of are of that character. It is said that although the letter in which the words appear forms part of a political controversy, it really charges that the plaintiff at a certain time when he was sure of the party nomination by his friends at a political convention of the party to which he belonged, held for the purpose of nominating candidates to contest the county for the Dominion House of Commons, withdrew his name from the contest "and took off his coat" and worked for his rival candidate, and further, that he did so as a consequence of some price or consideration. It is maintained that the only possible meaning attributable to the libellous article is that the plaintiff had "sold out," as it is said, for his own ends and purposes, and in this way took advantage of the good opinion his friends had formed of him, and that the article further charged that the consideration or price of plaintiff's withdrawal, although promised, was not given. The further necessary contention is made on behalf of respondent that no reasonable man looking at all the circumstances and facts appearing with respect to the publication could say the words were

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capable of any other construction or meaning than the defamatory one suggested.

The majority of the court I understand accept this view. I am unable to do so and find it necessary therefore to state as shortly as I reasonably can my reasons for being unable to concur in holding that arbitrary construction of the article in question to be the only possible one which reasonable men could make.

It is necessary, of course, to look at the article as a whole, at its subject-matter and at the relative positions in which the parties stood towards each other. The plaintiff was a prominent politician in his county, had been its representative in the Commons and had sought for a re-nomination in the southern half of the constituency which had been subdivided. At a convention called of the party delegates the plaintiff's name had after conferences and disputes been withdrawn, and the alleged libel had reference to this withdrawal. The defendants' newspaper was the local organ of the opposite side of politics, and some years after the withdrawal on the eve of another political contest published the letter charged as being libellous.

That letter asserted practically that there had been a price or consideration given or promised to induce plaintiff to withdraw his name and intimated pretty clearly that good faith had not been kept and the promises had not been carried out. Did this necessarily mean that the plaintiff had withdrawn his name in consequence of some corrupt or immoral promise made to him of personal future advantage to himself, or was it capable of a more innocent meaning not necessarily libellous. The whole circumstances were in arriving at their conclusion to be weighed by the jury. As practical men they would know that many different

reasons not necessarily corrupt or immoral would induce strong party men out of loyalty to their party to withdraw their names from nominations, even though at the time they had every reason to believe they had a majority of the convention with them, and they would also know that the political opponents of such men would in their comments or criticisms on the withdrawal, place the matter in the worst possible light and indulge in strong extravagant and indefensible language with regard to it. In deciding whether or not those who read the article would understand it as charging plaintiff with having made a corrupt or immoral bargain for himself, however, as the price of withdrawal of his name, they would naturally consider what the article expressed that while the plaintiff supposed himself to have a majority of the convention favourable to his nomination, he had a strong rival. They would also consider as practical men the local political situation which probably, as in most places, demanded practical unanimity in the party as the price of success at the polls, and the pressure which under such circumstances would be brought to bear by the party agents or managers to ensure the withdrawal of one of the rival candidates; the appeal to party loyalty; the consequences which would flow from disunion; the party gratitude which would be earned by the self-sacrificing candidate in future nominations. On the other hand, they would consider the well-known and understood extravagance of language used by party papers on the eve of elections and during their progress towards their political adversaries, and might possibly reach a conclusion that language so published might be understood by those who read it as not carrying the imputation suggested by the

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mere natural consideration of the words themselves. All these things had fairly to be weighed and considered by the jury. They evidently and properly rejected the interpretation which the learned trial judge suggested the words bore. They must clearly, as shewn by their verdict, have concluded that under all the circumstances the people who read the article would discount its violence and extravagance, and would not understand it as conveying the grave imputation which its reading in the serene atmosphere of the courts and apart from the local facts and circumstances might justify.

I cannot believe this court in a libel action is justified in setting aside such a finding of a jury and is compelled to accept as the only possible meaning of the words complained of that which may be said to be their natural and ordinary meaning when used under ordinary circumstances and with reference to the every day matters of life.

I think the language used by some of the most distinguished jurists on the subject of the relative rights and duties of juries and judges in actions of libel alike appropriate and instructive in this appeal and are binding authorities upon us in cases such as the one before us. I venture to insert one or two of them.

In the case of *Capital and Counties Bank* v. *Henty* (1), at page 762, Lord Penzance is reported as saying:

> I am, therefore, of opinion that if a publication, either standing alone, or taken in connection with other circumstances, is reasonably capable of a libellous construction, it is for a jury, and not for the court, to say whether a libellous construction should be put upon it. The question not being what a court of law might understand by

(1) 7 App. Cas. 741.

it, but what inferences the class of people to whom it is addressed would draw from the language used, it is properly and essentially a question of fact, and as such properly devolves upon a jury.

And Lord Blackburn in his speech at page 775, after reviewing the law on the question of libel or no libel as it stood before the passage of Fox's Act says in his speech:

But though no doubt the court has more power to set aside verdicts in civil cases, there is no reason why the functions of the court and jury should be different in civil proceedings for a libel, and in criminal proceedings for a libel. And accordingly it has been for some years generally thought that the law, in civil actions for libel, was the same as it had been expressly enacted that it was to be in criminal proceedings for libel.

It certainly had always been my impression that there was a difference between the position of the prosecutor, or plaintiff, and that of the defendant. The onus always was on the prosecutor or plaintiff to shew that the words conveyed the libellous imputation, and if he failed to satisfy that onus, whether he had done so or not, being a question for the court, the defendant always was entitled to go free. Since Fox's Act at least, however the law may have been before, the prosecutor or plaintiff must also satisfy a jury that the words are such, and so published, as to convey the libellous imputation. If the defendant can get either the court or the jury to be in his favour, he succeeds. The prosecutor, or plaintiff, cannot succeed unless he gets both the court and the jury to decide for him.

Now, it seems to me that when the court come to decide whether a particular set of words published under particular circumstances are or are not libellous, they have to decide a very different question from that which they have to decide when determining whether another tribunal, whether a jury or another set of judges might, not unreasonably, hold such words to be libellous.

In the later case of *Australian Newspaper Co.* v. *Bennett*(1), the Judicial Committee of the Privy Council reviewed the law on the subject of the respective functions of courts and juries in actions of libel and the Lord Chancellor, Herschell, in delivering the judgment of that Committee said, at page 287:

It is not disputed that, whilst it is for the court to determine whether the words are capable of the meaning alleged in the innuendo,

(1) [1894] A.C. 284.

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it is for the jury to determine whether that meaning was properly attached to them. It was, therefore, the province of the jury in the present case to determine whether the words used were written of the plaintiff, and whether they bore the defamatory sense alleged.

Windeyer J. observed in the course of his judgment that he admitted that the court would only be justified in reversing the finding of the jury "if their decision upon that point is such as no jury could give as reasonable men." This is a correct statement of the law. Their Lordships have not, any more than the court below had, to determine in the present case what is the conclusion at which they would have arrived, or what is the verdict they would have found. The only point to be determined is, whether the verdict found by the jury, for whose consideration it essentially was, was such as no jury could have found as reasonable men.

The judgment of the court below was founded on the use of the word "Ananias." Windeyer J. has expressed the opinion that only one meaning could be attributed to that word, that every one must understand it to impute wilful and deliberate falsehood, and that therefore the mere use of the word "Ananias" which necessarily involves such an imputation, could not reasonably be held to be innocent, or to be otherwise than intended to cast this imputation upon the plaintiff. Even admitting that the natural effect of the use of the word "Ananias," standing alone would be to convey the imputation suggested, the learned judge appears to their Lordships, with all respect, to have lost sight of the fact that people not unfrequently use words, and are understood to use words, not in their natural sense, or as conveying the imputation which, in ordinary circumstances, and apart from their surroundings, they would convey, but extravagantly, and in a manner which would be understood by those who hear or read them as not conveying the grave imputation suggested by a mere consideration of the words themselves. Whether a word is, in any particular instance, used, and would be understood as being used, for the purpose of conveying an imputation upon character must be for the jury.

Applying to the case before us the law as I understand to be laid down alike by the House of Lords as by the Judicial Committee of the Privy Council, I am of the opinion that the jury having under all the circumstances of this case found a verdict for the defendants, it would be exceeding the legitimate function of this court if such verdict was set aside and a new trial ordered. The court would then in reality be taking upon itself the function which the law has committed

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to the jury of looking at the alleged libellous matter as a whole and determining whether under all the facts and circumstances as proved before them it is defamatory of the plaintiff.

IDINGTON J.—At first I was inclined to think the letter complained of might be read as one of those ambiguous productions not necessarily meaning much or of as serious import as respondent alleges.

However, the word price is an ugly one and it seems on reflection hard to give another meaning to it than respondent claims. And it is by no means clearly intended in this production to have been synonymous with the word consideration, which is used later and clearly might be ambiguous if it stood alone.

The evidence of the appellant's manager seems clearly to lead to but one inference of how he as a bystander interpreted this language.

The court below seems to have been unanimous as is frankly admitted by counsel in taking the same view.

I do not think in face of all parties concerned, but the jury so reading the letter, I ought to say the jury may have been right after all.

The appeal should be dismissed with costs.

DUFF J. (dissenting).—This appeal should, in my opinion, be allowed. The function of a court of appeal in passing on an application to set aside the verdict of a jury in an action for libel where the only issue is whether the publication complained of is libellous and the defendant has succeeded, has been thus described

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by the Judicial Committee in *Australian Newspaper Co.* v. *Bennett*(1):

> Whether the verdict found by the jury, for whose consideration it essentially was, was such that no jury could have found as reasonable men.

Theoretically, therefore, the function of the court of appeal in such cases does not materially differ from its function in any application to set aside a verdict of a jury as against the weight of evidence, as that expression has been explained and applied in modern cases. In determining the question, however, the court has always in actions for libel regarded the opinion of a jury that the publication complained of is not libellous as of the greatest weight. The point in all such cases is: Do the words convey, that is, would sensible persons reading them in the locality in which the publication was circulated regard them as conveying, an imputation damaging to the character of the plaintiff? If the jury think they do not convey such an imputation that, of course, is not necessarily conclusive. The imputation may be so plain that no reasonable persons could take the view of the jury, and in that case the court may act. But the question of the effect of words in their bearing upon reputation in the locality from which the jury is taken is one of those perhaps upon which a jury ought to be most qualified to speak. So much weight has been given to this circumstance that for nearly sixty years there appears to be only a single reported instance of a verdict for a defendant having been set aside in England on the ground that the language of the publication was necessarily defamatory; and in that instance the question of

(1) [1894] A.C. 284, at p. 287.

libel or no libel had been left to the jury, although the libellous character of the words had been admitted by the pleadings. In *Wills* v. *Carman*(1), at page 225, a most able and experienced judge, Armour C.J., in delivering the judgment of the Court of Queen's Bench, went so far as to say:

> According to the usual practice of this court new trials are not granted in actions of libel such as this, merely on the ground that the verdict is against the evidence and the weight of evidence. It is for the jury to say whether alleged defamatory matter published is a libel or not, and the widest latitude is given to them in dealing with it.

There are two grounds upon which it is contended that the jury in this case has failed to do its duty. It is said first that the publication manifestly imputes an offence against the "Dominion Elections Act," and secondly, that it plainly charges the plaintiff with having withdrawn his name from a liberal nominating convention where the members desired to nominate him, as the result of an arrangement through which he was to receive some personal benefit for doing so.

As to the first of these contentions, it is to be observed that the question is: What is the meaning of the words? Not what did the writer intend to convey by them, still less on what grounds did the writer think they might be justified. (*Hulton & Co.* v. *Jones*(2), at pages 23 and 24, *per* Lord Loreburn.) Now the contention is that the words convey a charge that the respondent was guilty of an offence under the "Dominion Elections Act," ch. 6, sec. 265(*g*), or section 265(*i*). The first of these sub-sections was not, I think, relied upon by Mr. Mellish, and we may eliminate it from the discussion.

(1) 17 O.R. 223.

(2) [1910] A.C. 20.

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The second is that relied upon by the learned Chief Justice of Nova Scotia. The offence which this letter is said to charge is that somebody offered to give or procure him an office, place or employment if he should not become a candidate and that by accepting the office and refraining from presenting himself for nomination he became a party to the offence. Nobody, of course, pretends that the words in themselves in their natural and ordinary meaning convey any such imputation. The whole contention is based upon the circumstance that the manager of the defendant company in an affidavit filed to procure an adjournment of the trial had stated his intention of procuring evidence (in support of his plea of justification) to shew that Dr. Kendall had acted upon an arrangement that he should be appointed to the Senate of Canada. This affidavit, in my view, is not of the least value upon the question the jury had before them. Nobody disputes that the defendant was entitled, in addition to his plea of justification, to dispute the libellous character of the publication; and it is, I think, a most novel suggestion to say that because words may be justified by proof of a criminal offence, they can on that ground alone be held to impute one. A father informs his friends that he will not permit his son to associate with a given person; his reason for doing so is that he believes that person to be a criminal. Does that make his words actionable *per se*? If he is sued may he not at the same time deny the words to be actionable and in the alternative allege that plaintiff is a thief?

On this point not only do I think the verdict of the jury not unreasonable, but I think it right. The words do not, in my opinion, on any fair construction convey the suggested imputation. On the second point there

is much more to be said; but without expressing my own view as to the meaning of the words (which would perhaps not be material on point at issue), it seems to me to be impossible to say that the words are incapable of an innocent construction.

Dr. Kendall the letter states was a public man whom a majority of a liberal convention wished to nominate as the liberal candidate at the election of 1904. Then it is said that he refused to allow his name to go before the convention; and that is commented upon in this passage:

> The Doctor had a great deal to say of the elections in 1904. Well, I have some recollections of that contest myself, and I ask the Doctor: Why did you at that time withdraw your name from the liberal convention ? The majority of the delegates came there to see you nominated ? Why did you not accede to their request ? Doctor Kendall, what was your price ? Did you get it ? Take the good liberals of this county into your confidence and tell them what happened in those two awful hours in a certain room in the Sydney Hotel that day ?
>
> The proceedings of the convention were held up for no reason that the delegates saw, but for reasons which are very well known to you and three or four others whom I might mention. One speaker after another killed time at the Alexandria Hall while you were in dread conflict with the machine. Finally the *consideration* was fixed and you took off your coat and shouted for Johnston. What was that *consideration ?*

This passage does no doubt imply the allegation that there was an arrangement between Dr. Kendall and what is called "the machine," by which Dr. Kendall was to receive a consideration for withdrawing, and that Dr. Kendall withdrew, and that he then supported the candidature of Mr. Johnston. Does this necessarily involve a disgraceful imputation ? I do not think anybody would suggest that were it not for the use of the words "price" and "consideration." It is said that these words imply that the arrangement included a provision for bestowing upon Dr.

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Kendall personally some profit or material benefit in return for the withdrawal of his name or his support of Mr. Johnston. I do not think that is necessarily so. In the language of political controversy the words "price" and "consideration" are constantly used, with perhaps some rhetorical exaggeration, to characterize concessions of a purely political nature involved in political arrangements; without any idea of conveying and without conveying any imputation damaging to personal character. Illustrations of this would immediately occur to any intelligent person.

Therefore, I think the jury were not bound to hold that the language in question here involves the charge that there was anything sordid in the conduct of the respondent, or that the concession made to him was of such a nature as that, in acting upon it as he is alleged to have acted on the occasion in question, he was necessarily playing a dishonourable part.

ANGLIN J.—If the publication of which the plaintiff complains were reasonably susceptible of any construction not defamatory, I would agree that the verdict for the defendants should not have been disturbed.

The question, therefore, is whether in all the circumstances it can be said that a jury of reasonable men could not possibly find that the article, although it contains that which had much better not have been published, did not reflect upon the plaintiff's character. *Australian Newspaper Co.* v. *Bennett*(1), at page 289.

Counsel for the appellants pressed upon us as reasonably possible one or two constructions of the letter published by the appellants — such as that it might be taken to mean that the plaintiff had withdrawn his

(1) [1894] A.C. 284.

candidature on a previous occasion in order to prevent the disastrous consequences of a split in his own political party upon some sort of understanding more or less definite that his doing so would be to his own political advantage in the future — which would rather redound to the credit of the plaintiff than prove injurious to him. But, having regard to the manifest purpose of the letter before us to injure and discredit the plaintiff, then a prospective Parliamentary candidate, apparent to everybody who read it, I have no doubt that the words complained of are not susceptible of any construction which is not defamatory. To charge that a political candidate in such circumstances withdrew his candidature for a consideration or a price (the interrogative form in which it is couched does not render the charge less plain or pointed) is to impute to him, if not the making of a corrupt and criminal bargain, at least that he was a party to a discreditable transaction. The question is not what readers of the letter would believe of the plaintiff, but what they would understand the writer to charge. That, I think, admits of no doubt. Publication having been conclusively proven, in the absence of any defence whatever the verdict for the defendant was, in my opinion, clearly

> perverse and so unreasonable as to lead to the conclusion that the jury have not honestly taken the facts into their consideration,

O'Brien v. *Marquis of Salisbury*(1), at page 137, "was such as no jury could have found as reasonable men." *Australian Newspaper Co.* v. *Bennett*(2), at page 287.

The cases of *Levi* v. *Milne*(3) and *Hakewell* v. *Ingram*(4), have never been overruled and are cited

(1) 6 Times L.R. 133.
(2) [1894] A.C. 284.
(3) 4 Bing. 195.
(4) 2 C.L.R. 1397.

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by Mr. Odgers in a late edition (1905) of his work on Libel, at page 654, as unquestioned authority for the proposition that:

> A new trial will, however, be granted when the matter complained of is clearly libellous, and there is no question as to the fact of publication, or as to its application to the plaintiff, and yet the jury have perversely found a verdict for the defendant, in spite of the summing up of the learned judge.

See also Folkard on Libel (1908), page 317.

To quote the language of Best C.J.:

> If the jury were to be made judges of the law as well as of fact, parties would be always liable to suffer from arbitrary decisions. * * * Being clear that the publication in question is a libel I am of the opinion that the rule for a new trial should be made absolute. 4 Bing. 195, at pages 199, 200.

The right to grant a new trial in a libel action where the verdict, though in favour of the defendant, is incontrovertibly wrong is affirmed in *Parmiter* v. *Coupland*(1).

These authorities have never been overruled. No case has been cited, and, so far as I can discover, there is no reported case in which the court, although of opinion that a verdict importing "no libel" was clearly perverse and the document in question indubitably not susceptible of any but a libellous meaning, nevertheless refused a new trial on the ground that in libel cases a verdict for the defendant upon such an issue is always conclusive.

Such dicta as that of Lord Blackburn in *Capital and Counties Bank* v. *Henty*(2), should not, I think, be taken to mean more than that where the defendant has had a verdict the court cannot upon appeal enter judgment for the plaintiff however clear the libel, and

(1) 6 M. & W. 105. (2) 7 App. Cas. 741, at p. 776.

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may give him no greater relief than a new trial, because in order to succeed the plaintiff must "get both the court and the jury to decide for him."

I fully appreciate the reluctance of the courts to interfere with verdicts of juries in libel cases. But where, as here, the defamatory character of the publication does not admit of dispute, the order for a new trial should not be disturbed.

I would, therefore, dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *H. P. Duchemin.*

Solicitor for the respondent: *D. A. Cameron.*

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*May 18, 19.
*June 15.

THE CITY OF SYDNEY (DEFENDANTS) ..... } APPELLANTS;

AND

CHAPPELL BROTHERS AND COMPANY (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Municipal corporation—Public library—Offer of funds—Special legislation—Contract for plans—Municipal powers.

A sum of money was offered the City of Sydney for a public library on condition that the city procured the site and provided for its maintenance. An Act of the legislature authorized the purchase of the site and a special tax for its cost and future maintenance of the library. The City Council invited tenders for plans of the building and accepted that of C. Bros. & Co. The scheme, however, fell through, the money offered was not paid nor the library built. C. Bros. & Co. sued the city for the cost of their plans.

Held, that the city had no authority to enter into any contract involving the expenditure of municipal funds in respect to the said building and the action could not be maintained.

APPEAL from a decision of the Supreme Court of Nova Scotia maintaining the verdict at the trial in favour of the plaintiffs and increasing the amount thereby awarded.

The facts are sufficiently stated in the above headnote.

O'Connor K.C. and *Finlay McDonald* for the appellants.

Newcombe K.C. for the respondents.

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

GIROUARD J. agreed with Duff J.

DAVIES J.—For the reasons given by Chief Justice Townshend, who dissented from the judgment rendered by the majority of his colleagues I am of opinion that this appeal should be allowed and the action dismissed with costs in all the courts. I desire to add a few words.

I am quite unable to agree with the reasons of Mr. Justice Drysdale, concurred in by a majority of the court appealed from, that the special Act relating to the proposed Carnegie Library "conferred upon the defendant corporation legislative authority to *erect a public library,* purchase a site therefor, and assess to the limit mentioned for its annual maintenance."

The enacting part of the statute is strictly confined to authorizing the Town of Sydney to include in the estimates of the amount required for the general purposes of the town, $1,900 per annum for three years, to be expended in the *purchase of a site* of a free public library in Sydney, and an annual sum of $1,500 for the *support and maintenance* of the library when built.

The preamble recited the reason for the grant of these limited powers to the corporation. They were substantially that Andrew Carnegie "had donated to the town the sum of $15,000 for the erection of a free public library, conditioned on the Town of Sydney contributing annually towards its support $1,500 and that the ratepayers "had approved of the acceptance of the said gift" and of the expenditure of $5,700 for the purchase of a site.

As a fact the gift of $15,000, for reasons unnecessary to refer to, was never paid by Mr. Carnegie or received by the corporation.

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Davies J.

If the money had been paid over and received there might possibly have been implied the necessary powers to expend it for the purpose given and to authorize the creation on the part of the corporation of a liability which could be enforced against it. But whether that would be so or not we have not to determine. The money never was paid over and no implication of legislative authority to erect a library at the expense of the citizens of the town could in my judgment possibly be implied from the statute in question.

In this view of the case it is unnecessary for me to say anything on the point raised and argued by Mr. O'Connor that whether the city corporation had the power to do so or not they never did as a fact enter into any contract with the plaintiff.

IDINGTON J.—The appellant is a municipal corporation to which a proposal had been made if it furnished a site for a library that Mr. Carnegie would donate fifteen thousand dollars to erect a building thereon.

The promoters of the scheme induced the legislature to confer upon appellant's council the power to buy the site needed and to levy the price thereof and an annual sum named for maintenance.

Without a vestige of authority beyond this it is contended there was implied therein the power to tax the ratepayers to pay for plans and specifications, although in the face of the transactions involved the cost thereof was to come out of the said fifteen thousand dollars if and when received, and as the scheme fell through, never was received.

There is not, so far as I can see, the slightest ground for any such implication.

There was never a legal duty imposed upon the municipal authorities to do anything relative to procuring or building or maintaining a library. If some such duty had existed then the acts relied upon, though done by a committee possessing no legal right to create any such liability, but which made a report which was adopted by the council, might have lent some colour to this suggestion of implication.

In the entire absence of any such duty the council's authority did not extend beyond the mere exercise, when it saw fit, of the limited power given.

But on the face of this report relied upon and said to have been adopted by the council as if that would add to the council's powers, no final determination or acceptance of such plans and specifications appears.

Indeed, the contrary is implied.

The appeal should be allowed with costs.

DUFF J.—I think this appeal should be allowed. It is conceded very properly by Mr. Newcombe that the authority of the municipal council to pledge the credit of the municipality in respect of payments for the services of the respondents must be derived from the Act of 1903, ch. 169; and that no such power being expressly conferred by that statute it can only be found in such implication as is necessary to give effect to the objects of the statute. I do not think there is anything in the enactment implying such authority. The statute authorizes the purchase of a site for a library and the levying of the cost of it within a specified limit and of a specified annual grant as a part of the ordinary taxation of the inhabitants. The Act is passed upon the assumption, as the preamble shews, that the necessary funds to defray the cost of erecting

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Duff J.

a building are at the disposal of the municipality; and it was manifestly not the design of the legislature by this statute to authorize the levying by taxation of the moneys required for that purpose. The legislature did obviously contemplate the erection of a building to be used for housing a library and I think in view of the preamble it is fair to say that the municipality was expected to undertake the administration of the fund in hand for that purpose. But while it might be a convenient thing that in such circumstances the municipality should have power to enter into contracts by which its general credit should be pledged — that was by no means necessary to enable it effectively to apply the fund for the purpose of attaining the object in view. In the absence of such necessity there is, in my opinion, no satisfactory foundation for the implication which the court below has drawn from the provisions of the Act.

ANGLIN J.—It is not a reasonably necessary and, therefore, in my opinion, in this case not a proper implication from the statute passed by the Nova Scotia Legislature (3 Edw. VII. ch. 169) that the corporation of the Town of Sydney was clothed with authority to make any expenditure or to incur any liability for or in connection with the projected building for a library — at all events until the sum of $15,000 promised for that purpose by Mr. Andrew Carnegie had been placed at its disposal. In the absence of such legislative authorization, the municipal corporation lacked the power to enter into the contract sued upon.

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Anglin J.

On this short ground I think this appeal must be allowed.

Appeal allowed with costs.

Solicitor for the appellants: *Finlay McDonald.*

Solicitor for the respondents: *W. H. Covert.*

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*May 19.
*June 15.

CHARLES H. MUSGRAVE (DEFENDANT) ..... } APPELLANT;

AND

DAVID ROBINSON ANGLE (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Evidence—Will—Evidence Act—R.S.N.S. (1900) *c.* 163, *ss.* 22 *and* 27 *—Secondary evidence—Ejectment—Mesne profits.*

Section 27 of the "Evidence Act" of Nova Scotia (R.S.N.S. (1900) ch. 163) provides that "a copy of a notarial act or instrument in writing made in Quebec before a notary public, filed, enrolled or enregistered by such notary and certified by a notary or prothonotary to be a true copy of the original, thereby certified to be in his possession as such notary or prothonotary, shall be received in evidence in any court in place of the original, and shall have the same force and effect as the original would have if produced and proved."

And by the first two sub-sections of section 22 it is provided that: —

"The probate of a will or a copy thereof certified under the hand of the registrar of probate or found to be a true copy of the original will, when such will has been recorded, shall be received as evidence of the original will, but the court may, upon due cause shewn upon affidavit, order the original will to be produced in evidence, or may direct such other proof of the original will as under the circumstances appears necessary or reasonable for testing the authenticity of the alleged original will, and its unaltered condition and the correctness of the prepared copy."

"(2) This section shall apply to wills and the probate and copies of wills proved elsewhere than in this province, provided that the original wills have been deposited and the probate and copies granted in courts having jurisdiction over the proof of wills and administration of intestate estates, or the custody of wills."

Held, that a copy of a will executed before two notaries in the Province of Quebec under the provisions of article 834 C.C. certified by one of said notaries to be a true copy of the original in his possession, is admissible in evidence on the trial of an action of ejectment in Nova Scotia, as provided in section 27.

PRESENT:—Girouard, Davies, Idington, Duff and Anglin JJ.

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APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the plaintiff.

The plaintiff brought action to recover possession of a lot of land in Sydney, C.B., which he claimed as devisee under the will of one George I. Bradley, of Montreal, Que. The defendant set up a title by possession, and also claimed a large sum in payment for improvements and disbursements.

The plaintiff proved the title of George I. Bradley and tendered in evidence a copy of his will certified by a notary of Montreal. The will purported to be in authentic form and executed before two notaries as required by article 843 of the Quebec Civil Code. The trial judge admitted the copy as proof of the will, and gave judgment for the plaintiff for possession of the lot and mesne profits for nine years, also allowing defendant his claim for improvements. This judgment was affirmed by the full court in Nova Scotia which held, however, that plaintiff could only recover mesne profits for the period in which the title was in him and the defendant's claim should be limited to the same space of time. This would give plaintiff more than was allowed at the trial, but as there was no cross-appeal the latter amount stood.

The defendant appealed to the Supreme Court of Canada, claiming that the copy of the will was improperly admitted in evidence, and that his claim should be allowed as settled at the trial.

O'Connor K.C. and *A. D. Gunn* for the appellant.
Finlay McDonald for the respondent.

GIROUARD J.—I concur in the judgment of Mr. Justice Idington.

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Davies J.

DAVIES J.—The will, the admissibility of which in evidence was in question in this case, was executed in the Province of Quebec before two notaries public in manner and according to the requirements of article 843 of the Civil Code of that province.

It was known to the law of Quebec as an "authentic will" and remained of record with one of the witnessing notaries as an original document as required by article 844.

No probate was contemplated or could be made of such a will when filed or remaining with the notary.

There are two other classes of wills which may be made pursuant to the Code, namely, holograph wills and "those made in the form derived from the laws of England," article 842.

These two latter classes of wills must be probated as provided by article 857 and special provision seems to be made for the probating of wills found amongst testator's effects after his death. Section 1367 of the Code of Civil Procedure.

The 27th section of the "Evidence Act" of Nova Scotia provides as follows:

> A copy of a notarial act or instrument in writing made in Quebec before a notary public, filed, enrolled or enregistered by such notary and certified by a notary or prothonotary to be a true copy of the original, thereby certified to be in his possession as such notary or prothonotary, shall be received in evidence in any court in place of the original, and shall have the same force and effect as the original would have if produced and proved.

A copy of the will in question in this case duly certified by the notary with whom it was recorded to be a true copy of the original in his possession as such notary, was offered in evidence at the trial of this cause. It came within the very words of the statute, being a notarial act or instrument in writing made in

the Province of Quebec before a notary public and filed and enrolled by him.

It appeared on its face to have been executed in compliance with the formalities required by the laws of Nova Scotia respecting wills, otherwise it would not have any effect upon the disposition of lands in that province purported to have been made by it.

The section of the "Evidence Act" above quoted, enacts that such certified copy

> shall be received in evidence in any court in place of the original, and shall have the same force and effect as the original would have if produced and proved.

No language could, in my opinion, be plainer alike as to right to put the certified copy in evidence and as to its effect when so received.

It is to "have the same force and effect as the original would have if produced and proved."

The certified copy of the will was admitted in evidence and the judgment of the Supreme Court now in appeal held that it was rightly so received and that it had the full effect prescribed by the section above quoted.

The argument of Chief Justice Townshend, who dissented from the judgment, was based upon the grounds that the section relied on made no specific mention of "wills" and that these instruments are fully dealt with by section 22, sub-sections 1 and 2.

The section reads:

> The probate of a will or a copy thereof certified under the hand of the registrar of probate or found to be a true copy of the original will, when such will has been recorded, shall be received as evidence of the original will, but the court may, upon due cause shewn upon affidavit, order the original will to be produced in evidence, or may direct such other proof of the original will as under the circumstances appears necessary or reasonable for testing the authenticity

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of the alleged original will, and its unaltered condition and the correctness of the prepared copy.

Sub-section (2) This section shall apply to wills and the probate and copies of wills proved elsewhere than in this province, provided that the original wills have been deposited and the probate and copies granted in courts having jurisdiction over the proof of wills and administration of intestate estates, or the custody of wills.

This sub-section 2 only refers to wills proved elsewhere than in Nova Scotia, which have been probated in courts having jurisdiction over the proof of wills, etc., and therefore would cover the two classes of wills executed in Quebec, namely, holograph wills and "wills made in form derived from the law of England."

It does not, however, cover "wills in notarial or authentic form" filed or remaining with the notary before whom it was received such as the one in question, the probating of which is not contemplated by the Code.

These latter are, in my opinion, clearly covered by section 27 of the "Evidence Act" as "notarial acts or instruments filed, enrolled or enregistered" by a notary.

The Chief Justice seemed to be of the opinion that if this certified copy of the will was admitted "transfer of land could be made without any record in the province and without any of the proofs required by our (N.S.) statute for authenticating the due execution of wills."

But that is not so. "Authentic wills must be made as originals remaining with the notary," article 844. They must conform to all the special prescribed requirements of that and the following articles, and so far as they make any disposition of land in Nova Scotia they must conform to the proofs of the statutory law in that province relating to the due execution of wills.

The intention of the legislature seems to be plain that so far as wills executed in Quebec in "notarial or authentic form" are concerned, and which cannot be probated there, they fall within section 22, which latter section clearly does not cover such authentic wills as the one here in question.

I agree with the disposition of "mesne profits" made by the court below and would dismiss the appeal with costs.

IDINGTON J.—Two questions are raised by this appeal.

The appellant claims he is not liable as he has been found for mesne profits and is entitled to full value for improvements he had made on land in question before action brought.

I think the learned trial judge's findings of fact upheld by court below cannot be disturbed.

On such findings I do not see any legal error.

The other point is that the proof accepted, of the will made in Quebec and under and by virtue of which the plaintiff claimed, was inadmissible, and even if admissible insufficiently proven.

The will was certified by one of the Quebec notaries by whom it was drawn up and before whom it was executed and in whose hands it had been as usual in that province left after execution.

The will never was admitted to probate.

It is urged that unless and until so admitted this action cannot succeed.

In the "Evidence Act" of Nova Scotia there are two enabling sections to overcome the difficulty of adducing proof by secondary evidence relative to documents which it is physically impossible or highly in-

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convenient to produce at trial or even within the jurisdiction of the court.

The first, being section 22 of said Act relative to wills, is as follows:

> The probate of a will or a copy thereof certified under the hand of the registrar of probate or found to be a true copy of the original will, when such will has been recorded, shall be received as evidence of the original will, but the court may, upon due cause shewn upon affidavit, order the original will to be produced in evidence, or may direct such other proof of the original will as under the circumstances appears necessary or reasonable for testing the authenticity of the alleged original will, and its unaltered condition and the correctness of the prepared copy.
>
> Sub-section (2). This section shall apply to wills and the probate and copies of wills proved elsewhere than in this province, provided that the original wills have been deposited and the probate and copies granted in courts having jurisdiction over the proof of wills and administration of intestate estates, or the custody of wills.

The first sub-section just quoted never could have been of use for such purpose as here in question.

The second sub-section makes it applicable to wills though it seems to contemplate probates only. But pass that it makes it applicable only where "the original wills have been deposited and the probate and copies granted in courts having jurisdiction," etc.

When this was first enacted there was an impossibility in some cases not unlikely of occurrence to get probate in Quebec at all. 2 Edw. VII. ch. 37 (Quebec), helped to overcome this.

I will not say it would now be impossible to get probate of any will in Quebec. But of what good ?

A probate is but *primâ facie* evidence of the authenticity of a will.

It is liable after probate to be attacked and set aside.

In Quebec the practice of observing the form of having documents executed before a notary or notaries

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and the system of law recognizing such officials and constituting the documents so executed authentic is the legal equivalent of the probate. Hence wills made in authentic form are not as Chief Justice Townshend fears if recognized likely to become a source of fraud or danger any more than probates in another country.

The authentication by a public official in the one case accompanies the act done and precedes and in the other succeeds the death of the testator.

It is, I take it, recognizing such a condition of things that the Legislature of Nova Scotia enacted as follows by section 27 of said Act:

> A copy of a notarial act or instrument in writing made in Quebec before a notary public, filed, enrolled or enregistered by such notary and certified by a notary or prothonotary to be a true copy of the original, thereby certified to be in his possession as such notary or prothonotary, shall be received in evidence in any court in place of the original, and shall have the same force and effect as the original would have if produced and proved.

It was, I rather think, from a comparison of article 1215 of the Civil Code of Quebec taken therefrom and adapted to what was needed in Nova Scotia relative to transactions in Quebec.

There is nothing inconsistent between these two sections, Nos. 22 and 27.

Indeed, I venture to submit there is nothing difficult or dangerous in permitting operation being given to both and more that there are possible cases even where English law prevails in which probate of a will dealing only with land and not naming an executor may be impossible and a third section covering this ground would be advisable legislation for Nova Scotia.

As to Quebec, where the will is not authentic probate undoubtedly can be got and this section 27 is only as to notarial acts or instruments in writing and leaves

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Idington J.

others, for which the safeguards of notaries does not vouch, untouched and to fall under the 22nd section.

There is this to be observed as possibly wanting in this case at the trial. Some proof of the Quebec law as to notaries and their practice of retaining wills so as to render it physically impossible to produce them, perhaps had better have been given to enable the secondary evidence to be admitted.

The nature of the objections as appearing on this record leaves it doubtful if the point was taken.

Fortunately, assuming it was inasmuch as we can here (see case of *Logan* v. *Lee*(1)) take judicial notice of the law that such was the case the objection falls.

I think the section 27 applies herein and is quite sufficient to cover the other objections taken.

I agree in the reasoning of Mr. Justice Russell, which covers points I have not touched upon.

Appeal should be dismissed with costs.

DUFF J. concurred with Idington J.

ANGLIN J.—I am of opinion that, under section 22 of R.S.N.S. ch. 163, it was proper to receive the notarial copy of the will of Geo. J. Bradley in evidence and to act upon it without further proof of its authenticity, validity or due execution in conformity with the requirements of the law of Nova Scotia as to wills disposing of real property. I agree with Mr. Justice Russell that

> If this section had been intended merely to say that the original document should be received in evidence *valeat quantum* it might well have closed with the phrase directing that it should be received in evidence in place of the original. In that case the question might still be left open whether, although admissible in evidence and effectual for some purpose, it could be effectual to operate on the

(1) 39 Can. S.C.R. 311.

title to land in this province. * * * It (the notarial copy) is to have the same force and effect as the original would have if produced and proved. Proved how? Proved to have been executed in the manner in which it purports to have been executed. The language might have been more explicit, but I think it means nothing if it does not mean this.

I further think that the language of the statute means that the notarial copy is to be deemed not merely evidence of an original document, in the terms of the copy, having been duly executed as the copy purports to shew, but also *primâ facie* proof of an original instrument otherwise valid.

I am also of opinion that the provisions of section 27 do not apply to a Quebec notarial will, which this was. Probate of such a will is not required in Quebec. If section 27 were applicable, it does not at all follow that its presence in the statute would render section 22 inapplicable. *Prescott Election Case*(1).

Upon a perusal of the judgment of the learned trial judge and of the evidence before him I am further of opinion that the plaintiff has received full compensation in respect of his expenditure for improvements.

I would therefore dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. D. Gunn.*

Solicitor for the respondent: *David A. Hearn.*

(1) Hodgins' El. Cas. 1.

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*May 25-27.
*June 15.

KATE FRALICK (PLAINTIFF).....APPELLANT;

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway—Accident—Negligence—Railway rules—Special instructions—Defective system—Common law negligence—Workmen's Compensation Act.

The "Railway Act" prescribes that rules and regulations for travelling upon and the use or working of a railway must be approved by the Governor-General in Council and that, until so approved, such rules and regulations shall have no force or effect; when approved they are binding on all persons. Rule 2 of the rules of the Grand Trunk Railway Co. provides that "In addition to these rules, the time-tables will contain special instructions, as the same may be found necessary. Special instructions, not in conflict with these rules, which may be given by proper authority, whether upon the time-tables or otherwise, shall be fully observed while in force." Trains running out of Brantford, Ont., are under control of the train-despatcher at London. The railway time-table has for many years contained the following foot-note:—

"Tilsonburg Branch.—Yard-engines at Brantford are allowed to push freight trains up the Mount Vernon grade and return to Brantford B. & T. station without special orders from the train-despatcher. Yard-foreman in charge of yard-engine will be held responsible for protecting the return of the yard-engine, and for knowing such engine has returned before allowing a train or engine to follow.—A. J. Nixon, Assistant Superintendent."

This regulation or instruction had not then been submitted for the approval of the Governor-General in Council.

By Rule 224 "all messages or orders respecting the movement of trains * * * must be in writing."

Held, Davies J. dissenting, that assuming the foot-note on the time-table to be a "special instruction" under Rule 2, it is inconsistent with the train-despatching system in force at Brantford and if,

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

as the evidence indicates, it purports to authorize the sending out of engines under verbal orders to push freight trains up the grade it is also inconsistent with Rule 224. Such instruction has, therefore, no legal operation.

Held, per Girouard and Anglin JJ., that it was not a "special instruction" but a regulation, and not having been sanctioned by order in council operation under it was illegal.

By "The Railway Act" a "train" includes any engine or locomotive. Rule 198 provides that it "includes an engine in service with or without cars equipped with signals."

Held, per Girouard, Idington and Anglin JJ., that an engine returning to the yard after pushing a train up the grade, is a "train" subject to the provisions of Rule 224, and to the rules of the train-despatching system.

The accident in this case occurred through the yard-foreman failing to protect the engine on its return to the yard.

Held, Davies J. dissenting, that the company operated the yard-engines under an illegal system and were liable to common law damages and that sub-section 2 of section 427 of the "Railway Act" applied.

Held, per Duff J., that since, as regards the danger of collision with trains stopping at Brantford for orders, the system of operating the yard-engines through the telegraphic despatchers would clearly have afforded greater protection than that in use, and since there was admittedly no impediment in the way of adopting the former system, there was evidence for the jury of want of care in not adopting the safer system; and the fact that the existing system had been in operation for 25 years was evidence from which the jury might infer that the general governing body of the company was aware of it. And further, following *Smith* v. *Baker* ((1891) A.C. 325), and *Ainslie Mining and Railway Co.* v. *McDougall* (42 Can. S.C.R. 420), that, in these circumstances, the company was responsible for the defects in the system.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial awarding the plaintiff damages under the "Workmen's Compensation Act" and refusing her common law damages.

The material facts are set out in the above headnote.

Gibbons K.C. and *G. S. Gibbons* for the appellant.

D. L. McCarthy K.C. for the respondents.

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GIROUARD J.—I agree in the opinion stated by Mr. Justice Anglin.

DAVIES J. (dissenting).—As far as this court is concerned our late judgment in *Ainslie Mining and Railway Co.* v. *McDougall*(1), lays down the law binding upon us that, as between master and servant, the duty of the former to

> provide, in the first instance at least, fit and proper places for the workmen to work in, and a fit and proper system and suitable materials under and with which to work

is one which cannot be got rid of by delegating its discharge to others, and as to which the doctrine of common employment cannot be invoked. I am, therefore, quite prepared to accept the argument of Mr. Gibbons, for the appellant, that if there was sufficient evidence to justify the jury in finding that the death of Fralick, the engine driver, was caused by a defective system in respect of the operation of the defendant company's trains on the Mount Vernon grade not authorized by the rules sanctioned and approved by the Governor in Council the doctrine of common employment could not be invoked by the company to enable them to escape a liability for which they would but for the application of such doctrine be liable.

During the course of the argument before us a very important question was raised as to the *legality* of this system which the company had inaugurated some twenty-five years before the accident, and continued down to the present time, of permitting the yard-engine at Brantford under the special circumstances and conditions which existed at this particular spot to push freight trains up the Mount Vernon grade and

(1) 42 Can. S.C.R. 420.

return to Brantford B. & T. station *without special orders from the train-despatcher.* That departure from the general system prescribed by the rules seems to have been accepted in the courts below as at any rate not illegal or in conflict with the general rules, the only question raised being whether it was or was not in itself a defective system.

The jury found it was defective, exposing the employees to unnecessary danger for the reason that when away from the yard it was not and should have been *under the control of the train-despatcher.* They further found that the adoption and use of the system was due to the negligence of Superintendent Gillan and yard-master McGuire, and that the collision which caused the death of the engineer, Fralick, was due to McGuire allowing the "engine to leave the yard without protection," and that the accident would have been prevented if the defects in the system had not existed.

The defendant company contended that the system in operation at the place in question was established under an instruction printed on the employee's time-table and authorized by Rule 2 of the general rules and regulations; that the uncontradicted evidence shewed it to be a good system affording adequate protection; that it had been in force and observed at all necessary times for some twenty-five years without any accident resulting from it; that it was not in conflict with the other general rules, and that, as found by the jury, it was McGuire's negligence in not protecting the return of the engine as the instructions required him to do, which caused the death of the deceased engineer.

The situation at the place where the accident occurred, as I gather it from the factums and plans and

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the statements of counsel, was somewhat peculiar, but the facts relating to it were not in dispute.

The Buffalo and Goderich lines of the Grand Trunk Railway, and the main line to Sarnia tunnel, pass through the City of Brantford. At right angles to these two main lines and running underneath them is the line to Tilsonburg, and, in order to get to the Tilsonburg line, the trains or engines have to go down a steep grade, and by means of a sharp curve switch on to the Tilsonburg branch by means of an under-pass. About seven or eight miles out of Brantford on the Tilsonburg branch is a steep grade known as the Mount Vernon grade, and it frequently happens when freight trains are very heavy on this branch that the yard-engine at Brantford has to assist in pushing trains up this grade. When the yard-engine is required for this purpose the yard-foreman in charge of the engine is required to remain either in the yard, or station on the Tilsonburg branch, or at one of the switches leading down the grade to the Tilsonburg branch to see that no train follows on that branch until his engine has returned from pushing the train up the Mount Vernon grade. The rule in the "employees' time-table" governing this and what is put in as exhibit at the trial, is as follows:

> Yard-engines at Brantford are allowed to push freight trains up the Mount Vernon grade and return to Brantford B. & T. station, without special orders from the train-despatcher. Yard-foreman in charge of yard-engine will be held responsible for protecting the return of yard-engine, and for knowing such engine has returned before allowing a train or engine to follow.

On the morning of the accident the yard-engine at Brantford was in charge of yard-foreman or conductor McGuire, the engine was required to be used as a pusher up the Mount Vernon grade, and the yard-fore-

man saw the engine placed at the rear of the train preparatory to starting. After leaving his engine on the Tilsonburg branch, McGuire came up the main line and jumped on a train that was pulling into the Brantford station on the Buffalo and Goderich line, instead of remaining at the switch to protect his engine from any trains that might follow. While doing this he failed to notice a train on the other side of the train on which he had ridden into the station and which was going up the Tilsonburg branch, and, owing to his neglect allowed that train to pass the switch down the Tilsonburg branch, where he should properly have stationed himself to protect his engine until its return, the result being that this engine, in returning, collided with the train which he should have stopped at the switch, and the engineer, Fralick, was killed.

The defendant company tendered a large mass of experienced railway men to testify with respect to the adequacy of the system provided on this Tilsonburg branch. After a number of these had been examined the trial judge thought it unnecessary to call further witnesses of the same class. The substance of the evidence given by these railway experts was to the effect that similar systems to that provided for by the instruction at Tilsonburg prevailed on the railways with which they were connected; that it was a good, safe system providing adequate protection and in throwing the responsibility upon one competent man had advantages over systems which divided the responsibility between the train-despatcher and others. No evidence was given to the contrary unless that of element is so considered. His evidence, however, was simply to the effect that yard-engines were controlled in other parts of the defendants' system by

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train-despatchers, and that this particular yard-engine could have been so controlled while and when it was used as a pusher on the Mount Vernon grade. He, however, did not venture to say that the existing system was defective or that a double protection of train-despatcher and yardman, involving divided responsibility, would be a better system.

The trial judge directed judgment to be entered for the plaintiff for the $3,300 awarded under the "Workmen's Compensation Act" and dismissed the action at common law. The Court of Appeal confirmed his judgment on appeal by the plaintiff on the ground that there was no evidence to justify the jury in finding the system a defective one. Both courts proceeded on the assumption, which apparently was not challenged, that the instruction or rule on the time-table making the yard-foreman responsible for protecting the return of the engine when pushing trains up the Mount Vernon grade and return, without special orders from the train-despatcher and for knowing such engine had returned before allowing a train or engine to follow, was legal in the sense that the company had power to make it and was not inconsistent with the general rules. The only question argued in the courts below with regard to the instruction, as I gather, was whether it inaugurated and sanctioned a defective system of regulating the trains or not.

If I had to give my opinion upon the question whether or not the evidence justified the jury's finding of a defective system I should answer "No, it did not," and my judgment would be to maintain that of the trial judge and the Court of Appeal on the appeal to this court. However, a new question was raised and the legality of this instruction was for the first time

directly challenged as being in conflict with the general rules which had been approved by the Governor in Council, and were by statute made binding upon all parties. Rule 2 of the "General Rules" under which Mr. McCarthy endeavoured to support the validity of the instruction reads as follows:

> In addition to these rules the time-tables will contain instructions as the same may be found necessary. Special instructions, not in conflict with these rules, which may be given by proper authority, whether upon the time-tables or otherwise, shall be fully observed while in force.

If the instruction in question can be deemed to be a "special instruction, not in conflict with the rules," then the question whether or not the evidence justified the finding of the jury that the system it provided for was defective would necessarily have to be determined on this appeal.

If the instruction, however, is determined to be "in conflict with the rules" then, it appears to me, that the question whether it authorized or created a good or bad system is irrelevant and that it offers no defence to the action. See section 311 of the "Railway Act."

If the "control of the train-despatcher" over the yard-engine when engaged in pushing a train up Mount Vernon grade was necessary as part of the system authorized by the rules, then the system established under the present authority of Rule 2 would be legally and fatally defective. On this important question I have from the first entertained grave doubts which I cannot say are even now entirely removed.

It is, I think, clear that while no rule explicitly declares that the movements of trains are to be under the control of the train-despatcher, it is the general scheme of the rules that they should be so controlled,

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and it is not unfair to say that any departure from that general scheme must be clearly justified.

In the case of the movements and shunting of all yard-engines when in the railway yards or of any engines or cars between semaphores on the line of railway it is conceded that no such control of the train-despatcher is requisite. I take it such control would not be possible. All such movements of trains within railway yards and between semaphore signals on the line are impliedly exceptions from the general scheme. Then comes Rule 2 authorizing special instructions as the same may be found necessary which, I take it, involves departures under special circumstances from the general scheme or system which do not conflict with any particular rule. Any instruction within those rules must be fully observed while in force. No one contends that any instruction under Rule 2 could justify a defective system, and, assuming as I have that the instruction in question here introduced a good and proper system, the only remaining question is: Was it in conflict with the general rules?

As the yard-system and the system of shunting between semaphores, though at variance with the general scheme, is nevertheless not in conflict with any special rule and not illegal, so, it seems to me, the system authorized by this instruction, good in itself and not contravening, in my opinion, Rule 450 with regard to movements varying from or additional to the time-table, is not illegal. I think it may fairly be held to come within Rule 2 and, therefore, authorized if not in itself defective.

Mr. Gibbons invoked Rule 224, requiring all messages or orders respecting the movement of trains or the condition of track or bridges to be *in writing*, as

being in conflict with the instruction or system relied upon by the company, but I do not agree with that. Apart from the facts that this rule does not come under the class of Rules 450 and following, relating to the movement of trains by telegraphic orders, there is no finding that the yard-master's order was not in writing. It must be conceded that the rule does not and cannot apply to the movements of yard-engines in yards and of other engines within semaphores in shunting or otherwise moving trains, and I see no reason why under Rule 2 a special system for special conditions otherwise good and proper could not be introduced without a written order for every movement just as in the case of yard-engines, or engines shunting or moving cars or trains between semaphores.

My conclusions are, therefore, that there was no evidence whatever before the jury which would justify their finding the system, under which the engine which caused the accident was operated, a defective system; that there was no particular rule of the general rules of the company, as sanctioned and approved by the Governor in Council, which required an order from the train-despatcher to justify the running of the yard-engine as a pusher up the steep grade at Mount Vernon, although the general scheme of these rules contemplated the movements of trains generally being under the control of the train-despatcher and that Rule No. 2 of those so sanctioned and approved was passed for the purpose of giving the railway authorities power, in exceptional circumstances and conditions such as those existing in this case, to authorize instructions with regard to assisting trains up steep grades such as the one here relied upon.

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In these circumstances, the common law liability which otherwise would arise as against the company cannot be invoked.

IDINGTON J.—This appeal arises out of an accidental collision on the respondents' railway between an engine in charge of Engineer Yapp sent out by a verbal order of the yard-foreman, from Brantford yard, to push a freight train up a grade about seven miles out on the Tilsonburgh branch (and running on its return trip from such service) and a freight train which the yard-foreman had failed to stop. In the result the appellant's husband was killed.

The company admit liability but only within the "Workmen's Compensation for Injuries Act," for which damages were assessed at $3,300. This is not appealed against. The appellant claimed to recover as at common law and damages on such basis were provisionally assessed at $8,250.

The jury found all questions submitted in favour of the appellant, but the learned trial judge and the Court of Appeal held she could not in law recover beyond the first named sum.

The appeal involves an examination of the law relative to the movements of trains on the respondents' road.

The respondents' management framed rules for their transportation department, pursuant to the provisions of the "Railway Act" then in force and had them so sanctioned by the Governor in Council as to come into force on the first of July, 1901.

The Act, as amended by 63 & 64 Vict. ch. 23, rendered it obligatory that all by-laws, rules and regulations made by directors or company should be reduced

to writing and, except as to such as related to tolls and such as were of a private or domestic nature and did not affect the public generally, should be submitted to the Governor in Council for approval.

Unless so sanctioned they are declared to have no effect. The Governor in Council might rescind such sanction or any part thereof. No one else can.

When so approved they were binding upon and to be observed by all persons, and sufficient to justify all persons, acting thereunder.

Rule 2 was as follows:

2. In addition to these rules, the time-tables will contain special instructions, as the same may be found necessary. Special instructions, not in conflict with these rules, which may be given by proper authority, whether upon the time-tables or otherwise, shall be fully observed while in force.

Many years before this some one in authority framed a special instruction put upon the time-table and made to read as follows:

TILSONBURG BRANCH.

Yard-engines at Brantford are allowed to push freight trains up the Mount Vernon grade and return to Brantford B. & T. station, without special orders from the train-despatcher. Yard-foreman in charge of yard-engine will be held responsible for protecting the return of yard-engine, and for knowing such engine has returned before allowing a train or engine to follow.

A. J. NIXON,
Assistant Superintendent.

The time-tables, no doubt with this, were issued periodically for years before said rules, and the superintendent in charge for some years previous to and at the time of the accident in question adopted and used same form.

If it can be made effective merely by such a method the superintendent and his predecessors are the proper authority to issue it. Each time-table which has these

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instructions upon it is framed so as to lead one to infer it is issued by the sanction of the second vice-president and general manager of the company and other leading officers thereof.

There is no provision in it or by its author for orders given under it being reduced to writing. Its later use in that regard is, in the particular case now under inquiry, shewn by what transpired in connection therewith. Yapp, the engineer, says he simply was told by the yard-foreman to take the yard-engine out as he had repeatedly done before on the like service.

In view of the evidence of such conduct having extended for years previously I take it none of these incidents of the method had ever varied and that oral orders of the yard-foreman or yard-master were part of the method of applying such instruction.

Among the rules above referred to are Rules Nos. 224 and 226, which read as follows:

224. All messages or orders respecting the movement of trains or the condition of the track or bridges must be in writing.

226. Extra trains must not be run without an order from the superintendent or train-master.

After the enactment of such stringent rules as these there surely was an end to any shadow of authority for the continuation of such a system.

If it ever had any legal existence that was surely abrogated by Rule No. 1, which reads as follows:

1. The rules herein set forth apply to and govern all roads operated by the Grand Trunk Railway system. They shall supersede all prior rules and instructions in whatsoever form issued which are inconsistent therewith.

How can any system dependent on oral order be more "inconsistent" with or "in conflict with" these rules? Rule 1 uses the word "inconsistent," and Rule No. 2, these latter words.

The rules are intended, I take it, from their general scope, to cover, as far as possible, every phase of operating the transportation department of the railway.

Let us see if anything exists to detract from the force of this glaring "conflict" and "inconsistency."

Let us note the statutory meaning of train, and also observe that Rule 198 says:

> Whenever the word "train" is used it must be understood to include an engine in service with or without cars, etc.

And, by the same rule,

> extra trains are those not represented on the time-table.

Then, Rule No. 200 distinguishes extra trains as "passenger," "special," "freight," "extra" and "work-train."

The rules above quoted shew the absolute need for orders being in writing and that an "extra," of which this "working-train" or engine in charge of Yapp was one, could not run without an order from the superintendent or train-master.

Neither ever gave any such order as, expressly and implicitly, is here recognized.

There is no other method adopted or sanctioned by these rules than the telegraphic method for the movement of trains. Once they are despatched and in motion on their way pursuant to order so given, there is a section of these rules headed, "Movement of Trains," which provides for their conduct towards each other and in their own movements and the precautions to be taken, but does not provide for their starting otherwise than indicated by telegraph messages.

It is in this section that the above quoted Rules 224 and 226 are placed, as if to emphasize their import.

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Then, we have next after that section, headed in large type "Rules for the Movement of Trains by Telegraph Orders." And in this there are twenty rules and a great many illustrations of how the operations are to be carried on, covering together in all some nineteen pages of the book.

Amongst those illustrations are given those applicable to "work-trains," of which class Yapp's engine was one.

Then, take Rule 450 in this section of the rules as an illustration of what is directed generally and is key to the whole situation.

It provides for special orders varying from or additional to the time-table. They are to be issued by the train-master.

> They are not to be used for movements that can be provided for by rule or time-table.

The context and heading, as well as the rule above quoted, indicate that they are to be in writing and as emergencies arise, and only permissible of communication by telegraph.

This instruction now in question seems to have been just of that character that a time-table could not provide for, but which a rule most certainly could and the rules most certainly had already provided for.

A rule such as the instruction implies would have required governmental sanction.

If such a thing had ever been submitted I cannot believe it ever would have been listened to.

Why was the thing of so long standing never tried ?

Does it not follow from all these considerations that the instruction was in conflict with the rules?

How can the rule be conflicted with better than by

an implied repeal *pro tanto* and systematic observance of substituted orders ?

It is clear that an additional safeguard against accident may well be provided by instructions in this way.

If, for example, this instruction could be read as if the action to be taken were upon the hypothesis of a train-despatcher's order, or a train-master's order, in writing and this protection supplementary thereto, no harm could follow. It would be consistent with the rule. Such no one pretends to have been the mode of applying it.

But how can something which no one pretends to be in itself superior to the safeguard supplied by the telegraphic rules expressly designed to govern the movements of trains be justified?

It must never be forgotten an engine is declared to be a train.

If an official of any kind can provide thus for one train he may, if he see fit, provide for half a dozen, or more. What limit can be assigned to his power ? Clearly if he can take one train he can take every train and substitute an entirely different system. Indeed, counsel for respondent suggested the movement of trains could, if seen fit, be done by telephone.

I should hope no one, in face of the statute rendering these rules obligatory and the obtaining of the sanction of the constituted authority in that behalf also as a necessarily binding obligation, will, if he regard his personal liberty, try that without such sanction.

Yet that is just, on a large scale, what has been done by some one here on a small scale.

Experts were able to say what was adopted was,

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in their opinion, safe. The statute has not left it to experts to determine.

Train masters have large authority to exercise over trains, but even they and the superintendent are enjoined to put their orders for such car or extra train in writing; yet this superintendent put his in the shape of an overriding instruction committing the duty to a yard-foreman without more than the printed instruction contains and, apparently, in entire disregard of Rule No. 224 which requires every order respecting the movement of trains to be in writing.

The clear inference from the evidence of Yapp, the engineer who took the pilot engine (a train) out, is that any order was oral.

I think the fair inference is there never was compliance with this Rule 224 so far as regarded the movement of any engine sent out by virtue of these instructions.

If all these considerations do not demonstrate this instruction as inconsistent with the purview of the rules as a whole and, hence, in conflict therewith, I do not know what would.

Indeed, if this method of procedure is permissible, the rules, so far as they can have any relation to the movement of trains, including every detail therein which directly concerns the safeguarding of the public may be frittered away and the obligatory sanction of governmental supervision in that regard reduced to a solemn mockery.

This gives rise to more than one point of view in its result.

In the first place: Is there not thus created a condition of things that entitles the servant to say (quite independently of the liability directly given by statute,

to which I will refer presently), the protection he was entitled to at common law has not been given ?

Can he be said to have contracted against risks which implied a violation of the statutory rules, which have the force of law; yes, a systematic violation ?

Is it not just as clearly this had become an indefensible mode of which the respondents knew or ought or must be taken to have known ?

No doubt rules had been enacted before and received governmental sanction, but it is to be observed that just at this stage of growth of railway legislation, 63 & 64 Vict. ch. 23, sec. 9, sub-sec. 2, had proposed governmental assistance to frame such rules and, whether given or not, it was something of which the directors of this company must be held to have had notice, and, it might not be unfair to infer, had, as the result, produced the rules before us which govern or ought to have governed this case.

The express language of Rule No. 1, as already noted, swept away every previous instruction inconsistent with the new rules.

Why was this one retained in use ?

It surely must have come to the knowledge of the directors revising such work. Its then long use for preceding years clearly implies it was only by crass neglect that it could have been overlooked. Its operation continued nevertheless. Whose duty was it to see that its operation ceased ?

Was it not the duty of the company to have taken steps to protect its servants by expressly prohibiting the use of such an antiquated method ? The rules, as I read them, not only sweep away the instruction, but forbid its continuance.

The continuation of this instruction was, no doubt,

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due to neglect on the part of every one, from the directors down to the superintendent.

It was, I incline to think, incumbent on the respondent at the trial to have removed the presumption of neglect or ground to infer same on the part of the directors relative to the instruction having been repealed. It may have been that such was done and the evidence of continual and continuous use is untrue. The case of *Britannic Merthyr Coal Co.* v. *David* (1), seems to me, in principle, to throw upon the respondents the onus of proof of the condition of things, at this new starting point, and of inference of orders being otherwise than indicated.

It may be answered, the directors had done so by inviting its company's servants to read the new rules. I doubt if that suggestion should suffice to excuse when the thing continues for seven years afterwards and the inconsistencies not pointed out.

If this inference is not the proper one to draw, it then comes back to the use of an unjustifiable mode or system for so long a time being, of itself, sufficient, under said conditions, to bring home to the company the knowledge that their servants were not properly protected.

If proof were needed, do we not find it in this very case ? Who is defending it ?

It is being justified. If in law, as I have found it, unjustifiable, how can the company say and be permitted to prove it, rely on it, if thus unjustifiable, unless there is to be implied the authority of the company to do that complained of ?

I submit this reasoning in this connection as relative to the line of argument which was presented by

(1) [1910] A.C. 74.

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the law as laid down in *Wilson* v. *Merry*(1), and herein much relied upon, and to overcome the difficulty thereby created.

If that difficulty is thus surmounted and the proof brought home to the company of knowledge of negligent, and in this case, in my view, illegal (which quality of illegality adds evidence) methods that case no longer applies and the law as laid down in *Smith* v. *Baker*(2) applies.

The jury have found, and I must say, after a perusal of the entire evidence bearing upon such issues, most properly found that the defendants' superintendent was negligent in permitting such a state of things to exist, as to rest upon the obviously imperfect safeguard when the rules provided an obviously safer one.

The ability and right of juries to find, as against so-called experts, is criticized in this and another case before us. I dissent therefrom. As the learned trial judge intimated in answer to such contentions, the issues here, (and, I may add, in most cases involving accidents on a railway) are easily understood by men of ordinary common sense.

The classes from which juries are drawn are quite as ready as others to appreciate all that and especially the mechanical and other devices so often to be considered, and, with every respect, I may say, a great deal better than others, their superiors in other respects, the habit of thought of, and how much load the brain of, the average workman on the railway can and is likely to carry into effective use.

It was this latter factor in this case that failed and the failure of any expert to appreciate that fact and

(1) L.R. 1 H.L.Sc. 326. (2) [1891] A.C. 325, at p. 345.

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admit the system of the rules was superior to trusting a man loaded as this man was, would condemn the expert, in my humble opinion. I do not read their evidence as a denial of that, but as palliation and excuse.

The juryman has his limitations of efficiency, just as others, but he did not fail in this case.

I have now to point out another ground which, with respect, hardly got full justice done it.

The point is taken in a few lines, at the end of the appellant's factum, that what was done gave a right of action at common law for a breach of a statutory obligation, but the failure to comply with our rules requiring statutes relied upon to be quoted leaves me in doubt as to what was really intended to be raised.

I agree in the claim put forward that such an action would lie, but, how far does that carry us ?

Does it get over the doctrine of common employment ?

It still leaves the superintendent the fellow-servant who committed the breach unless knowledge and consequent authority can be imputed in some such way as I have outlined.

I doubt if it can be treated as if, as definite and absolute as, a statute for fencing machinery, for example. I should have liked to have heard argument on this, or, perhaps, what was covered in the defective factum. The "Railway Act" expressly gives the right of action by section 427, sub-section 2.

If this is the common law claim made in pleadings, and they are wide enough to cover it, or in the factum equally so, then, it seems to me maintainable and overcomes all the difficulties in the appellant's way.

Indeed, it seems conclusive, having regard to the

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frog-packing case of *LeMay* v. *The Canadian Pacific Railway Co.*(1), which arose under the "Railway Act" of 1888, being 51 Vict. ch. 29, the forerunner of this Act now in question.

It was sought there to have the Act interpreted as if excluding the servant from its benefits, but, the Court of Appeal, upholding the learned trial judge and the Chancery Division, held the servant had the same right under it as any other person — in short, that he was a person.

The case of *Washington* v. *The Grand Trunk Railway Co.*(2), upon the same Act and provision, except with regard to a license given not to pack, but in which the point, if the Court of Appeal had erred in the previous case, was still open if the defendant had seen fit to take it and bring it here and to the Privy Council.

I suspect the reasoning upon which the courts had gone in the earlier case was thought to have rendered this hopeless.

As I agree in that and cannot distinguish this case therefrom, I think the appellant entitled thereby to maintain her claim.

I need not say that it is only upon the ground that I hold the instruction I have dealt with as invalid that this sub-section of section 427 becomes clearly operative.

The provision of subject-matter, respecting which the company had power to make rules, when these were made, distinctly enumerated such as to render it applicable here. The rules, though brought into force before this amending sub-section, are, I think, being

(1) 17 Ont. App. R. 293.

(2) 28 Can. S.C.R. 184; [1899] A.C. 275.

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in force, those which fall within the exact words of the section 427, sub-section 2.

I do not mean to express or imply any opinion as to the right of action in a like case on the Act as it stood before this amendment, nor do I wish to imply that my opinion of the inconsistency between the instruction and the rules holding former invalid is the only basis upon which the action resting upon the sub-section in question can stand.

Out of respect I followed the line of conflict forcibly pointed out though not followed up in detail in argument and examined the case from every point of view suggested on either side with such reflections as I could add, but regret the importance attached throughout the entire proceedings to what seems to me, perhaps erroneously, so entirely irrelevant, to the exclusion of that consideration the said sub-section and whatever may be said as to it certainly has seemed to me entitled to.

I think the appeal should be allowed with costs here and below and judgment be entered for the full amount of damages assessed with costs of suit.

DUFF J.—I find myself unable to agree that the plaintiff's claim can be sustained under section 427 of the "Railway Act." I am not able to discover any necessary *ex facie* conflict between the time-table instruction under which McGuire acted and the approved rules. The rules do not in terms declare that the method of moving trains by telegraphic orders is to be the one exclusive method to be employed upon the respondents' system. I think that omission is a very pointed one. There is sufficient evidence in this case to shew that the practice authorized by the instruction in question is one which has been in operation in dif-

ferent places on the system for many years, and if it had been the intention to abolish that practice I should have expected to find an explicit provision to that effect.

Then there is Rule 224 which requires that all orders for the moving of trains shall be in writing. On the face of it there is certainly nothing in the instruction repugnant to this rule, assuming in the meantime the rule to apply to a yard-engine when outside the limits of its yard. It was suggested on the argument that the instruction necessarily implies the operation of the engine under oral orders from the yard-foreman to the engineman. The instruction itself does not require that the orders shall be given by the yard-foreman. It says nothing about who is to give the orders. If it is to be assumed that the yard-foreman is to be a person not competent to give written instructions — I am afraid that is rather a venturesome assumption for this court — that is a sufficient reason not for reading the instruction as conflicting with one of the rules, but for inferring that the yard-foreman was not the person to give the orders.

The evidence is conflicting respecting the origin of the order on the morning of the accident. The engineman says it came from McGuire; McGuire denies this. The impression one gets is that the order was an oral one; but the evidence is not directed to the point and is quite equivocal. Nor is there any evidence as to the practice commonly observed in that regard. Strange to say no such official as a yard-foreman appears to be mentioned in the book of rules produced. If the engineman of the yard-engine when operating under the instruction is to be treated as an "engineman" within the rules, then it is quite clear from Rules 50 and 52

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that he is not under the orders of the yard-foreman. I should have thought indeed unless there is something in the circumstances of railway practice generally or of the locality in question here making it obligatory upon us to give to the instruction a different interpretation, that one must read it as subject to the paramount authority of the rules and not as conflicting with them. I am disposed, however, to read the rules governing the movement of trains as not applying to yard-engines except when coupled with one or more cars. I think that where you have two distinct classes of engines mentioned and you have the "train" defined to the extent of saying that it shall include one of these classes, that is a sufficient indication that it excludes the other. If it be said that there is nothing in the rules authorizing yard-engines to leave the limits of their yards, the answer seems to be that there is nothing in the rules prohibiting it and that Rule 2 does authorize the giving of special instructions not inconsistent with the rules themselves. I have no doubt that an instruction confined in its application to the yard-engines of a particular station and authorizing the use of those engines in a specified limited service is a special instruction.

I have perhaps not made it clear that I should not wish to express a confident opinion that an examination of the rules with such light as might be thrown upon them by extrinsic evidence properly admissible, might not shew that the instruction relied upon is one which is in conflict with the approved rules and therefore does not come within the authority conferred by Rule 2. To me it is sufficient for discarding the consideration of the question for the purposes of this appeal that I feel satisfied, first, that the instruction

is capable of being read as not in conflict with the rules, and secondly, that I am not satisfied that we have before us all the evidence which might throw light upon the question whether, on the true construction of both, there is any such conflict. It has been repeatedly held that this court will not consider a view of the facts not put forward before if there be any question whether further relevant evidence might have been adduced if it had been advanced at the trial. *Lamb* v. *Kincaid*(1); *The "Tordenskjold"* v. *The "Euphemia"*(2). And see *Seaton* v. *Burnand*(3); *Nevill's Case*(4); *Browne* v. *Dunn*(5); *City of Victoria* v. *Patterson*(6).

I have, however, come to the conclusion that the plaintiff is entitled to succeed upon the ground upon which she placed her case at the trial. With great respect for the courts below, I think there was evidence from which the jury might conclude that the system under which the yard-engine was used beyond the yard limits on the Tilsonburg branch was a system not to be reconciled with the exercise by the appellants of that degree of care they were bound in the circumstances to exercise for the purpose of avoiding collisions on that branch. First, a word about the law. Having regard to the consequences of such a mishap as a collision between trains moving in opposite directions upon a single track line, the defendants, I think, were bound to exercise a very high degree of care to prevent such accidents. They owed that obligation, — as respects the system of managing trains — in my opinion, as well to their servants as to others. If it would be

(1) 38 Can. S.C.R. 516.
(2) 41 Can. S.C.R. 154.
(3) [1900] A.C. 135, at p. 145.
(4) [1897] A.C. 68, at p. 76.
(5) 6 R. 67, at p. 75.
(6) [1899] A.C. 615, at p. 619.

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clear to reasonable persons with competent knowledge that by the adoption of one system they would in an appreciable degree enhance the risk of such collisions, or that by the adoption of another system they could in an appreciable degree diminish that risk, and if the adoption of the comparatively safer system would not involve them in any appreciable difficulty or expense in the working of the railway, then, in my judgment, it was their plain duty to adopt the safer system. Now, it is not disputed that by subjecting McGuire's engine to the orders of the despatcher the company would have brought upon themselves no increased difficulty in management, no appreciably increased expense. The experts called on behalf of the respondents support the system in operation simply because they say the precautions are sufficient. The question of fact then for the jury on this branch was: Did the system in operation involve any unnecessary peril to persons travelling on the Tilsonburg branch, that is to say, any peril which might have been avoided or lessened by placing this yard-engine under telegraphic orders ? I do not agree, with great respect, with the learned judges of the courts below that on this point it was the duty of the jury to accept the opinions of the experts. Indeed, I am not confident that if I had been a juryman and the evidence had impressed me as it now impresses me, reading it in the record, I should not have concluded from the evidence of those witnesses that any competent and careful man applying himself to the subject in the course of his duty and with a real appreciation of the responsibility of the company, would have seen that with regard to one class of trains at least there would be a distinct advantage in point of safety by placing the engine in question under the control of the

despatcher. With respect to trains obliged to stop at Brantford for orders, I do not think it is seriously disputed that such an accident as that which led to this litigation — although it might conceivably have occurred — could hardly have taken place if the yard-engine and the train had been under the control of the same set of persons. It appears to me that that of itself is sufficient to support the verdict on this branch of the argument. If in respect of a certain class of trains one system affords greater safety than the other, assuming that in respect of all other trains it afford only equal safety, and if this comparatively greater degree of safety can be had without any extra cost, without any disturbance or dislocation of other arrangements, without any added embarrassment or difficulty, — what possible excuse could there be for not adopting the safer system ? I think, however, notwithstanding the opinions of the experts, that there was sufficient evidence to justify the jury in finding as regards all trains that the telegraphic system is the safer, and that reasonably competent persons ought to have known that.

The responsibility of the company for the defects in the system is sufficiently established, in my opinion, by the cases of *Smith* v. *Baker*(1), at pages 339, 353 and 364, and *Ainslie Mining and Railway Co.* v. *McDougall*(2), at pages 424 and 426. The system in question had been in operation for twenty-five years; that, in my judgment, is sufficient to put the onus upon the company to shew that it was not brought home to the general governing body.

There remains another contention of Mr. McCarthy — that the plaintiff has not sufficiently con-

(1) [1891] A.C. 325. (2) 42 Can. S.C.R. 420.

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nected the alleged negligence of the respondents with the collision that caused her husband's death. The precise point taken, and very forcibly put, is that the proximate cause was the negligence of McGuire. It was, I think, McGuire's first duty to protect his engine, and, given the system in operation, it was his default unquestionably which led to the accident. I do not think, however, that the case is governed by the principle relied upon by Mr. McCarthy; it seems to be outside the decision in *Dominion Natural Gas Co.* v. *Collins*(1), and ought rather to be referred to the principle of a series of cases from which Lord Dunedin distinguished the last mentioned case, at page 646, in this sentence:

> The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter.

It is pointed out again and again in the evidence given by the expert witnesses that no system can be devised by which the human element, and therefore the possibility of human error and carelessness, can be excluded. The desideratum is a system which consistently with reasonable efficiency reduces to as low a degree as possible the risks arising from the imperfections of human instruments. The charge against the company is, and the default found is, that they failed to adopt a system which to a much greater degree (and — in the case of trains obliged to stop at Brantford for orders as Fralick's was — almost entirely) would have eliminated the chances of any lapse such as that which McGuire was guilty of. It is no answer then to say that McGuire was in fault; because it was in not providing a better means of preventing such defaults and

(1) [1909] A.C. 640.

avoiding the evil effects of them when they take place that the respondents' failure of duty consisted.

ANGLIN J.—Having obtained judgment for $3,300 under the "Workmen's Compensation Act," the plaintiff appeals from the refusal of the Ontario Court of Appeal, affirming the judgment of Meredith C.J., to direct the entry of judgment for her for $8,250, the amount at which the jury assessed her damages if she should be held entitled to recover at common law for the death of her husband.

In my opinion the appellant is entitled to succeed, but on a ground not presented at the trial, or before the Court of Appeal, and, if taken, not at all adequately developed in her factum in this court.

In the local working time-table for the middle division of the Grand Trunk Railway System (No. 33), the following "regulation" or "instruction" (which it should be deemed I shall discuss later) was inserted:

TILSONBURG BRANCH.

Yard-engines at Brantford are allowed to push freight trains up the Mount Vernon grade and return to Brantford B. & T. station without special orders from the train-despatcher. Yard-foreman in charge of yard-engine will be held responsible for protecting the return of yard-engine, and for knowing such engine has returned before allowing a train or engine to follow.

While returning from pushing a freight train up the Mount Vernon grade, pursuant to a verbal order of yard-foreman McGuire given under this regulation or instruction, the Brantford yard-engine collided with an engine drawing a special train driven by the plaintiff's deceased husband, who was killed in the collision. This train left Brantford under orders from the train-despatcher at London, given through the operator at Brantford, neither of whom knew that the yard-engine

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was then out on the Tilsonburg branch. Yard-foreman McGuire did not expect Fralick's train. Having other urgent duties to perform, after sending out the yard-engine he did not remain at the switch of the Tilsonburg branch, but went to another part of the yard to place some cars at a freight shed. While he was thus engaged, Fralick's train left the yard without his noticing it.

The defendants admit liability under the "Workmen's Compensation Act" in consequence of McGuire's failure to protect the return of the yard-engine. The jury have found that the system in use on the defendants' railway is not reasonably safe and adequate, and that it was defective and exposed the employees to unnecessary danger — because the yard or pilot-engine when away was not under the control of the despatcher, and that the accident in which the plaintiff's husband was killed would have been prevented had there not been such defects in the defendants' system. They further found that the deceased did not voluntarily undertake the risk to which the defective system exposed him.

Much argument was devoted to the questions whether the system under the time-table regulation or instruction above quoted was or was not reasonably safe, and whether the adoption of such a system was or was not *per se* negligent, having regard to the fact that the entire middle division, including the Tilsonburg branch, is operated under a train-despatching system controlled from London. In the view I take of this case we are not concerned with these questions. But, in the course of his able argument upon them, Mr. Gibbons demonstrated, in my opinion conclusively, that the operation of a yard-engine outside the limits of

the yard under such a regulation or instruction as that quoted from the time-table No. 33 rendered ineffectual and useless, on the portion of the railway affected by it, the precautions prescribed by the rules of the train-despatching system and was in conflict with and destructive of the fundamental principle of that system — viz., complete knowledge and control by the train-despatcher (except in cases of such inevitable accidents as engines becoming stalled or trains parting on a grade, for which the approved rules make other suitable provisions) of all movements of every train and engine outside yard limits.

The yard-engine while outgoing may be regarded as part of the train which it pushes, and, as such, moving under the train-despatcher's orders; but, when returning, its movement is solely under the direction of the yard-foreman and if, as happened in this instance, he should fail to discharge his duty, whether through his own fault or through inevitable accident, the elaborate precautions prescribed by the rules of the train-despatching system not only afford no protection to the returning yard-engine or to an outgoing train, but form a veritable trap for the employees in charge of the outgoing train by lulling them into a false sense of security.

No expert opinion evidence is necessary upon these matters. These conclusions are so obvious from a simple statement of the train-despatching system and the time-table regulation that a common jury can safely and properly draw them.

The findings of the jury in this case — that the system was not reasonably safe but was defective and that it exposed the employees to unnecessary danger, the defect in it being that the yard-engine when away from

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the yard was not under the control of the despatcher — probably involve a finding that the system of directing the movements of the yard-engine under the time-table regulation or instruction was in conflict with the train-despatching system and destructive of its essential principle. If this is not involved in these findings of the jury, since the learned trial judge reserved to himself

> the disposition of any question of fact not covered by the jury's findings, which might be necessary to be found in order to determine the rights of the parties,

the Court of Appeal could, and, therefore, this court may make any proper findings not inconsistent with the findings of the jury. The evidence, in my opinion, not only warrants, but renders inevitable, the finding that the operation of a yard-engine outside the yard limits under the sole direction and control of the yard-foreman and without communication with or orders from the train-despatcher was in direct conflict with the rules governing the train-despatching system in force at Brantford and on the Tilsonburg branch, and destructive of the protection which that system was designed to afford to employees operating, and to passengers being carried upon trains leaving Brantford on the Tilsonburg branch.

The rules of the transportation department of the Grand Trunk Railway System, produced by the defendants as those in force when the plaintiff's husband met his death, were sanctioned by the Governor-General in Council under section 217 of the "Railway Act" of 1888, to take effect on the 1st of July, 1898, or the 1st of August, 1901 (both dates are given in the book produced and, for the present, it is not material which is correct). By section 214 of that statute the company was empowered,

subject to the restrictions in this and the special Act contained to make rules and regulations * * * (*f*) for regulating the travelling upon, or the using or working of the railway.

By section 217 the company was obliged to submit such rules and regulations for approval by the Governor General in Council, and it was declared that they should have no force or effect until so approved. When so confirmed they were, by section 220, declared to be binding on all persons. These provisions, amended in immaterial particulars, were continued in the legislation of 1903, and are now found in sections 307, 310 and 311 of chapter 37 of the Revised Statutes of Canada. It is not suggested that the sanction of the rules and regulations so approved and confirmed, or of any part thereof, was ever rescinded (63 & 64 Vict. ch. 23, sec. 9, now R.S.C. [1906], ch. 37, sec. 310 (2)). There is no evidence in the record that the regulation or instruction printed at the foot of time-table No. 33 was ever submitted to or sanctioned by the Governor-General in Council. It appears that it has been upon the time-tables and that the Brantford yard-engine has been operated under it as a freight train "pusher" for about twenty-five years. By consent of counsel, an inquiry was made during the argument of this appeal to ascertain whether any such approval of this regulation or instruction had been obtained, with the result that counsel for the defendants admitted that none could be shewn. Inasmuch as this regulation or instruction is relied upon by the defendants as warranting the movement of the yard-engine, if it required the approval of the Governor-General in Council to render it valid, the burden, in my opinion, rested on the defendants to establish that such approval had been given. I, therefore, proceed upon the

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assumption that it had not been approved. If not so approved or sanctioned, and if it was a rule or regulation within sections 214, 216 and 217 of the "Railway Act" of 1888, it was of no force or effect (section 217), and operation under it was illegal. I think it was a regulation intended to govern "the working of the railway" and that as such the company was obliged to procure the sanction of it by the Governor-General in Council before operating under it.

Mr. McCarthy strongly urged that this foot-note to the time-table should be deemed not a rule or regulation requiring submission to and approval from the Governor-General in Council, but merely a "special instruction" within Rule 2 of the "General Rules," which reads as follows:

> 2. In addition to these rules, the time-tables will contain special instructions, as the same may be found necessary. Special instructions not in conflict with these rules, which may be given by proper authority, whether upon the time-tables or otherwise, shall be fully observed while in force.

Although upon the time-table and of local application only, the provision regarding the use and movement of the Brantford yard-engine as a "pusher" was permanent in character and scarcely fell within the description "special." It regulated the "using or working" of a portion of the railway. It was of such importance that it should, on that account alone, be classified as a rule or regulation rather than as a mere special instruction. It abrogated the rules of the train-despatching system in regard to the yard-engine to which it applied. Upon these grounds I think it required the sanction of the Governor-General in Council.

But, if it should, nevertheless, be regarded as a "special instruction," it would be authorized by Rule

2 only if not in conflict with the rules approved by the Governor-General in Council. For reasons which I have already given I regard the conflict between this "instruction" and the fundamental idea of the train-despatching system as irreconcilable. It is, moreover, inconsistent with the rules of that system. They provide for operating under written orders only; for a record of all such orders; that they should originate with a train-despatcher and should be transmitted through local operators, who are required to write them out, manifolding so as to prepare the necessary number of copies and to repeat back the order to the despatcher's office. An elaborate system of checks and counter-checks to minimize the possibility of mistakes is provided. All these regulations were set at naught when a yard-foreman was empowered, upon mere verbal order, to send an engine out of the yard without any order from, or even the knowledge of the despatcher or the local operator. Whether it should be regarded as a regulation within the statute, or as a special instruction within Rule 2 — the foot-note to time-table No. 33 purports to authorize a practice so utterly inconsistent with the train-despatching system that, in my opinion, it is not susceptible of justification or defence.

But, it is said there is nothing in the rules making the use of the telegraphic train-despatching system obligatory and, therefore, that the adoption of the practice which the time-table foot-note purports to authorize was not a breach of the statute. The first of the general rules says that:

> The rules herein set forth apply to and govern all roads operated by the Grand Trunk Railway system.

If this does not suffice to render the use of the tele-

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graphic train-despatching system obligatory on the defendants — I rather think it does — the fact that they have adopted it for and have applied it to the entire middle division, including the Tilsonburg branch, precludes the possibility of their legally making any regulation or giving any instruction in conflict with that system or with the rules approved for carrying it out.

It is not pretended that the foot-note to time-table No. 33 contemplated that the yard-foreman's orders to the engineman on the yard-engine should be in writing. The form of the foot-note itself, the character of the employee who was to act upon it, and the circumstances in which he was to act all indicate that he was meant to give merely verbal directions. That is the practice which has prevailed and that practice, as followed on the occasion in question, is justified by the defendants. Yet Rule 224 provides that:

> All messages or orders respecting the movement of trains * * * must be in writing.

This rule is not in the group relating to the movement of trains by telegraphic orders. The time-table foot-note seems to have been in direct conflict with it also.

Mr. McCarthy further contended that the yard-engine when executing the movement in question was not a "train" within the meaning of the rules, and he referred to Rule 198, which reads, in part, as follows:

> Whenever the word "train" is used it must be understood *to include* an engine in service with or without cars, equipped with signals as provided in Rules 155 and 156.

The application of this defining provision to the entire book of rules is questionable. But, if it is generally applicable, the statement that the word "train"

shall *include* an engine with certain equipment does not necessarily mean that an engine lacking such equipment is never to be regarded as a train for the purposes of any of the rules. Such interpretative provisions are inapplicable when the context indicates a contrary intention. A contrary intention is abundantly indicated in the rules governing the train-despatching system. The "Railway Act" defines the word "train" as including any engine or locomotive. I have no doubt that a yard-engine sent several miles out from its yard limits to push a freight train up a grade forms part of that train while outgoing, and is, when returning alone, itself a train. The rule that a yard-engine is not required to display markers does not necessarily mean that such an engine when employed outside the yard should not display these signals. I rather think this exemption applies only when it is employed in the yard as a yard-engine properly so-called, and that, when sent abroad, for whatever purpose, it should carry markers under Rule 155. But, whether it should or should not display markers when sent out as a "pusher," I have no doubt that it is then within the provisions of the rules governing the train-despatching system and must be regarded as a train to which those rules apply.

I, therefore, reach the conclusion that, in operating under the regulation or instruction contained in the foot-note to the middle division time-table, the defendants were contravening section 311 of the "Railway Act" (R.S.C. [1906], ch. 37), and were doing what was illegal. This renders superfluous any consideration of the intrinsic merits or demerits of the system under which the Brantford yard-engine was operated as a "pusher."

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It was argued that this illegal practice was not the proximate cause of the collision in which the unfortunate Fralick was killed; that the sole proximate cause was McGuire's neglect of his duty to protect the yard-engine by preventing Fralick's train from going out on the Tilsonburg branch until its return. There can be no reasonable doubt that had the movement of the yard-engine when on the branch been directed by the train-despatcher, Fralick's train would not have been allowed to leave Brantford until its return, and the collision would never have occurred. The jury have found that the accident would have been prevented had the defects in the system not existed. As forcibly put by Mr. Gibbons, one main purpose of the train-despatching system is to prevent as far as possible the occurrence of disasters likely to result from entrusting the protection of trains to such an employee as a yard-foreman, charged with other duties, often of a pressing nature, and apt, through momentary carelessness, or excessive zeal and eagerness to perform all his work promptly, coupled with an inadequate appreciation of the danger involved, to fall into the error of taking what he may consider a slight risk — just as McGuire seems to have done. If not the immediate cause of the collision in which Fralick was killed, the partial abandonment or abrogation of the train-despatching system was eminently calculated sooner or later to lead to such a result; and it was, in fact, an operative cause of the collision. In case of a breach of statutory duty by a defendant such causation of the injuries for which damages are claimed suffices to support the action.

If a defendant, who is required by statute to provide certain means of protection, has chosen to sub-

stitute for them other means, however effective when properly carried out, but which have failed to afford protection owing to negligence of the person employed to carry them out — and if it be found on sufficient evidence that had the statute been obeyed the injury complained of would not have been sustained, the defendant's position is that of a man from whose failure to discharge an absolute statutory duty injury has resulted. He substitutes means other than those prescribed by the statute entirely at his own peril, and if he would discharge himself from liability he must see to it that the protection thus provided proves efficacious. He takes the risk of all injuries which observance of the statute would probably have prevented.

In such cases his breach of statutory duty may be regarded as the cause of the injury jointly with any other neglect of duty (not being contributory negligence chargeable to the plaintiff), which may have been the more immediate occasion of it. *Illidge* v. *Goodwin*(1); *Dixon* v. *Bell*(2); Beven on Negligence (Can. ed.), p. 546.

If a man obliged under the "Factory Act" to guard dangerous machinery should fail to do so and, instead, should place a watchman to protect persons obliged to move about it, he would have no defence to the claim of such a person (based on an injury sustained while the watchman was negligently absent and which, if present, he would in all probability have prevented) if a proper guard on the machinery would have saved the victim.

Had the regulations approved under the statute been observed and had the "pusher" engine been operated under the control of the train-despatcher, he

(1) 5 C. & P. 190.

(2) 5 M. & S. 198.

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would, no doubt, have held Fralick's train either at Brantford station or at the Tilsonburg switch and McGuire's breach of duty under the time-table footnote would not have resulted in the collision. In this sense the defendants' breach of their statutory duty was a proximate — if not *the* proximate cause of the collision. In *McKelvey* v. *Le Roi Mining Co.*(1), notwithstanding that the immediate cause of the fall of an elevator was carelessness of the engineman in allowing it to strike the sheave-wheel with force, since the consequences of this carelessness would probably have been avoided had the defendants supplied proper guide-rails, their negligence in failing to do so was found to be the proximate cause of the accident. This court refused to set aside the finding, and upon it held the plaintiff entitled to recover.

If a defendant is a wrong-doer without whose wrong-doing the plaintiff would not have been damaged, he cannot be heard to say that there is some other wrong-doer who contributed to the damage.

Sault Ste. Marie Pulp and Paper Co. v. *Myers*(2).

Finally, it was contended for the defendants that, having employed competent officials to frame their rules and time-tables, as the jury have found, they cannot be held responsible at common law for the introduction or continuation by those officials of a regulation in contravention of the statute.

This regulation appears on a time-table bearing the signatures of Charles M. Hays, second vice-president, E. H. Fitzhugh, third vice-president, W. G. Brownlee, general transportation manager, and U. E. Gillen, superintendent. It has been in force on the Tilsonburg branch since it was opened — for a period

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

(2) 33 Can. S.C.R. 23, at p. 32; 3 Ont. L.R. 600., at p. 605.

of about twenty-five years. In these circumstances knowledge of it may, I think, be imputed to the company.

But, whether this be so or not, the duty to submit rules and regulations for the working of the railway to the Governor-General in Council is statutory: the prohibition against departure from these rules sanctioned by the Governor-General in Council is absolute. To an action founded on the breach of such duties, the defence of common employment is not available. *Groves* v. *Wimborne*(1); *David* v. *Britannic Merthyr Coal Co.*(2), at page 152. Moreover, by section 427(2) of the "Railway Act" (R.S.C. [1906], ch. 37), for injuries resulting from breaches of their statutory duties railway companies are declared to be liable to the full extent of the damages sustained. *Curran* v. *Grand Trunk Railway Co.*(3).

I am, therefore, of the opinion that the plaintiff's appeal should be allowed and that the judgment entered for her should be increased to the sum of $8,250. She should have her costs of this appeal, but no costs of the appeal to the Court of Appeal for Ontario because of her failure to raise in that court the point on which she has now succeeded.

*Appeal allowed with costs.**

Solicitors for the appellant: *Gibbons, Harper & Gibbons.*

Solicitor for the respondents: *W. H. Biggar.*

(1) [1898] 2 Q.B. 402. (2) [1909] 2 K.B. 146.
(3) 25 Ont. App. R. 407.

*Leave to appeal to Privy Council refused, 25th July, 1910.

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*Oct. 11.

IN RE REFERENCES BY THE GOVERNOR-GENERAL IN COUNCIL.

Constitutional law—Construction of statute—B.N.A. Act, ss. 91, 92, 101—"*Supreme Court Act,*" *R.S.C.* (1906) *c.* 139, *ss.* 3, 60—*References by Governor-General in Council—Opinions and advice—Jurisdiction of Parliament—Independence of judges—Judicial functions—Constitution of courts—Administration of the laws of Canada—Provincial legislative jurisdiction.*

Per Fitzpatrick C.J. and Davies, Duff and Anglin JJ.—The provisions of section 60 of the "Supreme Court Act," R.S.C. (1906) ch. 139, are within the legislative jurisdiction of the Parliament of Canada.

Per Girouard and Idington JJ.—The provisions of that section assuming to authorize references by the Governor-General in Council to the judges of the Supreme Court of Canada for their opinions in respect to matters within provincial legislative jurisdiction are *ultra vires* of the Parliament of Canada; but, if the governments of the Dominion and of a province unite in the submission of the questions so referred the judges of the Supreme Court of Canada should entertain the reference.

Per Idington J.—The administration of justice in each province having been assigned exclusively to it the power of Parliament in regard to the same is limited to creating a court of appeal and courts for the administration of the laws of Canada.

Per Idington J.—Parliament has no power to authorize the interrogation of the Supreme Court of Canada except where the question submitted relates to some subject or matter respecting which it is competent for Parliament to legislate and respecting which it has legislated and competently constituted judicial authority in that court to administer or aid in administering the laws so enacted.

Per Idington J.—*Quære.* As to the constitutionality of adopting a system of interrogations of the judiciary even when the questions are confined to subjects of the kind thus indicated.

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

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MOTION on behalf of the Provinces of Ontario, Nova Scotia, New Brunswick, Manitoba, Prince Edward Island and Alberta, by way of protest against the Supreme Court of Canada, or the individual members thereof, entertaining or considering the questions, hereinafter referred to, submitted by the Governor-General in Council, and that the inscription on the roll for the hearing thereof be stricken from the list, and that the same be reported back to the Governor-General in Council as not being matters which can properly be considered by the court as a court, or by the individual members thereof under the constitution of the court as such, nor by the members thereof in the proper execution of their judicial duties.

The matters referred by His Excellency the Governor-General in Council by Orders in Council on 9th and 30th May, 1910, were as follows:

"1. What limitation exists under 'The British North America Act, 1867,' upon the power of the provincial legislatures to incorporate companies?

"What is the meaning of the expression 'with provincial objects' in section 92, article II., of the said Act? Is the limitation thereby defined territorial, or does it have regard to the character of the powers which may be conferred upon companies locally incorporated, or what otherwise is the intention and effect of the said limitation?

"2. Has a company incorporated by a provincial legislature under the powers conferred in that behalf by section 92, article II. of 'The 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?

"Has a company incorporated by a provincial legis-

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lature for the purpose, for example, of buying and selling or grinding grain, the power or capacity, by virtue of such provincial incorporation, to buy or sell or grind grain outside of the incorporating province ?

"3. Has a corporation constituted by a provincial legislature with power to carry on a fire insurance business, there being no stated limitation as to the locality within which the business may be carried on, power or capacity to make and execute contracts—

(*a*) within the incorporating province insuring property outside of the province;

(*b*) outside of the incorporating province insuring property within the province;

(*c*) outside of the incorporating province insuring property outside of the province ?

"Has such a corporation power or capacity to insure property situate in a foreign country, or to make an insurance contract within a foreign country ?

"Do the answers to the foregoing inquiries, or any and which of them, depend upon whether or not the owner of the property or risk insured is a citizen or resident of the incorporating province ?

"4. If in any or all of the above mentioned cases (*a*), (*b*) and (*c*) the answer be negative, would the corporation have throughout Canada the power or capacity mentioned in any and which of the said cases on availing itself of the 'Insurance Act,' 1910, 9 & 10 Edw. VII., chapter 32, section 3, sub-section 3 ?

"Is the said enactment, the 'Insurance Act,' 1910, chapter 32, section 23, sub-section 3, *intra vires* of the Parliament of Canada ?

"5. Can the powers of a company incorporated by a provincial legislature be enlarged, and to what extent, either as to locality or objects by

"(*a*) the Dominion Parliament ?

"(*b*) the legislature of another province ?

"6. Has the legislature of a province power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province unless or until the companies obtain a license so to do from the government of the province, or other local authority constituted by the legislature, if fees are required to be paid upon the issue of such licenses ?

"For examples of such provincial legislation see Ontario, 63 Vict. ch. 24; New Brunswick Cons. Stats., 1903, ch. 18; British Columbia, 5 Edw. VII. ch. II.

"7. Is it competent to a provincial legislature to restrict a company incorporated by the Parliament of Canada for the purpose of trading throughout the whole Dominion in the exercise of the special trading powers so conferred or to limit the exercise of such powers within the province ?

"Is such a Dominion trading company subject to or governed by the legislation of a province in which it carries out or proposes to carry out its trading powers limiting the nature or kinds of business which corporations not incorporated by the legislature of the province may carry on, or the powers which they may exercise within the province, or imposing conditions which are to be observed or complied with by such corporations before they can engage in business within the province ?

"Can such a company so incorporated by the Parliament of Canada be otherwise restricted in the exercise of its corporate powers or capacity, and how, and in what respect by provincial legislation ?"

The questions referred by order in council, on 29th June, 1910, were as follows:

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"1. Is it competent to the legislature of British Columbia to authorize the government of the province to grant by way of lease, license or otherwise the exclusive right to fish in any or what part or parts of the waters within the 'Railway Belt,'

"(*a*) as to such waters as are tidal, and

"(*b*) as to such waters as although not tidal are in fact navigable ?

"2. Is it competent to the legislature of British Columbia to authorize the government of that province to grant by way of lease, license or otherwise the exclusive right, or any right, to fish below low water mark in or in any or what part or parts of the open sea within a marine league of the coast of the province ?

"3. Is there any and what difference between the open sea within a marine league of the coast of British Columbia and the gulfs, bays, channels, arms of the sea and estuaries of the rivers within the province, or lying between the province and the United States of America, so far as concerns the authority of the Legislature of British Columbia to authorize the government of the province to grant by way of lease, license or otherwise the exclusive right, or any right, to fish below low water mark in the said waters or any of them ? "

Wallace Nesbitt K.C. for the motion. There is no jurisdiction conferred upon Your Lordships to consider and determine the questions now referred and the court and the members thereof should refrain from doing so. The jurisdiction of the Parliament of Canada to enact section 60 of the "Supreme Court Act" must be supported, if at all, under the terms of

section 101 of the "British North America Act," 1867. With this section must be read sub-section 14 of section 92 of the "British North America Act." The terms of section 60 do not fall within the terms of section 101 relating to the constitution, maintenance and organization of a "general court of appeal," nor within those relating to the establishment of "additional courts for the better administration of the laws of Canada." The term "administration of the laws" must refer to the enforcement of laws after adjudication between parties, or upon proper application by the application of legal remedies. Section 60 provides for a proceeding of an entirely different character.

The court is asked to arrive at a conclusion which is not to be enforced in any way and which is utterly ineffective in so far as it may throw light upon the views entertained by the members of the court upon the questions at the moment when they are referred.

This is not a matter of the administration of the law. In dealing with the questions referred, the court is not dealing with the laws of Canada. In two of the references the questions are as to the jurisdiction of the provincial legislatures and can have no relation to the administration of the laws of Canada. Section 101 in conferring jurisdiction to establish additional courts for the better administration of the laws expressly limits this power to the laws of Canada as opposed to the laws of the provinces:—and this limitation has been clearly understood and acted upon by Parliament on various occasions, as, for instance, in section 67 of the "Supreme Court Act," where the operation of that section is made dependent on the provincial legislature agreeing and providing that

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the Supreme Court of Canada should have the necessary jurisdiction. The same proviso is found in section 32 of the "Exchequer Court Act." Without such proviso Parliament would have clearly infringed upon the provincial jurisdiction conferred by sub-section 14 of section 92 of the "British North America Act." Reference may also be had to the general scope of the "Exchequer Court Act."

It would seem that section 60 has no relation to the administration of any law whether of Canada or of the provinces, but simply provides for taking opinions in an entirely advisory and ineffective manner, in an entirely non-judicial capacity, just as Parliament might have provided for taking opinions of any other body or person upon any question, legal or otherwise, upon which the opinion of such body or person was of interest to the Dominion of Canada. A consideration of some instances in which the matter has been brought before this court will shew that this has been the almost unanimous opinion of its members. Of the references under section 60, and sections it now replaces, made to the Supreme Court of Canada on various occasions, with but one exception the reference has been, in a sense, upon consent of both parties, no objection being raised to the expression of the opinions, and those opinions have been consequently expressed, as a general rule, without consideration of the power of Parliament to impose such a duty upon the court, or its members, or upon the desirability or non-desirability of acting upon the reference. *Re Provincial Fisheries*(1), *per* Taschereau J., at p. 539. In *Re "Lord's Day Act"*(2), objection was taken to the jur-

(1) 26 Can. S.C.R. 444. (2) 35 Can. S.C.R. 581.

isdiction by a private party merely as to answering questions in respect to hypothetical or supposed legislation. The majority of the court considered this objection well taken, but concluded that, as the court theretofore had answered similar questions, and as the Privy Council had answered questions of the same character, they should proceed to answer the questions in that case; see cases referred to by Idington J. and his remarks, at page 600, on the section now represented by section 60, which apply equally to the question now raised and explain and justify the course heretofore taken in answering questions under section 60. The special difficulty as to hypothetical questions has since been cured by an amendment to the section. In *Re Criminal Code*(1), the whole question was the subject of discussion; see *per* Girouard J. at page 436; *per* Davies J., at page 437; *per* Idington J., at page 441; *per* Duff J., at page 452; and *per* Anglin J., at page 454.

The answers requested are of an entirely advisory and non-judicial character, not by way of the exercise of functions of a court of appeal nor of a court for the administration of the laws of Canada, and, therefore, not within the terms of section 101 of the "British North America Act." Parliament has no jurisdiction to command or compel the giving of advice by members of the Supreme Court of Canada, who, when once duly appointed, are no longer in any sense under the orders of Parliament except in so far as it has jurisdiction to legislate for that court as a court.

The feeling that this court, although not viewing the section as legislation binding upon it, should, nevertheless, out of courtesy or deference to Parlia-

(1) 43 Can. S.C.R. 434.

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ment and to the Governor-General in Council, render answers, involves very serious consideration in a case where any party concerned raises objection. If the Government, although in certain circumstances entitled to obtain opinions, by obtaining those opinions are obtaining something not merely of use for their information or guidance, but which may be a source of embarrassment to the administration of justice in its proper channels, they are obtaining something to which they are not entitled. An opinion by the judges of the Supreme Court of Canada is entirely different from an opinion given by any other individuals, even if equally qualified, inasmuch as all provincial courts, while not, perhaps, legally bound to give effect to that opinion, would feel themselves bound by that opinion as though it were a judgment of the court, notwithstanding that the matter was not brought before the Supreme Court of Canada through the usual and proper channel, with the usual procedure devised to safeguard the interests of parties.

Newcombe K.C., Deputy-Minister of Justice, contra.—The answers requested are, by sub-section 6 of section 60, declared to be advisory only. This is within the jurisdiction of the Parliament of Canada; it forms part of the legislation enacted by the group of sections, in the "Supreme Court Act," included in sections 35 to 49, and is consistent with them. The same objections were taken, *arguendo*, by Mr. Blackstock K.C., in *Re "The Lord's Day Act"* (1), at pages 588-589, notwithstanding which the court proceeded to answer the questions there submitted, as it has done in numerous other cases referred under the same legislation. Notices of

(1) 35 Can. S.C.R. 581.

the present references have been duly given to the governments of all the provinces and several of them have signified their concurrence and the desire to have the questions answered.

Lafleur K.C., on behalf of the Provinces of Quebec and British Columbia, stated that these provinces had consented to the reference in regard to "Fisheries," and, also, on behalf of the "All-Canada Insurance Federation" that they were desirous of having the questions respecting the "Insurance Act" decided.

A. Geoffrion K.C., on behalf of the Province of Quebec, stated that the province desired to have the questions respecting the "Insurance Act" disposed of by the court.

THE CHIEF JUSTICE.—The question, and the only question, we have now to dispose of, is a preliminary objection which has been taken to our hearing and considering these references made to us by order in council, on the ground that notwithstanding anything contained in the "British North America Act, 1867," the Parliament of Canada cannot impose upon this court the duty of answering questions which, as those representing some of the provinces contend, do not apply to legislation actually passed by that Parliament, or to legislation which it is intended it should pass.

The questions relate to:

(*a*) The limitations placed by the "British North America Act, 1867," upon the power of provincial legislatures with respect to the incorporation of companies;

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(*b*) The competency of the legislature of British Columbia to grant by way of lease the exclusive right to fish in certain parts of the waters within the "Railway Belt" in that province;

(*c*) The validity of certain sections of the "Insurance Act," 1910.

The Province of British Columbia consents to the reference with respect to the granting of licenses to fish within the "Railway Belt."

Various questions involving, as those now submitted, the true construction of the "British North America Act" with respect to the exercise of the legislative power of Parliament and of the provinces respectively have been at different times submitted to this court by the executive and answered; in some instances, it is true, in recent years, under protest. The answers given to those questions have been on several occasions appealed to the Judicial Committee of the Privy Council and that body assumed it had jurisdiction to deal with them, although certainly in no respect under the legislative control of the Parliament of Canada. A list of those references will be found on page 267 of Mr. Cameron's "Supreme Court Practice."

Speaking for myself, I feel bound by the rule established for us by these precedents which date back to the very beginning of this court. They have established a rule of conduct which now has for me the force of law.

If the practice originated (as a learned legal writer says) in error, yet the error is now so common that it must have the force of law.

I entertain no doubt, however, that independently of all precedent it is our duty to consider the questions submitted. It is not necessary for us to say now

whether everything that is or may be involved in the consideration of each of the questions referred would or would not properly fall under our cognizance. If in the course of the argument or subsequently it becomes apparent that to answer any particular question might interfere with the proper administration of justice, it will then be time to ask the executive, for that reason, not to insist upon answers being given; and this might very properly be done notwithstanding that such answers would not in any circumstances have the binding force of adjudications, like decisions given in regular course of judicial proceedings. Lord Watson, in the *Brewers Case*(1). In other words even in the absence of those special provisions in the "British North America Act" and the "Supreme Court Act," to which I will hereafter refer, I would still hold that the members of this court are the official advisers of the executive in the same way as the judges in England are the counsel or advisers of the King in matters of law, our constitution being "similar in principle to that of the United Kingdom." (Preamble of the "British North America Act.") The same Act, in the distribution of powers, declares

> that the executive government and authority of and over Canada continues to be and is vested in the Queen.

In England the practice of calling on the judges for their opinion as to existing law is well established. Evidence of its existence will be found as far back as history and tradition throws any light on British legal institutions(2). After quoting the section of the constitution of Massachusetts which provides for taking

(1) [1896] A.C. 348.

(2) *Beckman* v. *Mapelsden*, O. Bridg. 60, at p. 78.

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the opinion of the judges by the executive or legislative department, Chief Justice Gray says(1):

> This article, as reported in the convention that framed the constitution, limited the authority to the Governor and Council and the Senate, and was extended by the convention so as to include the House of Representatives; and, as may be inferred from the form in which it was originally presented, evidently had in view the usage of the English Constitution, by which the King, as well as the House of Lords, whether acting in their judicial or their legislative capacity, had the right to demand the opinions of the twelve judges of England.

The case in which the Lords in their judicial capacity called for the opinion of the judges, is a very familiar one. I might mention *O'Connell's Case*(2), in which the decision of the Lords was against the opinion of the majority of the judges. A well-known precedent may be cited of *McNaghten's Case*(3). Here not only was there no litigated question before the Lords, but not even any pending legislative question. The Lords, in the course of their debates, having fallen into a discussion about a case recently tried at the central criminal court, but not in any way before them, a case developing interesting questions in the law relating to insanity, conceived that they would like to know a little more accurately what the law on those points was. They accordingly put a set of "abstract questions" to the judges — questions not arising out of any business before them, actual or contemplated. One of the judges protested against this proceeding and his objections bear a close resemblance to those urged in support of this preliminary objection, *e.g.*, that the questions put

(1) Op. of Justices, 126 Mass. 557, at p. 561.

(2) 11 Cl. & F. 155.

(3) 10 Cl. & F. 200.

do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of the terms, that he had heard no argument;

and that he feared

that as the questions relate to matters of criminal law of great importance, the answers to them by the judges might embarrass the administration of justice when they are cited in trials.

The Lords took notice of this and while courteously thanking the judges for their opinions, expressed a unanimous judgment that it was proper and in order for the Lords to call for opinions on "abstract questions of existing law."

For your Lordships (said Lord Campbell) may be called on, in your legislative capacity, to change the law and before doing so it is proper that you should be satisfied beyond a doubt what the law really is.

These words of Lord Campbell are absolutely applicable to this reference. In anticipation of possible legislation on the important subjects of insurance, incorporation of joint stock companies and control of fisheries, the executive of Canada desires to be advised as to the constitutional limitations upon its legislative power. In *McNaghten's Case* (1) Lord Brougham refers to the case of "Fox's Libel Act," when the judges answered questions about the existing law of libel. Lord Campbell cited an instance where the judges were called on to give their opinion upon the questions of law propounded to them respecting the "Clergy Reserves (Canada) Act." (2). One of the questions was whether the Legislative Assembly of United Canada had exceeded their lawful authority in legislating with respect to the sale of the clergy reserves. Lord Wynford said he did not doubt the

(1) 10 Cl. & F. 200.

(2) 7 & 8 Geo. IV., ch. 62.

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power of the House to call on the judges and to have their opinion as to existing law. He recalled the instance when he was Lord Chief Justice of the Court of Common Pleas that he communicated to the house the opinion of the judges with regard to the usury laws, and the house subsequently passed a law on the subject. The Lord Chancellor (Lord Lyndhurst) concurred "as to our right to have the opinions of the judges" on existing law. In a previous case the judges begged to be excused from giving an opinion, requested by the House of Lords, upon the question whether a pending bill was in conflict with previous acts relating to the Bank of England. The questions were argued by counsel on both sides; but the judges said that the inquiries were not

> confined to the strict construction of existing Acts of Parliament.
>
> *In re Westminster Bank*(1).

This is not a case in which we are called on to express an opinion by anticipation on causes actually depending before the courts nor is it to be supposed for one moment that we will consider ourselves bound by the opinions given in answer to the questions submitted to us if the principles involved are brought before us in due course of law. As Lord Mansfield said in the *Sackville Case*(2),

> we shall be ready, without difficulty, to change our opinions, if we see cause, upon objections that may then be laid before us, though none have occurred to us at present which we think sufficient.

I am certainly of opinion that the practice of taking counsel, as it were, with the judges, to ascertain and elicit their opinions upon a specific question before it had been brought judicially before them is objec-

(1) 2 Cl. & F. 191. (2) 2 Eden 371.

tionable. And I entirely agree with what is said by Mr. Hargrave(1):

> However numerous and strong the precedents may be in favour of the King's extra-judicially consulting the judges on questions in which the Crown is interested, it is a right to be understood with many exceptions, and such as ought to be exercised with great reserve lest the rigid impartiality so essential to their judicial capacity, should be violated. The anticipation of judicial opinions on causes actually depending should be particularly guarded against, and therefore a wise and upright judge will ever be cautious how he extra-judicially answers questions of such a tendency.

At the same time we must not forget that judges are officers of the Crown, and I adopt without any reserve the opinion expressed by Dorion C.J., a man of wide political and judicial experience, when, speaking for the full Court of Queen's Bench in Quebec, he said in *Bruneau et al.* v. *Massue*(2):

> The judges of the Superior Court as citizens are bound to perform all the duties which are imposed upon them by either the Dominion or the local legislature. If these duties were either incompatible or too onerous to be properly performed, provided neither legislature had exceeded the limits of its legislative power, it would become the duty of the local and Dominion Governments to suggest a remedy by some practical solution of the difficulty, *but it does not devolve upon courts of justice to assume the authority of declaring unconstitutional a law on account of the real or supposed inconveniences which may result in carrying out its provisions.*

These words were subsequently quoted with approval by Chief Justice Sir W. Meredith in *Langlois* v. *Valin*(3), at page 16, and they are specially applicable in the present circumstance. This court was established by the Parliament of Canada

> as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada(4),

(1) Co. Litt. 110*a* (5).
(2) 23 L.C. Jur. 60.
(3) 5 Q.L.R. 1.
(4) Sec. 3, "Supreme Court Act."

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under the authority of section 101 of the "British North America Act." That section is as follows:

> The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance and organization of a general court of appeal for Canada and for the establishment of any additional courts for the better administration of the laws of Canada.

And we are asked to answer certain questions submitted to us by the executive for the express purpose of obtaining information which may assist in the administration of the fundamental law of the Canadian constitution, the "British North America Act."

Dealing now with the constitutionality of those provisions of the "Supreme Court Act," under which this reference has been made. That Act was drafted and passed through Parliament when Hon. T. Fournier was Minister of Justice and was brought into force by a proclamation issued by Hon. Ed. Blake, his successor in office. The general legal presumption that a legislature does not intend to exceed its jurisdiction is strengthened in this case by the fact that constitutional lawyers of such eminence as Blake and Fournier are responsible for the legislation, the validity of which is now challenged.

I presume it will not be suggested that the Imperial Parliament could not constitutionally confer upon the Canadian Legislature the power to establish a court competent to deal with such references as we have now before us; and, if not, how could more apt words be found to express their intention to confer that power? Could better words be used to convey the widest discretion of legislation with respect to the all embracing subject "the better administration of the laws of Canada?" It cannot now be doubted either in

view of the decision of the Privy Council in *Valin* v. *Langlois*(1), that if the Parliament of Canada might have created a new court for the purpose of hearing such references as are now submitted, it could commit the exercise of this new jurisdiction to this court.

The distinction between creating a new court and conferring a new jurisdiction upon an existing court is but a verbal and non-substantial distinction.

If any doubt remains as to the legislative jurisdiction of Parliament in the premises, a reference to section 91 of the "British North America Act," which provides that the Parliament of Canada may from time to time make laws for the peace, order and good government of Canada in relation to all matters not coming within the class of subjects assigned exclusively to the legislation of the provinces, should dispel that doubt.

Lord Halsbury, delivering the judgment of the Judicial Committee in *Riel* v. *The Queen*(2), at pages 678-9, said, interpreting the words "peace, order and good government":

> The words of the statute are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to. They are words under which the widest departure from criminal procedure as it is known and practised in this country have been authorized in Her Majesty's Indian Empire. Forms of procedure unknown to the English common law have there been established and acted upon, and to throw the least doubt upon the validity of powers conveyed by those words would be of widely mischievous consequence.

It has not been argued, and I do not think it could seriously be argued for a moment, that if Parliament possesses the power to make these references, that power has not been vested in the executive. Section

(1) 5 App. Cas. 115. (2) 10 App. Cas. 675.

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37 of the "Supreme Court Act," as originally enacted, read as follows:

The Governor in Council may refer to the Supreme Court for hearing or consideration, any matter which he thinks fit; and the court shall thereupon hear or consider the same and certify their opinion thereon to the Governor in Council; provided that any judge or judges of the court who differ from the opinion of the majority may, in like manner, certify his or their opinion or opinions to the Governor in Council.

In view of doubts expressed by members of this court at different times as to whether the intention of the legislature had been clearly expressed, changes have been made widening the scope of that section until we finally have section 60 of the "Supreme Court Act," which is in the following terms:

Important questions of law or fact touching

(*a*) the interpretation of the "British North America Acts," 1867 to 1886; or

(*b*) The constitutionality or interpretation of any Dominion or provincial legislation; or,

(*c*) The appellate jurisdiction as to educational matters, by the "British North America Act, 1867," or by any other Act or law vested in the Governor in Council; or,

(*d*) The powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be executed; or,

(*e*) Any other matter, whether or not in the opinion of the court *ejusdem generis* with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question; may be referred by the Governor in Council to the Supreme Court for hearing and consideration; and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question.

2. When any such reference is made to the court it shall be the duty of the court to hear and consider it, and to answer each question so referred; and the court shall certify to the Governor in Council, for his information, its opinion upon each such question, with the reasons for each such answer; and such opinion shall be pronounced in like manner as in the case of a judgment upon an appeal to the Court; and any judge who differs from the opinion of the majority shall in like manner certify his opinion and his reasons.

3. In case any such question relates to the constitutional validity

of any Act which has heretofore been or shall hereafter be passed by the legislature of any province, or of any provision in any such Act, or in case, for any reason, the government of any province has any special interest in any such question, the Attorney-General of such province shall be notified of the hearing, in order that he may be heard if he thinks fit.

4. The court shall have power to direct that any person interested, or where there is a class of persons interested, any one or more persons as representatives of such class, shall be notified of the hearing upon any reference under this section, and such persons shall be entitled to be heard thereon.

5. The court may, in its discretion, request any counsel to argue the case as to any interest which is affected and as to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance out of any moneys appropriated by Parliament for expenses of litigation.

6. The opinion of the court upon any such reference, although advisory only, shall, for all purposes of appeal to His Majesty in Council, be treated as a final judgment of the said court between parties.

It is to be observed that this section was enacted to remove all doubt as to the intention of Parliament, to get the opinion of the members of this court as to the validity of proposed legislation as well as of all existing legislation.

Section 37 of the "Supreme Court Act," as it was originally enacted, seems to have been taken from 3 & 4 Wm. IV. ch. 41, which reads as follows:

It shall be lawful for His Majesty to refer to the said Judicial Committee (the Judicial Committee of the Privy Council), for hearing and consideration and such other matters whatsoever as His Majesty shall think fit, and such Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon in manner aforesaid.

In re Schlumberger(1), at page 12, speaking of this section, the Right Honourable Dr. Lushington said, dealing with an objection to the jurisdiction of the Privy Council to hear and consider a petition referred to them by order in council:

(1) 9 Moo. P.C. 1.

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The only construction that can be placed upon the section above quoted is a construction which shall give to the words therein contained their complete meaning, without limitation whatsoever,

and further,

that the Judicial Committee were not entitled to put any limitation on these words in any matter referred to them by the Crown.

In addition to those above mentioned, constitutional cases of great importance to a colony have been referred by the Sovereign to the Judicial Committee, such as to the power of the legislature of Queensland in respect of money bills and the validity of Protestant marriages in Malta and upon their report have been decided by the Governor in Council. (See P. papers, 1894, No. 214, 1896, 7982.)

Objection was taken by some of the judges of this court to the hearing of the reference *Re Sunday Legislation*(1). At the argument on the appeal to the Privy Council, it appears from the report that Mr. Newcombe, in reply said:

Then, my Lords, Mr. Riddell has questioned the jurisdiction under the "Supreme Court Act" to make the reference. I do not know whether your Lordships desire me to reply to that.

To which Lord McNaghten said:

I think we know the terms of the Act. They are wide enough to embrace it.

The sections of the "Supreme Court Act" to which I think useful reference may be made are:

Section 3, which constitutes the Supreme Court as a general court of appeal and as an additional court for the better administration of the laws of Canada;

Sections 35 to 49 inclusive, defining the appellate jurisdiction of the Supreme Court;

(1) 35 Can. S.C.R. 581.

Sections 60 to 67 inclusive, which define the special jurisdiction of the Supreme Court, which includes not only references by the Governor in Council but also references by the Senate and House of Commons, habeas corpus and certiorari and cases removed by provincial courts.

In addition we have section 55 of the "Railway Act," R.S.C. [1906] ch. 37, which provides that the Railway Commissioners may refer questions for the opinion of the judges of the Supreme Court. This power has been freely exercised by the Commission and we have never to my knowledge refused to answer the questions submitted. Can it now be successfully argued that the Railway Commissioners have the power to make references to this court and that the Parliament, that created the Commission, has not got that power?

Section 55 of the "British North America Act" provides that a bill may be reserved for the signification of the Sovereign's pleasure. Before exercising this prerogative of rejection would it not be within the power of the Home Government to refer the question involved to the Judicial Committee under the fourth section of 3 & 4 Wm. IV. ch. 41, above quoted? If so, by analogy, may we not argue that the same principle would apply to the case of disallowance which may be exercised in connection with the power of supervision over provincial legislation entrusted to the Dominion Government, as provided for in section 60 of the "British North America Act"? If a provincial Act is reserved by a lieutenant-governor for the consideration of the Governor-General in Council, the opinion of the members of this court as to its constitutionality might well be taken for the guidance of His Excellency.

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If this may be done after an Act has been passed, why should it not be competent to seek such advice in advance of legislation?

For all these reasons I hold:

1. That the Governor in Council has the power under the constitution to make this reference;

2. That it is the duty of the members of this court to hear the argument of counsel and to answer the questions, subject to our right to make all proper representations if it appears to us during the course of the argument, or thereafter, that to answer such questions might in any way embarrass the administration of justice.

GIROUARD J. (dissenting).—As to the motion to quash, I would prefer to wait for judgment till the matter is discussed on the merits. I am prepared, however, to say that the Governor-General in Council has jurisdiction to refer the constitutionality or interpretation of federal statutes or other federal matters to this court; but he cannot do so if the subject-matter of reference is merely provincial; and with regard to the latter I think the "Supreme Court Act," especially section 60 (para. (*b*)), is *ultra vires*. In a case like this, this court does not sit as a general court of appeal for Canada, but as an "additional court for the administration of the laws of Canada" within section 101 of the "British North America Act, 1867."

This additional court is a court of common law and equity in and for Canada and is merely advisory. Its decision binds no one. R.S.C., ch. 139, section 3.

The consent of the provinces is not sufficient to give us jurisdiction, unless they agree to the reference and constitute what may be called a submission to

the court which is always open to litigants even at common law; and in such a case the decision of this court should be binding as to the parties to it.

DAVIES J.—Questions with regard to the legislative powers of the Dominion Parliament and the provincial legislatures, and also as to the meaning and extent of certain enactments made by these bodies respectively, having been referred by the Governor in Council to this court pursuant to section 60 of the "Supreme Court Act" for hearing and reasoned answers our jurisdiction has been challenged on the ground that the section of the "Supreme Court Act" above referred to was either altogether or in part *ultra vires* of the Parliament of Canada.

The preamble to Canada's constitutional Act refers to the expressed desire of the provinces then confederated

> to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar *in principle* to that of the United Kingdom,

and the Act was passed to carry into effect that expressed desire.

In the division of legislative powers assigned to the Canadian Parliament and legislatures, Parliament is empowered generally to

> make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces,

and is given exclusive and paramount legislative authority over all matters coming within the 29 classes of subjects specifically enumerated.

The classes of subjects exclusively assigned by the

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92nd section to the legislatures of the provinces embrace

> 14. The administration of justice in the province including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.

In addition to this division of legislative power, section 101 provides for the establishment by Parliament "notwithstanding anything in this Act" of a general court of appeal for Canada and of any additional courts for the better administration of its laws.

The first step necessary to determine whether in authorizing questions to be put to this court on important constitutional and legal points by the Governor in Council, Parliament acted beyond its powers is to determine whether section 60 is in conflict with the powers exclusively assigned to the provincial legislatures. If it is not in such conflict then in my opinion the objection is entirely disposed of.

The "Federation Act" as was said by the Judicial Committee in *Bank of Toronto* v. *Lambe*(1), at page 588,

> exhausts the whole range of legislative power and whatever is not thereby given to the provincial legislatures rests with the Parliament.

Sub-section 14 of section 92 of our constitutional Act is the one with which it is contended section 60 of the "Supreme Court Act" is in conflict. I quite fail to appreciate in what respect this can be held to be so.

The former assigns to the legislature the exclusive power to make laws for the administration of justice in the province.

The latter authorizes the Governor-General in

(1) 12 App. Cas. 575.

Council to submit important questions to this court relating to the powers of Parliament and the legislatures respectively, and to other subjects affecting the general administration of the laws of Canada.

The answers which the judges of this court are required to give to the questions asked are reasoned answers after having heard arguments from counsel representing the different conflicting interests. But these answers are simply to aid the Governor in Council in reaching conclusions for which they must be held entirely responsible. The answers do not bind the Governor in Council. He may act in accordance with them or not, as he pleases, giving them just such weight as he pleases. They are advisory only. They do not bind even this court as has been often said before if at any time it is called upon in its strictly judicial capacity to decide the very question asked. Being advisory only and not binding upon the body to whom they are given or upon the judges who give them they cannot be said to be in any way binding upon the judges of any of the provincial courts. For these reasons I am of the opinion that there is no necessary conflict between the two sections and that therefore the objection taken to the constitutional validity of section 60 fails.

But even if it was decided that such conflict did exist, it would by no means determine the invalidity of the clause attacked. The inquiry would then be removed one step further back and would require the proper construction of section 101 authorizing Parliament,

notwithstanding anything in the Act, to constitute a general court of appeal for Canada and also additional courts for the better administration of the laws of Canada.

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If that section and the legislation of Parliament under it are broad enough to confer on the Governor in Council the power to put these questions then that alone would dispose of the objection.

In my opinion the language of the section is quite broad and ample enough to confer the required and assumed power. The section says that, "notwithstanding anything in this Act" the Parliament of Canada may, etc., so that even if the powers conferred when exercised necessarily conflicted with any of the exclusive powers of the legislatures they would be constitutional. We all know that the laws of Canada are administered by the several departments of government, that these laws consist not only of the statutes passed by Parliament but of the rules and regulations authorized by these statutes to be made by the Governor in Council, the better to carry out the general object and purpose of the statutes. The administration of these statutes and regulations often and necessarily under our constitution involve the determination of most difficult and novel legal and constitutional questions. It would only seem right and proper that there should have been in the constitutional Act some means authorized by which the opinions of some independent tribunal might be obtained on such questions as related to the proper interpretation of the constitutional Act itself; the constitutionality or interpretation of Dominion or provincial legislation; or the exercise by the Governor-General in Council of any of the judicial or quasi-judicial functions he may under the constitutional Act be called upon to discharge, as well as other kindred questions.

In my judgment such an apparently desirable ob-

ject was accomplished by the language of the 101st section. The powers given to Parliament by that section whatever they may be construed to cover and include were certainly paramount powers, not limited by any powers of legislation assigned to the provincial Parliament. They are given expressly "notwithstanding anything" in the constitutional Act.

In my opinion they are broad and ample enough to cover the powers which Parliament has attempted in the 60th section to exercise. They authorize the establishment of a court for the better administration of the laws of Canada. Parliament has established this general appeal court as such a court. There cannot be any constitutional objection in my opinion to its doing so and with matters of policy we have no concern. The better administration of the laws of Canada may and doubtless frequently does necessarily involve a consideration and determination of the extent, meaning and constitutionality of provincial legislation and the advisory powers with which section 60 deals cover and are intended to cover both fields of legislation. In point of fact and law, these powers of legislation, Dominion and provincial, are so interlaced that one can hardly be considered apart from the other.

If I am right in my construction of this section 101 nothing more remains to be said on the question before us. It is said that this court is a general court of appeal for Canada, but I see no constitutional reason if we were that and that alone, why Parliament could not impose on it the duty of giving reasoned answers to such important questions as it might authorize the Governor-General in Council to ask.

But Parliament has made this court more than a

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mere general court of appeal. It has made it also a "court for the better administration of the laws of Canada," and, as I have already said, that, to my mind, removes any reasonable doubt upon the point in question.

The different references which have from time to time been made to this court have always been heard and answered without question as to the constitutionality of the section under which they were made. Many appeals of a most important character have gone to the Judicial Committee from the answers given by this court on these references, but in no case has any such objection as that now under consideration been taken. The section largely, indeed almost substantially, as it stands to-day was passed in 1891, based on a resolution introduced into the House of Commons by Mr. E. Blake, accepted by the late Sir John A. Macdonald, then leader of the government, and adopted unanimously by the House. These facts by no means conclude the question. At the same time they shew what the opinion of many of Canada's most distinguished jurists has been and it is hard to believe that such a point as that now raised, if well taken, could have escaped the observation of all the distinguished counsel who have argued the question on the many references made, and the jurists who constituted the board of the Judicial Committee and decided those of them which were appealed to that board.

If the power of Parliament now in controversy to pass section 60 is held to depend upon the general power to legislate for the peace, order and good government of Canada, then of course the question whether there was a conflict of jurisdiction between the Dominion and the provincial authorities would

have to be decided. It seems to me that the very broadest construction should be placed upon these words, "peace, order and good government." They certainly would, in relation to the objection now taken, be construed in the light of the words in the preamble that our constitution was to be similar in principle to that of the United Kingdom.

While the constitutions of the Dominion and the provinces are mainly written and defined, that of the United Kingdom is unwritten and is the growth of customs, precedents, practices and principles defined from time to time, sometimes by Acts of Parliament, and sometimes by judicial decisions, sometimes left undefined. When we find that it has been the undoubted right of the House of Lords, itself the highest court of appeal in the United Kingdom, as also a branch of the High Court of Parliament to summon the common law judges before their House to answer questions as to what the law of the Kingdom is on any given question, and when we further find that the Imperial Parliament has itself enacted laws declaring the right of the King in Council to call upon the Judicial Committee, itself a court of appeal, in certain matters, alike in England and from the Dominions of the Crown beyond the seas, we can fairly say that such right to obtain the opinions of the common law judges and of the Judicial Committee is a principle of the British constitution and in accordance with its spirit. When, therefore, we are called upon to determine what meaning should be given to the power assigned in our constitutional Act to Parliament to legislate for the peace, order and good government of Canada, we cannot hold that legislation requiring the judges of our Court of Appeal to answer questions submitted

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to them by the Governor in Council is not in accordance with the spirit or principle of our constitution and would not be within Parliament's powers.

My conclusions, therefore, are, first, that the legislation challenged by the motion now before us is constitutional under section 101 of our constitutional Act, and that if there is a doubt upon that point it comes clearly within the power of legislating for the peace, order and good government of Canada, because it is in accordance with British precedent and practice, and is not in conflict with any of the powers exclusively assigned to the legislatures of the provinces.

I say nothing whatever about the particular questions now before us awaiting argument. Whether they go further than they should must be determined later.

IDINGTON J. (dissenting).—The jurisdiction of this court to answer the questions submitted by these references has been challenged by the motion made.

I respectfully dissent from the conclusion arrived at by a majority of the court. I agree in regard to our jurisdiction to answer some of the questions submitted. But the decision as a whole implies not only that Parliament has, but also has exercised, the power of commanding this court, originally constituted and established a court of common law and equity, never supposed to have been constituted by virtue of any other power than section 101 of the "British North America Act," which enacts as follows,

> 101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance and organization of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada,

to become an advisory adjunct of the Department of Justice and fill the place usually held by subaltern law officers of the Crown. As if to shew more clearly than ever this section 101 to be its sole foundation the constituting Act was amended by 6 Edw. VII. ch. 50, section 1, being substituted for the original declaration, and stands now as follows:

> 3. The court of common law and equity in and for Canada now existing under the name of the Supreme Court of Canada, is hereby continued under that name, as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a court of record.

I desire at the outset to make clear that the references which have the sanction of the provincial government to their submission by the Dominion government are within the jurisdiction of this court.

Section 101 of the "British North America Act" does not so clearly as it might cover the ground of authority for the creation of a court of quasi-original jurisdiction to dispose of such constitutional controversies as said references imply between the Dominion and provinces. But said section 101 and sub-section 14, of section 92, of the "British North America Act," coupled together do lay such a foundation of authority and followed by section 67 of the "Supreme Court Act," and the correlative provincial legislation provided for therein, do seem to me sufficient to confer jurisdiction within the limits thus assigned.

However that may be, the jurisdiction of the court I think, was always wide enough to cover submissions made jointly by Dominion and province. And the province in some cases has so legislated as to render it necessary to inform the Attorney-General of the province of any constitutional question raised in any case, and enabled him to intervene.

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I see no objection to the practice that has arisen as the result of all this by which the Dominion and provinces have repeatedly come directly here, and stated and argued the point of legal controversy involved, and had the same decided and then sometimes appealed to the Privy Council.

I am not oblivious of the fact that the omission in the "British North America Act" to provide expressly for the expedients thus adopted, leaves them open to criticism, which is, however, answered, it seems to me, by the implied constitutional powers we must assume to be inherent in these constituent bodies mutually to protect and so far as possible delimit their respective spheres of jurisdiction in relation to each other or the subject-matters assigned to each to deal with.

This sane method thus adopted and long acted upon, I do not question; nor do I question section 60 of the "Supreme Court Act," in so far as in aid thereof. I cannot agree in the sweeping attacks upon it in argument here by way of asserting its entire invalidity.

I therefore hold so far as regards the reference in the Fisheries case, said to be made pursuant to an understanding between the Dominion and the Province of British Columbia, and thereby falling within said method, that it is within our jurisdiction.

It was objected in argument that our decision of that might in an indirect way affect other provinces.

Such must of necessity under our system of jurisprudence, resting upon precedent, be the result of any decision of any concrete case, where the precedent created thereby may bind in a like case between other parties not made parties to such preceding cases.

The like result would also follow if a point of con-

stitutional law happened to arise in an action between private litigants and be there decided.

I also am of opinion that section 101 enables Parliament to confer, if it see fit, on this court, jurisdiction to hear disputed cases involving or springing out of the application of the laws of Canada.

I do not think that the phrase "any additional courts" in said section implies that the additional courts must of necessity be a separate tribunal composed of different persons.

Indeed, the words "additional courts" are, I think, relative to the existing provincial courts, administering the laws of Canada as well as of the provinces.

This court as originally constituted was blended as it were with the Exchequer Court. Their respective functions were defined, but the same persons were judges of both courts.

Moreover, the power of Parliament to delegate its powers of trying election petitions to a provincial court, was duly maintained though it might have constituted under section 101, a court of its own for the purposes of such trials.

The question of separation of one or more juridical powers when being created, or of consolidation of two or more after their creation, when and so far as within the power of Parliament to constitute the judicial powers then in question, seems to me entirely matter of convenience and expediency, and does not touch the question of jurisdiction.

I am, therefore, prepared to hold that if and in so far as this court has been or may be duly given jurisdiction to administer any laws of Canada, and so far as the proceedings in question can be brought thereunder, we are bound to observe and discharge

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such judicial functions as implied therein. In the submission *In re Criminal Code*(1), made to us last term, though inclined to think the reference pushed the power and duty to the verge of the reasonable limits section 101 of the "British North America Act" would permit, I, with some doubt, agreed the questions might fall within the words of that section.

In disposing of that reference the majority of the court seemed impressed, as I was, with the futility of the proceeding, and intimated that their opinions bound no one. But as it was quite competent for Parliament to enact relative to criminal procedure whatever it pleased, no great harm could arise from answering any such questions.

The questions here submitted relative to the "Insurance Act" enacted by Parliament are of an entirely different character. It is not so admittedly within the power of Parliament. It is in truth the true meaning of the "British North America Act" that is involved. How can the solution of that be said to be administering the laws of Canada unless presented in a concrete case?

To say that our opinion may bind no one is, I respectfully submit, not a satisfactory disposition of the matter. For if Parliament has the power to insist upon an answer it must be because it would be competent for Parliament to enact, and that it might enact, retrospectively and prospectively that our answers, or rather the concurrent answer of the majority, is or is to become law, binding all concerned.

This brings us to the solution of the problem of whether or not Parliament can by any method impose

(1) 43 Can. S.C.R. 434.

upon this court the duty of answering or constitute by any method a judicial court that can properly be asked to answer, in an inquiry of this kind now submitted to us and in face of the submission being objected to by all the provinces concerned, and only spoken to by counsel for the Dominion and possibly our nominee.

Let us first assume this court has been constituted only by virtue of the authority of section 101 above quoted, and see if anything therein can justify such a position as asking or answering all these questions. Pass for the present those relative to the meaning of any statute enacted by Parliament. The observations I am about to make may well apply to those questions as well as to the others relative to the "British North America Act" and provincial statutes to which I will first direct particular attention. Some different considerations may arise relative to the questions touching the laws of Canada. But some of the considerations I am about to bring forward apply to all.

No one can pretend that answering these questions is an exercise of or falls within the appellate jurisdiction of this court. Every one will admit, however, that the questions of law involved therein may each and all involve the very issue of law to be presented at any moment by a private litigant or be raised by a province in private litigation or come within the range of a controversy which section 67 and provincial legislation have paved the way for, if not expressly provided for, being dealt with by mutual submission.

Why should any or all of such parties be prejudiced and embarrassed by a proceeding of this kind?

It is not of its expediency I am treating, for that does not directly concern this inquiry, but of its bearing upon the administration of justice.

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That whole subject, save as specifically provided, is by section 92, sub-section 14, expressly assigned to the provincial authorities. I say the whole, for when that administered in each province is so, there is nothing left unless in unorganized territory. And there is only one exception or method of reservation given by the "British North America Act," so far as provincial legislation and the judicial administration thereof is concerned and that is by way of appeal to this court. It is the method that (if permissible), I may say, appears in the Quebec resolutions at the meeting that led to the passing of the "British North America Act." And the power to create additional courts appears to have been resolved separately and expressed as relative to the Acts of Parliament.

All rights springing from or resting upon provincial legislation must be determined first by the local courts and if need be then by appeal therefrom. What right have we to attempt to overawe them by dicta of ours obtained from us by this method? What right and authority legislative or judicial exists to interfere with the administration of justice according to the methods and the mode assigned by this organic law designed to guard and enforce the rights, obligations and duties of all concerned?

The questions coming thus for adjudication may involve the very existence of the corporate powers of those concerned and of many others in a like plight. What right have we to jeopardize their stability by expressing any opinion on an *ex parte* application, or where no right exists to command an appearance, and, as we have found possible, upon a perfunctory exposition of the law upon which we are asked to pass ?

What would be thought of a judge who had ex-

pressed to a private litigant an opinion more or less deliberate upon the questions upon the solving of which the determination of that litigant's rights must turn, sitting afterwards upon his case, hearing and adjudging it?

The thing thus put would (I am glad to believe) be an absolute impossibility. No such man sits upon the bench in our country.

But analyze the situation we are now presented with, and wherein lies the difference?

The controversy on some of these cases submitted seems to be one between the Dominion and the provinces, or some of them. The very questions may involve the solution of the exact point in some case now on its way here in a due, orderly and ordinary way; why forestall the rights of these suitors?

Is there any difference in the last analysis between answering and advising the Dominion as a litigant as to its rights as against a province, and the case I have put of a private litigant? How can we when we have answered sit upon the appeal of a private litigant, either with a province intervening as under existing legislation is possible, or without, to decide the identical question upon which we have already given an *ex parte* opinion?

The constitution of this court was intended for the purpose of adjudicating by way of appeal or otherwise upon such questions as might be by it finally disposed of or authoritatively reviewed and finally disposed of by the Privy Council.

It was sought thereby to eliminate by such a system for the administration of justice a mass of appellate work which the growing demands then present and prospective required should be disposed of in this

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country and at the same time the way be kept open in the more important and far reaching judgments pronounced here and elsewhere for an appeal to an Imperial tribunal.

It never was intended by the creation of this court or the power given to create it to change the leading features of constitutional government expressly designed after the model of the British constitution as adopted and in use for a quarter of a century in a number of the provinces confederated by the "British North America Act," and thereby (subject to the features of the federal system) intended to be continued by the Dominion and inferentially also by each of the provinces, so far as circumstances would permit.

It is therefore necessary in order to understand the full compass of what we are asked to undertake and the full import of the challenge now made respecting the constitutional power of Parliament to impose upon us the duty of such an undertaking, that we should comprehend something of the constitutional limitations implied in the leading features of constitutional government to which I have adverted.

Is there any parallel in that constitutional government for such an interrogation of the judiciary as to the meaning of a mass of acts as these inquiries embrace ?

Is it any answer to say that an inquiry may be made of the Privy Council, historically and by statute duly constituted by a plenary parliament a consultative as well as a judicial body? Is it any answer to say that at rare intervals in modern times there have been submissions to the judges by virtue of a survival of a part of a practice having an historical record trace-

able to times when the separation of the legislative, executive and judicial functions were not supposed to be as necessary, indeed speaking generally so cardinal a principle of modern constitutional government as modern thought has held necessary?

Is it any answer to say that what might exist in an almost dormant condition in a state of society where the force of historic tradition and constitutional usages are a guarantee that cannot be supplied here, could be supposed proper to establish here and to have incorporated in such an Act as the British North America Act?

These considerations are submitted in answer to the suggestion that in some way I am unable to understand such vestiges or survivals existent in England might have been in the minds of men enacting expressly as section 101 does enact and may be implied therein as inherent in the power conferred to establish any additional courts.

But the language forbids the thought.

It is expressly confined to courts for administering the laws of Canada. What are the laws of Canada? Is it not obvious that they are the laws enacted by the Parliament of Canada? Is it not obvious that such a thing as administering the laws of the provinces is a thing beyond the literal meaning of the words, and in conflict with the exclusive power assigned to the provinces of constituting courts of justice for that very purpose.

How can it be supposed in the face of such an enactment and such a system as a whole that the Dominion could ever interfere?

Moreover, the expression "any law of Canada" when used in an Act of Parliament dealing with a sub-

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ject matter that might well have implied giving it the full remedial effect and measure of relief that seemed necessary and by its purview to incorporate the local laws therewith, this Court held itself bound by the phrase to limit the operation of that statute to an enactment of the Parliament of Canada.

I refer to the case of *Ryder* v. *The King* (1), where it was attempted to be maintained that by force of the said expression in sub-section (*d*) of section 16, of the Exchequer Court Act, giving relief against the crown in the case of workmen entitled to compensation it covered the right in a local law. It was held it could not be so extended.

When we thus eliminate from the operation of section 101 anything but that comprised in the laws of Canada, where is there any authority in Parliament to direct as it is claimed to have directed?

Many of those reasons and considerations already assigned relative to the inquiry so far as relative to questions respecting the British North America Act and provincial laws, are applicable to, and I think effectively cover inquiries relative to the laws of Canada.

It is said, however, Parliament can enact relative to subjects beyond those specifically assigned when it deems it necessary for the peace, order and good government of Canada.

In the first place I repeat the "British North America Act" has by section 101 impliedly exhausted the subject and covered everything of a judicial character possible to assign, when we have regard to section 92, sub-section 14. And thus as well by the application of

(1) 36 Can. S.C.R. 462.

the maxim *expressio unius est exclusio alterius* as that by the inherent character of the subject-matter, having regard to what has already been said, everything directly involved herein has been disposed of.

In the next place the power given by the "British North America Act" in section 91, relative to peace, order and good government, expressly excludes the classes of subjects assigned exclusively to the legislatures of the provinces. I am thus unable to find the power to direct claimed to have been conferred.

Let the interpretation of the law of Canada now before us in scction 60 of the "Supreme Court Act," be considered here.

I submit as to that, wide as some of its expressions are and possibly partially inoperative we must never, if we can help it, attribute to Parliament the purpose of intending to exceed or of even unintentionally exceeding its powers, and must give its enactments operation so far as not *ultra vires.*

The final paragraph declaring what is decided to be held a final judgment of the court binding on the parties for purposes of appeal implies that there must have been before the court parties concerned who can appeal. There can be no appeal unless parties of some kind are affected; no one can be heard to appeal who has not appeared.

Something it may be said so omitted we are to supply by nominating counsel.

I prefer, if possible, assuming Parliament never intended such a submission as those respecting powers over which it has no control, or power to meddle with, and where no one will appear or can be brought forward to appear. I prefer assuming the legislation presupposed that the provinces would appear in accord-

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ance with the practice I have already adverted to; either willingly or by force of public opinion; or at all events that the jurisdiction is to be restricted in other cases to the classes of appeals such as involved in the *Manitoba School Case* (1), or relative to the laws of Canada, wherein no question of a conflict with a province or its exclusive rights and powers could be at all involved or anything relative thereto.

Let us assume for the present that no appeal is taken from such expressions of our opinion. The nominating of counsel to appeal is unprovided for.

Let us assume each of these questions answered in such a way as to derogate from or deny the right of the provinces to legislate in a way they have long been accustomed to do, and thus cast doubt on the legal existence of a vast number of corporate bodies and the legality of contracts innumerable.

Are we to assume that our opinions no matter how much we may protest that they do not bind, will be treated as contemptible and of no effect? To do so would be to encourage a contempt for the highest court in the Dominion.

Let us assume that our opinions are treated with the respect due to such a court, and we may shake to its foundation the commercial seats of business and interests of the country.

We may be thus placed by asserting jurisdiction between contempt on the one hand and disorder on the other.

Or let us assume that an appeal is taken and the court above us has as heretofore refused to answer or to attempt to solve in that way mere speculative or

(1) 22 Can. S.C.R. 577.

theoretical issues. Where are we left? Where can we and how can we remedy the evil plight into which we have plunged our court or the commercial interests we have involved; or perhaps both.

This court has consistently and most properly said that when there is a doubt of our jurisdiction we must refuse to act or to presume we have it.

I submit with respect that there is the gravest doubt of our jurisdiction.

As germane to what I have already said of the constitutional models and problems involved in the framing of the "British North America Act," and the inherent improbabilities of such a thing being attempted as the creation of our court with such powers, I might be permitted to refer to the history of such references in the United States. In my opinion on the *"Lord's Day" Case* (1), I referred thereto, and now make the further reference to Black on Constitutional Law, p. 84, where a further collection of authorities may be found.

These all indicate that short of an express authority engrafted as it must in all such cases be in the State Constitution, and adopted by a direct vote of the people, such a thing is non-existent in that country and in a most restricted form even in the few cases permitted.

We know we are much indebted to the experience of that country for the form of government we in Canada enjoy. I think we can, despite what may have been said to the contrary, in arriving at the true interpretation of our "British North America Act" (brought into being when civil war there had become an object lesson which bore fruit in the form of federation

(1) 35 Can. S.C.R. 581.

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adopted by that Act) especially on questions of this kind, receive most useful lessons both of instruction and warning from the experience of that country and from many of its master-minds that have dealt with the solving of such problems as are now presented to us.

When one has pondered over the constitutional problems they have been engaged with, the solution of and the long time it has taken to solve some such questions as propounded to us herein which we are expected to do within a few weeks, one must feel the wisdom of making haste slowly.

Our Constitution like that of the United States, consists largely of enumerated subject-matters and powers to be exercised exclusively in respect of same without any attempt at definition of how or how far by federal or provincial authority respectively.

I may be permitted in relation thereto to draw from one of the sources I have indicated an enunciation of principles that are worth considering.

That great judge, Chief Justice Marshall of the United States Supreme Court, whose long life-work was taken up in a great part with solving problems arising out of such conditions, in one of his judgments in speaking relatively to this feature which is common to our "British North America Act" and the Constitution of the United States, said:—

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.

And speaking of the constitutional question then before him, he says:—

> In considering this question, then, we must never forget that it is a *constitution* we are expounding.

It has been said that it is quite competent for Parliament to impose upon this court any duty it sees fit, and the election case of *Valin* v. *Langlois*(1), (from which judgment leave to appeal was refused (2), is relied upon.

I am quite unable to see any analogy, in some of these submissions to that case.

That case would go a long way to maintain the proposition that any judicial duty within the competence of Parliament to create might be imposed upon us but falls far short of what is involved in some of these questions submitted.

Can Parliament constitute this court a tariff commission, a civil service commission, a conservation commission, a department for the management of any of the affairs of state, or an adjunct to any of the departments discharging such duties, or an advisory adjunct to the provincial courts?

It matters not to reply that these things are unlikely to be proposed.

It is a bare question of the power to impose any other than a judicial duty and that relative to the laws of Canada. When argument goes beyond that limit any one of these extreme questions is an apt answer to such a pretence.

I do not deny for one moment the competence of Parliament to constitute a Board for any one of these suggested purposes or to annex thereto an advisory

(1) 3 Can. S.C.R. 1. (2) 5 App. Cas. 115.

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committee for purposes of inquiry into and answering questions of law.

But I do say that no such or the like duties can be imposed upon this court. And I most respectfully submit (if we bear in mind not only that it is a constitution we are expounding but one as clear as any thing can be, not entirely written in express words, but to be inferred from the nature of things as understood by the highest authorities and the language of the "British North America Act" itself), that it clearly would not be any more competent for Parliament to do so than to constitute the Minister of Justice the supreme court.

The legislative, executive and judicial functions of government must be kept separate if we are to maintain the principles of government we enjoy, and which it was intended we should enjoy.

If we degrade this court by imposing upon it duties that cannot be held judicial but merely advisory and especially in the wholesale way submitted herein, we destroy a fundamental principle of our government.

I am speaking of jurisdiction. I am dealing with the power of Parliament relative to the constitution of a judicial tribunal.

The production of a thesis on such subjects as involved in some of the questions submitted, which can only be answered in some such form, might be a profitable mental exercise but seems beyond the scope and purview of anything permitted by the "British North America Act" as part of any judicial duty.

To any one who supposes all or any of these suggestions as to the duty we are asked to undertake as fanciful, let him turn to the hypothetical questions put, and some that are not so purely hypothetical, but

all intended to be disposed of on an *ex parte* argument decisive of the right of nine provinces to legislate on a variety of subjects. Let him turn to the cases giving rise to some few of the many contentions involved, and having read them and considered, again read these questions.

Is there not involved, in the very essence of what is attempted, the taking away of men's rights or liberties without due process of law?

Was the doing of that not the fundamental reason that led to the remonstrances that brought about the granting of the great charter that such things should not thenceforth be done?

It seems to me so and in the highest sense there can never be supposed to have been or to be any implication justifying such a thing as possible within the powers to be used for the peace, order and good government of Canada.

The Manitoba School Case (1), was relied upon.

That case and the legislation anticipating it of which section 60 is now the substitute in a more extended form was a disposition by this means of the discharge of a judicial duty or quasi appellate judicial duty, which was cast upon the Governor-General in Council by the "British North America Act."

Parliament was held to have a right to delegate the discharge of part of that duty to this court. It was and is an entirely different question from what arises here.

It has no relation to what arises herein. If the mere statement of the legal facts relative to each of these two classes of cases cannot be grasped so that

(1) 22 Can. S.C.R. 577.

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their distinction becomes thereby clear, it would, I fear be hopeless to make anything I have said understood.

In the one case we have a duty expressly cast by the "British North America Act" upon the authorities which have to deal with both the adjudication and the execution of the judgment, and these same authorities may well be implied to have inherently possessed the means of disposing of such an appeal to be resolved in some way. In the other there is not in the slightest way any express duty cast upon the Dominion to delimit the sphere of action of the provinces. And nothing in that regard is implied save by virtue of section 101. And there is nothing that can be reasonably implied therein of an extra-judicial nature. There is, therefore, nothing to rest upon as in the other case any shadow of excuse for claiming the like right or power relative to this court.

Again it is said that it need not be an *ex parte* argument for this court can designate some counsel to represent the provinces or any one concerned in spite of them and their resolve not to appear.

I mention it lest my repeated reference to the *ex parte* nature of the kind of proceeding taken should lead any one to suppose I had overlooked this.

If any one thinks that or the exercise of that supposed power can render the proceeding any other than *ex parte* in every essential, then I most respectfully submit he has failed to grasp the nature of the problems to be solved.

When the provinces have done their best and exercised the greatest care and study of the facts and the operation of the conditions to be understood if a right conclusion is to be reached one may well doubt if it is

possible to find continuously existent that depth of insight into the future to reach right conclusions. A direct specific power of supervision by means of the veto is assigned to the Dominion as the corrective of any presumption on the part of any provincial legislature to exceed its powers. Does not that direct power exclude the adoption of any indirect method such as the expedient now in question? A workable conclusion can never be reached save by the slow methods that from time to time have been exercised to solve other questions of law and liberty by a treatment of concrete cases as the occasions arise.

In referring to the history of the "British North America Act," the improbabilities that history suggests relative to its scope and purposes and the inconveniences and considerations of the possible consequences of any such mode of proceeding as now in question as proper to be had in view in arriving at the true interpretation of the powers it confers or fails to confer, I may be told this Act is a written instrument that must be construed by what it contains.

I agree it is so to a certain extent and I think I have demonstrated from what it contains the absolute negation of any such power of interference with the exercise of the powers of the provinces as claimed herein. But beyond that when and where the terms of the instrument may be found ambiguous we must, I submit, approach its interpretation somewhat after the fashion or in the like manner in which we approach any other written instrument of ambiguous import and have as its surrounding circumstances, regard to its origin, its general character and purposes and then these considerations I have adverted to may well be borne in mind.

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When we turn our attention to the omission to define in detail the enumerated powers as already referred to and the omission of much more I have not referred to, the careful student will find much need for a knowledge of history and especially of constitutional history to aid him in the interpretation of this instrument.

In conclusion I hold that if we have jurisdiction we are in duty bound to answer so far as our knowledge and understanding enable us to.

I hold further that if in our collective view it is held or if any of us in his individual view holds we have no jurisdiction to answer and Parliament no power to give that jurisdiction, we are, and each of us is, in duty bound to say so, and abide by that position until the court above has on appeal decided otherwise.

DUFF J.—The objection taken *in limine* by the provincial governments is that the questions in so far as they expressly call for an expression of opinion respecting the extent of the legislative powers of the provinces are such as Parliament has no authority to require or authorize this court to answer. I think it cannot be disputed that Parliament might constitute a body (whether described as a court or not) empowered to exercise a purely consultative jurisdiction in respect of questions touching the limitations imposed upon the legislative powers of the Dominion or the provinces in respect of any given subject. This authority would seem to be a necessary adjunct to the legislative authority with which Parliament is invested — limited as it is (within the boundaries of Canada) by reference to the powers conferred upon the local legislatures. Subject

to some limited exceptions (with which we are not here concerned), full legislative authority within Canada is divided between Parliament and the provincial legislatures. All such authority as is not given to the legislatures is vested in Parliament. In most cases in which controversy arises respecting the limits of Dominion legislative authority the limits of provincial authority are to a greater or less extent involved. Very obviously, I should think, it must frequently be desirable if not absolutely essential that Parliament be in a position to inform itself as thoroughly as possible in advance of legislation upon any particular subject, not only how far its own powers extend in reference to that subject but what authority may be lawfully exercised by the provinces in relation to it. Parliament may desire in some cases to legislate to the full limit of its own powers. In other cases it may be desirable that as far as possible legislative action in given conditions should be left to the local legislatures. In all such cases the advantage of trustworthy legal advice respecting the constitutional authority of the Dominion and the provinces respectively must be evident. It seems, therefore, to be outside the range of dispute apart from any special provision that authority to take such steps must be regarded as involved in the grant of the legislative powers conferred upon Parliament. The substantial question presented by the appeal is whether there is anything in the character of this court as a "general court of appeal for Canada" established under section 101 of the "British North America Act" which is necessarily incompatible with the exercise of the functions that section 60 of the "Supreme Court Act" professes to require the court to perform. In other

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words, is there anything in section 101 which by necessary implication prohibits the exercise of such functions by a court of general appeal for Canada established under it?

I am not able to reach the conclusion that the constitution of a general court of appeal for Canada under this section would necessarily involve the exclusion of such a jurisdiction. The jurisdiction conferred by section 60 is consultative merely. The advice although expressed in the form of a judgment and given after argument, is not a judicial deliverance of this court as a court. It is consequently not binding on anybody—neither upon the government asking for advice nor upon interested parties, who take part in the discussion. The opinions expressed do not, in my judgment, constitute judicial precedents by which this court in the exercise of its jurisdiction under section 101 can be bound or by which any court whose judgments are appealable to this court can be bound.

I do not think that the connotation of the term "general court of appeal for Canada" involves any interdiction upon the exercise by that body of such extra-judicial functions. Under the constitution of the United Kingdom (and the first paragraph of the preamble of the "British North America Act" discloses the intention that the Constitution of Canada shall be similar in principle to that of the United Kingdom) the business of judicature is and has always been performed by bodies and persons invested with other powers, legislative, administrative or consultative. The highest court of appeal in the United Kingdom is a legislative body. Some of the powers of the High Court of Justice are really administrative powers formerly exercised by the Lord Chancellor in his ad-

ministrative capacity. Even habeas corpus seems to have been thought by an eminent judge (Lord Bramwell in *Cox* v. *Hakes*(1), at pages 525-6) not to be an act of judicature. The Lord Chancellor has been a member of the cabinet since cabinets existed, and has always exercised wide administrative powers. The common law judges have always been subject to be summoned by the peers to advise upon questions of law. The High Court of Justice in one instance at least (under section 29 of the "Local Government Act," 1888), exercises a purely advisory jurisdiction, *Ex parte County Council of Kent* (2). There is nothing then in the fact that this court is a court which according to traditional British notions is necessarily inconsistent with the exercise of such duties. Nor do I think there is anything in the circumstance that the court, as constituted under section 101, is a court of appeal. The "Supreme Court Act" confers or professes to confer upon the judges of this court jurisdiction in habeas corpus where the question involved relates to criminal proceedings under a statute of the Parliament of Canada; and I do not think the validity of this provision has ever been questioned. I have mentioned the Lord Chancellor, and the House of Lords; and even the High Court of Justice now exercises appellate jurisdiction. In none of these cases, as I have pointed out, has the exercise of legislative administrative or advisory functions been regarded as incompatible with the judicial character of the body exercising those functions.

The objection to some extent is also rested upon section 92, sub-section 14, of the Act. I quite agree

(1) 15 App. Cas. 506. (2) [1891] 1 Q.B. 725.

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that if section 60 on its true construction required this court to do any act directly affecting the action of the courts of any of the provinces in respect of such a question either by way of declaring a rule which those courts should be bound to follow or creating a judicial precedent binding upon them, or upon this court in its capacity as a court entertaining appeals from the provincial courts under section 101 or imposing on this court any duty incompatible with the due exercise of its jurisdiction in respect of such appeals—such for example as pronouncing, *ex parte,* at the behest of the executive upon a question raised, *inter partes,* in such an appeal — I quite agree, I say, that if that were the effect of section 60 then the validity of that section might be open to objection as Dominion legislation professing to deal with the subject of the administration of justice in the provinces after a manner not justified by the "British North America Act." But I do not think the submission (for advice) of questions relating to the legislative jurisdiction of the provinces or the giving of such advice necessarily constitute such an interference with the administration of justice.

I should, perhaps, add that I do not wish to be understood as expressing any opinion upon the propriety of the questions now before us. I confine myself to the precise point raised by Mr. Nesbitt.

ANGLIN J.—If the jurisdiction of the Parliament of Canada to enact it depended solely upon section 101 of the "British North America Act," I am not certain that section 60 of the "Supreme Court Act" would be *intra vires.* The duties which it imposes do not appertain to the work of "a general court of appeal for

Canada"; and the constitution of this court "as an additional court for the better administration of the laws of Canada" (Sup. Ct. Act, sec. 3), I incline to think, contemplates its having jurisdiction to interpret, apply, and carry out (administer) such laws rather than to act as the adviser of the executive, or of Parliament, or its component branches, upon questions of jurisdiction to enact prospective legislation (sec. 60 (*d*)). It may be that, having regard to the preamble of the "British North America Act," the power to create a court involves the right to impose upon it the duties prescribed by section 60 and that, *ex vi termini*, when constituted it is endowed with the powers necessary to enable it to discharge such duties. But such implied or inherent jurisdiction, whether legislative or judicial, is apt to prove, like public policy, "a very unruly horse." Its limits are vague and ill-defined. It may become a specious pretext to cloak an unwarranted assumption of power. I prefer to rest my opinion that section 60 of the "Supreme Court Act," is *intra vires* upon the provision of section 91 of the "British North America Act," empowering Parliament

> to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

In section 92, which deals with the "exclusive powers of provincial legislatures," I find no subject enumerated with provincial jurisdiction over which anything in section 60 of the "Supreme Court Act" could be deemed an interference. It has been argued that the administration of justice in the provinces(1)

(1) Section 92, sub-section 14.

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would be affected by the exercise by this court of the jurisdiction which section 60 purports to confer. If Parliament had attempted to give to opinions of this court thus obtained the effect of judgments *inter partes,* there would be much force in this contention, because, assuming the validity of the legislation, provincial courts might then properly deem themselves bound to regard such opinions as binding upon them. But the express declaration that, except for purposes of appeal to His Majesty in Council, the opinion of the court on any reference under section 60 is "advisory only" (sub-section 6), denudes it of all the other notes of a judgment of this court sitting as "a general court of appeal for Canada," leaving this court itself and every other court throughout the Dominion—inferior as well as superior—free to disregard it. The views of members of this court upon the character and effect of their answers to questions referred to them under section 60 have been expressed in several cases: *Re Provincial Fisheries* (1) at page 539; *Re Sunday Labour Legislation* (2); *In re Criminal Code* (3). I therefore fail to perceive in the impugned legislation any interference with "the administration of justice in the provinces." On no other ground was it suggested that section 60 invaded the field of legislation exclusively assigned to the provinces.

The words of the "British North America Act," empowering Parliament to make laws for the peace, order and good government of Canada,

are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to. *Riel* v. *The Queen* (4), at page 678.

(1) 26 Can. S.C.R. 444.
(2) 35 Can. S.C.R. 581.
(3) 43 Can. S.C.R. 434.
(4) 10 App. Cas. 675.

Lord Chancellor Halsbury, delivering the judgment of the Judicial Committee, further said that their Lordships were of the opinion that there is not the least colour for the contention

> that if a court of law should come to the conclusion that a particular enactment was not calculated as matter of fact and policy to secure peace, order and good government that they would be entitled to regard any statute directed to those objects, which a court should think likely to fail of that effect, as *ultra vires* and beyond the competency of the Dominion Parliament to enact.

Parliament having the responsibility of legislating must be allowed to decide for itself what particular measures are calculated to promote peace, order and good government. If its legislation does not on the one hand trench upon the exclusive domain of provincial legislative jurisdiction and on the other does not overstep the restrictions necessarily flowing from the inherent condition of a dependency, or conflict with paramount Imperial legislation, no court may question its validity, because

> the "Federation Act" exhausts the whole range of legislative power, and whatever is not thereby given to provincial legislatures rests with the Parliament. *The Bank of Toronto* v. *Lambe*(1), at page 588;

and "when acting within the limits" of its jurisdiction our Parliament

> has and was intended to have plenary powers of legislation, as large and of the same nature as those of the (Imperial) Parliament itself. *The Queen* v. *Burah*(2), at page 904.

That Parliament could have provided for the creation of a body of law officers and have imposed upon it the duty of advising upon such questions (speaking generally) as are now propounded for our considera-

(1) 12 App. Cas. 575. (2) 3 App. Cas. 889.

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tion admits of no doubt. I know of nothing to prevent its requiring the discharge of such duties by lawyers who happen to be members of this court. The wisdom of such legislation as a matter of policy Parliament and not this court must determine.

I am, therefore, of opinion that we may not decline to entertain this reference on the ground that section 60 of the "Supreme Court Act" is *ultra vires* of Parliament.

I reserve consideration of whether and how far each of the several questions included in the present reference falls within the purview of section 60 and can be or should be answered, until we have had the advantage of argument and discussion upon them.

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

AND

THE ST. CATHARINES HYDRAULIC COMPANY (SUPPLIANTS) ... } RESPONDENTS.

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*May 25.
*Nov. 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Lease—Covenant for renewal—Construction.

A lease for 21 years of mill-races and lands on the old Welland Canal contained the covenant that: "After the end of 21 years, as aforesaid, if the said (lessors) do not continue the lease of the said water and works" they would compensate the lessees for their improvements.

Held, Girouard and Duff JJ. dissenting, that at the end of the 21 years the lessees were entitled to a renewal of the term but not to a new lease containing a similar covenant for renewal or compensation. They had a right to renewal or compensation but not to both.

After the original term expired the lessees remained in possession, paying the same rental as before, for a further term of 21 years, no formal lease therefor having been executed and none demanded or tendered for execution. Ten years after the expiration of this second term they were dispossessed and claimed compensation for improvements by petition of right.

Held, that the rights of the lessees were the same as if the original term of 21 years had been formally continued, or renewed, for a further like term.

Held, per Idington J., Girouard J. contra, that the lessees having obtained a renewal their right to compensation was gone.

Per Davies and Anglin JJ.—The lease was probably not renewed within the meaning or the lessor's covenant, but there having been no proof of a demand for renewal and the lessees having remained in possession for the entire period for which they could have claimed a renewal, they can have no right to compensation for improvements. If they ever had such a right in default of obtaining a renewal it is barred by the Statute of Limitations.

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

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APPEAL from a judgment of the Exchequer Court of Canada in favour of the suppliants.

The facts are sufficiently set out in the above headnote.

Dewart K.C. for the appellant. If the contention of the lessees as to the effect of the covenant for renewal is sound the lessees could claim renewal or compensation in perpetuity. This has always been discountenanced by the courts. See *Lewis* v. *Stephenson*(1); *Nudell* v. *Williams*(2); *Sears* v. *City of St. John*(3).

To provide for a perpetual right of renewal the covenant should contain such expressions as "renewal for ever," "renewable from time to time," or others equivalent to these terms. See *Furnival* v. *Crew*(4); *Clinch* v. *Pernette*(5).

Mowat K.C. for the respondents. The lease must be construed most strongly against the appellants.

The word "continue" has been held in covenants similar to that in question here to involve perpetuity. See *Furnival* v. *Crew*(4).

If the language is ambiguous evidence of surrounding circumstances can be relied on to explain it: *Clinch* v. *Pernette*(5); and such evidence shews that the parties intended a succession of renewals.

See also Taylor on Evidence (10 ed.), sec. 1198.

GIROUARD J. (dissenting).—I dissent for the reasons given in the court below.

(1) 67 L.J.Q.B. 296.
(2) 15 U.C.C.P. 348.
(3) 18 Can. S.C.R. 702.
(4) 3 Atk. 83.
(5) 24 Can. S.C.R. 385.

DAVIES J.—I concur in the opinion of Mr. Justice Anglin.

IDINGTON J.—In *Hyde* v. *Skinner*(1), (decided so long ago as A.D. 1723), which was the case of a claim by an executor of a lessee for a renewal of a lease, which the lessor had covenanted to renew at the same rent and on the same covenants upon the request of the lessee, who had laid out a considerable sum of money in improving the premises, and where the executor had within the term requested the lessor to make a new lease for fifty years, the court said

> the meaning of this covenant was to the end the lessee might be reimbursed the money which he had laid out in improvements of the premises for which reason it is immaterial whether the testator or the executors required the renewal.

And the court directed a renewal for the term of twenty-one years being a usual term, but held that though it had been covenanted that it was to contain the same covenants that could not extend to the inserting a covenant for another renewal.

From that time to this the holding has been almost uniformly against the insertion in the renewal lease of such a covenant unless the language used in the contract expressly or by very clear implication shewed such was the intention of the parties.

I have looked at all the cases upon which respondent relied in argument and a very great many more to see if there was authority for the contention of perpetuity or the more moderate claim, which I was inclined to think might appear, that the renewal lease if executed would likely if settled by a court have been

(1) 2 P. Wms. 196.

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directed to have inserted therein the same as that in the lease in question and which I am about to quote.

I can find no authority to support herein any such proposition as either I suggest.

The case of *Swinburne* v. *Milburn*(1), is illustrative of the modern way of looking at such a covenant and contains references to the leading authorities on the subject and indicates no material change of view from the old one I have referred to.

The lease in question herein was for twenty-one years "renewable as hereinafter provided."

The only provision making any further reference to the subject is the following:

> And, it is further agreed by and between the parties to these presents, that after the end and term of twenty-one years as aforesaid, if the said Commissioners or their successors in office shall or do not continue the lease of the said water and works to the said parties of the second part or their assigns that they the said Commissioners or their successors in office shall pay the said parties of the second part, or their assigns or any person or persons making erections under them with their consent, the full amount of their expenditure, or the value of the same, for the construction of any race or water course, lands, mills and mill houses, or any other tenement with their machinery and appurtenances thereto in any wise belonging, the same to be determined by arbitrators mutually approved of by the parties to these presents, each choosing one man and they the third, when the said parties of the second part and the parties making erections under them as aforesaid, or their assigns, shall upon receiving payment in full for the erections and appurtenances so arbitrated for as above, assign and surrender to Her Majesty the Queen, or her heirs and successors, all their right, title and interest thereto, whether in lands, buildings or other erections.

It seems to me the utmost that can be made of this covenant illuminated if possible by the preceding phrase is a covenant for a single renewal and no more.

The authorities would not have carried the parties or committed them further.

(1) 9 App. Cas. 844.

Such a renewal lease, I repeat, could not, against the will of the lessors, have the renewal of this covenant inserted therein.

There is thus no right to any relief by way of compensation for improvements made during the second term (if we are to hold there was in fact a second term as I think we may on the principle that equity looks on that as done which ought to have been done), or for the years since its expiry.

The lessees in short had a right to expect compensation if they did not enjoy a second term. If the lessors did not permit the enjoyment of the second term by way of compensation for the improvements theretofore made by the lessees they were to be compensated therefor.

The lessees continued in undisturbed possession of the property and paid the same rent which relatively speaking and having regard to lessor's expenditure on the premises was almost nominal.

The lessees or one of them says in a letter written the Department in charge, and put in without objection I infer, that he had some years previously asked orally for a renewal lease, but was told it could not be granted until the new canal line "was definitely settled" and would like some modification if and when made out. That was replied to as follows:

June 12th, 1880.

Sir,—In reply to your letter of the 8th ult. wherein you apply on behalf of the St. Catharines Hydraulic Company for a renewal of their lease bearing date 14th of May, 1851 (and numbered 1420), as modified by certain changes which you desire to make in the wording thereof, I am directed to inform you that before the terms of the present lease can be altered in any way, the proposed changes must first be submitted for the approval of and be settled by this Department; and if material in character may even require the sanction of an Order-in Council. However, nothing can be done

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with reference to the matter until you have furnished for the information of the Department a statement of the changes required and the names of those at present entitled to hold under the said lease.

I am, Sir,

Your obedient servant,

(Sgd.) F. BRAUN,
Secretary.

Every one seemed to assume the lessees not only had a right to renewal but were enjoying it.

That changes incidental to the projected changes in the canal which were referred to might have required modification is all that was said. No one ever refused them a renewal. They made no tender of a renewal lease. And wherein is there a breach of the covenant above quoted ?

On what principle can the lessees receive anything ?

The covenant was that if the lessors did "not continue the lease of the said water and works," the lessors should pay for something described of which the value was to be fixed by and in the method specified and upon the terms specified.

It does not say how the lease was to continue. It does not say it shall be in writing so continued or how. It does not say whose duty it was to prepare or settle the said lease if presumed to have been intended to be in writing.

Are damages for breach of this covenant to be awarded though the covenant never was broken ?

It seems to me a singular sort of claim. The enjoyment of the lease for another term was the compensation the parties intended to be given. It is just as clear to my mind as the court found and expressed a hundred and eighty years ago in the case I first cited, though the idea of compensation being basis of

claim to remuneration was not there reduced to such explicit terms as used here.

The reduction to writing of what the parties really were about should not alter the thing itself.

It is said this compensation is to be made for what was done nearly forty years ago and possibly sixty years ago.

And why? Because the lessees relying on the honour of the lessors did not bother their heads to get a writing made out; and never specified the changes wanted, but doubtless enjoyed them all the same.

They have got what they contracted for and if for an instant they had supposed themselves in the slightest degree put in peril I do not think we would have found the files so barren of complaint as they seem when emptied into this case indiscriminately as it seems to have been done.

But why if there was a refusal and semblance of a foundation for what is now set up was there nothing done to bring about an arbitration? It was by means of an arbitration the amount to be paid was to have been fixed. It was only on the payment of that so arbitrated about that the lessees' possession could have been disturbed.

The chances are that if such a thing had ever been dreamed of as disturbing these lessees we would have some evidence of it.

There is not a shadow of such a thing. On the contrary after nearly sixteen years of this renewal term had run, the Government wanting to anticipate for some reason its expiry sent its officer to negotiate for the surrender of the term.

It is thus plainly written that no one thought of disturbing the lessees for a moment.

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It might pay to be rid of them for it turned out they were making a surplus of rents every year and by reason of the changes in the canal were getting a better bargain than they had anticipated, but as nothing was said when second term began could not be asked now for increased rent. See letter of Mr. Fissieault of 26th August, 1887.

It is urged that by reason of the term not having been fixed definitely the lessees have suffered. I find nothing to prove such a claim and have no doubt every one knew the term was as certain as if in writing.

Provisionally $21,000 was fixed upon by the negotiations, but evidently either such a price was more than worth while giving or that the proposal could not stand fire in the House of Commons and had to be dropped.

Now this incident is put forward as giving some sort of confidence in support of the claim made.

To my mind that story shews clearly enough all concerned knew the lease must run until the 1st January, 1893.

The utmost a renewal lease could have given bearing on the point of compensation would have been the insertion which I have shewn to be against authority of a covenant identical with the above. Assume it done, how could any action on such a covenant relate back to and indemnify for what had been done during a prior term?

Are the lessees to be better off than if they had got a formally executed lease with such a covenant ? Yet such is the effect of the judgment.

Not only do they thereby get what such a second lease would have given, but after enjoying it they are to have added thereto the compensation they were to have got if they had not enjoyed it.

And subject to what in such a case should go into the lease the rights of the parties should be so treated accordingly.

It is clear that the issue of specific performance at the time could have been foiled by relying upon the covenant which left only one escape and that was arbitration and compensation or specific performance.

How can those who omitted that, now claim on flimsy evidence relied on here, that there was a breach of the covenant ?

The Statute of Limitations it seems to me ought to have been pleaded against such a stale claim.

For some good reason possibly, though not disclosed, it was not.

If for greater safety it is desired now to plead the Statute of Limitations, I think it ought to be permitted but on payment however of all costs since the filing of defence.

But for the reasons I have set forth I have failed to find that breach of covenant that alone can lay any foundation for any assessment of damages and the appeal should be allowed and action dismissed with costs.

DUFF J.—Upon my construction of the original lease — if the landlord elected not to pay compensation for improvements at the end of the term — the lessee thereupon became entitled to a renewed lease containing the covenants of the old lease including that respecting compensation for improvements. I am not at all in agreement with the assumption that the covenant now under consideration is (for the purpose of ascertaining what were to be the covenants of the renewed lease) to be treated as that of a simple

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covenant for renewal. The rule that such a covenant for renewal is not reproduced in the subsequent lease (under a general covenant that the subsequent lease shall contain all of the covenants of the original lease) has been put on various grounds. In *Harnett* v. *Yielding*(1) such a covenant (for renewal) was held by Lord Redesdale not to be a covenant incidental to the enjoyment which was said to be the test to be applied for determining whether a particular covenant was to be inserted in the renewed lease. In *Iggulden* v. *May*(2), the rule was put by Lord Ellenborough on the ground that if so extraordinary a thing as a right of perpetual renewal was to be granted the intention would have been marked by some unequivocal words as "from time to time." In *Lewis* v. *Stephenson*(3) [Bruce J.] it is said that the rule may be put upon the ground that "the renewal of a lease," in its strict literal terms, means the renewal of the same term for the same period. In *Swinburne* v. *Milburn*(4) the rule is put by Lord Blackburn on the ground that the perpetual right of renewal is so unusual that a heavy burden rests upon him who asserts a right to it; and much to the same effect are the views expressed by Lord Fitzgerald.

I am unable to find one among these grounds applicable to the covenant under consideration. If we take the reasoning of Lord Redesdale, which perhaps is the true foundation of the rule, can it be fairly said that the payment of compensation is not incidental to the enjoyment as much as, let us say, the covenant to leave in good repair ? Or that of Lord Blackburn or of Lord Ellenborough — what unusual thing is there

(1) 2 Sch. & Lef. 549, at p. 556.
(2) 7 East 237, at p. 242.
(3) 67 L.J.Q.B. 296.
(4) 9 App. Cas. 844.

about such a covenant as that which we have before us? There is in this covenant nothing necessarily importing perpetuity: there is nothing remarkable, nothing out of keeping with the ordinary provisions of ordinary leases. And if the observation of Mr. Justice Bruce has any force as applied to a covenant to pay compensation, it seems equally applicable to many other covenants admittedly falling within the contemplation of such a covenant as that before us.

There remain some subsidiary points. It is too late — the Crown having with the lessees acted on the assumption of the existence of a second term — to raise the question of want of authority. The Statute of Limitations cannot, I think, avail because it seems to me we must treat the situation as if a lease had actually been executed; and, moreover, I do not agree that it is a proper case for an amendment at this stage, no application having been made even on the hearing of the appeal. The Crown stands, therefore, in the same position as if at the end of a second term there had been improvements executed under a covenant in a lease for that term. Such a covenant in the same form as that in the original lease would not apply to improvements made during the first term; and the right of recovery must therefore be limited to compensation for improvements during the second term.

There should, I think, be judgment for the value of such improvements to be ascertained in the usual way if the plaintiff chooses to take the reference — costs to be reserved.

ANGLIN J.—Having regard to the facts that the term demised to the respondents was for twenty-one years "renewable as hereinafter provided," and that

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the only other reference to renewal in the lease is in the words, "if the said Commissioners or their successors do not continue the lease of the said water and works," found in the clause respecting compensation, I am of opinion that the word "continue" was used as the equivalent of "renew" and must be given that meaning. The continuance contemplated was not indefinite, but was in the nature of a renewal and, in the absence of a designation of any other period, for a further term of the same duration as that originally created — 21 years. *Price* v. *Assheton* (1).

I am further of opinion that the lessees would not have been entitled to the insertion in a renewal lease for such further term of an agreement for payment of compensation for improvements in default of a further renewal. The agreement in the original lease is that such compensation will be paid by the lessors, if they "do not continue the lease" — "after the end and term of twenty-one years as aforesaid." That means that the lessees shall have either a renewal or compensation — not both, but one or the other. Upon a renewal being granted the right to compensation would be extinguished. It follows that if the lessees have had a renewal for a term of 21 years they have had all that they are entitled to and cannot have any valid claim for compensation.

If, on the other hand, the proper conclusion upon the evidence is that there was no renewal of the lease, two questions arise: The first, had the lessees, without a demand for renewal and refusal or neglect by the lessors to comply therewith, an enforceable claim for compensation for improvements; the second, if they

(1) 1 Y. & C. (Ex.) 82.

had such a right of action, has it been barred by the Statute of Limitations ?

The original term expired in 1872. In 1880 the lessees, having had no renewal lease, made application to the Crown for renewal, but with some modifications which they spoke of as "trifling changes" in the description of the leasehold property. No definite reply was made to their request for renewal; but they were informed that

> before the terms of the present lease can be altered in any way the proposed changes must first be submitted for the approval of and be settled by this Department; and if material in character may even require the sanction of an Order in Council. However, nothing can be done with reference to the matter until you have furnished for the information of the Department a statement of the changes required and the names of those at present entitled to hold under the said lease.

So far as appears by the correspondence in evidence, the lessees did not, otherwise than by the letter of 10th November, 1880, which was apparently not answered, specify "the changes required." They were perhaps not called upon to prove tender of a formal lease for execution (*Cantley* v. *Powell*, 1876 (1)); but, having asked for a renewal with modifications, they should not only have proved that they had complied with the lessors' request for a statement of the changes required — but they should also have established that these changes were such as they were entitled to ask for. In the absence of such evidence no proper demand for a renewal lease is shewn.

The provision for renewal or compensation in the alternative was for the benefit of the lessees. While the lessors had the right to elect either to renew or to compensate, the lessees, on the other hand, were not

(1) Ir. R. 10 C.L. 200.

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bound to take a renewal: rather than do so they might forego their claim to compensation. I am, therefore, of the opinion that, as a first step towards establishing a right to compensation from the lessors for improvements, the lessees should have shewn that they had demanded such a renewal lease as the lessors had agreed to give them if unwilling to pay compensation for improvements. Not only does the evidence not prove such a demand, it shews a request for a renewal with changes, which, *primâ facie,* the lessees had not the right to ask, and, if anything, an unwillingness on their part to accept such a renewal as the lease provided for. I assume that in 1880 they were still entitled to demand a renewal lease for the remaining 13 years of the second term of 21 years. *Buckland* v. *Papillon*(1); *Moss* v. *Barton*(2).

The correspondence indicates that the lessees dealt with their sub-lessees as if they had not obtained a renewal. In 1883 the assistant engineer of the Department of Railways and Canals reported against giving a renewal of the lease. A similar report was made by him in 1887. Inquiry being then made by the Department of its legal officer whether, if the lease were renewed, the rental could be increased, a reply was given that if a renewal should be sought after the 1st Jany., 1893 — when the second term of 21 years would expire — an increased rental and other conditions might be imposed by the Crown. Whereupon, on the 15th Oct., 1887, the officers of the Department appear to have reached the conclusion, stated in a departmental memorandum, that "the lease may continue to the end of the second 21 years * * * the lessees to

(1) 2 Ch. App. 67. (2) 35 Beav. 197.

be notified one year before the 1st Jany., 1893, that their lease will then mature and will cease after 1st Jany., 1893." There is no evidence that this conclusion was ever communicated to the lessees. They were, however, written on the 11th June, 1892, that their lease had been

granted for a term of 21 years renewable for a second term of 21 years which term will expire upon the 1st Jany., 1893. You are, therefore, hereby notified that this Department will not continue the said lease beyond the expiration of said term ending upon the 1st Jany., 1893.

In acknowledging this letter the lessees asked for the appointment of some suitable person to confer with them with a view of arranging compensation for improvements. The Department appointed Mr. Douglas for this purpose. As a result of negotiations which ensued a provisional agreement was arrived at — but, though recommended to Council for approval and apparently approved, that agreement was never carried out and, like an earlier similar agreement of 1888, seems to be unenforceable.

The lessees retained possession, paying rent according to the terms of the original lease of 1851, until dispossessed by the Crown on the 1st Jany., 1903.

Upon the whole evidence I incline to the view that, as alleged by the petitioners in the 10th paragraph of their petition, "the said lease * * * was never renewed or continued" within the meaning of the phrase "continue the lease" in the compensation clause. They further allege that "those under whom your suppliants claim thereupon became entitled to * * * the compensation provided for in the said lease." At bar in this court Mr. Mowat maintained that this was in fact the position. The compensation clause in the original lease had no application to the tenancy from

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year to year which probably subsisted after the 1st Jany., 1872. If without demand for a renewal a right to compensation could arise, it would have accrued at, or within a reasonable time after the expiry of the first term; the right of action, if any, accrued at the same time. In this aspect of the case the right of the respondents to compensation has long since become barred by the Statute of Limitations, the mere fact that they retained possession not preventing its running; and the Crown should not be precluded from setting up this meritorious defence.

But, for the reasons I have already indicated, I am, with respect, of the opinion that, in the absence of evidence of a demand for a renewal pursuant to the terms of the lease, the petitioners have failed to establish an enforceable claim.

This appeal should therefore be allowed and the petition should be dismissed with costs; but if the appellant desires to amend by setting up the Statute of Limitations, that may be done only on payment of all costs subsequent to delivery of the statement of defence.

Appeal allowed with costs.

Solicitor for the appellant: *H. H. Dewart.*

Solicitor for the respondents: *H. M. Mowat.*

THE TOWN OF OUTREMONT (PLAINTIFF) ..... APPELLANT:

AND

ALFRED JOYCE (DEFENDANT) ..... RESPONDENT.

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*Oct. 4.
*Nov. 2.

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

Appeal—Jurisdiction—Matter in controversy—Instalment of municipal tax—Collateral effect of judgment.

In an action instituted in the Province of Quebec to recover the sum of $1,133.53 claimed as an instalment of an amount exceeding $2,000, imposed on the defendant's lands for special taxes, the Supreme Court of Canada has no jurisdiction to entertain an appeal although the judgment complained of may be conclusive in regard to the further instalments accruing under the same by-law which would exceed the amount mentioned in the statute limiting the jurisdiction of the Court. *Dominion Salvage and Wrecking Co.* v. *Brown* (20 Can. S.C.R. 203) followed.

MOTION to quash an appeal from the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, which dismissed the plaintiff's action with costs.

The action was for the recovery of $1,133.53 claimed by the town corporation as the amount of an instalment of taxes extending over a period of twenty years (which, in gross, exceeded $2,000) imposed on the lands of the defendant as a special tax for the improvement of the highways of the municipality. The action was dismissed by the Superior Court, at the

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

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trial, and the appeal was asserted from the judgment of the Court of King's Bench affirming this decision.

The questions raised on the argument of the motion are stated in the judgment of the Chief Justice now reported.

L. H. Davidson K.C. for the motion.

Beaubien K.C. contra.

THE CHIEF JUSTICE.—This is an action brought to recover a sum of $1,133.53 alleged to be an instalment due on a larger amount for municipal taxes, which, it was said at the argument, is within the appealable limit. The defence is based on grounds that involve the liability of the respondent for the whole assessment, and the judgment appealed from is conclusive on the liability in any action for the other instalments. By the conclusion of the declaration the appellants have with much care limited the matter in controversy in this proceeding to the amount of the one instalment due ($1,133.53), and they could not, if successful, get judgment for more. The statute enacts:

> No appeal shall lie wherein the matter in controversy does not amount to the sum or value of two thousand dollars,

and we are, therefore, without jurisdiction to entertain this appeal.

The motion to quash must be granted with costs.

See hereon *Dominion Salvage and Wrecking Company* v. *Brown*(1).

GIROUARD and DAVIES JJ. agreed in the opinion stated by the Chief Justice.

(1) 20 Can. S.C.R. 203.

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IDINGTON J.—I am unable to distinguish this from many other cases in which jurisdiction has been denied merely because the immediate sum or instalment did not reach the minimum sum limiting jurisdiction, though it might seem probable that a decision as to one instalment might ultimately have more or less effect on the recovery of others besides, and all making a total far exceeding the said minimum sum.

The motion to quash should, therefore, prevail.

DUFF and ANGLIN JJ. concurred in the opinion of the Chief Justice.

Appeal quashed with costs.

Solicitors for the appellant: *Beaubien & Lamarche.*
Solicitors for the respondent: *Davidson & Ritchie.*

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*Oct. 18, 19.
*Nov. 2.

THE SAWYER & MASSEY COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

THOMAS G. RITCHIE (DEFENDANT) .. RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Contract—Implied warranty—Fitness of machinery—New agreement —Breaches prior to new contract—Relinquishment of rights under former agreement.

R. & N. purchased threshing machinery from the company, in Nov., 1906, under an agreement similar to that in part quoted below, and gave notes for the price. They dissolved their business connection, after using the machine for some time, and, in March, 1907, after the threshing season was over, N. was released from his obligations under the agreement, the notes signed by R. & N. were cancelled, and R. gave the company his own notes in their place and entered into a new agreement containing the following provisions: "The said machinery is sold upon and subject to the following mutual and interdependent conditions, namely: It is warranted to be made of good material and durable with good care and with proper usage and skilful management to do as good work as any of the same size sold in Canada. If the purchasers after trial cannot make it satisfy the above warranty written notice shall within ten days after starting be given both to the company at Winnipeg and to the agent through whom purchased, stating wherein it fails to satisfy the warranty and reasonable time shall be given the company to remedy the difficulty, the purchasers rendering necessary and friendly assistance together with requisite men and horses; the company reserving the right to replace any defective part or parts; and if the machinery or any part of them cannot be made to satisfy the warranty it is to be returned by the purchaser free of charge to the place where received and another substituted therefor that shall satisfy the warranty or the money and notes immediately returned and this contract cancelled neither party in such case to have or make any claim against the other. And if both such

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

notices are not given within such time that shall be conclusive evidence that said machinery is as warranted under this agreement and that the machinery is satisfactory to the purchasers. If the company shall at purchaser's request render assistance of any kind in operating said machinery or any part thereof or in remedying any defects such assistance shall in no case be deemed a waiver of any term or provision of this agreement or excuse for any failure of the purchasers to fully keep and perform the conditions of this warranty. When at the request of the purchasers a man is sent to operate the above machinery which is found to have been carelessly or improperly handled said company putting same in working order again the expenses incurred by the company shall be paid by said purchasers. This warranty does not apply to second-hand machinery. It is also agreed that the purchasers will employ competent men to operate said machinery. There are no other warranties or guarantees, promises or agreements than those contained herein. All warranties are to be inoperative and void in case the machinery is not settled for when delivered or if the printed language of the above warranty is changed whether by addition, erasure or waiver or if the purchasers shall in any respect have failed to comply herewith."

Some defects in the machinery had given rise to complaints, during the previous threshing season, and had been rectified by the company before the execution of the second agreement; they also made further repairs during the Autumn of 1907 and then notified R. that future repairs must be at his own expense. R. paid the first instalment of the price of the machinery, but, when subsequently sued on his other notes, contested the claim, pleaded breach of an implied warranty of fitness and counterclaimed for damages for this breach.

Held, that all claims for damages for breaches of any kind prior to the second agreement had been waived by that agreement and that the provision that there were no other warranties, guarantees, promises or agreements than those contained in the agreement excluded all implied warranties.

Held, further, that the condition requiring written notice of breach of warranty applied only to the warranty that "with proper usage and skilful management" the machinery would "do as good work as any of the same size sold in Canada," and that it had no application to the warranties that the machinery was "made of good materials" and would be "durable with good care."

The consideration for the release of N., and the acceptance of the sole liability of R. for the price of the machinery was the execution of the new notes and agreement which involved the relinquishment by both parties of all their rights under the first agreement.

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SAWYER & MASSEY CO. v. RITCHIE.

APPEAL from the judgment of the Supreme Court of Alberta affirming the judgment of Beck J., at the trial, by which the plaintiffs' action was maintained and the defendant's counterclaim was allowed for an amount equal to the plaintiffs' claim, one judgment being set off against the other and general costs allowed to the defendant.

The company brought the action to recover the balance due on the price of machinery sold, under the agreement mentioned in the head-note, and the defence and counterclaim set up that the plaintiffs had warranted the machinery sold as fit for the purposes for which it was manufactured and intended, that it did not fulfil the warranty and was defective in many respects and the defendant claimed damages for breach of the contract of warranty. At the trial, Beck J. entered judgment for the amount of the plaintiffs' claim, without costs, and awarded a similar amount to the defendant on the counterclaim, with costs, the defendant's judgment to be set off against the plaintiffs' judgment, *pro tanto;* the result being a judgment in favour of the defendant for the general costs of the action. This decision was affirmed by the judgment from which the present appeal was asserted.

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

Bennett K.C. for the appellants.

Chrysler K.C. for the respondent.

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

GIROUARD and DAVIES JJ. agreed in the opinion stated by Anglin J.

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Idington J.

IDINGTON J.—The respondent and one Neuffel entered into a written contract agreeing to purchase a threshing machine and horse-power from the appellants and to give three promissory notes for the price and on delivery of these goods gave these notes for the price as agreed in December, 1906.

The machine was used for some time and then on account of some differences they came to an agreement between themselves whereby respondent was to acquire Neuffel's interest and assume the burden of paying the appellants and, thereupon, they abandoned their claims as against Neuffel and entered into a new agreement with respondent which ostensibly treated the transaction as a new bargain for the sale of these goods to respondent, who agreed thereby to purchase same from the company and give his notes for the price.

This latter agreement was upon one of the usual printed forms used by the appellants in the course of their business as manufacturers, as was the first bargain, and is dated 12th March, 1907.

The respondent before signing this, wrote, on the 4th March, 1907, a letter that complained of some things found unsatisfactory in the use or quality of the machine, but instead of refusing to enter into the new agreement or trying to rescind the old agreement between the company and himself and Neuffel, he signed the new agreement and gave his notes.

In my view it is unnecessary to follow in detail all that was done with or in relation to the machines and the contract.

Suffice it to say that the appellants sued respondent and besides pleading defences to the action he made a counterclaim for the breach of warranties (as

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I assume though by no means clear) express and implied by reason of damages he had suffered.

The learned trial judge found appellants entitled to judgment for the debt and this is not now questioned.

He besides found appellants liable for damages for breaches of warranties both express and implied relative to the machines. He found the machines in some respects not made of good material and in some parts badly constructed, neither of which are specified, and assessed the damages at such sum as equalled the appellants' claim in their action.

The learned trial judge then ordered judgment for plaintiffs' claim without costs and judgment for defendant, now respondent, on his counterclaim for a similar amount with costs and that the defendant's judgment be set off against the plaintiffs', *pro tanto,* leaving the costs to be paid by the plaintiffs to the defendant.

From this judgment the appellants appealed to the Supreme Court *en banc* claiming a reversal of the judgment for plaintiffs with costs. This appeal was dismissed with costs.

The only question of the many argued which I need, in my view of the case, refer to is whether or not there was any warranty either express or implied upon which the respondent can maintain his claim upon the counterclaim.

There seems to have existed throughout a strange misapprehension of the exact legal rights of the respondent.

Damages seem to have been assessed for breach of the original warranties express and implied.

How can respondent claim any such damages here?

That contract was one in which the obligation of the appellants, if any, was to Neuffel and Ritchie, and Neuffel is no party to these proceedings.

Besides that contract was put an end to by what transpired. Another was entered into between the parties hereto making no reference to the previous contract, nor in any way transferring such claims, if any, as Neuffel and Ritchie had for breaches of the original contract.

Indeed, even if such claims might have existed, they clearly were in law, and I think in fairness and justice also, extinguished.

Moreover, the counterclaim rests expressly upon the later contract of the 12th March, 1907.

The language of this contract is evidently inappropriate to the business the parties had in hand. It contemplates a new machine had been ordered and had to be started which certainly was not the case.

Some complaints, as I have already said, having been made by the respondent's letter of 4th March, I infer, led to appellants sending, though on the face of the transaction in no way bound to do so, a man to put the machines in proper condition in the following September.

How all this came about is not as clear as it might be, but no doubt appellants felt bound, by a due regard to their self-interest if nothing else, to pay heed to the respondent's complaints of the 4th of March, even if covered in law by his signing the contract of the 12th of March, to do something to satisfy him.

The repairs no doubt had been postponed by mutual convenience to the time a new harvest was in sight.

However all this may be, a letter was written by

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appellants to respondent immediately after, to which no reply appears.

And by the terms of that the respondent surely in good morals as well as law was bound then to object thereto or forever hold his peace. It would seem to be his misfortune and fate to have done neither.

The express warranty would seem as applied to the transaction unworkable and in light of respondent's conduct a thing he cannot rely on.

He gave no notice as required by that, or protest against the terms of the letter.

Then is there any implied warranty relative to this second sale ?

I think not. It is impossible for me to say, whatever might have been said as to the original purchase in respect to which I express no opinion, that in regard to this second sale the respondent, in the language of section 16, sub-section 1, of the "Sale of Goods Ordinance," was thereby giving an implied warranty or condition by implication to a buyer

> who makes known to the seller the particular purpose for which the goods are required so as to shew that the buyer relies on the seller's skill and judgment, etc.

It is impossible to say he was so relying on the sellers' skill. The facts if nothing else exclude any such idea.

Nor does the language of sub-section 2 of the same section relative to sale by description help respondent. And other parts of the statute relied upon are still more irrelevant.

Moreover, there is very much to be said in favour of the view that the express terms of the contract excluded reliance on any implied contract.

I express, however, no opinion upon that for two

good reasons; one that I am not called upon herein to do so, and the other that the party who chooses in an every day business dealing to employ vague and ambiguous language is not entitled to expect very much help from any court.

Although the result must be to reverse the judgments of the court below and dismiss the counterclaim with costs on and up to and inclusive of the trial, I do not think I should interfere with the learned trial judge's judgment as to costs by altering the judgment for appellants so as to entitle them to costs of prosecuting their claim.

Of course we never interfere to rectify a judgment as to costs only, but, when the appellants do in another substantial way succeed in appeal, the question of costs is also, I think, reviewable as a rule.

The ambiguous form of contract used I think has led to litigation herein.

I do not agree in the learned trial judge's view of the respondent having been excused from trying to understand the writing. I must say, however, it is one I am quite sure should not be used and as to general costs of suit I would refuse them on that ground alone when there is reason to believe a frank, clear form of contract might have averted litigation.

ANGLIN J.—The plaintiffs (appellants) brought this action upon promissory notes given by the defendant in payment of the price of an "Eclipse" thresher, a waggon-elevator for separator, and certain trucks. There was no defence to the plaintiffs' claim; but, by counterclaim, the defendant sought to recover damages for breach of a warranty that

the thresher and separator were fit for the purposes for which they were built and intended.

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The defendant and his then partner, or co-purchaser, one Neuffel, bought the separator and thresher from the plaintiffs in November, 1906. They then executed an agreement on the plaintiffs' usual form, similar to that executed at a later date by the defendant alone. They also gave their promissory notes for the price of the machinery. About the end of December, Ritchie and Neuffel determined to separate, and Ritchie agreed to take over Neuffel's interest in the threshing outfit. The agreement for the purchase of the trucks from the plaintiffs, dated the 3rd January, 1907, was accordingly made with Ritchie alone. On the advice of their agent that Ritchie was financially sound, the plaintiffs also agreed to accept his sole liability in lieu of that of himself and partner, for the separator and the thresher, stipulating, however, that Ritchie should execute a new agreement and should give new notes for the purchase money. Ritchie accordingly, on the 12th of March, executed a new agreement for the purchase of the thresher and separator from the plaintiffs and gave them the notes which are now sued upon. This agreement contains the following provisions:—

> The said machinery is sold upon and subject to the following mutual and interdependent conditions, namely:—
>
> It is warranted to be made of good material and durable with good care and with proper usage and skilful management to do as good work as any of the same size sold in Canada. If the purchasers after trial cannot make it satisfy the above warranty written notice shall within ten days after starting be given both to the company at Winnipeg and to the agent through whom purchased, stating wherein it fails to satisfy the warranty and reasonable time shall be given the company to remedy the difficulty, the purchasers rendering necessary and friendly assistance together with requisite men and horses; the company reserving the right to replace any defective part or parts; and if the machinery or any part of them cannot be made to satisfy the warranty it is to be returned by the purchaser free of charge to the place where received and another substituted there-

for that shall satisfy the warranty or the money and notes immediately returned and this contract cancelled, neither party in such case to have or make any claim against the other. And if both such notices are not given within such time that shall be conclusive evidence that said machinery is as warranted under this agreement, and that the machinery is satisfactory to the purchasers. If the company shall at purchaser's request render assistance of any kind in operating said machinery or any part thereof or in remedying any defects such assistance shall in no case be deemed a waiver of any term or provision of this agreement or excuse for any failure of the purchasers to fully keep and perform the conditions of this warranty. When at the request of the purchasers a man is sent to operate the above machinery which is found to have been carelessly or improperly handled said company putting same in working order again the expenses incurred by the company shall be paid by said purchasers.

This warranty does not apply to second-hand machinery.

It is also agreed that the purchasers will employ competent men to operate said machinery.

There are no other warranties or guarantees, promises, or agreements than those contained herein. All warranties are to be inoperative and void in case the machinery is not settled for when delivered or if the printed language of the above warranty is changed whether by addition, erasure or waiver or if the purchasers shall in any respect have failed to comply herewith.

In addition to the warranty expressed in these provisions of the contract the defendant alleges that there was an implied warranty of fitness. His counterclaim as pleaded appears to be based solely upon this implied warranty and the judgment in his favour also rests upon it.

There would appear to have been a number of defects in the threshing machinery, which caused trouble and difficulty during the threshing season of 1906-7. This threshing season had come to an end before the execution of the agreement of the 12th of March, 1907. The plaintiffs had made good a number of these defects. In September, 1907, they made some further repairs to the machinery and then notified Ritchie that any future repairs must be at his own expense. Before signing

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the agreement of the 12th of March, 1907, Ritchie made complaint about the threshing outfit, alleging that it was a constant source of loss and worry on account of defects in material and workmanship, having broken down six times in the course of seven threshings during the winter of 1906-7. He paid the first instalment of the purchase money under protest. The grain crop for the season of 1907-8 was a failure and there is no evidence that during that season the threshing outfit proved itself unfit for use. Only one or two small crops of grain were threshed and unsatisfactory results in that season may well be ascribed to the poor character of the grain itself.

Assuming that the defendant is entitled, notwithstanding the terms of his contract above quoted, to set up and rely upon an implied warranty of fitness, the record contains no evidence to support a finding of breach of such a warranty subsequent to the 12th of March, 1907. Whatever breaches there may have been, prior to that date, of any warranty, express or implied, under the contract between the plaintiffs and Ritchie and Neuffel, were, in my opinion, waived when the contract of the 12th of March, 1907, was entered into. Moreover, I think the provision that

> there are no other warranties or guarantees, promises or agreements than those contained herein

excludes all implied warranties. Upon this ground alone the defendant's counterclaim should fail inasmuch as it is based solely upon an implied warranty of fitness. But if, although he has not pleaded it, the defendant may, nevertheless, rely upon the express warranty above set forth, he is still confronted with insurmountable difficulties.

Upon the proper construction of this warranty the

provision requiring written notice of breach to be given to the company within ten days after starting, in my opinion, applies only to the warranty that

with proper usage and skilful management, the machinery will do as good work as any of the same size sold in Canada.

It has no application to the warranties that the machinery is "made of good materials" and will be "durable with good care." The notice is to be given "*if the purchasers* after trial *cannot make* it (the machinery) satisfy the above warranty." The purchasers had nothing to do with providing good material for the machinery or with making it durable. It was not their business to "make" it satisfy these warranties. It seems clear, therefore, that the provision as to notice can have no application to them.

Ritchie's failure to give the necessary written notice would preclude him from setting up breach of the warranty that

the machine will do as good work as any of the same size sold in Canada.

But as already stated, the evidence does not shew any breach of this warranty nor of the warranties as to good material and durability subsequent to the 12th of March, 1907. The consideration for the release of Neuffel by the company and their acceptance of the sole liability of Ritchie instead of that of Neuffel and Ritchie was the execution by Ritchie of the new agreement and his giving the new notes sued upon. The company expressly stipulated for both these things as conditions of Neuffel's release. Ritchie chose to assent to these terms. They involved the relinquishment by both parties of all their rights under the November agreement. The only agreement now in existence between

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Ritchie and the company is the agreement of the 12th of March, 1907. In order to succeed in his counterclaim he must, I think, prove breaches of warranty subsequent to that date. This he has failed to do.

I am, therefore, with respect, of the opinion that the plaintiff's appeal should be allowed with costs in this court and in the full court of the Province of Alberta, and that the defendant's counterclaim should be dismissed with costs. The plaintiffs should also have their costs of the action.

Appeal allowed with costs.

Solicitors for the appellants: *Lougheed, Bennett & Co.*

Solicitors for the respondent: *Jones & Pescod.*

THE GRAND TRUNK PACIFIC RAILWAY COMPANY (DEFENDANTS) ..... APPELLANTS;

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*Oct. 20.
*Nov. 2.

AND

CHARLES M. WHITE (PLAINTIFF) ... RESPONDENT;

AND

JOHN A. HISLOP (DEFENDANT).

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Negligence—Injury on public work—"Public Works Health Act"—Construction of statute—R.S.C. 1906, *c.* 135, *s.* 3—*Regulations by order-in-council—Breach of statutory duty—Action—Misjoinder.*

The provisions of section 3 of the "Public Works Health Act," R.S.C. 1906, ch. 135, do not impose on a Government Department or a company constructing a public work the obligation to provide hospitals and surgical attendance for the treatment of personal injuries sustained by employees, whether of themselves or of their contractors or sub-contractors, in the construction of such work.

APPEAL from the judgment of the Supreme Court of Alberta affirming the judgment of Harvey J., at the trial, whereby the plaintiff's action was maintained as against the company, with costs, and dismissed in respect to the other defendant.

The plaintiff, a labourer employed by a firm of sub-contractors engaged in the construction of a portion of the Grand Trunk Pacific Railway (a work being prosecuted under the control of the Parliament of

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

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Canada), while in the performance of his duties met with an accident by which his leg was broken. The injured limb was set and placed in a temporary splint at a local emergency hospital by the surgeon in charge, and the plaintiff was then transferred to the permanent hospital, at Edmonton, where he received treatment by Dr. Hislop, one of the defendants, until discharged from that hospital some weeks later. As a result of the injury the plaintiff's right leg remained shorter than the left and he lost the proper use of his right ankle. The action for damages was brought against the company and Dr. Hislop. The fault charged against the company was failure to provide proper surgical treatment and appliances, as required by the "Public Works Health Act" and the regulations made thereunder, by order-in-council, and it was also alleged that the medical attendant at the emergency hospital was not a properly qualified practitioner because he was not registered as such under the statute in force in the Province of Alberta. The other defendant, Hislop, was charged with malpractice. On an application, in Chambers, to compel the plaintiff to elect as to which of the defendants he would proceed against, Beck J. (1) held that these causes of action might properly be joined, and, at the trial, the jury exonerated Hislop and found that the plaintiff's injury was the result of negligence on the part of the company in failing to provide "a suitably equipped hospital, a duly authorized physician and attendants," in compliance with the terms of the "Public Works Health Act." The action was dismissed in respect to Hislop and, on the findings of the jury, the trial judge ordered judg-

(1) 2 Alta. L.R. 34.

ment to be entered against the company for the amount of damages assessed ($5,000), with costs of the action. This judgment was affirmed by the judgment now appealed from.

The issues in question on the present appeal are stated in the judgments now reported.

Chrysler K.C. for the appellants.

Ewart K.C. for the respondent.

THE CHIEF JUSTICE.—I agree that this appeal should be allowed. The object of the Act is to provide for the protection of the public health, although the regulations apparently go beyond the statute. If the Act or the regulations in so far as they are within the statute have not been observed the duty of enforcing them lies with the Government inspector but in default of his doing his duty no action lies at the suit of a party injured against the company. The statute has not created a contractual relation between the company and the employee of a contractor who may have his recourse on his contract of hire or against the medical man; but as to this I express no opinion. I am quite clear, however, that there is no *lien de droit* between the respondent and the appellants; and the appeal should be allowed with costs.

GIROUARD J.—I agree that this appeal should be allowed with costs.

DAVIES J.—I concur in the opinion stated by Mr. Justice Anglin.

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IDINGTON J.—The question is raised by this appeal of whether or not an action will lie upon the "Public Works Health Act," being chapter 135 of the Revised Statutes of Canada, at the suit of one of the labourers upon a public work who in the course of his employment had some bones of his leg broken which, in consequence, required surgical skill and due care which it is found were not given.

The third section enacts as follows:—

> For the preservation of health and the mitigation of disease amongst the persons employed in the construction of public works the Governor-General in Council may from time to time make regulations,—
>
> (*a*) As to the extent and character of the accommodation to be afforded by the houses, tents, or other quarters occupied by the employees on the works;
>
> (*b*) For the inspection of such houses, tents, or other quarters, and the cleansing, purifying and disinfecting thereof when necessary;
>
> (*c*) As to the number of qualified medical men to be employed on the works;
>
> (*d*) For the provision of hospitals on the works, and as to the number, location and character of such hospitals;
>
> (*e*) For the isolation and care of persons suffering from contagious or infectious diseases;
>
> (*f*) As to such other matters or things as he may deem best adapted to attain the objects of this Act.

The sub-sections (*c*) and (*d*) standing alone might in some way have been given some operation applicable to such a case as the treatment of respondent's leg, but, clearly, the other sub-sections relate to subjects quite foreign thereto.

Now, when we find these two sub-sections set in such a context and have regard to the primary and ordinary meaning of such phrases as

> the preservation of health and the mitigation of disease,

coupled thus together introducing and furnishing the key-note of the whole it seems impossible to find there-

in the purpose of providing an emergency hospital and surgery duly equipped for dealing with all that is involved in the product of accidents of any and every kind happening in the construction of great public works.

The subject-matter specified in sub-sections (*c*) and (*d*) must be held to relate to, and the regulations to be made thereunder to be such as to serve the obvious purposes of, the section as a whole.

Some stress is laid by respondent's factum on expressions in the regulations adopted tending to lead one to believe a wider purpose was had in view.

But the regulations can add nothing to the objects of the statute.

I need not say that, holding the opinion I express, it is unnecessary for me to give any opinion upon the important question of whether or not any liability to action can ever arise upon this statute.

I may, however, be permitted to point out that if the statute had expressly provided for the deduction of a weekly fee from the workmen, as the regulations seem to provide for, it would have been easier to hold that it was within the purview of the statute that such an action should lie thereon.

It would also in such a case have been easier to have found some force in the argument put forward based on the hypothesis that such a fee was legally exacted.

Its exaction seems to me bad both in law and in economics.

And, inasmuch as the unfortunate plaintiff had not paid any such fee, I can find nothing in regard to it upon which to found this action.

I regret to find no adequate legal machinery exists

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to enforce surgical and hospital provision to meet in a way that humane feelings dictate the necessities of the case of the ever-recurring accidents (inevitably attendant upon), the construction of public works.

When they are carried on in the depths of the wilderness some such provision is needed.

The appeal must be allowed, and with costs if insisted on.

ANGLIN J.—The plaintiff (respondent) was injured on the line of railway of the defendants, the Grand Trunk Pacific Railway Company, in course of construction between Edmonton and Pembina River. He sustained a fracture of the right leg. He admits that his injury was purely accidental. It is of his subsequent treatment that he complains. He was taken first to a temporary hospital distant about two miles from the place at which he was injured. His limb was there set and placed in a temporary wooden splint by the surgeon in charge, Dr. Culton, who is said not to be a duly qualified practitioner because his name does not appear upon the Medical Register of the Province of Alberta. He was then transferred to the hospital at Edmonton, a distance of sixty-five miles. The journey occupied nearly three days, being made partly in waggons and partly over the constructed line of railway. At the Edmonton Hospital he was attended by the division surgeon of the railway company, the defendant Hislop, against whom he charges malpractice. After some weeks' treatment he left the hospital. His right leg is, as a result of his injury, now somewhat shorter than the left, and he has not proper use of his right ankle.

The action went to the jury against both defendants. In answer to the question

Is the plaintiff's injury the result of any negligence on the part of the defendants ?

the jury replied "Yes." And to the question

If so, in what did that negligence consist ?

they answered —

In the failure of the Grand Trunk Pacific Railway Company to comply with the terms of the "Public Works Health Act" regarding the providing of a suitably equipped hospital, a duly authorized physician and attendants.

This verdict involved a finding in favour of the defendant Hislop, against whom the action was dismissed. From that judgment no appeal has been taken. Judgment was entered for the plaintiff against the Grand Trunk Pacific Railway Company for the damages assessed, $5,000, and, on appeal, this judgment was confirmed by the full court of the Province of Alberta.

After a careful perusal of the evidence I more than gravely doubt whether the permanent injuries sustained by the plaintiff are ascribable to the conditions found by the jury to constitute negligence on the part of the defendant railway company. Neither am I satisfied that, assuming the "Public Works Health Act" to require that the company should provide

a suitably equipped hospital and a duly authorized physician and attendants

for the care of employees, whether of themselves or of their contractors, injured during the construction of the railway, the evidence sufficiently establishes breaches of these duties. But, in the view I take of the purview of the statute, it is unnecessary to determine these questions.

Section 3 of the "Public Works Health Act" reads as follows:

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3. For the preservation of health and the mitigation of disease amongst persons employed in the construction of public works the Governor-General in Council may from time to time make regulations,—

(*a*) As to the extent and character of the accommodation to be afforded by the houses, tents, or other quarters occupied by the employees of the works;

(*b*) For the inspection of such houses, tents, or other quarters and the cleansing, purifying and disinfecting thereof when necessary;

(*c*) As to the number of qualified medical men to be employed on the works;

(*d*) For the provision of hospitals on the works, and as to the number, location and character of such hospitals;

(*e*) For the isolation and care of persons suffering from contagious or infectious diseases;

(*f*) As to such other matters and things as he may deem best adapted to attain the objects of this Act.

(2) Such regulations may be either general or special and may apply generally to all public works or specially to one or more public works or class of public works named therein.

In my opinion, the introductory words "for the preservation of health and the mitigation of disease" govern the construction of this entire section. These words exclude the idea that Parliament intended to impose upon persons and corporations in the position of the defendants an obligation to provide hospitals and medical attendance for employees injured in the construction of a public work as defined in the statute. It is true that in the regulations passed by the Governor-General in Council under the statute there are several provisions which might, perhaps, indicate that in the opinion of the Governor-General in Council the Act was intended to apply to surgical cases of accident. But these provisions do not suffice to extend the obligations imposed by section 3. Assuming, therefore, that the defendants failed to provide a suitably equipped hospital and proper surgical attendance for the plaintiff, that would not constitute a breach of

any statutory duty imposed on them by the "Public Works Health Act."

Assuming that it was sufficiently established that the plaintiff was liable under section 11 of the regulations to a deduction of fifty cents per month from his wages for medical attendance, and that the statute authorizes such a regulation, the medical attendance which this would oblige the defendants to furnish would probably be confined to that which the statute itself prescribes. But upon this branch the plaintiff has wholly failed to make out a case. He has neither shewn any actual deduction from his wages nor any agreement for such a deduction. He has not even shewn that such a deduction was contemplated or was actually made from the wages of other contractors' employees. Moreover, as already stated, I incline to the view that the evidence may not warrant a finding that the plaintiff's permanent injuries are due to any lack of hospital conveniences or of proper medical attendance.

It was further objected on the part of the appellants that the statutory cause of action against the Grand Trunk Pacific Railway Company was improperly joined with the common law cause of action against the defendant Hislop for alleged malpractice and that, as a result of such misjoinder, there had been a mistrial. Inasmuch as I would allow the defendants' appeal on the ground that it has not been established that they owed any statutory duty to the plaintiff, it is unnecessary to dispose of the question of misjoinder.

The appeal should, in my opinion, be allowed with costs in this court and in the Supreme Court of Alberta, and the action dismissed with costs.

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Appeal allowed with costs.

Solicitors for the appellants: *Short, Biggar, Cowan & Collisson.*

Solicitor for the respondent: *C. C. McCaul.*

THE DOMINION FISH COMPANY (DEFENDANTS) ..... APPELLANTS; 1910 *Oct. 21, 22. *Nov. 2.

AND

HELEN ISBESTER (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Appeal—Concurrent findings of fact—Negligence—Shipping—Action for damages—Personal injury—Evidence—Res ipsa loquitur—Limitation of liability—"Canada Shipping Act," R.S.C., 1906, c. 113, s. 921.

Concurrent findings on questions of fact in the courts below ought not to be disturbed on appeal unless a mistake is clearly shewn.

A ship lying at her dock caught fire during the night and was destroyed. The officers of the ship failed to arouse passengers in time to permit them to escape in safety and, in an action to recover damages for injuries sustained in consequence by a passenger, the owners adduced no evidence to explain the origin of the fire.

Held, affirming the judgment appealed from (19 Man. R. 430), that, in the circumstances, the only inference to be drawn was that the owners were grossly negligent.

In such an action the owners of the ship cannot invoke the limitation provided by section 921 of the "Canada Shipping Act," R.S.C., 1906, chapter 113. *The "Orwell"* (13 P.D. 80), and *Roche* v. *London and South-Western Rway Co.* ([1899] 2 Q.B. 502), referred to.

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

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

(1) 19 Man. R. 430.

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DOMINION FISH CO. v. ISBESTER.

The circumstances of the case sufficiently appear from the head-note and judgment now reported.

R. G. Affleck for the appellants.

Henry F. Blackwood for the respondent.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—I think I may say that it is the well settled rule of this tribunal that, in a case like the present, when the question is whether or not the concurrent judgments of two courts should be set aside on a question of fact the appellant must put his finger on the mistake made by the trial judge, and this the appellants have failed to do in the present instance. I agree with Mr. Justice Perdue; the evidence leads us irresistibly to this alternative. Either there was no watchman in charge on the night of the fire, as there should have been; or, if there was, he failed to perform his duty. The conduct of those responsible for the safety of the ship is, in my opinion, inexplicable. No attempt was made to explain the origin of the fire or the failure to arouse the passengers in time to allow their escape and the only inference to be drawn from the silence of the defendant company is that they were grossly negligent.

A question is raised on the pleadings which is not disposed of nor referred to in the courts below as to the effect of section 921 of chapter 113 of the Revised Statutes of Canada, the burned vessel being a ship within the meaning of that section. That section, in my opinion, has no application to the main issue which involves the liability of the defendants for damages resulting from the fire. That issue the courts

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The Chief Justice.

below had undoubtedly jurisdiction to dispose of and with the judgments on that issue we are now exclusively concerned. Whether the defendants may limit their liability in a proper proceeding instituted in another court to create a fund out of which the claims resulting from the fire are to be paid does not come before us for consideration now. *The "Orwell"*(1) in 1888; *Roche* v. *London and South-Western Railway Company*(2).

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Bernier, Blackwood, Bernier & Beaupré.*

(1) 13 P.D. 80.

(2) (1899), 2 Q.B. 502.

1910

*Oct. 24.
*Nov. 2.

JOHN LONGMORE (PLAINTIFF).....APPELLANT;

AND

THE J. D. McARTHUR COMPANY AND J. D. McARTHUR (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Negligence—Dangerous works—Joint tortfeasors—Judgment against one of several persons responsible for damages—Bar to action.

A proprietor or principal contractor undertaking works in the circumstances inherently dangerous cannot delegate the duty of providing against such danger so as to escape personal responsibility if that duty be neglected.

Failure to discharge such duty makes the proprietor and his contractor, or the contractor and his sub-contractor, as the case may be, equally liable as joint tortfeasors for resultant injury.

A judgment for damages sustained in consequence of any such injury against one of such joint tortfeasors is a bar to a subsequent action therefor against another.

Judgment appealed from (19 Man. R. 641) affirmed.

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

The defendants sublet a portion of their contract for the construction of a line of railway. In the execution of the work the sub-contractors made use of dynamite for the purpose of blasting rock excavations and,

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

(1) 19 Man. R. 641.

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in this process the plaintiff sustained personal injury for which, in an action against them for damages, he recovered judgment, issued execution and, on the levy, the sheriff returned a writ of execution *nulla bona,* the result being that the judgment against the sub-contractors remained unsatisfied. Subsequently the plaintiff brought action against the present defendants to recover damages for the same injuries and, at the trial, his action was dismissed. This decision was affirmed by the judgment from which the appeal is now asserted.

The question at issue on the appeal sufficiently appear from the judgments now reported.

A. C. Galt K.C. for the appellant.

Ewart K.C. for the respondents.

THE CHIEF JUSTICE.—This appeal involves the simple point as to whether or not a judgment against one of several joint tortfeasors is a bar to an action against the others, it being admitted that the injury complained of in both actions and the cause of such injury are identical. The facts are fully set forth in the judgment of the trial judge, Chief Justice Mathers, which judgment was affirmed by the Court of Appeal for Manitoba, and I would dismiss this appeal for the reasons given in that judgment.

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

DAVIES J.—For the reasons given by Chief Justice Mathers in delivering judgment in the Court of King's Bench dismissing the action, and which judg-

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ment was concurred in by the Court of Appeal, I am of opinion that this appeal should be dismissed with costs.

Idington J.

IDINGTON J.—This is an action brought by appellant against contractors for injuries caused to him by the negligence of a sub-contractor in the execution of a work requiring the use of explosives of a highly dangerous character in a place and under such circumstances that the subletting could not in law be held to have the effect of discharging the obligation to others from the observance of a duty to see that the said work was done with due care.

The appellant claims that the contractors and sub-contractors cannot be held, by reason of the negligence complained of, to have been joint tort-feasors.

He claims each to have been severally liable. So is each tort-feasor in any case where a joint tort has been committed.

The negligent execution of the work is the basis of the right of action and all implicated therein are jointly liable.

It is admitted in the stated case that "the injury complained of in both actions and the cause of such injury are identical."

It is clear also that the legal duty out of which springs the obligation to use that due care which would have avoided the cause of such injury is one and only one and not necessarily to be accomplished by the hands of either contractor or sub-contractor. It seems clear error to say that a declaration could not be properly framed alleging the duty as joint and the responsibility joint and ending with a prayer for relief against them jointly.

It is idle to allege that because the evidence relative to the part each had taken of necessity must be different can make any difference in the legal substance of the cause of action or legal consequences thereof.

In every case of joint tort the identity of and relative parts taken by each defendant and the connective evidence shewing how each of them is to be held jointly liable with the other, clearly needs different statements or pieces of evidence much of which may be given as to one without naming the other.

I assume as admitted each was liable, and pass no opinion upon the question of whether the contractor in fact fell within the class of cases wherein he cannot free himself from liability by means of a sub-contract.

I assume that to have been so as common ground between the parties.

I think the appeal must be dismissed with costs.

ANGLIN J.—The plaintiff appeals from the judgment of the Court of Appeal for Manitoba affirming the judgment of Mathers C.J., dismissing this action on the ground that the defendants, principal contractors, were joint tort-feasors with their sub-contractors against whom the plaintiff recovered judgment in a former action.

In support of his contention that the cause of action against the sub-contractors differs from that against the principal contractors, Mr. Galt ingeniously urged that while in the former action it was not, in the present action it is, necessary for the plaintiff to aver that the work, which the sub-contractors were engaged to perform, was necessarily attended with risk.

The negligence in respect of which the plaintiff re-

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Anglin J.

covered in his action against the sub-contractors admittedly gave him a cause of action against the defendants as well. That is the case only because that negligence consisted in failure to take the care called for by what was in the circumstances the inherently dangerous nature of the work. The moment this fact is stated the identity of the plaintiff's cause of action against both the principal contractors and their sub-contractors seems to me to be established.

In order to prove his charge of negligence against either he must establish breach of a duty owing to him to take care; that duty *ex hypothesi* in each case alike arises out of and depends upon the fact that the very work which the sub-contractors were engaged to do was necessarily attended with risk; therefore in both cases an allegation of actionable negligence implies and involves the averment that the work was inherently dangerous and that it for that reason cast upon the defendants, whether contractors or sub-contractors, the duty to take precautions which they omitted and which, if taken, would have prevented injury to the plaintiff. It is apparent that although a formal and explicit statement of the inherently dangerous character of the work may have been unnecessary in the action against the sub-contractors it was so only because this averment was implied in the charge that they were negligent or in the allegation that it was their duty to take the omitted precautions.

Another ingenious suggestion is that the duty of the sub-contractors was themselves to take due care, whereas that of the principal contractors was to see that the sub-contractors took such care and therefore that the cause of action against the former differs from that against the latter. It is only necessary to point out that the same distinction exists in fact, if

not in theory, between the responsibility of the master and that of the servant — between the duty of the principal and that of the agent. Yet where such a tort as is here complained of has been committed by a servant or agent, that the master or the principal respectively is jointly liable, and in fact a joint tort-feasor with his servant or agent admits of no doubt. While a sub-contractor is not, even in carrying out work necessarily attended with risk, the *alter ego* of his principal contractor so as to make the latter liable for collateral negligence of the former, as he would be if the relation between them were that of master and servant, on the other hand where the work undertaken by a sub-contractor involves a duty on the part of the contractor from responsibility for the performance of which he cannot escape by delegation, the sub-contractor is in regard to that duty so identified with the principal contractor that his failure to perform it is the failure of the principal contractor himself. *Quoad* that duty he is in fact the *alter ego* of the principal contractor.

In my opinion the present defendants and their sub-contractors were joint tort-feasors against whom the plaintiff has an identical cause of action and his judgment recovered against the sub-contractors is a complete answer to this action.

The appeal therefore fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Tupper, Galt, Tupper, Minty & McTavish.*

Solicitors for the respondents: *Fisher, Wilson, Battram & Hamilton.*

1910

*Oct. 25.
*Nov. 2.

ANDREW FINSETH .....APPELLANT;

AND

THE RYLEY HOTEL COMPANY....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Appeal—Jurisdiction—Special leave—"Judicial proceeding"—Discretionary order — Matter of public interest — Alberta "Liquor License Ordinance," s. 57—"Originating summons"—R.S.C. 1906, c. 139, s. 37—8 Edw. VII. (Alta.), c. 7, ss. 1, 2, 6.

Proceedings on an originating summons issued by a judge of the Supreme Court of Alberta on an application for cancellation of a license under section 57 of the "Liquor License Ordinance," are judicial proceedings within the meaning of section 37 of the "Supreme Court Act," R.S.C. 1906, ch. 139, and, consequently, the Supreme Court of Canada has jurisdiction to entertain an application for leave to appeal from the judgment of the Supreme Court of Alberta thereon.

Where the decisions of the provincial court shew that the judges of that court are equally divided in opinion as to the proper construction of a statute in force in the province and it appears to be desirable in the public interest that the question should be finally settled it is proper for the Supreme Court of Canada to exercise the discretion vested in it for the granting of special leave to appeal under the provisions of section 37 of the "Supreme Court Act." Girouard J. dissented on the ground that the proceedings in question were intended to be summary and that, in these circumstances, the case was not one in which special leave to appeal should be granted.

MOTION for special leave to appeal from the judgment of the Supreme Court of Alberta setting aside an order by Harvey J., whereby a license for the sale of malt and spirituous liquors granted to the respondents had been cancelled.

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The proceedings in the case were instituted, on an application to a judge of the Supreme Court of Alberta, under section 57 of the "Liquor License Ordinance" in force in that province, for the cancellation of a license granted to the respondents for the sale, by retail, of malt, spirituous and other liquors in the Village of Ryley, Alberta, upon which Mr. Justice Harvey issued an originating summons. On the return of the summons the learned judge proceeded, in a summary manner, to hear and investigate the appellant's complaint against the issue of the license, adjudicated thereupon, and made an order directing the license to be cancelled. This order was set aside, on an appeal, by the Supreme Court of Alberta, *in banco,* and the complainant applied for special leave to appeal from the latter judgment to the Supreme Court of Canada.

The questions raised on the application for special leave are set out in the judgment now reported.

Chrysler K.C. supported the application.

Ewart K.C. contra.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—This is an application for leave to appeal from a judgment of the Supreme Court of Alberta *en banc,* the highest court of final resort in the province. The two questions to be determined are: Have we jurisdiction to grant the application? and, Is this, assuming that we have jurisdiction, a proper case in which to grant the leave asked for ?

The "Supreme Court Act," section 37, enacts that

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an appeal shall lie on special leave, to this court, from any judgment of the highest court of final resort in the provinces of Saskatchewan and Alberta when the action, suit, cause, matter or other judicial proceeding has not originated in a superior court. The proceedings here originated in an application made by Andrew Finseth, the appellant, before Mr. Justice Harvey in July, 1910, for the cancellation of a retail liquor license granted to the Ryley Hotel Company, Limited, under section 57 of the "Liquor License Ordinance."

The first question to be decided is: Was this a judicial proceeding within the meaning of that section ?

The sections of the Alberta Acts to be referred to are sub-section 15, section 2 of the interpretation clause of the "Liquor License Ordinance" and sections 1, 2 and 6 of chapter 7 of the statutes of 1908(1). The judge to whom the application was made is the judge of the Supreme Court usually exercising jurisdiction in the judicial district in which the license district is situate, and the inquiry he was called upon to make was really a judicial inquiry. He could not properly exercise his discretion without hearing all the parties interested and he was obliged to bring to the performance of the duties assigned to him a judicial mind so as to determine what was fair and just in respect of the matter under consideration. Further the statute which provides for the enforcement of any order that may be made granting or refusing the application gives to the judge the same jurisdiction as a judge of the court to which he belongs; and his order, when made and filed in the office of the clerk of the court, becomes an order of the Supreme Court enforceable in like manner and by the like process, and from that

(1) 8 Edw. VII.

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order there is an appeal to the court *en banc* (section 1). I can entertain no doubt, therefore, that this is a judicial proceeding. See *per* Lopes L.J., in *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (1).

I am also of opinion that this is a proper case in which to grant leave. The appeal to the provincial court of appeal was limited to the question whether or not the judge to whom the application was made in the first instance had jurisdiction under section 57 of the "Liquor License Ordinance" to investigate and try the complaint. The majority of the court *en banc* delivered judgment allowing the appeal. The party moving here contends that the majority of the court overruled the unanimous judgment of three judges of the same court on the same point in another case. (In *Re Richelieu Hotel License* (2).) In view of this difference of opinion in the court below, we grant this motion, as it is desirable in the public interest that the point raised on this appeal should be definitely and finally settled.

GIROUARD J. (dissenting).—I do not look upon this case as one where special leave to appeal should be granted.

I think it was intended that proceedings of the nature in question in this case should be summary.

Motion granted.

Solicitors for the appellant: *Bishop, Grant & Delavault.*

Solicitors for the respondent: *Boyle, Parlee & Co.*

(1) [1892] 1 Q.B. 452. (2) 10 West. L.R. 402.

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*Oct. 4
*Nov. 21.

THE SHAWINIGAN HYDRO-ELECTRIC COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

THE SHAWINIGAN WATER AND POWER COMPANY (PLAINTIFFS) RESPONDENTS.

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

Appeal—Jurisdiction—Matter in controversy—Stare decisis—Municipal by-law—Injunction—Contract—Collateral effect of judgment—Construction of Statute—"Supreme Court Act," R.S.C. 1906, c. 139, ss. 36, 39(e), 46.

The action was brought by the respondents and other ratepayers of the Town of Shawinigan, against the town and the hydro-electric company, to set aside a by-law of the town corporation authorizing the purchase of certain lands with an electric power-house and plant from the hydro-electric company for $40,750, and for an injunction prohibiting the carrying into effect of the contract of sale. The final judgment in the Superior Court dissolved the injunction and dismissed the action, but on appeal by the plaintiffs the Court of King's Bench maintained the action and made the injunction permanent. On a motion to quash an appeal by the hydro-electric company to the Supreme Court of Canada,

Held, per Fitzpatrick C.J. and Girouard J., that the Supreme Court was competent to entertain the appeal under the provisions of section 39 (e) of the "Supreme Court Act." *The Bell Telephone Co.* v. *City of Quebec* (20 Can. S.C.R. 230) disapproved.

Per Duff and Anglin JJ.—*Semble.*—That the decision in *The Bell Telephone Co.* v. *City of Quebec* (20 Can. S.C.R. 230) is binding authority on the Supreme Court of Canada, but this case may be decided irrespective of it.

Per Idington, Duff and Anglin JJ. (Davies J. contra).—That, as the appeal was from the final judgment of the highest court of final resort in the Province of Quebec in an action instituted in a

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court of superior jurisdiction for the purpose of preventing the consummation of a contract for a consideration exceeding $2,000, the Supreme Court of Canada was competent to entertain the appeal under sections 36 and 46 of the "Supreme Court Act."

Per Davies J. (dissenting).—That the controversy related merely to the validity of the by-law and did not involve the sum or value of $2,000, that the collateral or incidental effects of the judgment were not in question on the appeal, and that, therefore, the Supreme Court of Canada was not competent to entertain the appeal. *The Bell Telephone Co.* v. *City of Quebec* (20 Can. S.C.R. 230) followed.

MOTION to quash an appeal from the Court of King's Bench, appeal side (1), which reversed the judgment of the Superior Court, District of Three Rivers, and maintained the plaintiff's action with costs.

The action was instituted against the Town of Shawinigan and the Shawinigan Hydro-Electric Company by the Shawinigan Water and Power Company and others, ratepayers of the Town of Shawinigan, for the purpose of setting aside a by-law of the town corporation authorizing it to purchase the electric power-house and electric plant of the hydro-electric company and certain lands of the company used in connection with these works and installations, for the sum of $40,750, and also for an injunction to prohibit the town corporation carrying into effect the contract in respect thereof made with the hydro-electric company. In the Superior Court, the final judgment dissolved the injunction and dismissed the plaintiffs' action with costs. On an appeal by the plaintiffs, the Court of King's Bench reversed the decision of the Superior Court, maintained the conclusions of the action and made the injunction permanent. The hydro-electric company then brought an appeal to the Supreme Court of Canada.

(1) Q.R. 19 K.B. 546.

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The questions raised on the motion by the present respondents to quash the appeal are stated in the judgments now reported.

Holden supported the motion.

Aimé Geoffrion, K.C. contra.

THE CHIEF JUSTICE.—This is an action brought by a ratepayer in the Superior Court, at Three Rivers, to set aside a by-law of the corporation of the Town of Shawinigan to which was joined an application for an interlocutory injunction. The action was dismissed by the first court; but on appeal to the Court of King's Bench that judgment was set aside, the by-law was quashed and the interlocutory injunction declared absolute. On this appeal the respondents challenge our jurisdiction on the ground that in proceedings to quash or annul by-laws commenced by action in the Superior Court in the Province of Quebec there is no appeal here.

A number of decisions of this court bearing on this question have been cited at bar, and others are to be found in Mr. Cameron's very useful book on the practice of this court. I confess that I find it difficult to reconcile all those decisions and so I am driven back upon the sections of the statute which give an appeal to this court in cases arising in the Province of Quebec. Section 39, sub-section (*e*), gives an appeal

> in any case in which a by-law of a municipal corporation has been quashed by rule or order of court, or the rule or order to quash had been refused after argument.

In view of the fact that this section applies to all the provinces of Canada, I am of the opinion that the

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word "quash" should not receive a narrow interpretation and be held to apply only to proceedings by petition or motion without a writ, such as we find in the Province of Ontario, but must be read as synonymous with "annul" or "make void." Whether this view be correct or not, an appeal is given by section 36 of the Supreme Court Act

> 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, in cases in which the court of original jurisdiction is a superior court.

The generality of this section is not restricted in the Province of Quebec where a municipal by-law is attacked because section 47 expressly provides that section 46, which places a limitation upon appeals from that province, shall not apply to appeals in cases of municipal by-laws.

Unfortunately we have the case of *The Bell Telephone Co.* v. *The City of Quebec*(1), in which it was held that, in view of previous decisions, and more expressly of the ruling in *The City of Sherbrooke* v. *McManamy*(2), this court is without jurisdiction to hear appeals in cases in which the validity of a by-law is attacked by direct action as in the present case; the judgment in such an action not being "a rule or order" quashing a by-law, within the meaning of section 39, sub-section (*e*). On examination, I find that *The City of Sherbrooke* v. *McManamy*(2), upon the authority of which *The Bell Telephone Co.* v. *The City of Quebec*(1) was decided, was an action to recover taxes due the plaintiff municipality under its by-law, and there Ritchie C.J. says, at page 596:

(1) 20 Can. S.C.R. 230. (2) 18 Can. S.C.R. 594.

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No question whatever as to quashing the by-law arises in this case;

and Taschereau J. says, at page 597:

There is no by-law quashed by a rule or order here. In fact, there is none quashed at all by the judgment appealed from. We are all agreed on this point, I believe.

It is difficult, therefore, to see the relation between these two cases and how the latter could serve as a precedent for the former. In the case of *Webster* v. *The City of Sherbrooke*(1), where the validity of a by-law was attacked by petition, the question of jurisdiction was raised, the court dismissed the motion to quash and disposed of the proceeding on the merits. Strong C.J. said, at page 53:

This was an application to quash a by-law and not a case like the cases referred to and decided of *the County of Verchères* v. *The Village of Varennes*(2); *The City of Sherbrooke* v. *McManamy* (3); and others decided in this court, as in all those cases it was in a private action that the by-laws were impugned and the proceedings were not to quash or annul the by-laws.

Subsequently, in *The City of St. Cunégonde* v. *Gougeon*(4), a case in which the proceedings were initiated by petition under the provisions of the very same Act (The Town Corporations Act, R.S.Q. section 4389), as in *Webster* v. *The City of Sherbrooke*(1), it was held:

Where the Court of Queen's Bench has quashed such an appeal for want of jurisdiction no appeal lies to the Supreme Court of Canada from its decision.

So that, if *The Bell Telephone Co.* v. *The City of Quebec*(5) and *The City of St. Cunégonde* v. *Gougeon*(4) are well decided, there can be no appeal here

(1) 24 Can. S.C.R. 52.
(2) 19 Can. S.C.R. 365.
(3) 18 Can. S.C.R. 594.
(4) 25 Can. S.C.R. 78.
(5) 20 Can. S.C.R. 230.

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in any proceedings in which a by-law is attacked in the Province of Quebec, whether by petition or by an ordinary writ of summons. The distinction made in *Webster* v. *The City of Sherbrooke* (1) by Taschereau J. between cases in which proceedings to set aside a by-law are commenced by petition and those in which the validity of a by-law is attacked by direct action by any party interested, with respect to the effect of the judgment, is, I respectfully submit, not founded. Under the Municipal Code, arts. 698 and 100, and under the "Town Corporations Act," R.S.Q. section 4389, the validity of a by-law may be attacked by petition by a municipal elector; but this does not exclude the common law right to proceed by writ. Any person whose rights or property may be injuriously affected by the acts of a corporation can invoke the ordinary procedure of the courts to get redress for his grievances. *County of Arthabaska* v. *Patoine* (2); *Coriveau* v. *Corporation de St. Valier* (3), at page 89; *Farwell* v. *City of Sherbrooke* (4); *Bélanger* v. *Ville de Montmagny* (5).

And whether the proceeding is begun by petition or by writ, the result as to the validity of the by-law is the same. In either case if the action is maintained, the judgment annuls the by-law which ceases to have any force or effect thereafter; (arts. 461-462 Municipal Code). The only difference being that if the proceedings are begun by petition either under the Municipal Code or under the "Town Corporations Act," there is no appeal to the provincial court of appeal, (art. 1077 Municipal Code and

(1) 24 Can. S.C.R. 52.
(2) 9 Legal News 82.
(3) 15 Q.L.R. 87.
(4) Q.R. 24 S.C. 350.
(5) 10 Rev. de Jur. 491.

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section 4614 "Town Corporations Act") and, consequently, no appeal to this court. But in both cases the proceeding is disposed of by a judgment which I hold to be the equivalent of the rule or order mentioned in section 39 (*e*). Sub-section (*d*) of section 2 of the "Supreme Court Act" enacts that "judgments" when used with reference to the court appealed from, includes any judgment, rule, order, decision, decree, decretal order or sentence thereof, etc. In my opinion, therefore, *Bell Telephone Co.* v. *City of Quebec* (1) was decided on an erroneous impression of the effect of *City of Sherbrooke* v. *McManamy* (2) and the terms of the "Supreme Court Act" are broad enough to provide an appeal here in all proceedings to quash or annul a by-law when the right of appeal to the provincial court of last resort is not taken away by the provincial legislature. Vide *per* Strong C.J. in *City of St. Cunégonde* v. *Gougeon* (3) at page 83.

I would dismiss motion with costs.

GIROUARD J.—La Shawinigan Water and Power Co. demande par sa requête à la cour supérieure des Trois-Rivières, qu'un règlement municipal de la corporation de la ville de Shawinigan Falls soit déclaré illégal, nul et de nul effet et qu'il soit annullé. Voici les conclusions de la demande:

Pourquoi les demandeurs concluent à ce que le règlement ci-dessus mentionné, passé et adopté par le conseil municipal de la corporation défenderesse à sa séance du 24 août dernier, et approuvé à son autre séance du 31 août dernier, soit déclaré illégal, nul et de nul effet, à ce qu'il soit cassé et annullé et à ce que l'ordonnance d'injonction interlocutoire émanée en cette cause à la demande de

(1) 20 Can. S.C.R. 230. (2) 18 Can. S.C.R. 594.
(3) 25 Can. S.C.R. 78.

la demanderesse contre les défendeurs et les mis-en-cause, soit par le jugement final déclarés permanente et péremptoire et à ce qu'il soit en conséquence enjoint aux défendeurs et aux mis-en-cause de se conformer permannement aux conclusions contenues dans la dite requête demandant l'émanation de la dite ordonnance, et ce, sous les pénalités pourvues par la loi en pareil cas, le tout avec dépens contre les défendeurs dans tous les cas, et contre les mis-en-cause au cas de contestation de leur part.

Le juge de première instance a débouté l'action des demandeurs avec dépens; mais, en appel, ce jugement fut renversé et le règlement en question fut déclaré illégal, et cassé et annullé avec dépens contre la corporation municipale; différant, les honorables juges Lavergne et Archambault. Voici le dispositif du jugement en appel:

Maintient l'appel et l'action, déclare illégal le règlement passé par le conseil de la corporation intimée le 24 août, 1908, et approuvé le 31 août, 1908; casse et annule le dit règlement, déclare absolue et péremptoire l'ordonnance d'injonction interlocutoire émanée en cette cause et enjoignant à la corporation intimée ainsi qu'aux mis-en-cause de ne pas donner effet au contrat basé sur le dit règlement ni de signer les billets promissoires, le tout avec dépens tant de la cour supérieure que de cette cour contre l'intimée, la corporation de la ville de Shawinigan Falls. Dissidents, les honorables juges Lavergne et Archambault.

La Shawinigan Hydro-Electric Co., à son tour, inscrit en appel devant cette cour; et la compagnie qui a réussi devant la cour d'appel fait motion que l'appel devant nous soit cassé faute de juridiction. Avons-nous juridiction? Voilà toute la question.

La constitution de la cour suprême a été plusieurs fois remodelée et a été le sujet d'un grand nombre de discussions devant nous, toujours au sujet de notre juridiction; bien qu'il ne semble pas que, sur le sujet qui nous occupe présentement, la législation aît varié. La section 39, chapitre 139, paragraphe (*e*), sous le titre "Loi concernant la cour suprême," déclare qu'il y a appel à la cour suprême

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dans tous les cas où un règlement d'une corporation municipale a été infirmée par règle ou ordonnance d'une cour, ou que la règle ou l'ordonnance pour l'infirmer a été refusée après audition.

C'est à-peu-près le langage du premier statut établissant la cour suprême, 38 Vict. ch. 11, sec. 17.

Cette disposition s'applique à toutes les provinces, même Québec. Il est vrai que par les clauses 44, 45 et 46 certaines exceptions et restrictions ont été créées en faveur de cette province; mais la section 47 déclare qu'elles n'auront pas d'application dans le cas de règlements municipaux.

En face d'un texte aussi positif, il est difficile de se rendre compte que la jurisprudence aît hésité et aît même varié. On cite surtout quatre précédents qui nient l'appel, dit-on.

City of Sherbrooke v. *McManamy*(1); mais à en juger par le rapport de la cause il ne paraît pas qu'il s'agissait de la nullité d'un règlement, ni que la cour ne l'aît prononcée.

County of Verchères v. *Village of Varennes*(2); même objection; il ne s'agissait pas ici d'un règlement mais d'un procès-verbal.

Egalement *Toussignant* v. *County of Nicolet*(3), que l'on cite contre notre juridiction, ne s'applique guère; car, en cette dernière cause, il ne s'agissait pas d'un règlement, mais d'un procès-verbal.

Bell Telephone Co. v. *City of Quebec*(4); ici la cour d'appel refusa d'annuller un règlement municipal pour des raisons que je ne puis apprécier, car je ne puis comprendre que l'ordre ou jugement de la cour d'appel ne soit pas la "règle ou ordonnance d'une cour" dans le sens de la clause 39 de l'acte de la cour

(1) 18 Can. S.C.R. 594.
(2) 19 Can. S.C.R. 365.
(3) 32 Can. S.C.R. 353.
(4) 20 Can. S.C.R. 230.

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suprême. Autrement il faudrait décider qu'il ne peut jamais y avoir d'appel à cette cour d'un règlement municipal dans la province de Québec.

Le code municipal et les chartes de plusieurs villes donnent à tout contribuable un mode sommaire d'attaquer un règlement municipal devant un tribunal spécial, le plus souvent la cour de circuit ou encore la cour du recorder, avec le droit d'appel à une autre cour indiquée; et nous venons de décider dans la cause de *Montreal Street Railway Co.* v. *City of Montreal* (1909), (1), que dans des cas comme ceux-là il n'y a pas d'appel à cette cour. A moins de donner le droit d'appel à un intéressé dans une action de droit commun instituée, comme dans l'espèce, en cour supérieure, un règlement municipal ne pourrait être examiné et revisé par cette cour. Nous devons cependant donner effet à la clause 39, par. (*e*), de l'acte de la cour suprême, qui ne distingue pas entre des procédés en nullité de droit commun et ceux indiqués au code municipal; dans l'un comme dans l'autre cas, la clause 39 ne limite pas l'effet de la nullité d'un règlement municipal aux parties ayant un intérêt spécial et distinct de celui des contribuables ordinaires. Elle permet l'annullation d'un règlement municipal sans restriction, c'est-à-dire à toutes fins quelconques à l'égard de tout le monde.

Enfin il ne manque pas de décisions où cette cour a exercé juridiction dans des appels de jugements sur des règlements municipaux: *Webster* v. *City of Sherbrooke*(2); *Longueuil Navigation Co.* v. *City of Montreal*(3); *Town of Chicoutimi* v. *Price*(4).

Pour ces raisons je suis d'avis de renvoyer la motion de l'intimée avec dépens.

(1) 41 Can. S.C.R. 427.
(2) 24 Can. S.C.R. 52.
(3) 15 Can. S.C.R. 566.
(4) 29 Can. S.C.R. 135.

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Davies J.

DAVIES J. (dissenting).—If the question of our jurisdiction to hear an appeal from the Province of Quebec in a judgment such as the one in this case annulling and declaring void a by-law of a municipality was *res integra,* I would accept the reasoning and conclusion of the Chief Justice affirming that jurisdiction. Unfortunately there is the case of *The Bell Telephone Co.* v. *The City of Quebec*(1), which expressly decides the other way. Until that decision is overruled I feel it binding upon me.

Upon the question whether the matter in controversy amounts to the sum of $2,000, I am unable to agree with the members of the court who hold that it does and dismiss the motion to quash on that ground.

The real matter in controversy is the validity or invalidity of the by-law. With the collateral or incidental effect of a judgment upon that point one way or the other we are not concerned. Whether it results in affecting property over $2,000 or not is not the question. For these reasons I am constrained to allow the motion to quash.

IDINGTON J.—I think the right of appeal exists by virtue of section 46 and sub-section (*c*) of the "Supreme Court Act."

The substance of the matter directly in controversy here is the validity of a contract plainly involving twenty times the measure of importance sub-section (*c*) assigns as one of the several tests thereof to be held sufficient for founding the jurisdiction of the court.

Matters of quite as much importance may be often indirectly involved and yet not fall within the defini-

(1) 20 Can. S.C.R. 230.

tion in question. This matter in controversy herein is directly (and plainly so) involved.

The incidental feature arising from the validity of the by-law being in question does not seem to me to affect the question any more than it might have done in *Ville de St. Jean* v. *Molleur*(1), which involved as a consequence of a rescission of the contractual relation, the rescission of a by-law.

The jurisdiction to hear was attacked in that case, and though the exact point here in question was not taken, it is hardly likely we would have heard the case if the incident that the validity of a by-law being involved should have made any difference.

Moreover, suppose a municipality through its council had entered without any by-law at all, into some such contract, and a ratepayer, as here, had chosen to attack the transaction in the courts as invalid, and the third party concerned as well as the municipal authorities, were in course of such attack enjoined from acting under such contract merely because the court so enjoining held, perhaps erroneously, a by-law was needed. Could it be said that the third party whose rights were so adjudicated upon could have no relief or appeal, though his contention might be that no by-law was needed? If in truth no by-law was necessary in law in the case put, then, if this motion is founded on sound principle, the third party would be deprived of his rights (perhaps involving ten times the limit assigning a right of appeal) and of his right to maintain such a contention.

I would dismiss the motion with costs.

DUFF J.—I agree with Mr. Justice Anglin.

(1) 40 Can. S.C.R. 139, 629.

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ANGLIN J.—With profound respect for the opinions to the contrary of my Lord, the Chief Justice, and my brother Girouard, I incline to the view that we are constrained by the authorities in this court to hold this case to be not within section 39 (*e*) of the "Supreme Court Act." *Bell Telephone Co.* v. *City of Quebec*(1); *Toussignant* v. *County of Nicolet*(2).

But, without determining that question, I think it clear that the motion to quash should be dismissed because this appeal is from the "final judgment of the highest court of final resort" in the province in an action instituted in a superior court (section 36), of which the substantial purpose is to prevent the consummation of a contract for the sale of real estate at a price far exceeding $2,000. The real matter in controversy is the right of the appellants to compel the municipality to take the land which it has agreed to buy and to make payment to them of the purchase money. This the plaintiff seeks by injunction to prevent. Such is the direct — not merely the collateral or consequential — effect of a judgment for the plaintiff. It is in fact an integral part of the judgment itself. The matter directly in controversy, therefore, in my opinion, "amounts to the sum or value of two thousand dollars," (section 46(*c*)). This suffices to establish the jurisdiction of this court to entertain the appeal. *Coté* v. *The James Richardson Co.*(3), at page 49; *Robinson, Little & Co.* v. *Scott & Son*(4).

The special jurisdiction conferred by section 39 (*e*) is supplementary. It does not exclude the general appellate jurisdiction conferred by section 36 in a

(1) 20 Can. S.S.R. 230.
(2) 32 Can. S.C.R. 353.
(3) 38 Can. S.C.R. 41.
(4) 38 Can. S.C.R. 490.

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Anglin J.

case otherwise appealable, although the validity of a municipal by-law may be brought in question in the action.

That the appellants, who were made defendants in this action and who are bound by the existing judgment declaring their contract with the municipality to be illegal and void, have sufficient interest to give them a right of appeal to this court, I entertain no doubt.

The motion to quash should be dismissed with costs.

Motion dismissed with costs.

Solicitors for the appellants; *Geoffrion, Geoffrion & Cusson.*

Solicitors for the respondents: *Meredith, Macpherson, Hague & Holden.*

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pensation for improvements. If they ever had such a right in default of obtaining a renewal it was barred by the Statute of Limitations. THE KING *v.* ST. CATHARINES HYDRAULIC CO... **595**

6——*Implied warranty — Fitness of machinery—New agreement — Breaches prior to new contract—Relinquishment of rights under former agreement.*] R. & N. purchased threshing machinery from the company, in Nov., 1906, under an agreement similar to that in part quoted below, and gave notes for the price. They dissolved their business connection, after using the machine for some time, and, in March, 1907, after the threshing season was over, N. was released from his obligations under the agreement, the notes signed by R. & N. were cancelled, and R. gave the company his own notes in their place and entered into a new agreement containing the following provisions: "The said machinery is sold upon and subject to the following mutual and interdependent conditions, namely: It is warranted to be made of good material and durable with good care and with proper usage and skilful management to do as good work as any of the same size sold in Canada. If the purchasers after trial cannot make it satisfy the above warranty written notice shall within ten days after starting be given, both to the company at Winnipeg and to the agent through whom purchased, stating wherein it fails to satisfy the warranty and reasonable time shall be given the company to remedy the difficulty, the purchasers rendering necessary and friendly assistance together with requisite men and horses; the company reserving the right to replace any defective part or parts; and if the machinery or any part of it cannot be made to satisfy the warranty it is to be returned by the purchaser free of charge to the place where received and another substituted therefor that shall satisfy the warranty or the money and notes immediately returned and this contract cancelled neither party in such case to have or make any claim against the other. And if both such notices are not given within such time that shall be conclusive evidence that said machinery is as warranted under this agreement and that the machinery is satisfactory to the purchasers. If the

company shall at purchaser's request render assistance of any kind in operating said machinery or any part thereof or in remedying any defects such assistance shall in no case be deemed a waiver of any term or provision of this agreement or excuse for any failure of the purchasers to fully keep and perform the conditions of this warranty. When at the request of the purchasers a man is sent to operate the above machinery which is found to have been carelessly or improperly handled said company putting same in working order again the expenses incurred by the company shall be paid by said purchasers. This warranty does not apply to second-hand machinery. It is also agreed that the purchasers will employ competent men to operate said machinery. There are no other warranties or guarantees, promises or agreements than those contained herein. All warranties are to be inoperative and void in case the machinery is not settled for when delivered or if the printed language of the above warranty is changed whether by addition, erasure or waiver or if the purchasers shall in any respect have failed to comply herewith." Some defects in the machinery had given rise to complaints, during the previous threshing season, and had been rectified by the company before the execution of the second agreement; they also made further repairs during the Autumn of 1907 and then notified R. that future repairs must be at his own expense. R. paid the first instalment of the price of the machinery, but, when subsequently sued on his other notes, contested the claim, pleaded breach of an implied warranty of fitness and counterclaimed for damages for this breach.—*Held*, that all claims for damages for breaches of any kind prior to the second agreement had been waived by that agreement and that the provision that there were no other warranties, guarantees, promises or agreements than those contained in the agreement excluded all implied warranties.—*Held*, further, that the condition requiring written notice of breach of warranty applied only to the warranty that "with proper usage and skilful management" the machinery would "do as good work as any of the same size sold in Canada," and that it had no application to the warranties that the machinery was

company—Tariffs "duly filed"—Jurisdiction of Board of Railway Commissioners.] Under section 336 of "The Railway Act," R.S.C. 1906, ch. 37, tariffs filed by foreign railway companies for rates on through traffic originating in foreign territory, to be carried by continuous routes owned or operated by two or more companies from foreign points to destinations in Canada, are effective and binding upon all Canadian companies participating in the transportation, although not expressly assented to by the latter, and may be enforced by the Board of Railway Commissioners for Canada against such Canadian companies. Anglin J. *contra.*—*Per* Anglin J. (dissenting).—"The Railway Act" requires concurrence by the several companies interested as in other joint tariffs on through traffic mentioned in the Act. GRAND TRUNK RY. CO. *v.* BRITISH AMERICAN OIL CO..... **311**

5——*Action—Damages—Denial of traffic facilities—Injury by reason of operation of railway—Limitation of actions—"Railway Act," 3 Edw. VII. c. 58, s. 242—Construction of statute.*] Injuries suffered through the refusal by a railway company to furnish reasonable and proper facilities for receiving, forwarding and delivering freight, as required by the "Railway Act," to and from a shipper's warehouse, by means of a private spur-track connecting with the railway, do not fall within the classes of injuries described as resulting from the construction or operation of the railway, in section 242 of the "Railway Act," 3 Edw. VII. ch. 58, and, consequently, an action to recover damages therefor is not barred by the limitation prescribed by that section for the commencement of actions and suits for indemnity. Judgment appealed from (19 Man. R. 300) affirmed, Girouard and Davies JJ. dissenting. CANADIAN NORTHERN RY. CO. *v.* ROBINSON. **387**

(Leave to appeal to Privy Council granted, 22 Nov., 1910.)

6——*Board of Railway Commissioners—Jurisdiction — Municipal streets — Railway upon or along highway—Leave to construct—Approval of location—Condition imposed—Payment of damages to abutting landowners — Construction of statute—R.S.C.* (1906) *c.* 37, *ss.* 47, 155, 159, 235, 237.] Having obtained the consent of the municipality to use certain public streets for that purpose, the G.T.P. Ry. Co. applied to the Board of Railway Commissioners for Canada for leave to construct and approval of the location of the line of their railway upon and along the highways in question. None of the lands abutting on these highways were to be appropriated for the purposes of the railway, nor were the rights or facilities of access thereto to be interfered with except in so far as might result from inconvenience caused by the construction and operation of the railway upon and along the streets. In granting the application the Board made the order complained of subject to the condition that the company should "make full compensation to all persons interested for all damage by them sustained by reason of the location of the said railway along any street." On appeal to the Supreme Court of Canada.—*Held,* Davies and Duff JJ. dissenting, that, under the provisions of section 47 of the "Railway Act," R.S.C. (1906) ch. 37, the Board had, on such application, the power to impose the condition directing that compensation should be made by the company in respect of the damages which might be suffered by the proprietors of the lands abutting on the highways or the municipality upon and along which the line of railway so located was to be constructed. GRAND TRUNK PACIFIC RY. CO. *v.* CITY OF FORT WILLIAM..... **412**

(Leave to appeal to Privy Council granted, 8 Nov., 1910.)

7——*Accident — Negligence — Railway rules — Special instructions — Defective system—Common law negligence—Workmen's Compensation Act.*] The "Railway Act," prescribes that rules and regulations for travelling upon and the use or working of a railway must be approved by the Governor-General in Council and that, until so approved, such rules and regulations shall have no force or effect; when approved they are binding on all persons. Rule 2 of the rules of the Grand Trunk Railway Co. provides that "In addition to these rules, the time-tables will contain special instructions, as the same may be found necessary. Special instructions, not in

conflict with these rules, which may be given by proper authority, whether upon the time-tables or otherwise, shall be fully observed while in force." Trains running out of Brantford, Ont., are under control of the train-despatcher at London. The railway time-table has for many years contained the following foot-note:—"Tilsonburg Branch.—Yard-engines at Brantford are allowed to push freight trains up the Mount Vernon grade and return to Brantford B. & T. station without special orders from the train-despatcher. Yard-foreman in charge of yard-engine will be held responsible for protecting the return of the yard-engine, and for knowing such engine has returned before allowing a train or engine to follow.—A. J. Nixon, Assistant Superintendent." This regulation or instruction had not then been submitted for the approval of the Governor-General in Council. By Rule 224 "all messages or orders respecting the movement of trains * * * must be in writing." —*Held*, Davies J. dissenting, that assuming the foot-note on the time-table to be a "special instruction" under Rule 2, it is inconsistent with the train-despatching system in force at Brantford and if, as the evidence indicates, it purports to authorize the sending out of engines under verbal orders to push freight trains up the grade it is also inconsistent with Rule 224. Such instruction has, therefore, no legal operation.—*Held*, *per* Girouard and Anglin JJ., that it was not a "special instruction" but a regulation, and not having been sanctioned by order in council operation under it was illegal.—By "The Railway Act," a "train" includes any engine or locomotive. Rule 198 provides that it "includes an engine in service with or without cars equipped with signals."—*Held*, *per* Girouard, Idington and Anglin JJ., that an engine returning to the yard after pushing a train up the grade, is a "train" subject to the provisions of Rule 224, and to the rules of the train-despatching system.—The accident in this case ocurred through the yard-foreman failing to protect the engine on its return to the yard. —*Held*, Davies J. dissenting, that the company operated the yard-engines under an illegal system and were liable to common law damages and that sub-section 2 of section 427 of the "Railway Act"

applied.—*Held*, *per* Duff J., that since, as regards the danger of collision with trains stopping at Brantford for orders, the system of operating the yard-engines through the telegraphic despatchers would clearly have afforded greater protection than that in use, and since there was admittedly no impediment in the way of adopting the former system, there was evidence for the jury of want of care in not adopting the safer system; and the fact that the existing system had been in operation for 25 years was evidence from which the jury might infer that the general governing body of the company was aware of it. And further, following *Smith* v. *Baker* (1891) A.C. 325), and *Ainslie Mining and Railway Co.* v. *McDougall* (42 Can. S.C.R. 420), that, in these circumstances, the company was responsible for the defects in the system. FRALICK *v.* GRAND TRUNK RY. CO. **494**

(Leave to appeal to Privy Council refused, 25 July, 1910.)

8——*Construction of statute — Limitations of actions—Supply of electric light —Negligence—Injury to person not privy to contract—"Consolidated Railway Company Act*, 1896," 59 *V. c.* 55 (*B.C.*), *ss.* 29, 59, 60 ..... **1**

See ACTION 1.

9——*Board of Railway Commissioners— Consideration of complaints—Evidence— Rejection—Agreement as to special rates —Unjust discrimination* **256**

See BOARD OF RAILWAY COMMISSIONERS 2.

10——*Arbitration and award — Expropriation—Form of award—View of property—Proceeding on wrong principle— Disregarding evidence* **379**

See ARBITRATION AND AWARD.

REFERENCES — *Constitutional law — Construction of statute—"B. N. A. Act*, 1867," *ss.* 91, 92, 101—"*Supreme Court Act*," *R.S.C.* 1906, *c.* 139, *ss.* 3, 60—*References by Governor-General in Council —Opinions and advice — Jurisdiction of Parliament — Independence of judges — Judicial functions — Constitution of courts—Administration of the laws of*

WARRANTY— *Contract — Implied warranty — Fitness of machinery — New agreement—Breaches prior to new contract—Relinquishment of rights under former agreement.*] R. & N. purchased threshing machinery from the company, in Nov., 1906, under an agreement similar to that in part quoted below, and gave notes for the price. They dissolved their business connection, after using the machine for some time, and, in March, 1907, after the threshing season was over, N. was released from his obligations under the agreement, the notes signed by R. & N. were cancelled, and R. gave the company his own notes in their place and entered into a new agreement containing the following provisions: "The said machinery is sold upon and subject to the following mutual and interdependent conditions, namely: It is warranted to be made of good material and durable with good care and with proper usage and skilful management to do as good work as any of the same size sold in Canada. If the purchasers after trial cannot make it satisfy the above warranty written notice shall within ten days after starting be given both to the company at Winnipeg and to the agent through whom purchased, stating wherein it fails to satisfy the warranty and reasonable time shall be given the company to remedy the difficulty, the purchasers rendering necessary and friendly assistance together with requisite men and horses; the company reserving the right to replace any defective part or parts; and if the machinery or any part of them cannot be made to satisfy the warranty it is to be returned by the purchaser free of charge to the place where received and another substituted therefor that shall satisfy the warranty or the money and notes immediately returned and this contract cancelled neither party in such case to have or make any claim against the other. And if both such notices are not given within such time that shall be conclusive evidence that said machinery is as warranted under this agreement and that the machinery is satisfactory to the purchasers. If the company shall at purchaser's request render assistance of any kind in operating said machinery or any part thereof or in remedying any defects such assistance shall in no case be deemed a waiver of any term or provision of this agreement or excuse for any failure of the

WARRANTY—*Continued.*

purchasers to fully keep and perform the conditions of this warranty. When at the request of the purchasers a man is sent to operate the above machinery which is found to have been carelessly or improperly handled said company putting same in working order again the expenses incurred by the company shall be paid by said purchasers. This warranty does not apply to second-hand machinery. It is also agreed that the purchasers will employ competent men to operate said machinery. There are no other warranties or guarantees, promises or agreements than those contained herein. All warranties are to be inoperative and void in case the machinery is not settled for when delivered or if the printed language of the above warranty is changed whether by addition, erasure or waiver or if the purchasers shall in any respect have failed to comply herewith." Some defects in the machinery had given rise to complaints, during the previous threshing season, and had been rectified by the company before the execution of the second agreement; they also made further repairs during the autumn of 1907 and then notified R. that future repairs must be at his own expense. R. paid the first instalment of the price of the machinery, but, when subsequently sued on his other notes, contested the claim, pleaded breach of an implied warranty of fitness and counterclaimed for damages for this breach.—*Held*, that all claims for damages for breaches of any kind prior to the second agreement had been waived by that agreement and that the provision that there were no other warranties, guarantees, promises or agreements than those contained in the agreement excluded all implied warranties. —*Held*, further, that the condition requiring written notice of breach of warranty applied only to the warranty that "with proper usage and skilful management" the machinery would "do as good work as any of the same size sold in Canada," and that it had no application to the warranties that the machinery was "made of good materials" and would be "durable with good care." The consideration for the release of N. and the acceptance of the sole liability of R. for the price of the machinery was the execution of the new notes and agreement which involved the relin-