REPORTS

OF THE

SUPREME COURT

OF

CANADA.

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1908.

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.

" DÉSIRÉ GIROUARD J.

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

" JOHN IDINGTON J.

" JAMES MACLENNAN J.

" LYMAN POORE DUFF J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. ALLEN BRISTOL AYLESWORTH K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. JACQUES BUREAU K.C.

ERRATA AND ADDENDA.

Errors and omissions in cases cited have been corrected in the list of cases cited.

Page 9, add after citation from Dalloz, 1823, I, 371, "*Cf. Direction des Domaines* v. *Gombert*, S.V. 1823, I, 317."

Page 188, add foot-note, reference to judgment appealed from, "(1) Q.R. 17 K.B. 112."

Page 294, line 19, for "re-entry or breach," read "re-entry for breach."

Page 418, add foot-note, reference to judgment appealed from, "(1) 11 Ex. C.R. 214."

Page 431, add foot-note, reference to judgment appealed from, "(1) 11 Ex. C.R. 252."

Page 452, the reference to *Holmes* v. *Jones*, is "4 Commw. L.R. 1692."

Page 523, line 10, for "of" read "or."

Page 600, in foot-note (5), read "(1901) 2 K.B. 669."

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOL. 39 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

Bonanza Creek Hydraulic Concession v. *The King* (40 Can. S.C.R. 281). Leave to appeal to Privy Council refused with costs (18th July, 1908; 51 Can. Gaz. 438).

Canadian Pacific Railway Co. v. *Hansen* (40 Can. S.C.R. 194). Leave to appeal to Privy Council refused (21st July, 1908).

Day v. *Crown Grain Co.* (39 Can. S.C.R. 258). Appeal to Privy Council dismissed with costs ([1908] A.C. 504).

Grenier v. *The King.* See *The Queen* v. *Grenier* (30 Can. S.C.R. 42). Leave to appeal to Privy Council refused (21st July, 1908).

The King v. *Armstrong* (40 Can. S.C.R. 226). Leave to appeal to Privy Council refused with costs (18th July, 1908).

The King v. *Lefrançois* (40 Can. S.C.R. 431). Leave to appeal to Privy Council refused (18th July, 1908).

Klondyke Government Concession v. *The King* (40 Can. S.C.R. 294). Leave to appeal to Privy Council refused with costs (18th July, 1908).

McLean v. *The King* (38 Can. S.C.R. 542). Appeal to Privy Council dismissed with costs (10th July, 1908).

McMullin v. *The Nova Scotia Steel and Coal Co.* (39 Can. S.C.R. 593). Leave to appeal to Privy Council refused (12th May, 1908).

Norton v. *Fulton* (39 Can. S.C.R. 202). Appeal to Privy Council dismissed with costs ([1908] A.C. 451.)

Prévost v. *Lamarche* (38 Can. S.C.R. 1). Appeal to Privy Council allowed with costs ([1908] A.C. 541).

Union Investment Co. v. *Wells* (39 Can. S.C.R. 625). Leave to appeal to Privy Council refused with costs.

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CASES

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ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES AND THE TERRITORIAL COURT OF THE YUKON TERRITORY.

NAPOLEON P. TANGUAY (DEFENDANT) ..... } APPELLANT;

AND

THE CANADIAN ELECTRIC LIGHT COMPANY (PLAINTIFFS) } RESPONDENTS.

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*Oct. 10.
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ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Rivers and streams—Crown domain—Title to land—"Flottage"—Driving loose logs—Public servitude—Riparian ownership—Action possessoire—Arts. 400, 503, 507, 2192 *C.C.—Art.* 1064 *C.P.Q.*

In the Province of Quebec, watercourses which are capable merely of floating loose logs, (*flottables à bûches perdues,*) are not dependencies of the Crown domain within the meaning of article 400 of the Civil Code. The owners of the adjoining riparian lands are, consequently, the proprietors of the banks and beds of such streams and have the right of action *au possessoire* in respect thereof.

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

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There is, however, a right of servitude over such watercourses in respect to all advantages which the streams and their banks, in their natural condition, can afford to the public, there being no distinction, in this regard, between navigable or floatable streams and those which are neither navigable nor floatable. *McBean* v. *Carlisle* (19 L.C. Jur. 276) and *Tanguay* v. *Price* (37 Can. S.C.R. 657) followed.

Judgment appealed from (Q.R. 16 K.B. 48) affirmed, Girouard and Idington JJ. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of Larue J., at the trial(2), in the Superior Court for the District of Quebec.

The action was *au possessoire et en démolition de nouvelles œuvres* and was brought by the respondents to obtain a declaration of their rights in the banks and bed of the River Chaudière as riparian proprietors of certain lands on both sides of that river. It was admitted that, at the *locus in quo,* the river was neither navigable nor floatable except for loose logs (*à bûches perdues*), that the plaintiffs had been for some years in actual possession of the banks and bed of the river and had constructed dams and done other works there for the purpose of creating a reservoir and developing water-power for the operation of their electric light system installed in their power-house on the lands in question. They contended that the defendant had illegally disturbed them in their possession and prayed for the demolition of certain wharves and piers placed by the defendant on the banks and booms stretched across the river for the purpose, as alleged by him, of improving the floatability of the stream to carry on his lumbering operations with better advantage. At the trial,

(1) Q.R. 16 K.B. 48. (2) Q.R. 28 S.C. 157.

the questions at issue were whether or not the plaintiffs were in possession of the bed and banks of the river, at the place where the encroachments complained of occurred, within the meaning of articles 2192 of the Civil Code and 1064 of the Code of Civil Procedure, and if the defendant was entitled, under the circumstances, to invoke the benefit of the provisions of articles 5535 and 5536 of the Revised Statutes of Quebec and of the Act, 54 Vict. ch. 25 (Que.).

The courts below unanimously held that the defendant did not come within the provisions of the provincial statutes referred to, and the majority of the Court of King's Bench, held that, as the river was floatable merely *à bûches perdues,* it was not part of the Crown domain, and affirmed the judgment of Larue J. which maintained the plaintiffs' action, Lavergne J. dissenting.

The questions raised on the present appeal are fully discussed in the judgments now reported.

Lane for the appellant.

G. G. Stuart K.C. and *L. P. Pelletier K.C.* for the respondents.

THE CHIEF JUSTICE.—The plaintiffs in the court of first instance (respondents) brought against the defendant (appellant) an action known in the Province of Quebec as an *action possessoire et en démolition de nouvelles œuvres,* whereby they sought the demolition and removal of certain piers and wharves built on the bed and the shores together with certain

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booms stretched across the waters of the River Chaudière.

In their declaration the plaintiffs set forth their documents of title and allege that they are proprietors and in possession of several lots of land fully described in such documents and situate within the parishes of St. Nicholas, St. Etienne de Lauzon and St. Jean Chrysostome, in the County of Levis, all crossed by or fronting on the River Chaudière. The plaintiffs further allege that as owners of the soil on both sides of the river (which they state to be at the *locus in quo* neither navigable nor floatable, except for loose logs) they are the owners of the land under the waters and that they have taken actual pedal possession of the same for the purpose of building a dam and creating a reservoir for the development of their electric light system. They complain that the defendant encroached on the bed of the river and its banks within the limits of their possession, and there proceeded to erect piers and wharves. By their conclusions, the plaintiffs pray for a declaration of their rights, for a declaration that the defendant has illegally disturbed the enjoyment of such rights, and for a declaration authorizing the demolition of the works complained of.

The defendant, without denying the alleged acts of trespass, except those that are charged with respect to the lands above high water mark, says:

1st. That the Chaudière is a navigable and floatable river, and consequently its bed forms part of the Crown domain. (Art. 400 C.C.)

2ndly. That the piers and the wharves in question were built by him on the bed and banks of the stream to improve its floatability and were necessary to carry on with advantage his lumber business, he being the

proprietor of extensive timber limits on the river above; and he claims the benefit of articles 5535 and 5536 of the Revised Statutes of Quebec and of the provincial statute, 54 Vict. ch. 25.

The questions in issue at the trial were, therefore:

1st. Were the plaintiffs in possession of the bed and banks of the River Chaudière, at the place where the encroachments complained of occurred, within the meaning of articles 1064 C.P.Q., and 2192 C.C.?

2ndly. Is the defendant, in the circumstances, entitled to claim the benefit of the statutory provisions he invokes?

The judges below are unanimously of opinion that the defendant did not come within the exceptional provisions of the Revised Statutes of Quebec which are applicable only to a proprietor whose lands border on a water-course, or to the owner of property along or across which a water-course runs or passes (art. 503 C.C.) and that defendant is not in either class.

Both courts also find that the Act, 54 Vict. ch. 25, does not, if applicable to the circumstances of this case, confer on the appellant power to do the acts complained of, unless and until certain conditions have been performed by him which have not been performed.

With the unanimous conclusions reached on these two points I agree; and the only question to be considered on this appeal, and it is of the greatest importance, is the one with respect to which there was a dissenting opinion below, viz.: Were the plaintiffs in possession of the bed and banks of the river as alleged in their declaration; or, in other words, is the Chaudière River navigable and floatable at the place where

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it crosses or passes over the plaintiff's property so as to make it part of the Crown domain?

The answer to this question depends upon the construction to be put upon the word "floatable" in article 400 of the Civil Code of the Province of Quebec.

It is unnecessary to add that the case must be decided according to the French law as it exists in that province.

Some reference was made to a supposed defect in the respondent's title resulting from the description of the lots which are stated to be bounded by the river.

In my opinion, this difficulty is disposed of by the judgment of this court in *Massawippi Valley Railway Co.* v. *Reed*(1). See also *Attorney-General of Quebec* v. *Scott*(2).

Admittedly the river is not navigable.

In *Bell* v. *The City of Quebec*(3), their Lordships, citing Dalloz, Rep. tit. *"Voirie par eau,"* no. 39, say the test of navigability of a river is its possible use for transport in some practical and profitable manner.

It cannot be said, taking the most favourable view of the evidence, that this river could be used in a profitable or practical manner for the purpose of navigation, and for that the defendant did not contend here. On this appeal, as in the courts below, the issue was as to the floatability of the river; and this issue involves the decision of a preliminary question which, from its very nature, is exclusively one of fact and as to which, under the French system, the finding of the trial judge

(1) 33 Can. S.C.R. 457. (2) 34 Can. S.C.R. 603.
(3) 5 App. Cas. 84.

is practically conclusive. (Beaudry-Lacantinerie, Des Biens, no. 174; *Attorney-General of Quebec* v. *Scott* (1)). The learned trial judge, who heard all the witnesses, after having described the character of the river throughout its entire course, from Lake Megantic to the estuary or basin at the foot of the falls below the plaintiff's property, sums up in these terms:

La preuve démontre de la manière la plus convaincante que cette rivière n'est navigable d'une manière pratique, dans son état naturel, dans aucune partie de son parcours, sauf en bas de la chaussée de la demanderesse dans l'estuaire du bassin de la rivière jusqu'à sa jonction avec le fleuve St. Laurent.

Quant á sa flottabilité elle est impossible pour les radeaux et trains de bois. Lors des grosses eaux du printemps et des pluies extraordinaires amenant une crue subite *le flottage à bûches perdues est le seul genre de flottage qui puisse s'y faire.*

Dans les basses eaux, les gens peuvent traverser à pied.

This finding of fact is concurred in by the majority of the court of appeal and is not expressly dissented from by Mr. Justice Lavergne, who says, at page 422:

La Chaudière est une des rivières les plus considérables. Sa larguer moyenne est de trois arpents; elle en a atteint jusqu'à 8 a 9. Au printemps et aux coups d'eau d'été, les eaux sont très hautes et alors se fait le flottage de centaines de milliers et peut-être de millions de billots qui se rendent aux divers moulins où ils sont sciés et mis sur le marché. Cependant de St. François à la jonction Scott, distance de 20 à 30 milles, il y a assez d'eau pour les petites embarcations, et même pour les bateaux à vapeur. *De la jonction Scott jusqu'à la chûte, suite de rapides.* Dans l'été, à eau basse, il n'y a de navigable ou de flottable que la partie de St. François à la jonction Scott.

See also *O'Farrell* v. *Duchesnay* (2).

The plaintiff's property is between *"la jonction Scott"* and *"la chûte."* *Vide The Queen* v. *Robertson* (3), *per* Strong J., at page 130.

(1) 34 Can. S.C.R. 603, at p. 614.
(2) 9 Leg. News 259.
(3) 6 Can. S.C.R. 52.

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Therefore I assume that the river is found to be in fact floatable only for loose logs; and, on that assumption, I proceed to examine the question as to whether such a river forms part of the Crown domain as being a floatable river within the meaning of article 400 C.C. The question is very frankly and very fairly put by Mr. Justice Lavergne in his dissenting judgment, when he says:

> Il est indéniable qu'aux hautes eaux la rivière est flottable pour des *flots de billots*. L'intimé nous dit que c'est là le flottage à bûches perdues et que les rivières flottables à bûches perdues ne sont pas des dépendances du domaine public.
>
> Cette distinction ne se trouve pas dans le code et il me semble qu'elle n'a pas lieu d'être dans le pays. Dans l'ancienne France elle n'était donnée que par un certain nombre d'auteurs. Le Code Napoléon ne distingue pas.

Here, I venture to say with deference, is the fundamental error which has led the learned judge to the erroneous conclusions he has reached. In France, before the Code, there was a broad distinction between streams that were floatable in the sense that they could be used for the transport of boats, flats or rafts (the words used are "*portant bateaux, trains ou radeaux*") and those streams that were floatable for loose logs only; and since the Code, as Laurent says, the distinction is universally admitted.

Dalloz, Rép. Jur. *Eaux*, no. 61:

> Il est vrai (dit-il), que le code civil n'a établi aucune distinction entre les deux sortes de flottage; il a même gardé un silence absolu à cet égard; mais la distinction se retrouve *dans toutes les anciennes lois*, comme dans *tous les monuments de la jurisprudence.*

Proudhon, Domaine public, vol. 3, no. 857:

> Il est essential de remarquer que les rivières flottables doivent être rangées dans deux classes très distinctes.
>
> La première classe comprend celles des rivières où le flottage s'exerce par trains ou radeaux, et la seconde celles où il ne se pratique qu'à bûches perdues.

On entend ici par trains, ou trains de bois, les groupes ou faisceaux de bois coupés en bouts de moindre ou médiocre longueur, que l'on assujettit les uns aux autres par des perches et des liens, pour pouvoir les soigner ensemble comme un seul corps lancé à flot dans la rivière par laquelle on veut les faire descendre.

Le mot radeau s'applique plus spécialement aux grands bois de charpente ou de mâture qu'on lance en rivière et qu'on y assujettit de même les uns aux autres par des perches et des liens, pour pouvoir les soigner ensemble et en gouverner la conduite comme s'ils ne formaient qu'un seul corps.

Il est aisé de comprendre que cette espèce de flottage ne peut s'exercer que dans les grandes rivières, où le volume des eaux est partout suffisant pour porter à flot les trains et radeaux, et dans le lit desquelles on ne trouve ni cataractes, ni cascades, ni rochers qui embarrassent le cours d'eau.

Tels sont les caractères par lesquels on distingue la première classe des rivières flottables.

Again at no. 860:

Il y a donc deux espèces bien distinctes de rivières flottables:

La première comprend celles sur lesquelles le flottage s'exerce par grosses masses de bois réunis et enlacés en trains ou radeaux; et cette espèce appartient, sous tous ses rapports, au domaine public, comme celle des rivières navigables:

La seconde espèce comprend celles des rivières ou même des gros ruisseaux qui ne sont flottables qu'à bûches perdues; et cette dernière classe reste, quant à tous ses usages, excepté celui de la flottabilité, dans le domaine privé des propriétaires riverains.

See also nos. 390 and 391.

The earliest reported case is in Dalloz, 1823, 1. 371, where it was held:

Les rivières ne doivent être considérées dépendant du domaine public que lorsqu'elles sont flottables à train ou à radeau. Celles qui ne sont flottables qu' à bûches perdues sont la propriété des riverains.

Reference is also directed to the note to this case, *loc. cit.*

Laurent, *Supplément des Principes du Droit Civil*, vol. 2, one of the most recent books, sums up the doctrine in these words:

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Une rivière n'est pas flottable dans le sens de l'article 538 quand elle ne l'est qu'à bûches perdues; ceci est universellement admis.

Beaudry-Lacantinerie, "Des Biens," page 134, no. 174, says:

174. *Les fleuves et les rivières navigables ou flottables.* Ce sont des chemins qui marchant, dit Paschal. Une rivière * * * peut servir au transport des bois par le flottage ou la flottaison. On distingue deux espèces de flottages, le flottage avec *trains ou radeaux*, * * * et le flottage *à bûches perdues* * * * . Il n'y a que les rivières flottables avec trains ou radeaux qui fassent partie du domaine public.

2 Plocque, Législation des *Eaux*, no. 174:

On appelle flottable une rivière sur laquelle on conduit des trains ou brelles, c'est-à-dire, des masses de bois de charpente, de menuiserie ou de chauffage, assujetties avec des perches ou des liens, en forme de radeau. Mais on ne comprend pas dans le nombre des rivières flottables les cours d'eau sur lesquels on fait flotter des bois isolés ou bûches perdues.

It is useless to accumulate references to books and cases; all the learning on the subject will be found in Fuzier-Herman, vbo. "*Rivières*," nos. 80 *et seq.*, where there is authority in abundance to support my submission that the distinction referred to by Mr. Justice Lavergne was universally admitted in France both before and since the Code. The distinction was recognized and acted upon in this court in *Ward* v. *Township of Grenville*(1). Mr. Justice Girouard, at page 524, says that the Rouge River

which in no sense is navigable *but only floatable à bûches perdues.* is the *property of the riparian proprietor.*

And again at page 526, he speaks of the rights of the public with respect to the use of a private river for the purpose of floating logs. However, as to the ownership of the beds of rivers floatable only for loose

(1) 32 Can. S.C.R. 510.

logs (*bûches perdues*), which is the point at issue on this appeal, Laurent, who with Daviel and Championnière, holds that the riparian proprietor is the owner of the bed of the stream opposite his property, says(1):

Il y a sur ce point un véritable chaos d'opinions, et dans la doctrine et dans la jurisprudence.

In 1846, however, the Cour de Cassation(2) decided that the beds of such rivers were *res nullius,* and this doctrine seems to have been finally adopted by the French courts(3).

Two very instructive notes to the cases cited shew how reluctantly the text-writers accepted this jurisprudence; but finally, in 1898, the doctrine propounded by Laurent, Daviel and Championnière prevailed, and legislation introduced in that year set at rest the long standing controversy in France. See "Loi du 8 avril, 1898," article 3 of which reads:

Le lit des cours d'eau non navigables et non flottables appartient aux propriétaires des deux rives.

In a note to the judgment rendered in 1846, Mr. Deville says(2):

La cour de cassation résout ici, pour la première fois, une question depuis longtemps controversée entre les jurisconsultes et qui, chaque fois qu'elle se présente, y est un sujet de grave perplexité.

* * * * * * * * *

L,arrêt que vient de rendre la cour mettra-t-il un terme à ce long débat, et fixira-t-il la jurisprudence? Il est permis d'en douter. Il est même remarquable qu'au moment où cet arrêt est rendu apparaît un ouvrage de l'un de nos plus savants jurisconsultes, ayant pour objet d'établir la thèse contraire à celle que vient de consacrer la cour suprême. Dans cet ouvrage intitulé "De la propriété des eaux courantes," etc., et appelé, nous n'hésitons pas à le dire, à faire sensation dans la science, l'auteur, M. Championnière, se livre

(1) Vol. 6, p. 25, no. 15. (2) S.V. 1846, 1. 433.
(3) See S.V. 1865, 1. 109.

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à une étude approfondie de l'état de la propriété foncière en général, et en particulier de celle des cours d'eau, sous l'empire de notre ancien régime féodal et des institutions seigneuriales, pour en faire ressortir la solution de la question qui nous occupe, et il en arrive à cette conclusion, qui nous semble irrésistible, qu'en France la propriété des rivières non navigables ni flottables n'a jamais appartenu au domaine, ni aux anciens seigneurs; qu'elle a toujours appartenu aux riverains; que, par conséquent, l' abolition du régime féodal n'a pu la transmettre à l'état; et qu'enfin, soit la législation intermédiaire, soit le code civil, l'ont laissée, comme elle l'avait été de tout temps, dans le domaine privé des particuliers.

In the Province of Quebec this question was the subject of judicial examination and decision by the special court established under the Seigniorial Act of 1854; and Sir Louis LaFontaine in his judgment (1) goes into the whole subject at great length. In the result it was held, in accordance with the earliest French decisions, that the beds of rivers floatable only for loose logs were not part of the Crown domain, but passed by the King's grant to the seignior and from the latter by subinfeudation or *accensement* to the *censitaire*. (See 70, 71, 72*a*, Vol. A, Quest. Seig.; and opinions of Day J., p. 50(*e*), Mondelet J., p. 34(*g*), Smith J. 80(*f*), and Meredith J., p. 79(*h*), Vol. B, Quest. Seig.)

At page 80(*h*), after a careful examination of all the authorities, Meredith J. states his conclusions as follows:

> There has been much controversy as to whether under the *code civil* (Code Napoléon) even unnavigable rivers are susceptible of being private property; but whatever doubts may exist as to the bearing of the modern law of France on this subject, it is indisputable that, before the revolution of 1789, unnavigable rivers in France were *universally* held as private property, subject to certain easements and servitudes in favour of the public, and that the state did not pretend to have any right of ownership therein.

And at page 81(*h*) he adds:

(1) Vol. A, Quest. Seig. p. 34*a*.

It appears to me to be clear that when the King of France made grants of lands in Canada the unnavigable rivers within the limits of the lands so granted were included in the grants.

It is needless however to dwell upon this point, as it is admitted both by the counsel for the seigniors and by the counsel for the Crown.

This principle admitted, as this eminent judge says, by all the great lawyers engaged in that case, and accepted by the thirteen judges who sat in the court as a legal axiom, would appear to me to be conclusive on the point we are considering. It is not contended, and no such contention could be successfully maintained, that the law has been changed by the Code. If the river is not floatable, as found by the trial judge (and there is no dispute as to the facts); and conceding, as stated by Meredith J., that by the King's grant the bed of the river passes to the grantee, *cadit quæstio* and the plaintiffs must succeed. In this view it is immaterial whether the lands in question were situated within what was called "le Canada seigneurial" or were granted by the King directly "en franc et commun soccage." In either case the beds of the unnavigable rivers—giving to the word "navigable" its widest and most comprehensive meaning as including floatable—contained within the limits of the lands so granted were included in the grants.

If after fifty years this principle of French law, so accepted by this great body of jurists as settled beyond controversy, is now to be upset, I must be content to say (paraphrasing and adapting the language of Mr. Justice Girouard in *Consumers Cordage Company* v. *Connolly*(1), at page 310), that I cannot disregard the opinions of these great jurists, three of whom subsequently drafted the Quebec Code; and

(1) 31 Can. S.C.R. 244.

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that if I did entertain a different view from theirs I would hesitate to express it, in view of the fact that it has within the last few months on two different occasions been re-affirmed and acted upon by the highest court of appeal in the province, composed of men specially trained in the principles of the law by which we must be guided in this case.

The court of appeal for the Province of Quebec in *Boswell* v. *Denis*(1), held that rivers non-navigable (*non navigables et non flottables*) are the property of the riparian proprietor who has the exclusive control of the same. The Chief Justice, Sir Louis LaFontaine, disposes of the question without distinguishing as to whether the lands through which the river flows were seigniorial or not, in these words:

It has been clearly proved that the river is neither navigable nor floatable; this being proved, the appellant has admitted having fished in it, on the side of and opposite to the respondent's property; and by the decision of the seigniorial court it is held and decided that rivers *non navigables et non flottables* belong to the riparian proprietors, the judgment of the court below must, therefore, be maintained.

This judgment, rendered in 1859, has never been reversed, nor, so far as I have been able to find, questioned. Article 400 of the Civil Code, promulgated in 1866, is not given as new law and reproduces article 538 of the Code Napoléon. It is to be borne in mind that the Quebec Civil Code and the Code Napoléon both proceed on the general principle that all property is private, and that to this general principle, articles 400 C.C. and 538 C.N. are exceptions. Laurent, Vol. 6, no. 16, makes this so clear that I cannot resist the desire to quote what he says:

16. Le Code Napoléon contient un chapitre spécial sur les biens dans leurs rapports avec ceux qui les possèdent, c'est-à-dire sur la

(1) 10 L.C.R. 294.

division des biens considérés quant à la propriété, car ce chapitre est le troisième du titre ler., intitulé "De la distinction des biens." Or, il n'y a qu'une seule classification dans le dit chapitre; il y est question de biens appartenant à des particuliers et de biens n'appartenant pas à des particuliers (art. 537). La loi prend soin d'énumérer les biens qui n'appartiennent pas à des particuliers, ce sont les biens du domaine public et les biens communaux. Tous les autres biens sont donc propriété privée. En d'autres termes, le domaine privé est à l'égard du domaine de l'Etat et des communes, ce que la règle est à égard de l'exception. Le domaine privé est certes la règle; nous avons déjà dit que c'est par nécessité que le législateur enlève une certaine partie du sol à l'exploitation des citoyens, toujours plus active et plus profitable que celle de l'Etat. Dès qu'il n'y a pas de nécessité publique en cause, les biens doivent rester dans le domaine des particuliers. Ce principe suffit, nous semble-t-il, pour décider la question. L'article 538 place dans le domaine public de l'Etat les fleuves et rivières navigables ou flottables. Cela implique d'abord que les cours d'eau non navigables ni flottables ne sont pas une dépendance du domaine public; sinon les mots *navigables* ou *flottables* de l'article 538 n'auraient pas de sens. L'article 644 est conçu de la même manière; il porte: "Celui dont la propriété borde une eau courante, autre que celle qui est déclarée dépendance du domaine public par l'article 538, peut s'en servir * *" Il y a donc une distinction; les cours d'eau navigables appartiennent à l'Etat; les cours d'eau non navigables ne lui appartiennent pas.

The question as to which the French text-writers and the courts were mainly divided, namely, as to whether the bed of a river, such as the Chaudière, was *res nullius,* does not seem to have ever been considered in Quebec; and it was not argued here nor decided by the judges below.

All the commentators of the French Code and the Cour de Cassation agree in distinguishing rivers floatable for rafts (*flottables en trains*) from those floatable only for loose logs (*flottables à bûches perdues*); and I can see no reason why the distinction which they make should not be applicable to the words used in the same connection in our Code, which is copied from the French. At the time the Quebec law was codified the word *"floatable"* had acquired a well defined and well settled meaning; and the reasonable

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presumption is that the well settled interpretation of the words was adopted with the words themselves by the codifiers. I have carefully examined all the cases decided before and since the Code to which my attention has been drawn, and if there are any in the Quebec court of appeal that in any way affect the holding in *Boswell* v. *Denis*(1), I have not been fortunate enough to see them. The only other case in which the question raised here was formally decided since the Code by the court of appeal is *Turcotte* v. *Laferrière Lumber Co.*(2), and in that case *Boswell* v. *Denis*(1) was followed.

Mr. Justice Bossé, in his notes, examines a great number of cases relied on by the appellant, such as *Hurdman* v. *Thompson*(3); *Tourville* v. *Ritchie*(4); *Pierce* v. *McConville*(5); *Laurin* v. *Charlemagne, etc., Lumber Co.*(6); *Bell* v. *Corporation of Quebec*(7); *McBean* v. *Carlisle*(8), and *Bourque* v. *Farwell*(9), in several of which he himself sat, and comes to the conclusion that they are not applicable to the point raised in this appeal. All of them, except *Hurdman* v. *Thompson*(3), refer to obstructions such as wharves, booms, dams and bridges which interfere with the free use of the waters of non-navigable and non-floatable streams. In *Hurdman* v. *Thompson* (3), the principal question at issue was as to whether the Ottawa River, because of the natural obstacle created by the Chaudière Falls, was to be considered, at that point, a navigable and floatable river.

(1) 10 L.C.R. 294.
(2) Beaubien, 290.
(3) Q.R. 4 Q.B. 409.
(4) 34 L.C. Jur. 312.
(5) 5 Rev. de Jur. 534.
(6) 6 Rev. de Jur. 49.
(7) 7 Q.L.R. 103.
(8) 19 L.C. Jur. 276.
(9) 3 R.L. 700.

In effect these cases, as also *Oliva* v. *Boissonnault* (1), and *Reg.* v. *Patton*(2), decide that there can be no interference with the rights of the public to the free use of the waters of a navigable or floatable river, including rivers floatable only for loose logs, except under legislative authority.

It is to be observed that Mr. Justice Bossé delivered the principal judgment in *Hurdman* v. *Thompson*(3), and Mr. Justice Larue, the trial judge in this case, delivered the judgment, which this court subsequently maintained, in the Moisie River Case (*Attorney-General of Quebec* v. *Fraser & Adams*(4)).

In *McBean* v. *Carlisle*(5), there is an expression of opinion by Dorion C.J. that might have some bearing on the question at issue; but that eminent judge, with characteristic reserve, added that the distinction between rivers that are floatable or navigable and those that are not was of no importance in that case, where it was not necessary to decide as to the ownership of the river, and whether or not it was private property.

The text-writers on the Quebec Code, Langelier and Mignault, both maintain that rivers that are floatable only for loose logs do not form part of the Crown domain and belong to the riparian owner. (2 Langelier, p. 130; 2 Mignault, p. 458.)

In conclusion, I must say that a careful examination of the authorities has convinced me that by the law of the Province of Quebec the plaintiffs, as owners of the soil on both sides of a stream floatable only for loose logs are owners of the soil that forms the bed of the stream, and as such are entitled to bring this action. In so holding, I do not for a moment

(1) Stu. K.B. 524.
(2) 11 R. Jud. Rev. 394.
(3) Q.R. 4 Q.B. 409.
(4) 37 Can. S.C.R. 577.
(5) 19 L.C. Jur. 276.

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question the right that the public have to all the advantages that a river, in its natural state, and its banks can afford to the public; and there is no difference in that respect whether the river is navigable or not, floatable or not. (Municipal Code, 868, 891; *McBean* v. *Carlisle*(1), *per* Dorion C.J., at page 278; *Tanguay* v. *Price*(2).)

It is generally admitted by the text-writers that grants made under the old seigniorial system in France conveyed special rights to the grantee in the non-navigable rivers in the lands granted.

Fuzier-Herman, vbo. "Rivières," no. 128:

> Dès avant 1898 la propriété du lit des rivières non navigables, déniée en principe aux riverains par la majorité de la doctrine et de la jurisprudence antérieurs à 1898, (v. *supra* no. 99) leur était accordée dans des circonstances exceptionnelles; quand elle résultait de titres spéciaux constitués avant la mise en vigueur du code civil. Ainsi la propriété du lit d'un cours d'eau pouvait être valablement attribuée à un particulier par la concession d'un seigneur haut-justicier consentie avant 1789.

(And see Dalloz, 1866, 1, 391.)

I assume that if in this case it had been satisfactorily proved that the plaintiffs' lands were included within the limits of the Lauzon Seigniory, and had been conceded previous to 1854, as appears probable by the titles alleged, then there could be no doubt that the riparian proprietor by his grant would be owner of the bed of the stream; but although the well-known rule under the old French law *"nulle terre sans seigneur"* created a presumption that until a title to the contrary was produced, all lands were held under the seigniorial tenure, *Wilcox* v. *Wilcox*(3), at page 14, I do not in my view of the case deem it necessary to

(1) 19 L.C. Jur. 276. (2) 37 Can. S.C.R. 657.
(3) 2 L.C. Jur. 1.

do more than suggest this additional reason why we should not disturb the judgment of the court of appeal.

The "Seigniorial Act," 18 Vict. ch. 3, sec. 16, sub-sec. 9, enacts that the decision to be pronounced on each of the questions submitted to the court shall in any case thereafter to arise be held to have been a judgment in appeal *"en dernier ressort"* on the point raised on such question in a like case by other parties; and that court has, as has been pointed out, held that by the King's grant the property in the bed of a non-navigable and non-floatable stream passes to the seignior and by his concession to the *censitaire*. If, therefore, the River Chaudière, situate within what was formally called Seigniorial Canada, is not a navigable and floatable river within the meaning of article 400 C.C., and on this question of fact there are the concurrent findings of two courts, the bed of the river is declared by a final judgment, from which there is no appeal here, to have passed out of the Crown domain by the King's grant.

I would dismiss the appeal with costs.

GIROUARD J. (dissenting).—The question raised by this appeal has nothing to do with the improvements which a riparian proprietor can make on a river or water-course. It does not affect, either, the right which the public, in the Province of Quebec at least, has to use any river, whether navigable or floatable, or the banks thereof, for the floating and conveyance of all kinds of timber and for the passage of all boats, ferries and canoes, subject to certain obligations and restrictions enacted by competent authority. All these rights have been secured by several

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statutes to which we simply refer; 14 & 15 Vict. ch. 102; 20 Vict. ch. 40, sec. 23 (1860), c. 26, s. 2; Revised Statutes of Quebec (1888), arts. 5535, 5551; R.S.C., 1906, ch. 115.

Likewise, it is immaterial whether the appellant has encroached upon the Chaudière River and its banks by piers, booms or other constructions. The principal and the only question, in this cause, is whether that river is floatable within the meaning of article 400 of the Civil Code, and consequently forms part of the domain of the Crown. If it is plaintiff's action must be dismissed, as it has not been taken by the Attorney-General who alone can represent the Crown, and no claim is made for special damage. *Brown* v. *Gugy*(1); *Bell* v. *City of Quebec*(2). If it is not the respondent must succeed.

Article 400 C.C., corresponding to article 538 of the Code Napoléon, says:

> Roads and public ways maintained by the state, navigable and floatable rivers and streams and their banks, the seashore, lands reclaimed from the sea, ports, harbours, and roadsteads and generally all those portions of territory which do not constitute private property, are considered as being dependencies of the Crown domain.

Navigable and floatable rivers are also mentioned in articles 420, 425, 426, 427 and 567 C.C.

These rivers are called public rivers, because at common law they are subject to a servitude or easement in favour of the public to navigate or float over the same which can be interfered with only by the legislative authority. See *Re Provincial Fisheries* (3).

What is a floatable river within the meaning of

(1) 11 L.C.R. 401; P.C. 14 L.C.R. 213.

(2) 5 App. Cas. 84; 7 Q.L.R. 103.

(3) 26 Can. S.C.R. 444, at p. 549.

article 400 of the Code? That is the question involved in this appeal. Respondents rely upon the old French laws. But were they ever in force in Canada?

I agree with Mr. Justice Lavergne, who has dissented from the majority of the court, that the regulations which heretofore or now prevail in France to determine the character of a river are not suitable to this country. Mr. Justice Bossé in this case starts with the proposition that, as our Code is worded like the French Code,

> les sources du droit français, comme les commentateurs du Code Napoléon, doivent nous servir de guides.

This is a very different rule from that he laid down in *Hurdman* v. *Thompson*(1). He said in the latter case, and I quite agree with him:

> Notre ancienne législation sur cette matière est incomplète et assez incertaine.
>
> Toutes deux procédaient d'un état de choses entièrement différent de celui que nous avons en ce pays.
>
> Loisel nous dit que les grosses rivières ont, pour le moins, quatorze pieds de largeur; les petites, sept; et les ruisseaux, trois et demi. Inst. liv. 2, tit. 2, règle 8.
>
> Il nous serait difficile d'appliquer au Canada une règle de cette nature, et l'on voit comment, le point de départ étant différent, nous devons, à défaut d'une législation précise, donner relativement peu d'importance aux opinions d'auteurs qui ont écrit au sujet d'un état de choses autre que celui qui nous régit.

For the same reason, in the provinces governed by the English common law, and more particularly in Ontario, the judges have refused to apply the rules of that common law to several rivers and lakes of this country. *The Queen* v. *Robertson*(2), at p. 129; *Re Provincial Fisheries*(3), at pp. 520, 553, 555. In England, navigable or public rivers are only those where

(1) Q.R. 4 Q.B. 409, at p. 433. (2) 6 Can. S.C.R. 52.
(3) 26 Can. S.C.R. 444.

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the tide is felt, but this rule does not generally prevail on the continent of America.

The reasons and authorities quoted by the learned dissenting judge have so convinced me of the soundness of his conclusions that I could content myself with referring to his judgment, and in fact I had prepared in a few words merely my concurrence in it; but, as there is diversity of opinion in this court and the case is important, I think it is proper that I should express my views more fully. I will, therefore, offer a few observations upon the word "floatable" which is to be found in article 400 of the Civil Code, and also upon the jurisprudence of France and of Quebec upon the same subject, both before and since the Quebec Code (1866).

It is contended that, as article 400 does not define what floatability means, we should consult the laws and decisions in force before the Code, especially the old French commentators, statutes and ordinances.

The ordinance of 1669, tit. 27, art. 41, for the first time provided that only rivers

portant bateaux de leurs fonds, sans artifices et ouvrages de mains,

form part of the Crown domain. Mr. Justice Bossé, who disregarded this ordinance in the *Hurdman Case* (1), for want of registration, is now willing to apply the same, as, in his opinion, it merely embodies the common law existing at the time of the creation of the Superior Council. With due deference, I cannot agree to this historical proposition. On referring to Guenois, *Conférence des Ordonnances,* Vol. 3, p. 319, and following, and the collection of Isambert, *Anciennes lois françaises,* especially the ordinances of 1415, 1520, 1570, 1577 and 1583, relating to forests and

(1) Q.R. 4 Q.B. 409.

streams, it will be found that the distinctions of the ordinance of 1669, arts. 43 to 46 as to floatable rivers, had no existence whatever before that time, for the simple reason that *flottage* was almost unknown. As Daviel remarks, Vol. I. p. 35, *"le flottage des bois,"* the floating of wood is not very ancient; it was first practised in 1549 by one Jean Bouvet who, I have read elsewhere, conveyed to Paris fire wood, *"bois de chauffage,"* and undoubtedly for that reason was called *"flottage à bûches perdues,"* or loose stumps. The King's declaration of the 15th July, 1572, refers in its title to *"rivières navigables et flottables,"* but in the text only to the

> grands fleuves et rivières et autres qui fluent et descendent en icelles. 14 Isambert, 252.

In several statutes we find what is meant by these grand rivers; they were La Seine, Loire, Garonne, Marne, Dordogne and others like them and their tributaries whether navigable or not. Edit of April, 1683; arrêt du conseil, 10th August, 1694; 19 Isambert, 425; 20 id. 226. If these laws—which were made applicable not only to the kingdom but also to every French possession—had been registered in Quebec, our task in this case would have been an easy one. The Chaudière and all the tributaries of the St. Lawrence would be part of the Crown domain like that great river, larger than all the navigable rivers of France put together.

The ordinance of 1669, like the Civil Code, used the expressions "navigable" and "floatable" as if they meant the same thing, and say nothing of *"flottage à bûches perdues."* But the ordinance of December, 1672, has done so, at least impliedly, by providing (ch. 1st. art. 1) and following, for the free naviga-

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tion and passage of *"bateaux et trains de bois,"* etc. Finally, Daviel, Vol. I., page 33, adds that an order of the Royal Council passed on the 9th November, 1694, with regard to the River Garonne *"aux lieux où elle est navigable par bateaux ou radeaux"* clearly indicates what the legislator meant by the words *"navigable et flottable."* This order in council is summarized by Isambert, Vol. 20, p. 232, in these words:

> Arrêt du conseil qui juge que ce n'est point par la force des bateaux que l'on doit juger si les rivières sont navigables, mais seulement par la navigation qui s'y fait, et en conséquence ordonne que les propriétaires des îles, îlots, dans l'étendue des rivières navigables, tant par bateaux que par radeaux, notamment des rivières de Garonne et de l'Aude, aux endroits où elles portent bateaux ou radeaux seront, * * * etc.

These old laws were in force in France at the time of the promulgation of the Code Napoléon, and it was first thought that they had been repealed by the Code. By a decision of the 6th November, 1820, the French Minister of Finance declared that all floatable rivers without any distinction were part of the public domain and were capable of being licensed by the government for fishery purposes, but an order of the State Council, which was the competent authority to declare when a river was navigable or floatable, made on the 21st February, 1822, added that this was true only with regard to rivers floatable for rafts or *radeaux,* and that the rivers or *ruisseaux* floatable only *à bûches perdues* did not form part of the public domain. The same rule had already been adopted by the administration on the 38 *pluviose, an* XIII., and last by the legislature on the 15th April, 1829, when providing for river fisheries.

We can easily conceive that the jurisprudence of the French courts, commentators and text writers has been altogether influenced by the text of these enact-

ments, and I cannot conceive that they can be considered as safe guides in Lower Canada. Laurent, Vol. 6, n. 12, tells us that, were it not for the old laws, no distinction between floatable rivers would be made. After laying down the rule with regard to the floating of rafts, he says:

En est-il de même quand le flottage se fait à bûches perdues, c'est-à-dire lorsque les rivières flottent du bois bûche à bûche? Si l'on s'en tenait au texte du code, il faudrait répondre affirmativement; en effet, l'article 538 ne distingue pas les deux espèces de flottage; or, dès qu'une rivière flotte du bois, elle est flottable. L'administration a soutenu cette opinion en France, mais ses prétentions ont été rejetées par le conseil d'état, et la jurisprudence des tribunaux ainsi que la doctrine se sont prononcées dans le même sens. L'opinion générale se fonde sur la tradition.

Then Laurent speaks of the

chaos d'opinions et dans la doctrine et dans la jurisprudence

with regard to rivers which are neither navigable nor floatable. Sir L. H. LaFontaine, in his admirable opinion in the Seigniorial Court, page 332*b* of the report, has enumerated five different systems having each quite an array of supporters, to which many more can be added, who came to light since the learned judge delivered his judgment in 1856. This controversy does not interest us, for it is a well settled rule with us that under the Code those rivers are the property of the riparian proprietors to the middle of the stream. Laurent concludes by observing that more uniformity of opinion would exist

si l'on s'attachait au texte et à l'esprit de la loi au lieu de se laisser influencer par l'ancien droit.

If it be true that the modern French classification of rivers is founded merely upon tradition, what is to be said of the Quebec jurisprudence? Here we have no old laws. The ordinances passed before the crea-

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tion of the Superior Council, in 1663, speak only of navigable rivers, without defining what they were and without requiring that the floatable ones should be *"portant radeaux de leurs fonds"*; this was done only afterwards. Not a line, not even a word can be found in the *Edits et Ordonnances* in force in La Nouvelle France, after 1663, respecting rivers, either in the Royal Edits and Declarations or the *ordonnances et arrêts* of the Council or the decisions of the intendants, or in the *Jugements et Délibérations du Conseil Supérieur,* recently published, or in Perrault's *"Précédents."* Not one of the laws above mentioned was registered by the Council or is even alluded to anywhere. The enactment of the ordonnance of 1669 was in this respect new law which all the commentators invoke in support of their doctrine. In Canada, till the promulgation of the Civil Code in 1866, there was, therefore, no written law respecting the classification, ownership or regulation of rivers. Perhaps the policy of the then French Government was the same as today; for at least three-quarters of a century in all the French colonies, all rivers without distinction form part of the public domain.

Few cases came before the courts of Lower Canada, and it is curious to see how they were dealt with. For a period extending from the time of the cession until 1810, we have no report of the decisions of our courts. In 1811, Pyke's reports of one term of the King's Bench, during that year, were published and later on appeared the *Revue de Législation* by Lelièvre et Angers, in three volumes covering the years from 1845 to 1847, and also a digest of cases from 1807 to 1822; and it is a remarkable fact that not a single case concerning rivers is reported. It may safely be said

that the first river cases will be found in Stuart's Reports, in one volume, published in 1834-35 and were decided at different periods from 1810 to 1835.

The first is *Fournier* v. *Oliva*(1), decided in 1830. Held in appeal that the banks of navigable rivers belong to the riparian proprietor, subject to a servitude in favour of the public for all purposes of public utility. Reid C.J., said:

> By the Roman law, the banks of navigable rivers belonged to the proprietors of the lands adjoining such rivers; and previous to the ordinance of 1669, no statutory law in France, to the contrary, could be found.

If this decision truly states the old law of Lower Canada, it is evident that our Code, article 400, has not adopted it.

In *Oliva* v. *Boissonnault*(2), decided in appeal in 1833, at page 564, Chief Justice Reid says:

> The waters of all rivers, whether navigable or not navigable, being matters of public benefit and public interest, are vested in the Crown.

In the case of *St. Louis* v. *St. Louis*(3), decided in 1834, and in 1841 by the Privy Council(4), the question of *flottage* is not even alluded to and for that reason it is of no value for the determination of this appeal.

In *Oliva* v. *Boissonnault*(2), in 1834, at page 525, Sewell C.J. said:

> It may, I think, be received as a general principle, that the public have a right to all the advantages, suited to public purposes, which the *natural state of a river* affords, and that no change can be effected in the state and condition of a river, which does afford such advantages, unless some greater degree of convenience is thereby obtained for the public.

(1) Stu. K.B. 427.
(2) Stu. K.B. 524.
(3) Stu. K.B. 575.
(4) 3 Moo. P.C. 398.

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Here the learned judge relies upon an English case, that of Lord Grosvenor reported in Starkie, Vol. 2(1). Then the learned Chief Justice continues:

> Accordingly, in the law of France, navigable rivers have always been regarded as public highways and as such dependencies of the public domain; and floatable rivers (*rivières flottables*, as they are there termed) have been viewed in the same light. In every river which is navigable for boats or larger vessels, and in every river which is floatable, that is capable of floating logs or rafts, the public, as in England and in America, have an easement or legal servitude. * * * The evidence in this case may not be sufficient to shew that the River St. Thomas is a *rivière navigable*. But the fact that the logs floated down the stream from the plaintiff's land to the defendant's and were there stopped in their progress towards the St. Lawrence by the boom which the latter has constructed, proves it to be a *rivière flottable*, and judgment, therefore, must be entered up for the plaintiff.

Here the learned judge refers to *l'ordonnance* of 1669. This decision shews that before the Code the highest court of Lower Canada gave to the word "floatable" its widest sense.

Next comes the decision of the Seigniorial Court rendered in 1856, which by the Seigniorial Act, 18 Vict. ch. 3, sec. 9, was declared to be final and binding. At pages 71*a* and 131*a*, the court held that *"rivières, ruisseaux et autres eaux courants,"* not navigable or floatable, are the property of the seigniors and not part of the public domain. But nowhere does the court undertake to define what is navigable or what is floatable. Likewise, Chief Justice LaFontaine, who seems to have been the leading spirit of that court, says that those rivers are private property, without, however, giving any definition whatever (p. 331*b*).

I am not aware of any decision supporting the distinction between floatable *à bûches perdues* or by rafts, except *Boswell* v. *Denis*(2), decided in 1859 by

(1) *Rex* v. *Lord Grosvenor*, 2 Stark. 511. (2) 10 L.C.R. 294.

LaFontaine C.J., Aylwin, Duval, Meredith and Mondelet JJ. The report is very meagre, the opinion of the Chief Justice covering only six or seven lines. He refers us to the decision of the Seigniorial Court. But that court never defined what floatable means. None of the judges even mentioned that the Jacques Cartier River, in question in the case, was only floatable *à bûches perdues*. In this respect, we have only the word of the reporter, who says that Mr. Justice Chabot, who had rendered the judgment in the court below, had clearly found that that river was in that condition. Mr. Justice Aylwin, one of the ablest judges that adorned the bench of Lower Canada, dissented, observing that

> the judgment of the court below is an exceedingly dangerous one by declaring such a river as the Jacques Cartier *non flottable* and vesting the property of it in the seignior or riparian proprietor.

These decisions form the whole jurisprudence of Quebec before the Code, with the exception of a few which were rendered by a single judge in the Superior Court, and are all in the sense of *Oliva* v. *Boissonnault*(1). See *Chapman* v. *Clark*(2), in 1858, *per* Short J; *Joly* v. *Gagnon*(3), in 1859, Chabot J.; and I cannot understand that it can be said that it is favourable to the respondents' contention.

The decisions under the Code are numerous and generally do not agree with *Boswell* v. *Denis*(4). They have been pronounced in every court, from the Superior Court to the court of review and the court of appeal. I will merely indicate those rendered by a single judge in the Superior Court. First, *Béliveau* v. *Levasseur*(5), in 1863, Pollette J.; *Laurin* v. *Char-*

(1) Stu. K.B. 524.
(2) 8 L.C.R. 147.
(3) 9 L.C.R. 166.
(4) 10 L.C.R. 294.
(5) 1 R.L. 720.

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lemagne & Lake Ouareau Lumber Co.(1), in 1899, de Lorimier J., both in favour of the appellant's contention; and *Geoffray* v. *Beausoleil*(2), in 1886, Papineau J., against it.

I find three decisions in review, one, and the first, of no value, and the other two in favour of the appellant. The first is *Kerr* v. *Laberge*(3), decided by Routhier J. in 1886, and confirmed in review by Caron, Andrews and Larue JJ. The report is very short; in fact we have only the head-notes, one of them being that the banks of navigable rivers belong to the riparian proprietors, subject to a certain servitude of passage, as was decided in the case of *Fournier* v. *Oliva* (4), which is quoted as an authority. This decision is clearly against article 400 of the Civil Code and *Morin* v. *Lefèvre*(5).

The two decisions in favour of the appellant are *Bourque* v. *Farwell*(6), in 1871, Berthelot, Mackay and Beaudry JJ., and *Atkinson* v. *Couture*(7), in 1892, Casault, Routhier and Caron JJ. In the first case, Short J. had decided in the first court, at Sherbrooke, that a branch of the River Nicolet was a floatable river for logs, *à bûches perdues*, "and, therefore, a highway appertaining to the public domain." In review this judgment was confirmed, the court holding

that a river floatable only at a certain season of the year comes *under* the general rule.

We are now coming to the jurisprudence of the

(1) 6 Rev. de Jur. 49.
(2) 9 Leg. News 402.
(3) 14 Leg. News 26.
(4) Stu. K.B. 427.
(5) 1 Rev. de Leg. 354.
(6) 3 R.L. 700.
(7) Q.R. 2 S.C. 46.

court of appeal. The first case is *King* v. *Ouellet*(1), in 1885, Dorion C.J., Monk, Tessier, Cross and Baby JJ., in which the question of ownership of a floatable river for loose logs was not discussed, not even raised. The whole decision turned upon a question of negligence. However, there is a *dictum* of the court that such a river is a private river, which is referred to in *Ward* v. *Township of Grenville*(2), another case where the question was not involved.

In the cases of *Pierce* v. *McConville*(3), Mr. Justice deLorimier has decided that floatable rivers at all times, or at certain periods only, were part of the public domain, and this decision was unanimously confirmed by the Court of Review, in 1899, and is quoted with approbation by Mr. Justice Ouimet, speaking for the court of appeal(4). It was remarkable that the river in this case was one floatable only for loose logs.

Finally, there is the case of *Hurdman* v. *Thompson*(5), which is not of much importance here, except on one point, namely, that a river may be navigable or floatable notwithstanding that its course is interrupted in many places by falls or rapids. It may not be without interest to note that the learned judges were of opinion that the enactment of the ordinance of 1669, quoted above, declaring navigable rivers only those

portant bateaux de leurs fonds, sans artifices ni ouvrages des mains,

was new law.

It cannot be asserted that the jurisprudence in

(1) 14 R.L. 331.
(2) 32 Can. S.C.R. 510.
(3) 5 Rev. de Jur. 534.
(4) Q.R. 12 K.B. 163, at p. 168.
(5) Q.R. 4 Q.B. 409.

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Quebec is so uniformly in favour of the respondent that it is almost binding upon us, according to the rules laid down by Rivière, *Jurisprudence de la Cour de Cassation,* p. 64 and following, where the whole subject of the authority of *arrêts* is discussed. I believe it is quite the other way. But suppose there was any doubt as to that point, which I do not entertain, I think that article 400 of the Civil Code contains rules on the subject complete in themselves which are binding upon us, and cannot be controlled by the pre-existing laws. This is the principle laid down by the Privy Council in *Abbott* v. *Fraser*(1), in 1874. That article makes no distinction whatever between the two kinds of floatable rivers, and I do not see why we should make any. If that was the old law, it has evidently been repealed by implication. I wish to base my conclusion upon that article of the Code and nothing else.

Floatable must mean something different from navigable, for if it means the same thing, then one of the two words is unnecessary. Navigable is intended to refer to craft that require the direction of man and carry a crew. It comprises rafts as well as vessels, because rafts need the management of men on board. They float, it is true, but every vessel does. The words "floatable" and "navigable" are coupled together to provide for two distinct situations, first the floating of vessels and rafts, which is navigation; and second the floating of loose logs and pieces of timber, which is *flottage,* and is generally done in this country by gangs of men called "drivers"; otherwise the word "floatable" would have no sense. Daviel, Vol. I., p. 32, says:

(1) L.R. 6 P.C. 96.

Dans l'acceptation la plus étendue du mot, on comprend parmi les rivières navigables celles qui sont flottables en trains, parce que c'est là une espèce de navigation. Les trains se meuvent à l'aide de moyens analogues à ceux qu'emploient les bateaux, le halage, la voile, la rame, le gouvernail, et c'est ainsi que s'exprimaient les anciennes ordonnances.

I do not mean to say that every floatable river is a public river and part of the Crown domain. I would put a limit, and that limit would be where public utility ceases. Any floatable river to which the public cannot have and has not any access is a private river. As Chief Justice Dorion properly remarks in the case of *Bell* v. *Corporation of Quebec*(1), it is not so much the volume of water that the river carries as the fact that its course is devoted to the public service, which gives it its legal character. This rule was also adopted by the Privy Council in the case of *Bell* v. *Corporation of Quebec*(2), and by our court in *Attorney-General of Quebec* v. *Fraser & Adams*(3). The Privy Council adds:

The French authorities evidently point to the possibility, at least, of the use of the river for transport in some practical and profitable way as the test of navigability.

This principle is also to be found in the *arrêt* of the State Council of France of the 9th November, 1694, quoted above, that it is not by reason of the force of the boats that we must decide whether a river is navigable or not, but only by the navigation which is therein carried on. I think the same principle should be applied to floatable rivers.

Whether a river is floatable or not is now a question of law and fact, but when the law will be settled, it will only be a question of fact.

(1) 7 Q.L.R. 103. (2) 5 App. Cas. 84.
(3) 37 Can. S.C.R. 577.

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The Chaudière River is admittedly one which the public can make use of, and has done so from time immemorial, running through a thickly populated country. It is more than 100 miles long, at many places several *arpents* wide, and during months, and at different seasons, is used to take down thousands, and it may be said millions, of logs and pieces of timber floating loosely, belonging to a large number of inhabitants, which supply a quantity of saw mills and others built along the shores of that river, some of the logs reaching even the River St. Lawrence below the property of the respondent, as Mr. H. M. Price testifies. Bouchette, in his Topography of Lower Canada, calls it a river of "considerable magnitude." The evidence shews that it is the grand artery of the lumber trade in that vast region of the country.

I have only one word to add, and that is with regard to the opinion of Canadian text-writers, or what is called *"la doctrine."* It can hardly be said that authors are numerous enough in this country to form what may be called public legal opinion, by writing books or articles in reviews. Leading lawyers seldom find the time necessary to write a law book. I have had the advantage of reading the judgment of our Chief Justice, and I have noticed that he relies upon the opinion of two of our Quebec text-writers. I am happy to say that, together with Mr. Beauchamp, they are recognized by all to have rendered great service to both the bench and the bar, but text-books of Canadian authors have rarely, if ever, received such a distinction in this court. I have seen several Chief Justices refuse to take any note of them, although for my part—and I am very glad to have this opportunity to put my views on record—I do not see why they should

not be cited, especially in Quebec cases, just as we quote the French commentators, dead or living. I have always expressed the view that we ought to get light wherever we can find it, either in the decisions of the courts or in the text-books, or reports of the framers of the Code, or even Parliamentary debates, a course which was denied during this and previous terms. This ruling is strictly in accordance with the practice prevailing in England, and to a limited extent in the United States, although in some cases we see quoted such standard books as those of Bacon, Coke, Hale, Story, Kent, and other jurists of equal eminence. Under the English system, decisions of courts alone constitute the authorities and a counsel or judge is expected to rely upon them alone, if they are of sufficient weight and can be supported by reason. In France and Quebec, on the contrary, a series of uniform decisions, approved by the commentators or *la doctrine,* forms what may be termed the jurisprudence of France, and on this subject I refer to an interesting dissertation by Rivière already alluded to. I thought, therefore, it was my duty to read what these Canadian law-writers said on the point under consideration, although in view of the decisions of the Quebec courts it can hardly be expected that their doctrine will be of much assistance.

Mr. Langelier (now Chief Justice of the Superior Court), who wrote his commentaries many years ago, as he tells us, for the students at Laval University, supports the case presented by the respondents. He does not cite, much less review, the decisions, observing in his preface that they are to be found in Beauchamp. And when we read the following passage as to what constitutes a navigable river, I do not

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think it is necessary to trouble ourselves about his opinion as to *flottage à bûches perdues:*

Il ne suffit pas, pour qu'une rivière soit navigable, qu'on puisse y naviguer avec n'importe quelle sorte d'embarcation, par exemple, avec un canot ou une chaloupe, car alors toutes les rivières, à peu près, seraient navigables. Mais il faut qu'on puisse y naviguer avec des bateaux suffisamment grands pour qu'ils puissent servir au transport des passagers ou des marchandises.

Mr. Mignault, K.C., of Montreal, has expressed no opinion. The passage cited is not his own, but that of Mourlon, a French commentator, influenced, like all French jurists, by the old and the new French ordonnances and regulations. Mr. Mignault is only the Canadian annotator of Mourlon, and a foot note at the same page (458) gives us some idea of his opinion on the subject. Referring to the distinction between floatable rivers for rafts and loose logs, he says that it is based upon the order of the State Council of the 21st February, 1822, and the law of the 15th April, 1829, art. 1. He merely adds to that:

Nous trouvons un arrêt conforme à cette doctrine dans le jugement de la cour d'appel dans la cause de *Boswell* v. *Denis*(1).

I have therefore come to the conclusion that the appeal should be allowed and the action and injunction dismissed with costs before all the courts.

DAVIES J.—The substantial question to be determined in this case was whether the rivers of Quebec which are floatable for loose logs only, in manner as used by lumbermen of the province in their business but not otherwise navigable, are "dependencies of the Crown domain" within the meaning of article 400 of the Civil Code of Quebec.

(1) 10 L.C.R. 294.

The words used in the article are "navigable and floatable rivers and streams and their banks" and the question came down to this:—Whether the use of the word "floatable" following the word "navigable" and conjoined with it extended the meaning and applicability of the word "navigable" to rivers and streams which were not navigable in the sense in which that word had been and is judicially interpreted; or whether the term "floatable" should be refused any distinctive meaning, and construed as synonymous with navigable.

Upon the determination of this question, depended the legal question of the ownership of the beds of the rivers which were not navigable but were floatable for loose logs.

If the word "floatable" was given the broader construction, namely, that it covered and included rivers and streams which were floatable only for loose logs in the manner used for the purpose of their business by lumbermen, then the river must be considered as being a dependency of the Crown domain. If, on the contrary, the jurisprudence of the Province of Quebec at the time of the enactment of the Civil Code had determined that this was not the true construction of the word, but that it meant when used in conjunction with rivers and streams, those rivers and streams only which were floatable for rafts of logs, or, in other words, rivers that were "navigable for commercial purposes" only and did not include rivers capable of floating loose logs only, though capable of doing that for lumbering and commercial purposes, then the beds and banks of these latter rivers were the property of the river proprietors on each side *ad medium filum aquæ*.

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There is much diversity of opinion upon the point in this court, and the Court of King's Bench itself was not unanimous.

But, after giving the different opinions and arguments my best consideration, I have concluded with some hesitation to concur with the Chief Justice and not to allow the appeal.

IDINGTON J. (dissenting).—For the reasons assigned in Mr. Justice Lavergne's dissenting judgment in the court below, I think this appeal should be allowed. I may be permitted to adopt it entirely, as I do, and yet to add a few words, in line with the reasoning it contains.

Inasmuch as the report of the case of *Boswell* v. *Denis*(1) shews, in its statement of facts, that the stream there in question had never been till then but once tested as to its floatability and that proving financially unsuccessful further trial was abandoned, and the learned trial judge having found it, notwithstanding this, floatable *à bûches perdues,* we are left to conjecture whether the majority of the court proceeded on the actual facts; or the trial judge's finding by way of legal interpretation of facts; or disagreed with his law on these facts.

Measuring floatability by its general public utility, I should have said, and I think it possible the learned judges whose opinions prevailed meant, that on the facts as there presented the stream was not floatable in any legal sense; and, therefore, I treat that case as quite consistent with the earlier cases and the view of many learned judges in later cases.

(1) 10 L.C.R. 294.

Nor can the adjudication of the special court passing on the rights of the seigniors in regard to navigable or non-navigable or non-floatable streams help us here.

The title here is not shewn by direct evidence to be derived from any such *seigneurial* right as these judgments upheld.

And, as my brother Girouard remarks, the judgments and the opinions of the learned judges referred only to the test of floatability, without saying or in any way indicating what the quality of that floatability was which they so sparingly refer to.

Were we to go beyond the direct evidence and rely on history, as one of the learned judges below does, and respondents' factum does, it would appear that respondents' title to the bed of the stream was doubly uncertain. The *seigneurie,* including the river, having become vested in the Crown about sixty years ago, there is nothing to shew that the Crown again parted with the river or its bed.

All we are shewn is that respondents presented a title that shews later conveyances (subsequent to such re-vesting) to it, of land on each side of the river by somebody, and that, after receiving the same, it presumed to erect a dam across the river, more than a year and a day before this action.

The conveyances are of lots set out by their boundary descriptions, of which the river appears, in part, to be a boundary, and by their lot number, on a cadastral plan referred to. Whether the conveyance includes more or not depends on the meaning of a clause that needs to be explained or joined to something not apparent.

This sort of description is not as satisfactory, as

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one would like to have to rely upon, for the application of the *ad filum aquæ* rule that carries a riparian title to the middle thread of the stream. Unless respondents can rest upon this rule they have no title.

Then the assertion of title by a possession, affected only by raising the water by a dam somewhere below, is a possession for a year and a day, which does not help as clearly as one might like.

I do not try to solve the questions arising out of either of these features of weakness in the respondents' title to the bed of the river. They were stoutly relied on by the appellant and claimed by him to be fatal to the respondents' case. Solution is needless from my point of view. I merely note them and pass on to say that this rule of ownership of land on either side of a stream carrying title *ad filum aquæ* will not in any case apply to any conveyance of land on either side of a stream which is either navigable or floatable and, hence, one of the dependencies of the Crown domain, unless that domain has been expressly granted by the Crown.

We are thus face to face with the question of whether or not this river is of either kind.

In other words, I feel I am, after much reading of authorities and the consideration of innumerable references, on the part of counsel and courts below, as well as of the learned Chief Justice here, and my brother Girouard here (all of which I have found most interesting), driven to and thus bound to find the meaning of the three words "navigable and floatable" in article 400 of the Code.

I have not found anything that requires me, as a matter of law, resting on canonical rules of construction or otherwise, to put upon these words, used as

they are in the connection in which they appear and in relation to the past history of the rights and duties they are designed to confirm and declare, anything but their plain and ordinary meaning.

That meaning includes a capacity to float logs *"à bûches perdues"* in a way to be serviceable as a public utility by the well known methods this river has served so long.

The absolute ownership of a private river that the alternative construction we are asked to place on those words implies, might deprive many of the right to float logs in a way so highly conducive to the public good.

We are told in argument, and I have observed it assumed in reported cases as a matter of course (and apparently assumed to exist quite independently of existing statutory provisions therefor), that the ownership of a private river was subject to such a public right of floatage. On what does it rest?

Is it supposed that the law *creating such a modern right* and imposing it on what had long before become private property in streams in France, had such an origin and such a character as to be as of course transferred to every French colony?

I am not concerned here to solve the problems thus suggested. I present them merely for consideration and to introduce what I am quite unable to understand in regard to respondents' view; that is this: Why, if it existed at the time of the codification and rested on some well known fundamental law that governed the whole of Quebec, was it not (if a servitude in favour of timbered estates, up-stream, for example) declared in the Code that so carefully and minutely provides for so very many servitudes of minor

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import? Why is it not defined and set forth anywhere else and traced to a source of custom or concession?

Why is it, even if not an ordinary servitude, but borrowed as some have said from the Roman law, left undefined?

Again, when providing for the many conditions and rights springing out of the action of rivers, such as accession in one way or another, or avulsion, was this condition of things left so completely unprovided for? So much ignored?

Can these questions be answered in any way but one? And is that one not simply this; that the word "floatable" in the many places used in the Code meant and was intended by the codifiers to mean either by rafts or loose logs. Practically every ordinary right of men to use, and ordinary use, of a river is thereby and by other provisions, covered or protected. In the converse way of dealing with the matter, I doubt it.

MACLENNAN J.—The only arguable question in this appeal appears to me to arise upon article 400 of the Civil Code, and that is, whether the River Chaudière, where it flows past the respondents' property, is floatable within the meaning of that article, and so is, with its banks, the property of the Crown, and not of the respondents as riparian proprietors.

The language of the article is that *"navigable and floatable rivers and streams and their banks"* are considered as being dependencies of the Crown.

It is admitted that the Chaudière is not navigable within the meaning of the article, and the contention is that it is floatable, because, during times of high water, saw-logs in very great quantities are floated

down to be converted into lumber at different mills along its course.

If the word "floatable" is construed in an absolute unqualified sense, it must be admitted that this is a floatable river. But, if so construed, then every river and stream, no matter how insignificant or turbulent, would be within the article, and the defining words would be unnecessary. This extreme construction of this article was not contended for, but it was insisted for the appellant that the river was within the article because of its capability of floating loose logs, as above mentioned.

The respondents, on the other hand, contend that the judgment is right in holding that the floatability intended by the article is of a much higher quality, and that a stream is floatable within the meaning of the article only when it is capable of floating logs in rafts or cribs, and not merely loose logs.

It is agreed that mere floatability will not do. Some line must be drawn, and the question is, where it is to be.

If this article were a new law, and to be construed for the first time, different minds might construe it in different ways, and some might well construe it as contended for by the appellant. But it is not a new law, and was not a new law when the Code was framed and confirmed by the legislature. It was inserted in the Code as an expression of what had always been the law of Lower Canada, derived from France, and it is identical with the article in the Code Napoléon.

This being so, we may not give to the words used the construction which it may seem to us, at the present time, they ought to receive, but must endeavour

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to ascertain what was the settled law of Quebec, before the enactment of the Code, and which the article was intended to express.

That being so, the reasoning of the learned Chief Justice, in his notes, and the authorities cited by him have convinced me that the line is properly drawn in the judgment appealed from so as to exclude rivers and streams floatable only for loose logs from being dependencies of the Crown.

I am, therefore, of opinion that the appeal should be dismissed.

DUFF J. concurred with the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Lane & Cantin.*

Solicitors for the respondents: *Drouin, Pelletier, Baillargeon & St. Laurent.*

THE INVERNESS RAILWAY AND COAL COMPANY (PLAINTIFFS). } APPELLANTS:

AND

SIR ALFRED LEWIS JONES AND WILLIAM JOHN DAVEY, CARRYING ON BUSINESS UNDER THE NAME AND STYLE OF ELDER, DEMPSTER & CO. (DEFENDANTS)..... } RESPONDENTS.

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*Oct. 8.
1908
*March 23.

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

Shipping—Material men—Supplies furnished for "last voyage"—Privilege of dernier équipeur—Round voyage—Charter-party—Personal debts of hirers—Seizure of ship—Arts. 2383, 2391 *C.C.—Art.* 931 *C.P.Q.—Construction of statute—Ordonnances de la Marine,* 1681.

A steamship lying at the port of Liverpool was chartered by the owners to P. for six months, for voyages between certain European ports and Canada, the hirers to bear all expenses of navigation and upkeep until she was returned to the owners. The ship was delivered to the hirers at Rotterdam where she took on cargo and sailed for Montreal. On arriving at Montreal she unloaded and re-loaded for a voyage to Rotterdam, with the intention of returning to Montreal, and obtained a supply of coal from the plaintiffs which was furnished on the order of the hirers' agent at Montreal. The ship sailed to Rotterdam and returned to Montreal in about one month, touching at Havre and Quebec, discharged her cargo and proceeded to re-load, obtaining another supply of coal from the plaintiffs in the same manner as the first supply had been furnished. Within a few days, the price of these supplies of coal being still owing and unpaid, the hirers became insolvent, and the plaintiffs arrested the ship at Montreal, claiming special privilege upon her as *derniers équipeurs* in furnishing the first supply of coal on her last round voyage, the right of attachment before judgment in respect of both supplies,

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

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and seizing her under the provisions of articles 2391 of the Civil Code and 931 of the Code of Civil Procedure.

Held, per Fitzpatrick C.J. and Davies, Maclennan and Duff JJ., that the voyage from Montreal to Rotterdam and return was not the ship's "last voyage" within the meaning of article 2383 (5) of the Civil Code; that the voyage out from Montreal and that returning from Rotterdam did not constitute one round voyage but were separate and complete voyages, and that, consequently, there was no privilege upon the ship for the supply of coal furnished for her voyage from Montreal to Rotterdam. And also, that the provisions of article 2391 of the Civil Code did not render the ship liable to seizure for personal debts of the hirers, and, consequently, that she could not be attached therefor by *saisie-arrêt*.

Judgment appealed from (Q.R. 16 K.B. 16) affirmed, Girouard J. dissenting.

**Per* Davies J.—The "last voyage" mentioned in art. 2383 C.C. refers only to a voyage ending in the Province of Quebec.

**Per* Idington J.—As the terms of the charter-party expressly excluded authority in the hirers to bind the ship for any expenses of supply and as nothing arose later that could by any implication of law confer any such authority on anyone and especially so in a port where the owners had their own agents any possible rights that might in a proper case arise under article 2383 of the Civil Code did not so arise here; and, therefore, though agreeing in the result he expressed no opinion on the meaning of the term "last voyage" therein. *Lloyd* v. *Guibert* (L.R. 1 Q.B. 115) should govern this case.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing the judgment of the Superior Court, District of Montreal(2), and dismissing the plaintiffs' action with costs.

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

T. Chase-Casgrain K.C. for the appellants. We claim, as declared by Mr. Justice Dunlop, in the

(1) Q.R. 16 K.B. 16; *sub-nom. Jones* v. *Inverness Ry. & Coal Co.*

(2) Q.R. 29 S.C. 151; *sub-nom. Inverness Ry. & Coal Co.* v. *Canadian Lines.*

Superior Court(1), that, even if Elder, Dempster & Co. are not personally liable, there is a privileged claim upon the ship for both supplies of coal.

The ship sailed from Montreal for the last time, in July, 1904, when the first sale of coal was made, and was about to sail again with the second supply of coal, in September, 1904, when she was stopped by appellants' attachment. The voyage from Montreal to Rotterdam and back was the first of a series of round voyages, with an interchange of cargo, contemplated by the charterers of the ship, and it constituted a single voyage; *The "Red Jacket"*(2), *per* Stuart J., at page 306; *McLea* v. *Holman*(3); 1 Valroyer, Dr. Mar. *n.* 42, p. 125; DeCourcy, Maritime Law, pp. 15-16; Dalloz, 1872, 2. 34; 1 Hennebicq, Dr. Mar. *n.* 232, p. 268; 5 Ruben de Conder, Dr. Mar. *vo.* "Navire," *n.* 274; Boistel, Dr. Comm. *n.* 1139, p. 844; 1 Cresp, p. 113; Gazette des Trib. 1905, 3, 103, *vo.* "Navire," *n.* 24; Pand. Fr. Rec. 1898, 1, 331; *The "Scarsdale"*(4), and in the same case on appeal(5), *per* Vaughan Williams L.J., at page 257, *per* Sterling L.J., at page 258, and in another report(6), *per* Vaughan Williams L.J., at page 33, referring to the "Sailors' Word Book." See also *The "Martha"*(7); *The "Mary Adelaide Randall"*(8).

The attachment, under article 931 C.P.Q., could be validly effected and treated as an ordinary *saisie-arrêt* or a conservatory attachment(9), as the plain-

(1) Q.R. 29 S.C. 151.
(2) Cook V.A. 304.
(3) Q.R. 2 S.C. 105.
(4) 21 Times L.R. 488.
(5) [1906] P. 103.
(6) 75 L.J.P. 31.
(7) 16 Fed. Cas. 860, at p. 861.
(8) 93 Fed. Rep. 222, at p. 225; 98 Fed. Rep. 895, at p. 896.
(9) Art. 955 C.P.Q.

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tiffs were privileged creditors for the supplies of coal necessary to enable the steamship to sail; 1 Maud & Pollock, "Law Merchant," (4 ed.), p. 86; Abbott on Shipping, p. 186, sec. 4; 19 Am. & Eng. Encycl. of Law (2 ed.), *vo.* "Maritime Liens," pp. 1094-1111.

Our codifiers do not claim to have changed the French law on this particular point. The privilege of the *dernier équipeur* has always been recognized by our jurisprudence. *Girard* v. *St. Louis*(1), at page 57; *Henn* v. *Kennedy*(2).

The reasoning of the court below leads to strange consequences, when, in effect, it says: "So long as the ship is in the port, you have no privilege for necessaries supplied in that port, but as soon as the ship has reached another port, then your claim becomes privileged, and you may take all provisional measures which the law gives you to enforce it." This carries too far the rule that privileges must be strictly interpreted. Modern law-writers have all protested against such narrow interpretations. DeCourcy, Dr. Mar., page 94, T.I.; Hennebicq, Dr. Mar., page 268, no. 232. The French Commentators read the article as meaning the supplies "before the departure for the last voyage." 1 Valroger, page 139, no. 61. In fact, this privilege has existed from time immemorial in the jurisprudence and in popular parlance and is, moreover, essentially equitable.

If we have not, as *dernier équipeur,* a privilege or right of preference on the steamship in the sense of articles 1983, 1994, and 2383 C.C., we have the extraordinary right conferred by article 931 C.P.Q., and the attachments before judgment and conserva-

(1) 6 R.L. 45.

(2) 17 Q.L.R. 243.

tory attachments(1) may be taken together(2), and under one or the other of these names; *Bourassa* v. *Lorigan*(3). The latter rests on a privilege, but the former is given in the case of the *dernier équipeur*(4). The procedure on both attachments is the same(5).

D. MacMaster K.C. and *Hickson* for the respondents. The "round voyage" theory was not suggested in the plaintiffs' declaration, but adopted at the trial; the first theory was that the voyage in question was the last voyage from the port of Montreal. Such a qualification has no place in the law; it would unsettle it. "Last voyage," unless otherwise qualified, must mean the last complete transit from the shipping port to the port of delivery. We are not concerned with the convenience of the supplier, on credit, following the ship for the purpose of attaching her at the journey's end. Nor can an ensuing voyage be construed as a "last voyage."

The right of the plaintiffs to attach the ship must be determined by articles 6 and 2383 C.C., and article 931 C.P.Q., neither of which can authorize an attachment or privilege in respect of goods supplied for an ensuing voyage. Article 931 C.P.Q. recognizes only the right to attach the property of the debtor. Here there is no personal debt due by the owners of the ship. We refer to *Pickford* v. *Dart*(6); *Gracie* v. *Marine Insurance Co. of Baltimore*(7). The *dernier équipeur* has no place in the laws of Quebec save under sub-section 5 of article 2383 C.C., and that

(1) Art. 955 C.P.Q.
(2) Art. 87 C.P.Q.
(3) 2 Q.P.R. 63.
(4) Arts. 391, par. 1; 933 C.P.Q.
(5) Art. 956 C.P.Q.
(6) 32 L.C. Jur. 327; M.L.R. 4 Q.B. 70; 31 L.C. Jur. 174; 15 R.L. 141.
(7) 8 Cranch 75.

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article gives him a privilege only in respect to "provisions" for the last voyage. See also, Sirey on article 191 Code de Commerce. The qualified ownership conferred by article 2391 C.C., does not involve a lien or privilege on the ship; it occurs in another part of the Code dealing with "owners, masters and seamen" and not dealing with the questions of privilege or liens provided for in a previous chapter. Transfers of British ships can be effected only in conformity with the laws respecting shipping(1); *Baumwoll Manufactur von Carl Scheibler* v. *Furness*(2); *The "David Wallace"* v. *Bain*(3). See also Sirey, Code Ann., art. 191, para. 17, page 219; *Valente* v. *Gibbs* (4); *The "Castlegate"*(5), at page 51; and *DeNicols* v. *Curlier*(6).

THE CHIEF JUSTICE concurred in the opinion stated by Maclennan J.

GIROUARD J. (dissenting).—The facts of this case are not in dispute. We are called upon to decide two questions of law. First: What is the meaning of the words "last voyage" used in paragraph 5 of art. 2383 of the Civil Code? And secondly: Who is the *dernier équipeur* within the meaning of arts. 931 and 983 of the Code of Civil Procedure?

Art. 2383 reads as follows:

> There is a privilege upon vessels for the payment of the following debts:
>
> * * * * * * *
>
> 5. The sum due for repairing and furnishing the ship on her last voyage,

"pour son dernier voyage," according to the French text.

(1) Art. 2359 C.C.
(2) (1893) A.C. 8, at p. 21.
(3) 8 Ex. C.R. 205.
(4) 6 C.B.N.S. 270, at p. 284.
(5) [1893] A.C. 38.
(6) [1900] A.C. 21.

This article is borrowed from the *Ordonnances de la Marine* of 1681 and from the common law of France as it existed at that time. See art. 18, *tit.* XIV., *liv.* 1, as explained by Valin in his commentaries on this ordinance, pages 397 and following, *édition* Bécane.

The framers of the Quebec Code express some doubt as to that ordinance, and also the ordinance of commerce of 1673, having ever been in force in Canada for want of registration by the Superior Council, and it may be added that such has been the general impression among Quebec jurists for many years. This registration was a prerogative of the Parliaments of France, recognized by the Sovereign himself, so that his laws would receive some sort of popular sanction; Decl. 7th July, 1572, 14 Isambert, *Anciennes lois françaises,* p. 252; and the Judicial Committee of the Privy Council has declared on several occasions that it was extended to the Superior Council of Quebec. *Hutchinson* v. *Gillepsie*(1), in 1844; *Symes* v. *Cuvillier*(2), in 1879. In view of documents recently made public, more particularly *Jugements et deliberations du Conseil Supérieur,* published by the Government of Quebec in 1885-1891, that doubt cannot any longer be entertained. This collection, forming six immense volumes, is most valuable, but unfortunately it is without index and unfinished. I had to spend several days in perusing the two last ones to obtain the information I desired. These volumes were stopped at the year 1716, and it is impossible to ascertain the jurisprudence of the Council from that date till the *Précédents* of Perrault, commencing in 1727. I am convinced that, if this collection was completed at least to Perrault's *Précédents* and a proper index

(1) 4 Moo. P.C. 378.
(2) 5 App. Cas. 138.

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made, more important information would be of easy reach on the laws of Quebec generally under the French *régime* and more particularly on the subject before us.

It is true that the sheet or sheets of registration of said ordinances cannot be found, but it is a well-known fact that they are not the only ones missing. Too often they were not recorded in a bound register or book and were kept loose. To quote one or two instances, how is it that the commission of one of the judges in admiralty, le Sieur Boucault, "lieutenant-général de l'amirauté de Quebec," is not in the third volume of the revised edition of *Edits et Ordonnances,* published in 1854 by the Government of the late Province of Canada, which is supposed to contain all the commissions of the officers of justice. The commission of Couillard de l'Espinay, the first judge, is there, pages 94 and 95; likewise that of the last judge, le Sieur Guillemin; but that of his predecessor, Boucault, is missing. The archives of the *Juridiction Royale* of Montreal disclose a still more flagrant example of carelessness and looseness in the keeping of the archives of the Council. In the first report of the Provincial Secretary of Quebec for 1886-87, Division of the Registrar, page 54, the proof is made that an important *règlement* or statute of the Council of the 5th May, 1727, concerning the keeping of registers of civil status, in thirteen sheets and twelve articles, was passed for the whole government of Canada. It is on file in the *greffe* of the Royal Court of Montreal, but it is not to be found in the *Edits et Ordonnances* which are represented to contain all the *règlements* of the Council. Why? Simply because it had been mislaid, and this in violation of the *arrêt* of the 28th

February, 1664, passed one year after the establishment of the Council, which provided for the keeping of a *plumitif* or register where the *arrêts et ordonnances* of the Council should be transcribed *"et non en feuille volante"* (2 Ed. et Ord. 15). It is remarkable that this regulation which no doubt applied to the acceptance or registration by the Council of the King's *Edits et Ordonnances* did not extend, at least expressly, to the transcription of the text of these statutes. Later on, a few years before the cession, the King and the Council made some enactments concerning the registration of said statutes, which will be found at pages 224 and 481, but nothing is said as to the manner of making the registration.

If the ordinances of 1673 and 1681 were not law in Canada, how can we explain the fact that all the courts including the Superior Council, followed them as law? We find in Perrault's *Précédents du Conseil,* p. 16, a decision relating to a bill of exchange, where undoubtedly the ordinance or Code of Commerce of 1673 is quoted as law. Perrault, an advocate and prothonotary of the King's Bench in Quebec for many years, and who had personally known many *praticiens* under the old French *régime* (he was born in 1753) observes in his *Précédents de la Prévosté de Québec* that that ordinance was one of the fundamental laws of the Canadian courts. (See also p. 26.) On the 19th September, 1712, and consequently before the creation of the Quebec admiralty court, at an extraordinary sitting of the Superior Council reported in the 6th volume of the *Jugements et Délibérations,* p. 504, reference is made to the *Ordonnance de la Marine* as being in force in La Nouvelle France, and also to the "Greffe d'Amirauté" which must have been a branch

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of the Prévosté or ordinary civil tribunal of the Town of Quebec.

Are not these declarations made not only by inferior courts but also by the very body who could declare whether these laws of national importance should be in force or not, equivalent to registration? I believe that it is the only conclusion we can arrive at.

But if any doubt be possible, it disappears in face of the King's *règlement* of the 12th January, 1717, registered the same year by the Superior Council, Edits et Ord., Vol. 1, p. 358. His Majesty does not complain that the ordinance was not registered. He supposes it had been, for he represents that the ordinance had not been put fully into operation, because admiralty courts had not been established in the colonies of America, and provides for the creation of such courts.

Article 1 says:

> Il y aura à l'avenir dans tous les ports des isles et colonies françoises, en quelque partie du monde qu'elles soient situées, des juges pour connoitre des causes maritimes, sous le nom d'officier d'amirauté, privativement à tous autres juges, et pour être par eux les dites causes jugées suivant l'ordonnance de 1681, et autres ordonnances et règlements touchant la marine.

This admiralty court was organized in Quebec in 1717 (see *Edits et Ordonnances,* Vol. 3, p. 94). I find in Perrault, *Prévosté de Québec,* p. 48, an *arrêt* of the 4th December, 1737, dismissing an action and ordering the parties to proceed elsewhere *"attendu que le fait dont il s'agit est un fait maritime."* But it must be observed that the ordinance of 1681, title 2, art. 1, and the *règlement* of 1717 quoted above, gave exclusive jurisdiction to admiralty courts in maritime cases. Likewise under the French Code de Commerce,

arts. 631, 633, the jurisdiction of the tribunals of commerce, which have replaced admiralty courts, has been held to be exclusive, although the word is not used.

This digression is not only interesting from an historical point of view; it is not without practical importance in the determination of marine cases, for whenever the Civil Code of Quebec has no provision upon any maritime matter, recourse can be had to the ordinance of 1681 and other French laws in force in the Parliament of Paris at the time of the creation of the Superior Council in 1663, or registered by the Council if enacted after its creation. Art. 2613, C.C.

After the cession of the country to Great Britain the ordinance and the French law generally ceased to be enforced in the Quebec admiralty court and the English law was substituted for them as part of the public law of Great Britain. By his commission, the first admiralty judge in Quebec, appointed in 1764, was empowered to hold a vice-admiralty court like the High Court of Admiralty in England, and, of course, according to the English laws. The Civil Code of Quebec, art. 2383, recognized that rule in express terms:

> The provisions in this chapter (chapter 4th relating to privilege and maritime lien) do not apply in cases before the court of vice-admiralty.
>
> Cases in that court are determined according to the civil and maritime laws of England.

Finally, the Imperial statute, 53 & 54 Vict. ch. 27, passed in 1890, empowering the legislature of a British possession to create colonial courts of admiralty, declares that the jurisdiction of such courts shall be

> as the admiralty jurisdiction of the High Court in England,

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For many years, ever since the cession, until the organization of colonial courts of admiralty by virtue of the said Imperial statute and the Canadian statute in pursuance thereof, there was only one admiralty court in Lower Canada, and that was the Quebec vice-admiralty court, having jurisdiction only over tidal waters. Under the new statutes, admiralty courts have been established all over Canada and the navigable waters thereof, whether tidal or non-tidal, but it is remarkable that their jurisdiction is not exclusive, at least expressly. It may be so impliedly, a point we are not called upon to decide. In the United States it is now well settled, after some years of hesitation and uncertainty, that admiralty jurisdiction is exclusive, although some of the states, for instance, Louisiana, have special laws like those of Quebec, governing the subject matter, and this in spite of the following saving clause in the constitution:

> saving to suitors in all cases the rights of a common law remedy where the common law is competent to give it;

Berwin v. *Steamship "Matanzas"* (1).

Strong grounds of public policy may be advanced against the maintenance of concurrent jurisdiction. It may be said that it is of national importance to the British Empire that British ships, whether owned or registered in the British Isles or the colonies, carrying the same flag, shall be governed by the same laws. But Parliament alone can so decree either expressly or impliedly. Whatever may be the rule of law in this respect, concurrent jurisdiction of ordinary courts in maritime matters provided for by the French laws has been so long exercised and recognized by the juris-

(1) 19 La. Ann. 384.

prudence of Quebec, from the cession to the present date, that I would hesitate to disturb it, especially as the point has not been taken either in the courts below or in this court. Therefore, in arriving at the conclusion I have reached upon the two points of law submitted for our decision, I have taken for granted that the case was properly before the courts below and this court, and is governed by Quebec law, a point which was, moreover, conceded by the respondent's counsel at the hearing before us.

What is therefore the meaning of the words "last voyage" within art. 2383, par. 5, of the Civil Code?

The trial judge, Dunlop J., who is also a judge in admiralty, after delivering a very elaborate opinion, gave judgment in favour of the appellants, and held that the "last voyage" means the round trip, or when the ship was last in the port of Montreal, as she intended to return to Montreal and did in fact return within about one month. In appeal, this judgment was reversed by all the judges who expressed the view that the "last voyage" means the return voyage only, or the voyage from Rotterdam to Montreal, and that the supplies having been furnished on the previous voyage, that is the voyage from Montreal to Rotterdam, the privilege existed no longer. It must be remarked that the case was not argued and was only submitted on the factums.

The respondents' counsel urged, both at the hearing before us and in his factum, that the appellants could only enforce their privilege by seizure of the coal before departure and of the ship at the port of destination in Europe. I must confess that I cannot conceive that that could be the intention of the legislature. That privilege was given not only to secure

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to our own people the payment of necessaries for a ship, but also to give the credit she may need. It would be illusory for a master to get supplies, if the latter be exposed to be revendicated before the voyage commenced. And is it not extraordinary to suppose that a merchant who has advanced necessaries, as in this case, to enable a ship to proceed to sea, cannot enforce any privilege he may have unless he enforces it either before departure or at the European port? In this case, that port was within easy reach. But suppose the port of destination was unknown or distant in Asia or Australia, can it be expected that this coal merchant will be obliged to follow the ship by cable, correspondence or otherwise to maintain his privilege upon her? Will that privilege be recognized in foreign courts? Will the local privileges be preferred? I think this situation is too absurd to be well founded. The privilege upon the ship, it is obvious, has been created not only in favour of commerce and navigation, but also to protect our own merchants, and the "last voyage" must mean the last trip she made from the port of Montreal, as held by the trial judge. We are bound to give to our statutes—and the Quebec Code is a statute adopted by the late Province of Canada before confederation—such interpretation as will fulfil the intention of the legislature and will give them effect.

The words "last voyage," to be found in several paragraphs of art. 2383 C.C., have not always the same meaning, because the circumstances are not the same. A seaman, for instance, runs no risk, because he follows the ship and is always in a position to enforce his rights. Chief Justice Lacoste admits that the words have a different meaning, but he holds, and the whole court with him, that in this case the "last

voyage" means the voyage from Rotterdam to Montreal.

It is perhaps impossible to lay down an absolute definition of what may be the last voyage. When a ship has no regular service to perform, a tramp, for instance, her last voyage may perhaps mean her last trip from the port of sailing, but when the ship belongs to a regular line, especially a Canadian line, as in this case, between Canadian ports and European ports and return, offering return passage, surely when that ship leaves the port of Montreal with a view of returning, and in fact returning regularly, it cannot be said that the voyage is only for one crossing and not also for the return crossing. It is not necessary to say more for the purposes of this case. Neither the Code nor the ordinance defines the last voyage. It is undoubtedly more a question of fact, or rather of intention, than of law. The very recent decision of the House of Lords in *Board of Trade* v. *Baxter; The "Scarsdale"*(1), in July, 1907, supports this view.

It cannot be said that the jurisprudence of Quebec is well settled. I know only of two decisions, *Henn* v. *Kennedy*(2), decided by Mr. Justice Routhier, in 1890, and adopted by Chief Justice Lacoste, and the other one *McLea* v. *Holman*(3), decided by Mr. Justice Pagnuelo, in 1892, and reported in the Quebec Law Reports, and followed in this case by Mr. Justice Dunlop.

Mr. Justice Pagnuelo has examined very fully the authorities, and I cannot add anything to what he says on the subject. I refer, therefore, to his elabor-

(1) [1907] A.C. 373, at p. 376. (2) 17 Q.L.R. 243.
(3) Q.R. 2 S.C. 105.

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ate opinion and also to the authorities quoted by the appellants' counsel in his factum. For the moment I will content myself with quoting the following passage from Mr. Justice Pagnuelo, in which I concur:

Il faut en cette matière, comme en toute autre, rechercher l'esprit de la loi et l'interprêter de manière à lui donner effet, en protégeant, d'une manière efficace, ceux que la loi a voulu protéger.

Le maître d'un navire qui le fait réparer ou l'approvisionne à crédit avant de faire un voyage, n'agit ainsi que parce qu'il n'a pas l'argent pour payer. La loi accorde un privilège pour les réparations faites ou les provisions fournies pour le dernier voyage. Si la course que le vaisseau doit faire, disons de Montréal à Liverpool, doit être considérée comme constituant et complétant le dernier voyage à l'égard de celui qui a fait les réparations ou fourni les provisions à Montréal, *il lui faudra suivre le vaisseau à Liverpool et l'y saisir sous peine de perdre son privilège, ou bien le saisir avant qu'il ne parte de Montréal.* En effect du moment que le navire laisserait le port de Liverpool pour naviguer durant l'hiver entre les ports de l'Europe ou de l'Amérique, le créancier de Montréal perdrait son privilège sur le navire; il lui faudrait donc suivre le navire en Angleterre pour le faire saisir, *ou le saisir à Montréal avant son départ.* Ce sont deux alternatives que rendraient impossible au maître du navire de faire réparer son vaisseau, ou de le faire approvisioner, s'il lui faillait payer avant de partir ou si le vaisseau était saisi avant son départ.

Le législateur l'a entendu autrement; il a voulu que le navire put être réparé ou approvisionné à crédit lorsque le maître n'a pas d'argent pour payer et la loi accorde au fournisseur un privilège sur le navire pour ses avances. Exiger qu'il suive le vaisseau en pays étranger pour l'y faire saisir sous peine de perdre son privilège, c'est aller contre l'esprit de la loi et rendre impossible ce qu'elle a voulu favoriser.

Le mot *voyage* et *dernier voyage* sont employés plusieurs fois par notre code civil et par l'ordonnance de la marine. On se tromperait en leur donnant dans tous les cas la même portée, la même signification.

Lorsque le code parle du privilège pour les gages et loyers du maître et de l'équipage *pour le dernier voyage* (art. 2383; 4 Ord. de la Marine, liv. 1, titre XIV., art. 16) des sommes dues pour réparer le bâtiment et l'approvisionner *pour son dernier voyage* (id. 5) de la prime d'assurance sur le navire *pour le dernier voyage* (id. 7) du cas où navire n'a pas encore fait de *voyage* (id. 8) de la prescription pour les gages des matelots, qui ne commence à courir qu'après le *parachèvement du voyage* (art. 2406); et des prêts à la grosse, soit sur le bâtiment ou sur les merchandises, faits pour le *dernier voyage,* lesquels sont préférés à ceux faits pour le *voyage*

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précedent (art. 2605), il n'entend pas toujours la même chose par le mot voyage et dans chaque cas l'on doit interpréter la loi de manière à assurer à chacun le privilège qu'il a voulu conférer. C'est se tromper que de vouloir donner au mot *voyage* la même signification dans tous les cas comme il a été fait dans la cause de *Henn* v. *Kennedy* (1).

As to the other reasons advanced by Mr. Justice Bossé, Chief Justice Lacoste has answered them to the satisfaction of the majority of his court and to mine also. It is not necessary that the coal should have been ordered by a captain appointed by the real owners. The article of the Code makes no distinction whatever, whether the captain is the agent of the real owner or of the charterer, a British or a Quebec ship, navigating Quebec or interprovincial waters, the high seas or foreign waters. It is sufficient that the coal was put on board the steamer and used there; a legal privilege or lien is granted if the coal has been for the last voyage, and is enforced before another voyage is undertaken from the Quebec ports.

Under article 2391 of the Civil Code, the charterer in a case like this is supposed to be the owner for the time being, and to be responsible as such owner to third parties. Article 2397 C.C. does not apply. Here the coal was ordered by the *gérant du bâtiment* and the reputed owners, that is the charterers and their agent in Montreal having the sole control of the ship.

That is all I have to say about the first item of the claim of the appellants. They have a privilege for the payment of the same which they can enforce by a conservatory process as they have done under article 955 of the Code of Procedure. They might have had recourse to the *saisie-arrêt* of article 931 C.P.Q., if they had attached the steamer on her arrival in the port

(1) 17 Q.L.R. 243.

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of Montreal; but instead of doing this, they delivered more coal and thereby became *dernier équipeur* for that last delivery, remaining privileged creditors for the first one, being merely entitled to be paid by preference, as long as another voyage is not commenced. It is a lien of temporary duration, unknown, I believe, to the English law, and under the *Ordonnance de la Marine* is subject to a prescription of one year. For the first supply they invoke the conservatory process of article 955. The trial judge found the procedure correct; no objection was taken against it. I believe none can be raised and judgment should go for plaintiffs to the extent of the first supply at least.

With regard to the second delivery of coal delivered after the return voyage to Montreal and before the departure of the "Lake Simcoe" on her next crossing, which the appellants claim *à titre de dernier équipeur* under articles 931 and 933 of the Code of Civil Procedure, I think they are likewise entitled to judgment in their favour.

One would naturally ask here, who is the *dernier équipeur?* No mention is made of him in any of the French ordinances, law dictionaries or books. He must have an exceptional position and a peculiar meaning, for whenever he appears in the statutes of Canada or Quebec, from the year 1787 to the present time, our legislature, even when using the English language, calls him by his French name only. Sir Alexander Lacoste C.J., looks upon him almost like a ghost conjured up to frighten navigators and craft owners:

> Quel est (he asks) ce personnage mystérieux que l'on appelle le dernier équipeur, qui a traversé les siécles et que personne ne semble avoir décrit avec précision?

Mr. Justice Stuart remarks in the case of *Plante* v. *Clarke*(1), that it has been thought by some that the words *"dernier équipeur"* means the person who formerly equipped *voyageurs* going to the Indian country. That is perfectly correct. The origin of the *dernier équipeur* is purely Canadian. For nearly 150 years he was a most important factor in the trade of Canada. He was no less a personage than the merchant who, in Montreal and elsewhere, had last outfitted on credit the canoes of the *voyageurs, coureurs des bois* and *traiteurs* dealing with the Indians of the far west. It was always understood that the suppliers would be paid out of the furs which these adventurers would take down in return for their goods. The *voyageurs* were not always scrupulous and not unfrequently disposed of their loads on the way down, especially at the posts on the lake of Two Mountains, at Carillon, Oka, Ile sur Tourtes, Ile Perrot, and Ste. Anne's, where a very large trade was illegally carried on at various times during the French *régime.* (6 Juge et Del. 456; Canadian Archives, Cor. Gén. XXII. 319.) In such emergency cases, the outfitter could resort to a *saisie-arrêt* before judgment, even in the hands of third parties. I recognize one of these cases in Perrault's *Précédents* of the *Prévosté,* p. 59, where one d'Ailleboust de Coulonge was allowed to be paid by privilege out of certain furs seized in the hands of a third party. There is another case reported in vol. 5 of the *Jugements et Déliberations,* pp. 927, 930, where a similar provision was made by the Superior Council in favour of Trottier des Ruisseaux, also a merchant and seignior of Ile Perrot.

In vol. 3 of *La Collection des Manuscrits,* p. 171,

(1) 17 L.C.R. 75.

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special mention is made of certain regulations adopted by the Government of Canada against *"les voyageurs et équipeurs de Montréal"* to prevent them from purchasing in the New England colonies the goods that they require *"pour faire leur traite et leurs équipements."*

On the 14th November, 1685, Governor de Denonville informs the minister in Paris that Berthé de Chailly, a notorious merchant of Ste. Anne's, had left the country for France, after having amassed a fortune of 40,000 livres, too often by means of various frauds and especially by intercepting part of the *pelleteries* of canoes which the *voyageur "devait apporter toutes au marchand qui l'a équipé"* (Canadian Archives, Cor. Gén. VII. 666; VIII. 18).

These attachments before judgment were easily obtained. No affidavit was required and it was sufficient for the plaintiff to mention his indebtedness. In the early days of the colony, it was not even necessary that the title upon which he relied should be authentic. It was sufficient that the debt was *claire et liquide* and exigible or that the debtor was insolvent. Pigeau, *Procédure Civile,* Vol. 1, pp. 121, 122, refers to a certain practice which, he says, was sanctioned *par l'usage,* and often made more easy, even in France, the recourse by *saisie-arrêt* before judgment, especially in cases of insolvency. Insolvency was almost the normal condition of these *voyageurs.*

In the year 1734, the Superior Council of Quebec put an end to attachments based only upon instruments under hand, and required authentic deeds or an order of the judge authorizing the seizure, *"à peine de nullité."* (*Perrault, Conseil Supérieur,* p. 22.)

This mode of procedure continued until 1787, when

the legislature introduced the English practice by 27 Geo. III., ch. 4, sec. 10, and for the first time required the affidavit which has been *de rigueur* ever since, except in the case of *dernier équipeur suivant l'usage du pays*. The same enactments have been made by the legislature from time to time, first in the old Revised Statutes of Lower Canada of 1845, next in the Consolidated Statutes of 1860, then in the Code of Civil Procedure of 1867, and finally in the Revised Statutes of Quebec of 1888, and the new Code of Civil Procedure of 1897, which provides, by article 933, for an affidavit disclosing "the existence of the required indebtedness."

Thus it appears that, although the days of canoes and bateaux have gone long ago and new modes of transportation and commerce have been devised, the last *équipeur* is still in the mind of our legislature. Who is he under these recent statutes? He is the butcher, baker, grocer, coal merchant, and other suppliers of necessaries for the voyage. He is exactly what the word implies, what he always has been, that is the last outfitter of a vessel for the purposes of navigation in contemplation. *"Equiper, Equipement, Equipeur,"* says Hartfield in his dictionary of the French language,

> c'est pour voir une embarcation de tout ce qui est nécessaire pour la manœuvre et pour la subsistance des hommes embarqués.

In other words, the last *équipeur* is the last outfitter of the vessel, the one who has advanced last. He is not the supplier for the last voyage which he has allowed to terminate without taking any proceedings, he even making fresh advances.

Our law reports contain many precedents where the exceptional rights of the *dernier équipeur* have

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been considered. They will be found collected in Martineau's Code of Procedure, art. 931, pars. 8, 9, 10; art. 955, pars. 6 and following. In this case the affidavit, required in all other cases that the defendant is about to secrete or abscond, etc., is not necessary, for it is sufficient to relate the existence of the required indebtedness, as prescribed by article 933.

The court of appeal rejected the contention of the respondents that, as they were not personally liable for the last delivery of coal, their ship could not be attached in payment of the same under art. 931, C.P.Q. They held that the other defendants were personally liable, and that this was sufficient, as for the time being they were the reputed owners and under article 385, C.C., ships are movable. Chief Justice Lacoste said:

> Nous avons une dette personnelle contractée par le locataire, qui est défendeur; ceci satisfait aux exigences de l'article.

The only objection the learned judges had as to the issue of the writ of *saisie-arrêt* under article 931 was that the last *équipeur* has no privilege. With due respect I believe this is a misconception of his position. Whether he has a lien or not, article 931 gives him a remedy which he can exercise, whether finally he is paid his debt or not. He has a right to demand that the vessel or at least the coal be sold in satisfaction of his debt, of course after the payment of the hypothecs and privileged claims. The question of privilege will present itself after the sale, at the time of the distribution of the moneys. Is he *dernier équipeur?* That is the whole question. Every privileged creditor on a vessel, even a sailor, is not entitled to a *saisie-arrêt* under article 931; he must be *dernier équipeur*, as was decided by several learned judges

familiar with ancient practice. *Delisle* v. *Lécuyer* (1), decided by Berthelot, Mackay and Torrance JJ. and *Dagenais* v. *Douglas* (2), decided by Mondelet, Mackay and Caron, JJ.

But is it so clear that the *dernier équipeur* has no lien or privilege? He may have none under article 2383, C.C., although the point is not very clear in face of par. 3. But is it necessary to go that far? Is he not entitled to a privilege under the ordinance of 1881, *liv.* 1, *tit.* XIV., which was law before the Code?

Ceux qui auront prête pour radoub, victuailles et équipement avant le départ.

Can a privilege exist without express language? Can it be created by implication? Under articles 191 and 192 of the French Code of Commerce, the negative seems to be the prevailing doctrine. See Bédarride, 1 Dr. Mar. *nn.* 51, 52, 53. But are they not more restrictive than the ordinance *liv.* 1, *tit.* XIV., arts. 16 and 17, or the Quebec Code, articles 2383 to 2386? The latter article refers to

other privileged debts, according to the circumstances under which the claim has arisen and the usage of trade.

The old French jurisprudence was well settled that the ordinance was not exclusive and that the privileges of the common law continued to exist, when not inconsistent. Emérigon in his treatise *Assurances et Contrats à la grosse,* observes, p. 571:

L'ordonnance, art. 16, titre de la saisie, place au troisième rang ceux qui auront prêté pour radoub, victuailles ou équipement avant le départ.

En 1755, je fus consulté si le rang devait être accordé pour bois et cordages fournis au navire avant le départ. Je répondis qu'oui; car peu importe qu'on ait prete de l'argent ou qu'on ait fourni les matériaux. Le cas du fournisseur a même quelque chose de plus

(1) 15 L.C. Jur. 262.

(2) 16 L.C. Jur. 109.

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favorable, puisque les fournisseurs ne sont pas équivoques; au lieu que l'utile emploi des deniers est toujours susceptible de quelque doute. Cette interprétation *non est extensiva, sed intellectiva.* Telle est notre jurisprudence.

Valin, who wrote his commentaries in 1760, mentions (page 400) necessary equipments of the ship made before her departure on any voyage.

Les fournisseurs des bois, des planches et du fer qui y ont été employés; les fournisseurs de voiles et de cordages, et généralement de tout ce qui a servi à mettre le navire en état de faire le voyage,

At page 443, Valin goes as far as to lay down the principle that provisions and equipments ordered by the captain at the domicile of the owners, although prohibited without special authority, should be paid if they were necessary, quoting the maxim of the ordinance de Wisbuy, generally followed by all maritime nations, article 65, *memo debet locupletari cum alterius jactura.* Such is also the opinion of Boulay-Pâty, 2 Dr. Mar. 52. It must be so especially in the present case with regard to the second item of the supply of coal, as it profited the real owners who took possession of it and consumed the same.

Granting that the privileges upon ships are limited to the cases expressly provided for in article 2383 C.C., and I must confess that this contention has a great deal of force, is it indispensable for the appellants to rely upon it? Upon what ground can it be said that they have no privilege upon the very coal they sold and seized in this cause with the ship as one of her accessories? Mr. Macmaster K.C., for the respondents, admitted, as already observed, that they were entitled to revendicate the same. But if they can revendicate, surely they can be paid by privilege. As I read articles 1998, 1999 and 2000 of the Civil Code, the unpaid vendor has two privileged rights: (1) A right

to revendicate; (2) A right of preference upon the price or the proceeds. Article 1994, par. 3, likewise provides for a privilege upon the article sold.

The appellants have, therefore, an ordinary privilege for the last delivery upon the coal which, I believe, they can enforce by *saisie-arrêt* under article 931 of the Code of Civil Procedure, as being *derniers équipeurs*. The debt is personal to the charterers, and I cannot understand why the appellants cannot proceed by attachment upon the coal under article 931, for they are *derniers équipeurs* and the coal seized in this case is the property of the personal debtor. In any event, they had a right to a *saisie-conservatoire* under article 955.

For all these reasons, I am satisfied that the judgment of the trial judge was the only one that could be rendered. I would, therefore, allow the appeal and maintain the *saisie-arrêt* and *saisie-conservatoire* and the action of the appellants with costs before all the courts.

DAVIES J.—This was an action begun by the appellant company in Montreal against three defendants: The Canadian Lines, Ltd.; William Peterson, Ltd.; and Elder, Dempster & Co., the respondents, to recover the price of certain quantities of coal delivered at different times aboard the SS. "Lake Simcoe" while in Montreal. The action was accompanied by a seizure of the steamship for the amount sued for on the grounds that with respect to $4,940 of the claim, article 2383 of the Civil Code created a privilege or lien upon the vessel for the payment of same as a sum due "for furnishing the ship on her last voyage" and with respect to $1,082.77, that the appellant was the *dernier équipeur* referred to in article

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931 C.C.P., and as such entitled to recover for this latter sum, although the coal supplied was not for the "last voyage" of the ship, but for her then ensuing voyage.

The Canadian Lines, Ltd., and Wm. Peterson, Ltd., entered no defence to the action, and judgment went against them by default. Elder, Dempster & Co., the owners of the ship, alone contested the action, and the Superior Court held that although they were not personally liable for the coal, the ship was liable and its seizure legal.

The Court of King's Bench unanimously reversed this judgment, holding that the first quantity of coal delivered to the ship was not for her "last voyage" within the meaning of that phrase in article 2383 C.C., and that for the second quantity delivered, it was avowedly for an ensuing and not a last voyage, and for coal so supplied there was no lien or privilege.

The facts necessary to be ascertained for the solution of the questions in dispute are few and about them there is no serious dispute, but there is much controversy as to the conclusions to be drawn from these facts.

The SS. "Lake Simcoe" is a British ship owned by the Elder, Dempster Co., and registered in England.

She was chartered by her owners to the defendants, Wm. Peterson, Ltd., of Newcastle-on-Tyne, on the 10th day of June, 1904,

for six months from the 16th of June, 1904, *for voyages from and between Rotterdam,* Havre or Dunkirk and Canadian ports, Quebec or Montreal,

and it was provided that under no circumstances should the steamer sail from or to or touch at any port in the United Kingdom or be employed in trading between any United Kingdom ports and Canada.

Further it was provided that the hirers should bear all expenses in connection with the navigation and upkeep of the vessel and

> provide coal stoves, emigrant outfits, and captain, officers and necessary crew, who should be their servants and bear all expenses in connection with the steamer from the time of delivery

until re-delivery to owners.

Part of the consideration payable by the hirers to the owners was to be

> a sum equal to one-half of the profits accruing from the working of the vessel

as provided in the charter-party.

It was argued in the courts below that this provision constituted the owners partners with the hirers, but the contention was, I think properly, not sustained, and it was not very strongly pressed before us.

The last clause provides that the contract "should be governed solely by the law of England," but this, of course, can have no application to the plaintiffs if their contentions with respect to the meaning and application of the articles of the Code are correct.

After the charter party was entered into the SS. "Lake Simcoe" was delivered to Peterson & Co., and proceeded from Birkenhead to Rotterdam, at which latter place, from which according to the charter party her voyages were to start, she loaded and sailed on her first voyage to Montreal, touching at Havre and Quebec. While at Montreal she unloaded and reloaded, and on the 29th July, 1904, took in a quantity of coal as supplies for her voyage from Montreal back to Rotterdam.

This coal was ordered by Thomas Harling, the agent in Montreal, of Wm. Peterson, Ltd., and the Canadian Lines, Ltd., which latter company was practically Peterson, Ltd., under another name.

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It is quite clear beyond any controversy that there was no personal liability attaching to the defendants, Elder, Dempster & Co., with respect to this coal, and both courts below have so held.

The captain of the ship had nothing to do with the contract of purchase. The sale was made by the plaintiffs to the Canadian Lines, Ltd., acting by their agent in Montreal, Thomas Harling, to whom the plaintiffs in due course rendered its account for the coal, and a draft was drawn by the appellants at Harling's request for the amount of the account upon William Peterson, Ltd., for acceptance, and was duly accepted by that firm on 10th August following.

On the 20th September, William Peterson, Ltd., suspended payment, and on the 23rd September the draft was presented for payment and was refused. Two days afterwards the ship, still being under charter as stated before, was seized in Montreal, where at the time she happened to be loading for what the respondents call her fourth voyage, under an attachment for the price of the coal, $4,490, and also for the price of another lot of coal sold on the 6th September by the plaintiffs to Harling as agent of the Canadian Lines, Ltd., for the said SS. "Lake Simcoe," and about that day delivered aboard of such ship for her use, amounting to $1,082.77.

The facts with reference to the sale of the latter lot of coal were substantially the same as the former, with the exception that no draft was drawn upon Peterson & Co., Ltd., for the amount, and that it was not contended that the voyage for which it was supplied was the last voyage on the ship within article 2383 of the Code.

In each case the coal was sold by the plaintiffs to Harling as the agent of the Canadian Lines, Ltd., and

Peterson, Ltd., without the intervention or knowledge of the captain, and there is no pretence of personal liability therefor on the part of the defendants, Elder, Dempster & Co., nor was their agent in Montreal ever communicated with on the subject of the sale and delivery of either lot of coal.

Immediately after the sale of the first lot of coal, in July, and its delivery aboard the SS. "Lake Simcoe," the steamer being re-loaded sailed for Rotterdam, calling at Quebec and Havre, on what the respondents call her second voyage.

At Rotterdam she again re-loaded and sailed back to Montreal on what is called by the respondents her third voyage, and it was while at the latter port on the 6th of September, 1904, and while outfitting and loading for what respondents call her fourth voyage that she took on the second quantity of coal, $1,082.77, which forms part of the amount sued for and for which the steamer was seized.

Peterson & Co. did not suspend payment until about a fortnight after the delivery aboard of this second lot of coal, namely, on the 20th September. The seizure was made on the 26th September.

There does not appear to be or to have been any pretence of a revendication of this latter lot of coal, and the only question as it seems to me which can arise upon the record as to this second lot is whether the Code in any of its articles provides in express terms for a privilege or lien upon the ship seized for the price of this lot of coal, and if not whether the seizure can be maintained as to it under the article 931 of the Code of Civil Procedure.

I fully concur in the judgment of the Court of King's Bench that no such privilege or lien is given

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expressly. Article 2383 of the Civil Code on which the plaintiffs rely to sustain their seizure for the price of the first lot of coal delivered, $4,951.29, clearly and admittedly does not cover the second lot delivered in September, which was delivered not for the last voyage, but for a future and ensuing voyage, and article 931 of the Code of Civil Procedure only provides and is intended to provide a remedy for an existing right and not to create a right itself unless indeed in the special contingencies and with respect to the special persons and properties specified in the article. It only applies to a case as expressed in the article

> wherein the defendant is *personally indebted* to the plaintiff in a sum exceeding five dollars,

and then only where one or other of the several contingencies specified in the sections of the article have arisen, such as in the case of a *dernier équipeur* where a debtor absconds with intent to defraud creditors, etc., or secretes, or makes away with property with intent, etc., or being a trader, ceases to make payments and refuses an abandonment of property to creditors, etc.

The article could not, in my opinion, be successfully invoked in such a case as the present where there neither was any personal liability of the contesting debtor whose property has been seized, nor where any one of the contingencies which justify the invocation of the article by the *dernier équipeur* can be said to have existed.

The right of the plaintiff to attach the ship for the price of the first lot of coal supplied in July, $4,951.29, depends entirely upon the true construction of the words "last voyage" in sub-section 5 of article 2383 of the Civil Code of Quebec, and to succeed he must

shew that the voyage for which such coal was supplied on the 29th July, 1904, from Montreal to Rotterdam. was the "last voyage" of the steamer within the meaning of that phrase in the 5th sub-section of the article.

In my view in order to reach a proper conclusion as to the meaning of the much-disputed phrase "last voyage" the article must be read and construed as a whole, and therefore I find it necessary to set it out fully. It reads as follows:

2383. There is a privilege upon vessels for the payment of the following debts:—

1. The costs of seizure and sale, according to article 1995;

2. Pilotage, wharfage, and harbour dues, and penalties for the infraction of lawful regulations;

3. The expense of keeping the vessel and rigging, and of repairing the latter since the last voyage;

4. The wages of the master and crew for the last voyage;

5. The sums due for repairing and furnishing the ship on her last voyage, and for merchandise sold by the captain for the same purpose.

6. Hypothecations upon the ship, according to the rules declared in the third chapter of this title and in the title *of Bottomry and Respondentia.*

7. Premiums of insurance upon the ship for the last voyage;

8. Damages due to freighters for not delivering the goods shipped by them, and in reimbursement for injury caused to such goods by the fault of the master or crew;

If the ship sold have not yet made a voyage, the seller, the workman employed in building and completing her, and the persons by whom the materials have been furnished, are paid by reference to all creditors, except those for debts enumerated in paragraphs 1 and 2.

No contention has been made before us as to whether this article of the Code applies at all to British registered ships or to foreign ships in the Province of Quebec, nor is it necessary, in the view I take of the case, to express any opinion whatever upon the point. If it became necessary it is obvious that articles 2355 and 2374 C.C. would have to be carefully considered together and in conjunction with the power of

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the legislature which enacted the Code, and I would not desire to be understood as expressing any opinion whatever upon the points.

The submission of the plaintiffs as I understand is that the SS. "Lake Simcoe" was engaged in making round voyages and that the starting point of such round voyages was Montreal. That the first round voyage was from Montreal to Rotterdam and back, touching both ways at Quebec and Havre, and that in this view the delivery of the lot of coal in Montreal in July was a delivery on a part of that round voyage, which would be the "last voyage" of the steamer within the meaning of the article in question before the seizure took place, the next and subsequent round voyage when the steamer was seized in Montreal in September being about to commence from that port at the time of seizure. This view has the inherent defect of entirely ignoring the first voyage of the steamer from Rotterdam to Montreal and the designation of the former port as the starting point of the steamer's voyages under her charter. The alternative view presented was that even if the round voyage be determined to have begun in Rotterdam in July, it meant a voyage from Rotterdam to Montreal and back to Rotterdam, and that the coal was delivered in Montreal during the course of and to complete that round voyage in July and August, and that this round voyage would therefore be the "last voyage" of the steamer before the seizure, within article 2383 C.C., such seizure having been made during the progress of the second round voyage of the ship in September.

The defendants on the other hand contend that each trip of the steamer was a complete and separate adventure; that neither Rotterdam nor Montreal was the ship's home port, she being a British registered

ship; that each trip the vessel made from Europe to Canada and Canada to Europe she discharged her cargo on arrival at her destined port and took a new cargo aboard for another voyage, and that each trip was complete in itself and constituted a voyage; that the coal supplied in July, in dispute, was for the steamer's second voyage, so that the second voyage could not be called in any sense, after she had completed her third voyage, the "last voyage" of the article of the Code.

They contended that the "last voyage" of the article unless otherwise defined, must mean the last complete transit of the ship from the shipping port to the port of delivery, and if the supplies were not paid for at the port of outfitting and furnishing, the supplier might follow the ship and attach her at her journey's end, and that with the argument as to convenience we have nothing to do. They also contended that the fact of the Canadian Lines, Ltd., having advertised in Montreal to carry passengers from Montreal to Havre and Rotterdam at certain specified fares and "return fare double above rates less 10%" was a mere incident which could not control or override the purpose and object of the hirers of the ship as evidenced by the broad facts to be drawn from the charter party and the actual sailings and loadings, ownership and chartering of the ship.

No evidence appears to have been given of the hiring of the crew whether for the single trip or voyage or the round trip or voyage, or for the time, six months, of the hiring of the ship under the charter party.

I attach little importance to the advertisement offering a holiday round trip from Montreal to Havre

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and Rotterdam and back as determining whether each trip was a voyage in itself or as transferring the starting point from Rotterdam to Montreal; nor do I think that there is any evidence in the case to justify us in holding that the round trip theory should prevail.

If one desired evidence of facts from which a conclusion might be drawn that the round trip theory was the correct one he would have to go outside of the record. Neither Rotterdam nor Montreal was her home port from which the steamer was sailing to a foreign port, and as I have said there was no evidence as to the hiring of the crew of the ship whether it was from Birkenhead where she was by the terms of the charter party received by Peterson, Ltd., from respondents, or from Rotterdam or from Montreal, or whether for a specified time or for a specified voyage. All we know is that the ship carried cargoes between each of the latter ports on each trip she made between them, and that there does not seem to have been any necessary relation between these trips as adventures. They were not the same kind of trips or voyages as are made by such of the regular transatlantic lines of steamers as sail from their home ports in either Europe or America across the Atlantic and back with crews hired for the round trip.

Applying as far as applicable the principles for the determination of the question of fact stated by the Lord Chancellor Lord Loreburn in the late case in the House of Lords of *Board of Trade* v. *Baxter; The "Scarsdale"*(1), at page 378, I have concluded that under the evidence in this case each trip of the steamer beginning at Rotterdam when and from which port she first started to Montreal, and from Montreal back

(1) [1907] A.C. 373.

again, constituted a voyage, and that in this view of the case the plaintiffs must fail because the trip or voyage for which the coal in dispute was supplied could not with reference to the seizure be in any sense the last voyage of the ship.

But if I am wrong in this conclusion of fact and the voyages of the ship are held to be round voyages, they must, in my opinion, be held to start from Rotterdam and end there, and in my judgment the last voyage contemplated in the article 2383 is a voyage ending in a port of the Province of Quebec. Whether the article must be construed as applying simply to home registered ships or not I pass by as not being argued and not necessary for decision.

I think each sub-section of the article in question shews that it is intended to refer to a voyage home to Quebec, to the ship's home port, either in the sense of registry there or ownership there or completing and ending her adventure there. I think when we find the same phrase used and repeated so often in the different sub-sections of the article we must ascribe to the legislature an intention of having the same meaning in each sub-section with reference to it, unless the context shews the contrary to be the case.

Now let us analyze the article a little closely. Its object is to give a preference upon vessels for the payment of certain specified debts; in other words, to create a new maritime lien. It provides that after the costs of seizure there shall be a privilege for the payment of pilotage, wharfage, harbour dues, etc., debts obviously of a local character, but without any limitations beyond that as to voyages or otherwise; (2) expenses of keeping the vessel and rigging and of repairing the latter *since the last voyage.* To my mind the

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subject matter dealt with and the language used in this sub-section shews that it was intended to relate to the close of an adventure *in some Quebec port* after a trip or trips abroad or to other Quebec ports. It covers unstripping the vessel, docking and laying her up for repairs or otherwise, men in charge, machinery or rigging, repairs, etc., etc. I should conclude that the phrase "last voyage" as there used can only have one relation and that is to a voyage, whether round or single, ending in some port in Quebec province. So in sub-section 4 with regard to the wages of the master and crew, I draw the same conclusion. The voyage, the adventure, is over and ended, the ship is in the province and the wages of the men who brought her home is made a privileged debt. So I would agree it might reasonably be held with regard to premiums of insurance which are limited to those paid for the "last voyage" a reasonable and necessary expenditure to get the vessel to her home port and so privileged. So again with regard to hypothecations which it will be seen are to be according to the rules declared in the third chapter of that part of the Code relating to merchant shipping and do not contemplate registered British ships which by article 2374 C.C. are to be governed in such matters by

> the provisions contained in the Imperial law respecting merchant shipping.

And so I conclude the last voyage in the sub-section 5 means the voyage home to Quebec, and gives the material and necessaries man who repairs or supplies the ship with necessaries to complete her voyage, to close her adventure, whatever it may have been, by returning to her home port in Quebec a preference on the ship for such necessary repairs or supplies. The latter part of sub-section 5 strengthens this argument.

It provides for the cases where the master has to sell part of his freight or merchandise to raise money to enable his ship to complete her last voyage which I conclude must mean her voyage to her home port in Quebec and the merchant or freighter whose goods are so sold for such a necessary purpose has the privilege created for their value because the sale was for the necessary purpose of bringing home the ship. I cannot place a different meaning on the same phrase the "last voyage" used in the several sub-sections. I think the meaning I suggest is the true one. The argument that the article is applicable only to Quebec registered ships has additional strength given to it by the latter part of sub-section 8, which has exclusive reference to ships built in the province, and which have not yet made a voyage.

The article was not enacted as was argued and assumed by appellants for the benefit of the material or necessaries man in the ports of Montreal or Quebec so as to give him a privilege or lien for supplies furnished to ships leaving those ports. I reason so not only because of its express limitations, but also because its main purport and object seems to have been to provide such security for the material and necessaries man in a foreign port as would induce him to furnish the supplies required by the ship to reach her home port in Quebec. To what extent this legislation, if it means what I think it does, may be beyond the legislative powers of the legislature that enacted it I do not stop to inquire. The question was not mooted or argued at bar, and its consideration is not necessary in the view I have taken of the facts.

Some suggestions were made as to the hardships such a construction as I suggest would make for the

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material and necessaries man in the Quebec ports. But apart from these suggested hardships which should not in any case be allowed to govern the construction of a statute, and which in my judgment are more figments of the imagination than business realities (because the material man is not obliged to give credit and in doing so to ship-owners or charterers does so on the same principles as he acts on in his general dealings, that is, gives credit when he thinks it safe to do so and withholds it when he does not), I do not think the construction of the language of the article justifies its application to ordinary trading ships leaving Quebec ports and the voyages of which could not in most cases be known to the supplier whether as last voyages or ensuing voyages or round voyages or single voyages.

The sole and only question is whether with reference to this British registered ship trading under such a charter-party as we have here from Rotterdam to Montreal, supplies furnished in the latter city to the agent of the charterer or hirer of the ship for the uses and purposes of the ship, but for which the ship-owner was in no way personally responsible, can be held to be within sub-section 5 of article 2383 of the Civil Code, and create a preference upon the ship itself so as to enable the material man or supplier to seize and sell it for the cost or value of the supplies on the ground that they were "for the furnishing of the ship for the last voyage."

I would dismiss this appeal and confirm the judgment below on the grounds, first, that each trip of the steamer across the Atlantic in the circumstances of this case constituted a voyage in itself which view, if correct, of course disposes of plaintiffs' action; and,

secondly, if I am wrong in that, and whether or not the article of the Code in question extends to ships other than those registered in the Province of Quebec, that it does not cover the particular voyage of this ship for which the coal delivered in July and sued for in this action was furnished, a voyage either round or single ending in Rotterdam.

IDINGTON J.—This action was brought by appellants in the Superior Court of Quebec against the Canadian Lines, Ltd., William Peterson, Limited, and Sir Alfred Jones and William John Davey, to recover the price of coal sold to them, it is claimed, and delivered at the port of Montreal on the "Lake Simcoe" on two different occasions for use in navigating that vessel.

The first delivery was on the 29th July, 1904, and the price was $4,940. The second was on or about the 6th and 7th September, 1904, and the price was $1,082.77. The orders therefor in each case were given by one Harling, the agent, at said port, of the William Peterson, Limited.

The master of the ship had nothing to do with ordering any of the coal, or so far as I can see in any way relative to it, beyond receiving and certifying to the quantity received on each occasion.

The ship was registered at Liverpool and belonged to the firm called "The Elder, Dempster & Company," which was composed of defendants Jones & Davey.

By a time charter these owners let the ship to the defendants William Peterson, Limited, for the period of six months from the 10th of June, 1904,

for voyages from and between Rotterdam, Havre or Dunkirk and Canadian ports.

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The second clause of the charter party is as follows:

The hirers shall purchase any coal and consumable stores now on board at current rates and shall bear all expenses in connection with the navigation and upkeep of the vessel and *shall provide coal, stores, emigrant outfits and shall provide captain, officers and necessary crew who shall be the servants of the hirers* and shall bear all expenses in connection with the steamer from the time of delivery until the re-delivery of the steamer to the owners as aforesaid.

Clauses 3 and 4 thereof provided that the hirers pay cost of insurance and seven per cent. per annum upon £40,000 from time of delivery to re-delivery or sale, in case they exercised the option given them to buy her.

Clause 5 provides that

the hirers, as further consideration for the hire of the steamer, shall pay to the owners a sum equal to one-half of the profits which shall accrue from the working of the vessel during each whole or part voyage during the time of hire,

and describes the charges to be considered in arriving at such profits.

Clause 7 provided if any voyage should result in a loss the owners should be under no liability in respect thereof.

Clause 11 provided that this contract should be governed solely by the law of England.

The appellants seek, notwithstanding the foregoing condition of things, to render the said sum of $4,940 a charge upon the vessel which was seized at the commencement of the action in the port of Montreal. Article 2383 of the Civil Code of Quebec province is invoked to maintain this claim.

Then the second claim of $1,082.77 is rested upon article 931 of the Code of Procedure.

The appellants also sought to rest their claims on the ground that by reason of the provision I have

quoted for sharing profits there was a partnership between the owners and the charterers that rendered the former liable for the debts thus incurred by the latter.

I cannot find under the terms of this charter-party, when looked at as a whole, that such partnership existed. I will deal with other aspects of this profit sharing clause hereafter.

There may be cases to which the respective provisions of these articles in these several Codes above referred to will apply.

Wherever one has supplied coal to a ship pursuant to the order of the ship owner, or one authorized to bind him, such provision might properly so bind the owner and ship as to enable the court of a province where the coal was thus ordered and supplied to seize and, if need be, sell the ship so supplied to satisfy the demand for payment.

But what authority had any one here concerned to bind the respondents, the ship owners?

The master in charge was not the owner nor in the employment of the owner at all. And, as already shewn, none of the orders were given by him and he only with the engineer certified to the weights being correct.

Then Mr. Harling, who gave the orders had no relation whatever to or with the owners. Clearly, I should infer every one knew at that port, where the orders were given, that he represented only William Peterson, Limited, or their creation, if I might say so, and ally, the Canadian Lines, Limited, but in no way the Elder, Dempster Co., who had in that very port their own offices and agents who never were, but should have been, asked or consulted if it ever had been intended to bind their company.

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Then, at the suggestion of Mr. Harling, a draft was drawn for the amount of the account arising from the first transaction upon William Peterson Co., Limited. I do not say this necessarily waived any right to charge the party properly chargeable with the price of the coal, but I do think it an important fact for consideration in relation to the question of knowledge that the ship was then under charter-party to the William Peterson Co., Limited.

With such knowledge of that fact on the part of appellants, of which evidence meets one at every turn, in considering the cardinal features of the case it would seem quite impossible to suppose that the appellants imagined they were selling on the credit of the owners of the ship or to any one at all authorized to bind the ship itself by any lien or charge.

The master, even if representing directly the owner, has no power to create such a lien. True, the owners being rendered liable in such a case, the court of admiralty may get possession of the ship, and enforce, by sale of the ship if need be, its judgment for the debt thus created.

This case is not within the range of operation of any such principle of law, or of any other principle of law, that would imply the right in any one concerned, in acting here, to bind, on these facts, the ship, or the owners thereof. The form of invoice gives the transaction no greater force.

All the rights springing from article 2383 of the Code in a proper case, have no foundation in fact to rest upon here.

I do not see, therefore, that I am called upon to interpret that article of the Code, so as to determine exactly what the phrase "last voyage" occurring therein may mean.

To reach, by said article of the Code, such results as claimed here it seems to me necessary to refrain from looking at anything else in the case and hold that a ship owner may by virtue of said article lose his ship by acts not his own directly or indirectly, but of some one acting without his authority. Maritime liens may arise out of wholly unauthorized acts. This claim is not founded on one of such maritime liens. Nor does the article create a lien. Nor did the law on which it was founded contemplate doing so in that sense. Can it be said that the privilege could be enforced in an English court in Liverpool as a maritime lien could be? Article 1983 of the Code defines what is meant by it in using the word privilege.

The English law would probably have as the law of the flag of the ship governed the limits of authority. See *Lloyd* v. *Guibert*(1). But we are not left to guess at the intention of the parties in that regard.

It is by the clause 11 referred to above put beyond dispute, that only by the law of England are we to find the authority for binding this ship.

The fact that the owners had a right to a share of the profits in addition to the sum or percentage fixed for compensation has given me a good deal of concern. In some cases the owner's interest that the ship should sail and earn profits has been found a determining factor in implying an authority in the master to bind the owner.

But on the whole case and including all the terms of agreement, and especially seeing the master was not he who ordered, or was employed by the owner, I do not think that the matter of right to profits without any correlative obligation as to losses can out-

(1) L.R. 1 Q.B. 115.

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weigh all else. I have not been able to find an exactly similar case.

Only one thing remains, and that is the extent of the rights, if any, of the *dernier équipeur* under article 931 of the Code of Procedure, and the features of that claim of the appellants which may distinguish it from all else I have said relative to facts common to both items claimed.

There is no right that can be claimed as of privilege or lien for such account, but there is a right given to stop the vessel and all therein when necessary to secure a debt properly incurred for equipment. It must, however, be a debt due from the defendant to the plaintiff.

That herein, not existing when the proceedings were taken, can any after ratification or adoption make it such a debt? A good deal may be said in favour of the proposition that the respondents, the Elder, Dempster Company, adopted this last order and liability thereon as theirs.

Can the owners come in and say as they did here, give us our vessel and we undertake to return it, if it be adjudged we are liable, and by that means carry away the coal just delivered and use it and profit by it and then repudiate all liability for it?

I fear these acts cannot in this action at all events be held to shew a ratification or adoption and in either case a relation back that would bind.

I regret to find a most righteous claim for the coal with which the vessel steamed away from port by virtue of the respondents' bail cannot, in this case, at least, be recovered from them.

I am compelled to hold the appeal should be dismissed with costs.

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MACLENNAN J.—The questions in this appeal relate to a steamship called the "Lake Simcoe," of British register, seized in the month of September, 1904, at the port of Montreal, under process for the enforcement of a privilege, claimed by the appellants upon the vessel, for coal supplied by them to the ship while lying in the port of Montreal.

The respondents, Sir Alfred Lewis Jones and William John Davey, carry on business as ship-owners in England and in Montreal, under the name and firm of Elder, Dempster & Co., and being the owners of the "Lake Simcoe," they on the 10th June, 1904, chartered her as she then lay at the port of Liverpool, to persons by the name of William Peterson, Limited, for six months from the sixteenth of June, 1904, for voyages from and between Rotterdam, Havre or Dunkirk and Canadian ports, Quebec and or, Montreal. But the ship was under no circumstances to sail from or to or touch at, any port in the United Kingdom, and not, directly or indirectly, to be used or employed in trading between any United Kingdom ports and Canada.

The ship commenced the voyages between the named European ports and Canada, which were contemplated by the charter-party; and on or about the first day of August, 1904, was lying in the port of Montreal; and the charterers on that day obtained from the appellants a supply of coal for the use of the ship, amounting to the sum of $4,951.29.

The ship afterwards sailed to Europe, and returned to Montreal; and on or about the 6th September, 1904, obtained a further supply of coal from the appellants of the value of $1,082.77. The charterers soon afterwards became insolvent, and default having

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been made in payment of both supplies of coal, and of the obligations given therefor, the ship was arrested by way of privilege for both supplies, and the question in the appeal is whether the arrest of the ship can be maintained against the owners for both or either of the supplies.

The learned trial judge upheld the claim of the plaintiffs against the ship for both supplies; but his judgment was reversed on appeal to the Court of King's Bench, so far as it maintained the seizure and directed a sale of the ship to satisfy the plaintiffs' claims.

The two claims are rested upon different articles of the Code, and I shall first consider the second supply.

This claim depends upon article 931 of the Code of Procedure, and article 2391 of the Civil Code.

Article 931 enables a creditor, in certain specified circumstances, to attach the goods of his debtor in any case wherein the defendant is personally indebted to the plaintiff in a sum exceeding five dollars. But there is nothing in the article which warrants the attachment of property, such as the ship in the present case, which is not the property of the debtor, or the attachment of one man's goods for another man's debt. Jones & Co. were not the plaintiffs' debtors, and they were the owners of the ship. Peterson & Co. alone were the debtors, and they were only the charterers of the ship, and not the owners.

But it was urged that article 2391, C.C., made, Peterson & Co. the owners for the purposes of the attachment, because it declares that a charterer such as they were, is held to be the owner,

with the rights and liabilities of an owner as respects third persons.

But that is very far from declaring that the charterer may charge the ship with his debts or liabilities. It is the rights and liabilities of the *charterer* which this article is dealing with and defining, not those of the *owner*. I think this article means only that the *charterer* may not escape liability for his engagements with third parties, in the management of the ship under his charter, by saying that he is not the owner.

I also think that article 2397 C.C., is a difficulty in the way of the appellants, for the owners of the ship were present at the port of Montreal, by agents who represented them, and it is not pretended that they authorized the purchase of the coal in question.

I am therefore clearly of opinion that the judgment is right with respect to the second supply of coal, and should be maintained.

The question of the first supply is one of greater difficulty.

Article 2383 C.C. declares that there is a privilege upon vessels for payment of the following debts:

1 The costs of seizure and sale, according to article 1995;

2 Pilotage, wharfage and harbour dues, and penalties for the infraction of lawful harbour regulations;

3 The expenses of keeping the vessel and rigging and of repairing the latter since the last voyage;

4 The wages of the master and crew for the last voyage;

5 The sums due for repairing and furnishing the ship on her last voyage, and for merchandise sold by the captain for the same purpose;

* * * * *

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7 Premiums of insurance upon the ship for the last voyage.

There are other two sub-sections (6) and (8), but they afford no assistance with reference to the present claim. The important sub-section is No. 5, and the question is whether the first supply of coal was furnished to the ship, *pour son dernier voyage,* as expressed in the French version, or *on* her last voyage, as expressed in the English version.

The coal was supplied at the request of the charterers while the ship was lying in the port of Montreal, after which she proceeded to sea, sailed to a European port, and then returned to Montreal, when the seizure was effected.

The question to be decided is: Was the coal supplied on or for the ship's last voyage? In other words what is the meaning of the words *last voyage,* as used in sub-section 5 ?

The meaning of the word "voyage" when applied to a ship, depends, in any particular case, on the employment in which the ship is engaged. If a ship of war, or other ship, is sent on a particular expedition, her voyage would generally include her return home, as a voyage of convoy, or of exploration or discovery, such as the voyages of Columbus, Captain Cook, Jacques Cartier, and other famous explorers.

It is otherwise in the case of the great Atlantic passenger steamships. In their case I think speaking generally, each passage across the sea is a voyage; and I think the same is true of ships like that in question, for their business is similar to that of the great liners, namely, the carrying of passengers and cargoes across the sea, and loading and discharging on both sides.

The ship in question was chartered in Liverpool, where she was then lying, expressly for voyages between certain named European ports and Canada; and she was to be delivered to her owners, when the charter expired, either at Liverpool, or in some continental port at the option of her owners.

The ship's first voyage began in Europe, and her last voyage was to end there, whether the voyages were to be regarded as round voyages, that is including the crossing of the ocean and return, or whether each passage across the ocean was a separate voyage. If they are to be regarded as round voyages, then the appellants ought to succeed, for in that view the first coal was supplied in the middle of a voyage, and the seizure was made in the middle of the next voyage, and while it was still incomplete.

The same conclusion follows if the voyages are to be regarded as round voyages, even if we suppose them to have commenced in the port of Montreal.

But if each passage across the ocean is to be regarded as a voyage, within the meaning of the sub-section, then the coal was not supplied on or for the last voyage, for, on that construction, she would have made a complete voyage between that for which she received the coal and her seizure.

I am of opinion that the fair and obvious meaning of the word "voyage," as applied to this ship, having regard to her charter and her employment, and to the ordinary and common use and understanding of the word, is a single passage across the ocean; and that the ship having made two voyages across the sea between the supply of coal and the seizure, the sub-section 5 of the article is inapplicable, and the seizure cannot be maintained.

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I am further of opinion that the same conclusion follows from an attentive consideration of sub-section 5 itself.

It provides a remedy for supplies and repairs obtained for the ship in two ways, namely, first, on credit, and secondly, by the sale of cargo by the captain in case of necessity, as authorized by article 2399 of the Civil Code. The voyage referred to in the sub-section must be the same voyage with reference to both kinds of debt, that is the debt for supplies and repairs obtained on credit, and those obtained by sale of cargo. The extreme act of selling merchandise for repairs or furnishings could not lawfully be resorted to by the captain either at the loading port, before sailing, or at the port of discharge after arrival. The sale which he is authorized to make must be one made in the course of his voyage, at some way port of call, between the time of loading and the time of unloading; and by reason of necessity, to enable him to complete his voyage. When, upon the arrival of the ship at the port of discharge, the owner or consignee of the cargo, or any part of it, goes to the ship for his goods, and finds that they have been sold by the captain, he has a privilege upon the ship by virtue of the sub-section. The conclusion is, therefore, plain that the word voyage, used in the sub-section, means a voyage between the port where the ship has been loaded, and the port of discharge, that is, in the present case, each separate passage across the sea.

That being so, the seizure for the first supply of coal was too late, and was unauthorized, as the coal was not supplied either *on* or *for* the last voyage.

I am therefore of opinion that the appeal fails and ought to be dismissed with costs.

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Duff J.

DUFF J.—The facts in evidence in this case do not, I think, afford any satisfactory reason for holding a passage of the respondents' ship from Rotterdam to Montreal or a passage from Montreal to Rotterdam to be other than that which in the ordinary sense of the words it would seem to be—a single complete voyage. Neither do I see anything in article 2383 of the Civil Code, which we are called upon to apply, justifying the view that a given voyage can be regarded as the "last voyage" within the meaning of the article if it be not the "last voyage" in fact.

It follows in the view I have indicated—since between the complete voyage from Montreal to Rotterdam and the proceedings to enforce the appellant's claim there intervened a complete voyage from Rotterdam to Montreal—that a debt incurred in respect of supplies furnished for the first of these voyages alone cannot be made a foundation for a valid claim of privilege under the paragraph 5 referred to; and that part of the appellants' claim which is based upon such a debt must consequently fail.

With respect to that part of the claim which is based upon the second supply of coal—upon that also I think the appellants fail, for the reasons given by my brother Maclennan.

Appeal dismissed with costs.

Solicitors for the appellants: *McGibbon, Casgrain, Mitchell & Surveyer.*

Solicitors for the respondents: *MacMaster, Hickson & Campbell.*

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*Feb. 18.

THE MONTREAL PARK AND ISLAND RAILWAY CO. v. LABROSSE DIT RAYMOND.

Appeal — Jurisdiction — Amount in controversy—Retraxit—R.S.C. (1906) *c.* 139, *s.* 46(*c*).

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment entered in favour of the plaintiff, by Guerin J. in the Superior Court, District of Montreal, upon the findings of the jury at the trial.

The plaintiff brought the action for damages sustained through the death of her husband caused, as alleged, by the negligence of the defendants, and, by her statement of claim, demanded $10,000 damages. Issues were joined and the cause set down for hearing upon this *demande*; the trial being fixed for the 3rd of June, 1907. On 31st May, 1907, the plaintiff filed a retraxit reducing her claim to $1,999, and gave notice thereof to the defendants and that, at the trial, her claim would be limited to that amount.

By the findings of the jury contributory negligence was attributed to the deceased, but they also found that the accident which resulted in his death had been caused by preponderating negligence on the part of the defendants, and, following the practice in the Province of Quebec the damages were assessed at $1,333, after reducing the assessment in proportion to the contributory negligence of the deceased. The trial

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

judge ordered judgment to be entered accordingly in favour of the plaintiff, with costs, and this judgment was affirmed by the judgment appealed from.

On the appeal to the Supreme Court of Canada, the respondent (plaintiff) moved to quash the appeal on the grounds, (1) that the amount in controversy was only $1,999, to which the retraxit had reduced the plaintiff's *demande*, and (2) that the case submitted to the jury and in the courts below and upon which the judgments therein had been rendered was one on a claim for $1,999 only, and, consequently, under the limitation provided by section 46(*c*) of "The Supreme Court Act," R.S.C. (1906) ch. 139, that the court was not competent to entertain an appeal.

After hearing counsel on behalf of the parties, the court allowed the motion and quashed the appeal with costs.

Appeal quashed with costs.

H. J. Elliott for the motion.

R. A. Taschereau contra.

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*Feb. 20, 21.
*March 23.

ALPHONSE RIOUX (PLAINTIFF).....APPELLANT;

AND

THE SAINT LAWRENCE TERMINAL COMPANY (INTERVENANTS), AND ALPHONSE LAUZIER (DEFENDANT).....RESPONDENTS.

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

Title to land—Sale—Construction of deed—Reservation of growing timber—Rights of vendor and purchaser—Resolutive condition.

A deed of sale of wild lands to be used for agricultural purposes clearly expressed certain specific reservations and contained, in addition, a clause as follows: "Et de plus la présente vente est faite à la condition expresse que le dit acquéreur n'aura pas le droit de couper, enlever ou charroyer aucun bois sur le terrain ci-dessus vendu autrement que pour son propre usage pour faire des bâtisses sur le terrain, des clôtures, et du bois de chauffage; il est, en conséquence, convenu que si l'acquéreur coupait du bois en violation de la présente clause, les vendeurs auront droit de demander la résiliation des présentes et de reprendre possession des immeubles ci-dessus vendus sans rien payer à l'acquéreur pour les améliorations qu'il pourra avoir faites. Et tout bois coupé en violation des présentes deviendra, aussitôt coupé, la propriété des vendeurs, car tel est la convention expresse des parties et sans laquelle les présentes n'auraient pas eu lieu."

Held, that, in the absence of any contrary intention expressed in the deed, the title to the lot of land sold passed absolutely to the purchaser with the exception of the special reservations.

Held, also, that the clause in question had not the effect of reserving to the vendors all the timber standing upon the land sold, nor can it be construed as giving them the right (without rescission upon breach of the resolutive condition) to re-enter on said land for the purpose of removing stumps or second growth timber.

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

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APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Rimouski, which maintained the intervention of the respondents and dismissed the appellant's action with costs.

The appellant acquired the lands in question in this cause from one Belzil, whose *auteur,* one Fortin, had purchased the property, in 1885, from King Brothers, then owners of the Seigniory of Matapédiac within which the lands are situated. After the sale to Fortin, the vendors, in the exercise of the stipulations in the deed of sale, had cut and removed the merchantable timber from the land. The respondents subsequently purchased the seigniory from King Brothers and, in 1905, sent their foreman, Lauzier, with a gang of men, to the lot of land in question, and caused them to enter upon the same for the purpose of cutting and removing the stumps of the merchantable timber which had been previously cut, and of cutting and taking away certain other timber then growing upon the land. The present action was thereupon brought by the appellant against Lauzier for a declaration that the plaintiff was the sole owner of the land with the timber thereon, to enjoin Lauzier from cutting the timber, and for $120, as damages, for the value of the timber already cut by him, as alleged, in trespass upon the property. The defendant pleaded that the entry and cutting of the timber by him was by the express orders of the company, respondents, who were the owners of the timber, and they intervened in the action and took up the *fait et cause* of the defendant, claiming that they were owners of the timber so cut and of all other timber on the lands, and that they had the right to cut and remove it as the successors

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in title of King Brothers who had reserved the same in the deed to Fortin, subject to the exception of what might be required for the construction of farm buildings and fences thereon.

The clauses of the deed in question are quoted and the questions at issue on the present appeal are stated in the judgments now reported.

L. P. Pelletier K.C. for the appellant. The clause in the deed by which the timber is sought to be reserved to the vendors is incompatible with the essence of a contract of sale of lands for agriculture purposes and contrary to law: art. 378 C.C.; the whole contract must be construed together in the sense in which it can produce the effect it was intended to have and against the vendors: arts. 1014, 1019 C.C.

Under art. 378 C.C. the wood formed an integral part of the immovable itself so long as the trees remained attached to the ground by their roots. Fortin acquired this immovable as it was then constituted and, in order that the ownership of any part of it should have remained vested in King Bros., an express and unequivocal reservation was necessary; after all the other express reservations contained in the deed, it would certainly have been stipulated had it been contemplated by the parties, but there was none made. The deed contains merely a prohibition to cut and haul away the wood and such a prohibition can no more logically be construed into a reservation of the ownership of the wood in favour of King Bros. than a prohibition to alienate could be taken to mean a reservation of the ownership of the immovable. No special reservation of the ownership of the wood was made and this prohibition does not constitute one.

This view is supported by the wording of the clause itself: "all wood cut contrary to these presents will immediately become, as soon as cut, the property of the vendors." See 25 Demolombe, *n.* 27; 10 Duranton, *n.* 518; 1 Guillouard, "Vente," *nn.* 198-203; 1 Troplong, "Vente," *n.* 260; 4 Aubry & Ran., p. 360, sec. 354, notes. Future growth could not have been contemplated in a sale of land for agricultural purposes; the plough and the mowing machine would prevent new growth.

A reservation of the ownership of the timber would have been null as contrary to law and to public policy. This lot is situated in a seigniory of which King Bros. were then seigniors and the deed is their original grant as such seigniors, made nearly forty years after the abolition of seigniorial tenure. The special court held under the Seigniorial Act of 1854 decided—and its decision is *res judicata* for all parties according to sub-section 9, section 16 of that Act(1)—that seigniors had no right to reserve the merchantable timber on the lots they granted and that such clauses in their grants were null and void as contrary to public policy (2). This was admitted to be the law before the abolition of seigniorial tenure and we have also the positive text of the statutes, 18 Vict. ch. 3, sec. 14, and 19 Vict. ch. 53, sec. 18.

Since the abolition of seigniorial tenure not only are all grants by the seignior presumed to be made *en franc-alleu roturier,* in absolute and unrestricted ownership, but any stipulation to the contrary is declared null and void. See also arts. 1062, 1080 C.C.

The respondents have failed to prove their right to cut the timber on appellant's lot, and, the prohibition

(1) 18 Vict. ch. 3.

(2) Quest. Seig. vol. A, p. 80*a*.

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not being a reservation of the ownership of this timber, the intervention should be dismissed. If the prohibition is to be construed as a perpetual reservation, it should be declared null and void as contrary to law and public policy. If it means a reservation of the first growth of timber and if such a reservation be held valid, then it should be declared extinct, as the first growth has long since been removed. At all events the appellant is entitled to restrain all parties from cutting any timber on the lot which would leave him without a sufficient quantity for building, fencing and heating purposes because the respondents had gone and were going beyond this restriction.

We also cite *Morel* v. *Lefrançois*(1); *Bury* v. *Murray*(2); *The United Shoe Machinery Co.* v. *Brunet*(3), and art. 970 C.C.

Lafleur K.C. and *Wainwright* for the respondents. The *habendum* in the deed is limited in such a manner as to negative an absolute conveyance in fee. Among other reservations the ownership of the timber is reserved to the vendors, there is a resolutive condition imposed for voluntary removal, and a penalty for involuntary destruction of it.

The surest method of determining the true meaning of an agreement is to follow the possession, or the interpretation which the parties themselves have given to the deed by the manner in which they have executed it. Dumoulin, Cout. de Paris, s. 46, *n.* 23; 6 Toullier, No. 320; 16 Laurent, No. 504. The appellant by his acquiescence and that of his *auteurs* is estopped from

(1) 38 Can. S.C.R. 75. (2) 24 Can. S.C.R. 77.
(3) Q.R. 27 S.C. 200.

pleading that the clauses in question do not constitute an express reservation of the wood. See cases cited in Coutlée's Supreme Court Digest, at pages 538 *et seq.*

The existence of a real right in wood or trees attached to the soil, distinct from the real right in the *fonds* or realty itself, is in accordance with the law of France, and, consequently, with that of the Province of Quebec. Perrin et Rendu, Dict. des soustruct, 11, 919 *et seq.*; 6 Laurent 252. Trees or hedges, planted on the land of another, are susceptible of immovable possession separate from the land on which they are and hence can give rise to the possessory action; 2 Aubry & Rau. 185, 124; 1 Garsonnet, Proc. Civ. 574, *n.* 133; Rousseau et Laisnez, *vo.* Action possessions, *n.* 72.

The terms of article 414 C.C. merely establish a presumption of law, which can be destroyed by simple presumptions to the contrary. *Habert* v. *Habert*(1); Baudry-Lacantinerie et Chauveau, *n.* 331; Fuzier-Herman, Rep., *vo.* "Accession," *n.* 72 *et seq.*; 6 Laurent, *n.* 246.

The interpretation appellant seeks to put on the clause in question is unreasonable, because, if it was not a reservation and he became the owner of all the wood, but able to use only that part for which he had personal need for the purposes mentioned, the absurd conclusion is that, with this exception, all the timber was to remain uncut and unused in perpetuity. This would also make the clause practically non-effective.

The expression *"tout bois coupé en violation des présentes deviendra la propriété des vendeurs"* was evidently to guard King Brothers against two possible

(1) 10 Leg. News 283.

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dangers: (1) Fraudulently procuring the cutting of the timber and claiming ownership upon the plea that it was no longer part of the realty, but a movable on his land; and (2) a claim for labour upon wood improperly cut. The deed, as a whole and in view of what precedes cannot have the meaning which appellant seeks to give it.

The issue that the clause is contrary to public policy is not pleaded and, after twenty years of acquiescence and many years of the exercise of their contractual rights in this respect by the vendors throughout the seigniory, it is now too late to raise the question, in an appellate court.

If the clause is a prohibition rather than a reservation, and even if a perpetual prohibition results there would be nothing contrary to public policy. 23 Am. & Eng. Encycl. of Law, p. 455. There can be nothing here in any sense "injurious to the public."

We deny that the reservation could only apply to the first cut of timber and that, consequently, the stumps remained the property of the vendee. No property in the wood was transferred, the property itself was reserved and not merely the right to cut. The vendors owned the standing trees and their branches as well as the trunk, and also the stumps. Cutting off the upper portion of the trunk did not destroy their right in the remaining stump, any more than the removal of the branches destroyed their right of property in the trunk itself. So long as any part of their property remained they were entitled to take it, according to their commercial requirements. The wood in the stumps was commercial wood in 1885 and is so to-day, and its value relatively the same. If all the wood was not removed on the first or second cut, that constituted no abandonment of what remained.

We also rely upon the decisions in *Williams* v. *Châteauvert*(1); *McCormick* v. *Simpson*(2); *Cadrain* v. *Theberge*(3); and *Breakey* v. *Bilodeau*(4).

THE CHIEF JUSTICE.—On the 22nd of September, 1885, King Bros., now represented in these proceedings by the intervening party, the St. Lawrence Terminal Co., sold to one Fortin, from whom the appellant acquired, two pieces of property described in the deed of sale as lots 62 and 64, at the place called Cedar Hall in the Seigniory of Matapédiac, and the appellant and his *auteurs* have been in possession as proprietors since that date.

The purchase price was one dollar an acre, which was liable to be increased under certain circumstances to two dollars an acre. The sale was made subject to certain charges, obligations and reservations enumerated in the deed, such, for instance, as the reservation of land bordering on Lake Matapédiac; the property on both sides of certain streams and all water-powers, mines, minerals and quarries to be found on the property. The charges and obligations mentioned are connected with the maintenance of roads, fences and drains and the settlement of squatters' claims. The deed of sale contains, in addition, this clause, the construction of which has given rise to the present appeal:

Et de plus la présente vente est faite à la condition expresse que le dit acquéreur n'aura pas le droit de couper, enlever ou charroyer aucun bois sur le terrain ci-dessus vendu autrement que pour son propre usage pour faire des bâtisses sur les terrains, des clôtures et son bois de chauffage; il est en conséquence convenu que si l'acquéreur coupait du bois en violation de la présente clause, les ven-

(1) 4 Rev. de Jur. 148.
(2) [1907] A.C. 494.
(3) 16 Q.L.R. 76.
(4) Q.R. 30 S.C. 142.

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The Chief Justice.

deurs auront le droit de demander la résiliation des présentes et de reprendre possession des immeubles ci-dessus vendus sans rien payer à l'acquéreur pour les améliorations qu'il pourra avoir faites. Et tout bois coupé en violation des présentes deviendra, aussitôt coupé, la propriété des vendeurs, car telle est la convention expresse des parties et sans laquelle les présentes n'auraient pas eu lieu.

In the Superior Court, it was held that this provision constituted a reservation in favour of the vendor of the property in the standing timber, subject to a right in the vendee to take so much as was necessary for building purposes and for fences and firewood. On appeal the judgment of the Superior Court was confirmed, Blanchet and Lemieux JJ. dissenting. We are without the notes of the majority in appeal.

I cannot agree with the conclusion reached below. Undoubtedly, by the sale, the property in the standing timber passed to the purchaser(1), unless a contrary intention can be gathered from the words of the clause above quoted; and, as I read it, no such intention is expressed. That clause merely contains a condition subject to which the sale is made. It is, what is well known under the Civil Code, a resolutive condition; this is a condition upon the realization of which the sale of the property may be rescinded(2). The sale made subject to such a condition produces all its effects, that is to say, the property with all its accessories passes; but if the event subject to which the sale is made happens then the sale may be set aside.

La condition résolutoire est celle à la réalisation de laquelle est subordonnée la résolution d'un droit; ainsi l'obligation sur condition résolutoire * * * existe immédiatement et produit tout de suite ses effets. Beaudry-Lacantinerie "Des Obligations," vol. 2, p. 13.

In the present instance, the event on the happening of which the sale may at the instance of the ven-

(1) Art. 414 C.C. (2) Art. 1079 C.C.

dor be rescinded is the cutting or carrying away by the purchaser of standing timber for any purpose other than those mentioned in the condition and this is not complained of. The property was sold admittedly to a settler, who immediately entered into possession, for agricultural purposes and necessarily it must be presumed that both parties intended that the timber would be cut down and this appears clearly from that other clause in the deed which provides that if in the process of clearing any merchantable timber is destroyed (*détruit*), then the purchase price is to be increased to $2 an acre. That is the penalty to be imposed for wanton destruction; but from this it is not to be inferred that in clearing the land for the purposes for which it was acquired the settler was not to cut down any timber. The intention was only to prevent its wanton destruction. The whole deed has to be examined so as to gather the substance of the agreement the parties intended to make. Apt words were found to make clear the intention of the vendor to reserve the water powers, mines, minerals and quarries as well as the land bordering on the lake and rivers; and if it was intended to reserve the property in the standing timber the same expressions could have been used for the purpose.

In my opinion the words of this clause of the deed are so clear that, were it not for the opinion expressed by the learned trial judge, I would have said that it was susceptible of but one meaning. The property passes with the standing timber, but if the purchaser cuts this timber for purposes other than those specified then the property does not revert to the vendor, he merely reserves to himself the right, which he may or may not exercise, to ask for a *résiliation* of the deed and to re-enter into the possession of the pro-

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perty. It is also provided that such timber as may be cut in violation of the terms of the deed is to become the property of the vendor. If the intention was to reserve the wood, why was it necessary to stipulate that the timber would become his when cut?

I have not overlooked the reference to *Williams* v. *Châteauvert*(1), upon which the trial judge relies, but I cannot see what bearing that case could have on the question at issue here. If I have properly construed this contract and understood the agreement made between the parties, the defendant, Lauzier, was a trespasser upon the plaintiff's land and is liable for the value of the timber cut in trespass; and I would allow the appeal and maintain the plaintiff's action with costs on both issues. *Vide McCormick* v. *Simpson*(2).

DAVIES J.—The substantial question in issue and to be determined on this appeal is as to the right of the company, respondents, the now proprietors of the ungranted part of the Seigniory of Lake Matapédiac, to cut the timber still remaining upon the farm of the appellant, which at one time formed part of that seigniory, whether in the form of stumps from which trees had already years ago been cut and taken away or of growing trees known as second growth.

On the 22nd December, 1885, Messrs. King Bros. of Quebec, the then owners of the seigniory, sold this lot to Joseph Fortin, appellant's *auteur*. The deed among other things provided as follows:

> And, moreover, the present sale is made on the express condition that the said purchaser should not have the right to cut, remove or cart away any wood on the land hereinabove sold, otherwise than

(1) 4 Rev. de Jur. 148, at p. 154.

(2) (1907) A.C. 494.

for his own use, for the erection of buildings on the land, fences and as firewood; it is, in consequence, agreed that, if the purchaser cuts wood in violation of the present clause, the vendors shall have the right to demand the rescission of these presents and to take possession of the immovables hereinabove sold, without paying anything to the purchaser for the improvements which he may have made. And all wood cut in violation of these presents shall become, as soon as cut, the property of the vendors, for such is the express agreement of the parties, without which these presents would not have been executed.

Further on in the deed there is this provision:

This sale is, moreover, made for the price and sum of one dollar *per* arpent in superficies, provided that the said purchaser *does not destroy commercial wood in clearing the said lots of land*, otherwise the price of sale of the said lots will be two dollars an arpent in superficies. It is agreed by these presents that the vendors, alone, shall determine whether or not the commercial wood has been destroyed either in part or wholly, on the said lots Nos. 62, 64, 73 and 74 thus sold.

The respondents' contentions, which were maintained by the Superior Court and by a majority of three to two in the Court of King's Bench, were that by the terms of this deed the property in all the wood growing or being on the land sold remained in King Bros., the grantors, and that the clause above quoted amounted to an express reservation of such wood. That this reservation was subject to the right of the grantee settler to use such of the wood as he might from time to time require for the special purposes specified, viz., the erection of buildings and fences on the land and for firewood, provided it had not previously been cut and removed by the grantor, and that, should the grantee settler seek to act as owner of the wood, the vendors might cancel the deed, take possession as their own of any wood improperly cut by the grantee settler without recompense for his labour or, in the alternative, might charge him an extra dollar an acre for the land.

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We are, unfortunately, without any notes of the reasons of the majority of the Court of King's Bench for confirming the judgment of the Superior Court and must conclude that they meant to adopt the construction put upon the deed by that court.

I agree with the conclusions reached by the minority judges, Blanchet and Lemieux JJ., though I do not agree with all of their reasoning.

I adopt the construction of the much debated clause in the contract submitted, as the true one, by the appellant.

By the terms of the deed the land and all the trees upon it would pass, of course, to the grantee, and, unless the prohibition to cut trees other than those required for the erection of buildings or fences or for firewood is to be held to amount to an absolute exception out of the grant of the trees, the property in the trees passed to the grantee.

In terms plain and clear the provision is a prohibition simply against the use of a part of the property granted in ways which the grantee would otherwise be justified in using it, but it does not profess to be an exception out of the grant and cannot, in my opinion, be construed to be such.

I think, considering the circumstances surrounding the issuing of the deed and the internal evidence of the document itself which clearly contemplates and speaks of the grantee clearing the land, that the intention is clear to give the lands to the grantee as a settler or occupier to reclaim the same as a farm from the wilderness, while at the same time imposing certain specified limitations upon his user of the wood.

Any wood required for buildings or fences or firewood is not within the prohibition as I construe it,

even if commercial wood. These trees would necessarily be required by the grantee if he was "to clear the land" as contemplated, and I do not in any view of the case concede the right to have been retained by the proprietor of the seigniory even to cut and take away all of the commercial wood on the farm sold regardless of the requirements of the settler, with respect to such wood as was necessary for buildings, fences and firewood. It would be indeed a singular and strange construction of the clause which on the proprietor's own shewing contemplated and conceded the right of the purchaser to cut all the wood necessary for these purposes to say yes, but that right is subject to my prior one to denude the land if I please of all trees and wood, and leave the pioneer grantee nothing for the purposes essential to a settler, as contemplated by the deed itself. Such a construction might, it seems to me, operate to defeat the very objects the parties to the deed had in view as they appear from the internal evidence of the deed itself. The land was sold to him to be cleared as a farm. Provision was expressly made for wood for the pioneer's necessary purposes in building dwelling houses, barns and fences and in using firewood. These certainly are unquestionable rights which the partial prohibitory clause against cutting commercial wood must be read as subject to. In any construction open with respect to the clause it must be read as only a partial restriction and subject to the grantee's paramount right to cut and take the necessary wood required for the necessary purposes for which the farm was clearly sold to him.

The proprietor even on the assumption that he had the right to cut reserved in himself would, I conceive,

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exercise it at his peril and would not be justified in so exercising it as to denude the land of all wood and so deprive the settler of the special wood required by him for the purposes specified in the deed.

Now if the prohibition is a partial one only, as I take it must be conceded, on what principle is it to be construed as an exception of the trees out of the deed? Surely if any such intention existed there were not wanting apt and appropriate words to express it.

But it is said such a construction necessarily flows from the use of the prohibitive words. I do not see why. I can see other meanings and other reasons much more reasonable and material than the one suggested by respondent.

The appellant suggests two, one in the fact that the purchase money was remaining unpaid as a charge upon the land and as the wood was then the more valuable part of it the prohibition was necessary as security to the grantor for the price for which the land was sold. The other was that King Bros., being themselves large lumbermen, wished to have in their own hands the control of the lumber and exclude rival lumber firms from competing with them on their own seigniory and so prohibited their grantees from selling to others. These are not unreasonable suggestions, and probably both had their influence in causing the insertion of the clause in question.

The grantor, on the assumption of the clause being valid, retained thus practically under his own control the commercial timber used by lumbermen. The grantee could not sell to others. His rights would be confined to cutting all such timber as was required for the purposes of the farm and to clear the farm, and if he desired to sell he must treat with his grantor alone.

But whether these suggestions are adopted or not, the proper construction of the language used does not amount to an exception of the trees out of the grant. That it does not I would conclude from the absence of any words of exception and from a reasonable construction of the very words of the prohibition, and I find such a conclusion strongly supported by the words defining what is to follow a breach of the prohibition, namely,

all wood cut contrary to these presents shall *immediately become, as soon as cut, the property of the vendors.*

If it was his property before as being excepted out of the grant such a declaration would be unnecessary and useless.

For these reasons I conclude that the clause does not reserve the property in the trees in the grantor, and that the prohibition even if valid generally, on which I am not called on to express any opinion, does not apply to stumps of trees which had already been cut and carried away as was stated many years ago by the grantor, and the cutting of which stumps by the company, respondents, gave rise to this action.

The exercise at this time of such a right involves necessarily a right of property in the trees and a right to have the stumps in the ground till such time as required by the grantor and practically denies to the grantee the right to do the very thing the deed on its face contemplated he would do, namely, clear up his land and make a farm out of a wilderness.

Once it is conceded that the prohibitory clause does not amount to an exception out of the grant of the property in the trees then to get at its real meaning as a prohibition upon the grantee's rights as such

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we must construe it with respect to the conditions existing at the time the deed was passed. In this view it certainly did not prevent the grantee entering upon the land he bought and cutting down the trees necessary for dwelling house, barns, fences or firewood. By parity of reasoning it would not operate to prevent him *bonâ fide* clearing up the land for farming purposes and in doing so necessarily clearing it of trees and stumps. Subject to this he was prohibited from cutting, but more especially from selling the timber or cutting the same for sale.

If, as I have held, the clause did not reserve to the grantor a property in the trees, this action is maintainable.

I would, therefore, allow the appeal with costs here and in each of the courts below, reversing the judgments of those courts and awarding the plaintiff, appellant, damages as proved.

IDINGTON J. concurred in the judgment allowing the appeal with costs.

MACLENNAN J. agreed in the opinion stated by Davies J.

DUFF J. concurred with the Chief Justice.

Appeal allowed with costs.

Solicitors for the appellants: *McGibbon, Casgrain, Mitchell & Surveyer.*

Solicitors for the respondents: *MacMaster, Hickson & Campbell.*

WILLIAM CHISHOLM (DEFENDANT) . . APPELLANT; 1908

AND

EVELYN CHISHOLM (PLAINTIFF) . . . RESPONDENT.

*Feb. 18.
*March 23.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Parent and child — Guardianship — Family arrangement — Public policy.

Where a widow, whose husband left no estate, agrees to give up her natural right of guardianship over her daughter and transfer the same to the latter's grandfather who, on his part, agrees to educate her, provide for her afterwards and allow as full intercourse as possible between her and her mother, the fact that the arrangement includes an allowance to the mother for her maintenance does not necessarily make it void as against public policy. Idington and Duff JJ. dissenting.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment at the trial in favour of the defendant.

The plaintiff, Evelyn Chisholm, was left a widow with a young daughter. Her husband had been during the coverture entirely dependent on his father and she was left without any means of support. Her father-in-law, the defendant, offered to educate the child in a convent in Halifax and Montreal, to make provision for her when her education was completed and to give the plaintiff an allowance of $500 a year, but insisted on being appointed her legal guardian. After resisting for some time the plaintiff consented

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

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and the arrangement was carried out. The allowance was paid to the plaintiff for some years and then withheld whereupon she brought an action for the arrears.

Several defences were pleaded, among others, want of consideration and that the alleged contract was against public policy, but the only one dealt with by the courts was that the transaction amounted to a sale of the custody of her child by the plaintiff, which was against public policy. The trial judge gave effect to this defence and dismissed the action. His judgment was reversed by the full court and the defendant appealed to the Supreme Court of Canada.

Nesbitt K.C. for the appellant. It is against public policy for a parent to surrender the natural rights and duties of guardianship over his child for a pecuniary consideration. *Vansittart* v. *Vansittart*(1); *Hope* v. *Hope*(2); *Humphrys* v. *Polak*(3).

The respondents rely on *Roberts* v. *Hall*(4), which is contrary to the decisions of the courts in England.

Harris K.C. for the respondent. If the arrangement has mainly in view the benefit of the child the allowance to the mother will not make it illegal. *Roberts* v. *Hall*(4); *Enders* v. *Enders*(5).

THE CHIEF JUSTICE.—The appointment of the appellant as guardian was made by the court in the exercise of its undoubted chancery jurisdiction on the application of the respondent, an application which

(1) 2 DeG. & J. 249.
(2) 8 DeG. M. & G. 731.
(3) [1901] 2 K.B. 385.
(4) 1 O.R. 388.
(5) 27 L.R.A. 56.

the Nova Scotia statute authorized her to make. There is no doubt that the court could, on cause shewn, set aside the appointment, but I cannot understand how the appellant could succeed in these proceedings in obtaining a declaration to the effect that an appointment made by the court was void as against public policy. I can find nothing in the agreement itself or in its surrounding circumstances as brought out by the evidence to justify the contention that the family agreement which is attacked was only a scheme to benefit the mother, or that she had any interest which conflicted or could be in conflict with that of her child. On the contrary, I believe that in contemplation of all the parties the contract had exclusively in view the benefit of the infant. There were, as pointed out by my brother Davies, many reasons why an arrangement of this kind should be entered into, and I agree entirely in the conclusions he has reached.

DAVIES J.—This was an action brought by the plaintiff, the widow of the only son of the defendant, to recover from the latter payment of an overdue instalment of an annuity agreed to be paid by him to her while she was self-dependent and defendant was able to pay it.

The defence set up was that the only consideration for the payment of the annuity to the plaintiff was the surrender by the mother to the grandfather of the control of the person and education of the child and *of the mother's rights and duties to the child,* and that such consideration was against public policy and void.

The learned trial judge after the hearing thinking

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himself bound by the case of *Humphrys* v. *Polak* (1), sustained this defence and dismissed the action, but on further consideration as a member of the court of appeal to which the case had been carried agreed with the rest of the court in allowing the appeal and directing judgment to be entered for the plaintiff for the amount of the overdue annuity.

From this latter judgment this appeal was taken to this court, and while reliance was placed upon the case of *Humphrys* v. *Polak*(1) referred to, it was strongly pressed upon us that the only consideration for the payment of the annuity to the widow was the agreement by her to the appointment of the grandfather as guardian of the child and that such a consideration was bad and a contravention of public policy as involving a necessary conflict between her interest and her duty as the child's maternal guardian.

I fully agree with the judgment of Mr. Justice Russell, speaking for the whole court, that the transaction attempted to be, at any rate partially, impeached in this case was considering the relationship, ages and means of the several parties to it "the most natural and commendable proceeding that could be thought of in the interests of the child," and that the guardianship of the child which was insisted upon by the grandfather was "desired merely as a guarantee that the child would finish her education at the convent." I also agree with the Supreme Court of Nova Scotia that the case of *Humphrys* v. *Polak*(1), before referred to, has little or no bearing upon the only point to be considered in this case.

It must be always borne in mind that the contract or agreement sought to be avoided in part by the de-

(1) [1901] 2 K.B. 385.

fendant here was a family arrangement and one agreed to be, on the whole, of a most natural and commendable kind. On the one hand we have a grandfather, stated to be a wealthy man, and on the other an only child of his only son who was dead and whose widow, the plaintiff, was in delicate health and without any means of support for herself and child except her own earnings. Everything that her deceased husband had left was included in the sum of $500 realized from the sale of his furniture. She herself, after her husband's death, had gone to her people in the United States taking, of course, her young child, then not a year old, and was living with her parents. They were all Roman Catholics, and the grandfather was very desirous that his only grandchild should be educated in a convent somewhere in Canada. The daughter-in-law, as can be gathered from the correspondence, contemplated going to Boston as soon as her health permitted to study nursing. She

> hoped to make a good nurse, work hard and give poor Will's little girl a good education.

Now it was not a good education such as is generally understood in Boston, that is a good public school education, that the grandfather desired for his grandchild. He wanted her to have such an education and training as is imparted in the convents of Halifax and Montreal, of which he knew something and which included a religious education in that branch of the Christian religion to which he belonged.

From the evidence it appeared that at and from the time of his marriage till his death the defendant's son was an invalid and "absolutely dependent on his father." The grandfather recognized his moral responsibility towards his grandchild and was eager and

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anxious to discharge it, but not unnaturally desired that so soon as the child was old enough to enter the convent as a boarder, mother and child should come to Canada and place the child in one of the convents named by him

and allow her to remain there until she had finished her education.

In his letter which forms the basis of the contract he goes on to say:

And after you place her in either convent, I will allow yourself $500.00 per annum paid quarterly in advance so long as I can do so whilst you are self-dependent. If you think Ruth is too young to be placed in a convent now, you can keep her where she is for a while, but I require that she will be placed in either convent not later than the first of September, 1898, where she is to remain until her education is finished. I will pay all her necessary bills for her education at either convent until she has finished her education, and after she has finished her education, I will allow her a sum yearly to keep her respectably until she is of age, and then I will make a suitable provision for her, but for all this *I require to be appointed her guardian, as a guarantee that her education shall be continued in the convent until she has finished it; you see I have no desire to part you from your child,* as you can live in either place with her, or in any other place you may wish. I merely wish to do what I consider is for her welfare; she will be taken care of in a convent, as well as you can take care of her. When you were sick some one else had to take care of her, and if you go to Boston you will have to leave her behind you for some one else to take care of her.

Now it seems to me to be plain that this family arrangement proposed and subsequently carried out involved the coming of mother and child to Canada and the education of the latter in a selected convent, the right of the mother to accompany and remain in the same city where the child was placed and where she could during the convent vacations look after the child and expend for its benefit the allowance agreed to be paid by the grandfather "to keep her respectably until she was of age." So far from separating mother and

child the letter clearly contemplated their being together.

> You see (he says) I have no desire to part you from your child as you can live in either place with her or in any other place you may wish" * * * "For all this (he continues) I require to be appointed her guardian as *a guarantee that her education shall be continued in the convent until she has finished it.*"

The arrangement contemplated, as I say, the abandonment of the project at one time entertained by the mother of studying nursing in Boston so as to enable her to maintain and educate the child there and instead the maintenance and education of the child in a named religious faith and in a named convent in Canada with the mother's presence near the child so as to enable her to discharge the many parental duties in vacation as well as in term which are required by a child in a convent at a mother's hands. Parental pride seemed to have had naturally a strong controlling influence with the grandfather in suggesting the family arrangement now sought in part to be avoided.

For my part I can see nothing in that family arrangement to condemn and very much entirely to commend. The substantial motive prompting the grandfather's action was the obtaining of a legal guardianship in himself which should be a guarantee of the maintenance of a system of maintaining and educating his grandchild, mixed with that was the parental pride which moved him to provide for his daughter-in-law's support and avoid the possible scandal of the widow of the only son of a rich man being compelled to resort possibly to some menial employment for her support which would entail separation from the child. The mother in consequence of the arrangement changes her residence from one country to another, abandons her contemplated study

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of nursing, forgoes the right she would otherwise have to the earnings of the child when and during the time the latter should become capable of earning, satisfies the natural parental pride of the defendant by ensuring alike the maintenance of the mother and the maintenance and education of the child in a manner consistent with their relations to a wealthy grandfather, and this without any surrender of the natural duties owing from the mother to her child beyond those involved in the transference to the grandfather of the legal guardianship under the Nova Scotia statute.

If all these family arrangements were indeed a mere cloak to hide and cover up an improper attempt to contravene the policy of the law, as by a natural guardian selling her right as such to another for a consideration, or a mother formally abdicating alike her rights over and her duties towards her child for a personal benefit to herself the argument against the validity of the arrangement so far as it so attempted to contravene such policy would be irresistible.

Only a feeble attempt was made to suggest such a state of matters here and from what I have already said it will be seen that in my opinion the basis of the arrangement as a whole was one *bonâ fide* for the benefit of the child which not improperly involved, considering the extreme youth of the child and under the circumstances of the case, provision for the maintenance of the widow.

The facts shew that for years the arrangement continued to be loyally carried out by both parties and there is nothing on the face of the record or suggested to us why it should now be declared invalid. Such a declaration would be most unjust to the widow as she

could not by any possibility now be placed in the position she occupied with respect to earning her own living by nursing or otherwise, and it seems to me would also be unjust to the child.

The appeal should be dismissed with costs.

IDINGTON J. (dissenting).—However commendable the intentions of the parties to the arrangement out of which this action has arisen the arrangement is wanting in the necessary legal form or substance to constitute a contract upon which to found an action such as this.

The simple contract it evinces requires for its support a consideration moving from the person seeking to enforce the promise.

The only consideration moving from the respondent to induce the appellant to make the promise relied upon was that which he so tersely put (before this poor mother who shrank so long as she could from yielding to the hard necessity) of surrendering the custody of her child, and in order to accomplish that, of petitioning the probate court to appoint him alone as guardian.

If the common law right of custody did not confer on a mother ample and efficacious authority in regard to the custody of her fatherless child the statute certainly did. R.S.N.S. ch. 115, sec. 4, is as follows:

> On the death of the father of an infant the mother if surviving shall be the guardian of the infant, either alone, when no guardian has been appointed, or jointly with any guardian appointed by the father.

I can find no power in that court to substitute another for this statutory guardian so long as she lives.

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Section 5 enacts that in default of a guardian being appointed by father or mother or such an appointee refusing to act the court may appoint a guardian.

(2) And if the infant is fourteen the court shall appoint his nominee.

(3) But if under that age the executor or administrator of an estate the child is interested in or next of kin may apply and court appoint.

None of these seem applicable, assuming, what I gravely doubt, that the court has such power of substitution during the lifetime of the mother, especially where no estate existed and no fault to be found with the character of the mother; what was her legal position or what were her duties in that respect?

True it was urged she had herself a power of appointment under the statute, but that also is matter of the gravest doubt.

But assume it exists, what again is her position? What were her duties in exercising such power?

In making such an appointment, or bringing about such an appointment, or taking any part whatsoever in its creation, the mother as statutory guardian must be taken to be acting in discharge of her legal duty, and cannot rid herself of the obligation to discharge such duty cast upon her.

She has no more right to sell the guardianship of her child than she has to sell her child.

The law has been so modified by statute in Nova Scotia as to render inapplicable some of the legal propositions contained in cases cited to us.

The point of view has been shifted a bit. The underlying principle of the cases remains untouched. A consideration consisting only in the discharge of

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such a duty is no consideration in law upon which to found an obligatory promise and claim an actionable breach thereof.

It seems to me idle to try and conjure up some other consideration than that so plainly written on the face of the correspondence in evidence, which forms such contract as there is.

It is not a case where the real consideration was doubtful, where it had to be found in the acts of the parties, and inferences had to be drawn, which might trace it out in one implication, rather than another, and if more than one existed (one being illegal but clearly severable) there might yet be found room to attribute the promise to some valid consideration, rather than impute an intention to violate public policy or morality.

In the alternative put before us there is either no consideration or an illegal consideration.

The substitution of the appellant for the respondent was all he valued.

It involved and carried with it all else, including the many things suggested by his counsel in argument, as possible considerations.

She gave him nothing else he valued. Her change of purpose as to her course of life or place of residence or habit of conduct was not stipulated for by him in any way.

He cared only for one thing and that was the mastery of the custody of the child.

How can we attribute to such a case upon the facts presented some other form of consideration than that which he who dictated the bargain specifies?

I do not assume that there was any gross impropriety in the arrangement, but when I am asked to

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find in it a necessary and legal consideration I cannot do it.

I can conceive of such an arrangement being submitted to a court empowered to pass upon it as a preliminary to its adoption and being approved of and become thereby valid. In such a case (which is not this) the court might become the keeper of the conscience of the guardian in discharging her duties where interest might lead one way and duty another.

I would allow the appeal.

MACLENNAN J.—I concur in the opinion of Mr. Justice Davies.

DUFF J. (dissenting).—I much regret that in this case I am unable to agree with the decision of the court below. Assuming that the Legislature of Nova Scotia has, by chapter 115, R.S.N.S., invested the mother of a child whose father is dead with the power to appoint within her lifetime a guardian of its person it is clear that the mother is intrusted with that power as a trustee for the benefit of her child; and likewise with respect to any application to the court of probate for the appointment of a guardian under the fifth section of the statute, or any such application to the Supreme Court of Nova Scotia to which she may be a party, the mother in relation to her child acts in a fiduciary capacity.

Now there is a long settled principle of English law which is stated by Lord Cranworth in these words:

> No one having duties to discharge of a fiduciary nature shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the in-

terests of those whom he is bound to protect. *Aberdeen Railway Co.* v. *Blaikie*(1), at p. 471.

That principle seems to me to apply to this case and to govern the decision of it. It can be nothing to the purpose that one be satisfied in the particular case that there has been no consciousness of wrong doing, that in fact the person occupying the fiduciary position was actuated only by a sense of duty, or that the particular arrangement was in fact as well as in intention for the benefit of the *cestui que trust*. The rule is a rule of public policy and is

based on the consideration that human nature being what it is, there is danger in such circumstances of the person holding the fiduciary position being swayed by interest rather than duty;

Bray v. *Ford*(2), at page 51 *per* Lord Herschell; therefore

it applies equally even though it be shewn that no advantage has been taken. The rule is made general in order to prevent the danger arising from the difficulty of disproving in particular cases that duty has given way to interest. See *per* Lord Eldon in the leading case *Ex parte Lacey*(3);

per Rigby L.J., in *Lagunas Nitrate Co.* v. *Lagunas Syndicate*(4).

For these reasons I think the defendant's promise to pay the sum of $500 yearly to the mother resting upon the consideration of her undertakings respecting the education and guardianship of her child, and upon that consideration alone, is such a promise as, under our law, the courts cannot enforce.

Appeal dismissed with costs.

Solicitor for the appellant: *W. H. Fulton.*
Solicitor for the respondent: *W. A. Henry.*

(1) 1 Macq. 461.
(2) (1896) A.C. 44.
(3) 6 Ves. 625.
(4) [1899] 2 Ch. 392, at p. 442.

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*March 2.
*March 23.

GONZAGUE E. HÊTU (PLAINTIFF) .... APPELLANT;

AND

THE DIXVILLE BUTTER AND CHEESE ASSOCIATION (DEFENDANTS) ..... RESPONDENTS.

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

Malicious prosecution—Reasonable and probable cause—Bonâ fide belief in guilt—Burden of proof—Right of action for damages—Art. 1053 C.C.—Pleading and practice.

An action for damages for malicious prosecution will not lie where it appears that the circumstances under which the information was laid were such that the party prosecuting entertained a reasonable *bonâ fide* belief, based upon full conviction founded upon reasonable grounds, that the accused was guilty of the offence charged. *Abrath* v. *North Eastern Railway Co.* (11 App. Cas. 247) and *Cox* v. *English, Scottish and Australian Bank* ((1905) A.C. 168) referred to.

Semble, that in such cases, the rule as to the burden of proof in the Province of Quebec is the same as that under the law of England, and the plaintiff is obliged to allege and prove that the prosecutor acted with malicious intentions or, at least, with indiscretion or reprehensible want of consideration. *Sharpe* v. *Willis* (Q.R. 29 S.C. 14; 11 Rev. de Jur. 538) and *Durocher* v. *Bradford* (13 R.L. (N.S.) 73) disapproved.

Judgment appealed from (Q.R. 16 K.B. 333) affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, Hutchinson J., by which the plaintiff's action was dismissed with costs.

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

(1) Q.R. 16 K.B. 333.

The material circumstances of the case are stated in the judgment of the Chief Justice now reported.

L. C. Bélanger K.C. and *Hector Verret* for the appellant. As we have shewn such absence of reasonable cause for arrest that the plaintiff was honourably acquitted by the magistrate, there is no necessity of going further and making affirmative proof of malice; *Sharpe* v. *Willis*(1); *Painchaud* v. *Bell*(2); *Gowan* v. *Holland*(3). The evidence of having taken the advice of counsel was irregularly admitted and was objected to at the trial. In any event, taking such advice is not an answer to the action; the defendants were obliged to shew the existence of probable cause for laying the information; *Tanguay* v. *Gaudry*(4); 61 Am. & Eng. Encyc., p. 899; *Rielle* v. *Benning*(5); *Charlebois* v. *Bourassa*(6); 19 Am. & Eng. Encyc., p. 687. We also rely upon the decisions in *Burrows* v. *Ransom*(7); *Brizard* v. *Sylvestre*(8); *Denard* v. *Gay* (9); and *Charlebois* v. *Surveyer*(10).

Shurtleff K.C. for the respondents. The facts justifying the prosecution have all been found in our favour by the trial judge. The plaintiff utterly failed to prove malice, or even any indiscretion or carelessness on the part of the respondents. These facts were found sufficient by the justice of the peace, by the trial judge and by the court below, as

(1) Q.R. 29 S.C. 14; 11 Rev. de Jur. 538.
(2) 21 R.L. 370.
(3) Q.R. 11 S.C. 75.
(4) 3 Que. P.R. 255.
(5) M.L.R. 4 S.C. 219; 6 Q.B. 365.
(6) 33 L.C. Jur. 234.
(7) Q.R. 3 Q.B. 152.
(8) 20 R.L. 205.
(9) 18 R.L. 654.
(10) 27 Can. S.C.R. 556.

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well as by the legal adviser to whom the respondents stated their case with full faith in the suspicious circumstances on which they founded a *bonâ fide* belief in the guilt of the plaintiff. See Hilliard on Torts, p. 49; Cooley on Torts, p. 123; *Bowes* v. *Ramsay*(1). It was the duty of the private prosecutor to lay the information and bring the guilty person to punishment; *Grothé* v. *Saunders*(2); *Pinsonneault* v. *Sébastien*(3); *Lefuntun* v. *Bolduc*(4). In addition to the authorities cited in the judgments in the court below, we refer to *Maloney* v. *Chase*(5); *Francœur* v. *Boulay*(6); *Lemire* v. *Duclos*(7); *Renaud* v. *Guenette*(8); and *Giguère* v. *Jacob*(9).

The judgment of the court was delivered by

THE CHIEF JUSTICE.—The action out of which this appeal arises was brought for the purpose of recovering damages for what is usually called malicious prosecution.

The plaintiff, now appellant, was the owner of a creamery at a place called Dixville in the Eastern Townships. After this creamery had been in operation about six years the defendants, now respondents, started a rival factory with the result that most of the business of the neighbourhood was attracted to their establishment.

During the night of July 27th, 1905, when the new creamery was completed and ready for business, an

(1) 4 Leg. News 227.
(2) M.L.R. 3 Q.B. 208.
(3) M.L.R. 3 S.C. 446.
(4) 1 Leg. News 266.
(5) Q.R. 7 S.C. 18.
(6) Q.R. 7 S.C. 402.
(7) Q.R. 13 S.C. 82.
(8) Q.R. 25 S.C. 310.
(9) Q.R. 10 K.B. 501.

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attempt was made to set fire to the building, and, for reasons which are stated at great length in the evidence, suspicion was directed towards the appellant as the guilty party. The local magistrate was consulted by one of the officials of the respondent company and on his suggestion further inquiries were made, the results of which were laid before counsel who advised that the appellant should be prosecuted. Thereupon the appellant was arrested and, after the preliminary examination, he was committed for trial. Subsequently the district magistrate before whom the case was tried under the "Speedy Trials Act" discharged him. Two of complainant's witnesses were absent from the country at the time of the trial, and there may have been sufficient evidence to shew a probable cause for prosecuting, but not such plain proof of guilt as would justify a conviction. After his acquittal by District Magistrate Mulvena, the appellant brought this action for $5,000 damages, alleging the arrest and subsequent discharge and that the respondents acted maliciously and without reasonable and probable cause. The respondents pleaded that they used proper care to inform themselves of the facts, that the act was done without malice and that they honestly believed the case which they laid before the magistrate. On these issues the parties went to trial.

The judge of the Superior Court, who saw the witnesses and had full opportunity of judging by their demeanour whether they were witnesses of truth, came to the conclusion that the respondents had taken care to inform themselves of the facts of the case; that no malice had been proved and that there was abundant evidence of reasonable and probable cause, and dismissed the action. In this conclusion the judges in

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appeal concur and I can see no reason on the evidence why we should reverse.

In appeal an issue was raised as to the burden of proof and this question has been recently much discussed in the Quebec Courts; *Sharpe* v. *Willis*(1), and *Durocher* v. *Bradford*(2). At page 80 of the last report many cases are cited and much learning is displayed to prove that there is a difference between the English and French rule of law on this point; but, expressing a personal opinion, I agree with Mr. Justice Blanchet that there is no such difference. Under the English system, in an action for malicious prosecution

> the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a judge can see no reasonable nor probable cause for instituting it:
> *Abrath* v. *North Eastern Railway Co.*(3); *Cox* v. *English, Scotch and Australian Bank*(4), at p. 170;

and the principles applicable in cases arising in Quebec will be found laid down in article 1053 of the Code:

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

To make the party prosecuting responsible, it is necessary that the damage should be caused by his fault; and to lay an information, when in possession of facts sufficient to establish a *bonâ fide* belief of guilt, is not a fault, but the exercise of an undoubted right. In Quebec, as in English courts, it must be alleged and proved that there was fault, that is to say, that

(1) Q.R. 29 S.C. 14; 11 Rev. de Jur. 538.
(2) 13 R.L. (N.S.) 73.
(3) 11 App. Cas. 247.
(4) (1905) A.C. 168.

the prosecutor acted, to use the words of the Cour de Cassation

> dans le dessein coupable de nuire ou, du moins, avec une indiscrétion et "une légèreté répréhensibles" (Fuzier-Hermann, vo. "Dénonciation calomnieuse, No. 231; Sourdat, Responsabilité, Vol. 1, No. 633; Receuil Philly. sommaires Mars 1908 No. 1930;

and the plaintiff in his declaration thought it necessary to allege in conformity with this view of the law that the prosecution was started maliciously to injure him and without reasonable and probable cause.

It is not necessary, however, for the purposes of this case to determine that point; the evidence given is sufficient to prove that the party prosecuting entertained a reasonable *bonâ fide* belief based upon full conviction founded upon reasonable grounds that the appellant was guilty of the offence which had undoubtedly been committed.

I would like to say, speaking again for myself, that in my opinion a private prosecutor is a useful person in a community where we have nothing in the nature of a public prosecutor and those who, having taken the reasonable care to ascertain the facts, prosecute duly in the public interest should be protected. It would be encouraging useless appeals for this court to hold that an uneducated layman was in fault in assuming that he had reasonable and probable cause for a prosecution in a case in which the trial judge and five judges in appeal agree with him.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *St. Pierre & Verret.*
Solicitor for the respondents: *W. L. Shurtleff.*

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*March 9, 10.
*March 23.

DUDLEY D. HUTCHINSON (DEFENDANT) ..... APPELLANT;

AND

AMOS C. FLEMING (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Principal and agent—Secret profit—Trust—Clandestine transactions by broker—Sham purchaser—Commission—Quantum meruit.

H., a broker, undertook to obtain two lots for F., as an investment of funds supplied by F. for that purpose, at prices quoted and on the understanding that any commission or brokerage chargeable was to be got out of the vendors. H. purchased one of the lots at a price lower than that quoted receiving, however, the full amount quoted from F., and, by representing a sham purchase of the other lot, got an advance from F. in order to secure it.

Held, affirming the judgment appealed from, that H. was the agent of F. and could not make any secret profits out of the transactions, nor was he entitled to any allowance by way of commission or brokerage in respect of either of the lots so purchased.

APPEAL from the judgment of the Supreme Court of British Columbia affirming the judgment by Morrison J., at the trial, which maintained the plaintiff's action with costs.

The plaintiff applied to the defendant, who was a real estate broker at Vancouver, B.C., for information respecting investments in city property and, in consequence of what took place between them, instructed the defendant to purchase a lot he had listed for sale at $220 per acre, and another at a price quoted. The

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defendant purchased the first mentioned lot at $180 per acre, received the full price quoted from the plaintiff and paid the vendor, at the lower rate, out of the money he received from the plaintiff. In respect to the second lot, the defendant falsely represented to the plaintiff that another party had bought it and that, in order to secure it, he would have to pay a considerable advance on the price first quoted. The plaintiff paid the increased price thus asked for the second lot and defendant purchased it from the vendor at the price originally stated, retaining the difference himself. It had been agreed that the defendant should not charge any commission or brokerage to the plaintiff.

The defendant then invested the profits he had made on these transactions in the purchase of four other city lots and the plaintiff, on discovery of the deceit and artifices which had been practised in connection with his business, brought the action for a declaration that the defendant was his agent and became trustee for him of the four other lots purchased by the defendant with the secret profits he had thus made, or, in the alternative, to recover the amount of the difference between what he had been obliged to pay for the two lots and the prices actually paid to the vendors for them by the defendant.

The trial judge held, affirmed by the judgment appealed from, that the defendant stood towards the plaintiff in the fiduciary relation of an agent and was bound to procure the lots for him on the most favourable terms and that he could not make any secret profit out of the transactions. The defendant urged, on the present appeal, that, according to the evidence, no such agency had been created, that the defendant had dealt in the matter simply as a broker undertak-

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ing to procure the lots for an investor, and that he could get them for any price the vendors were willing to accept and sell them to the plaintiff or any other person at any advance in price which he might be able to obtain. He claimed, alternatively, that he was, in any event, entitled to receive remuneration in the form of a commission or allowance in consideration of the services he had rendered in negotiating the purchases.

W. S. Deacon for the appellant.

D. Greenfield Macdonell for the respondent.

THE CHIEF JUSTICE and DAVIES J. concurred in the opinion stated by Duff J.

IDINGTON J.—It seems to me that there is enough stated in the evidence if that of the appellant is entirely discarded to support the respondent's claim either on the ground of his agency or of deceit.

Having read the evidence I am satisfied the learned trial judge was right in discarding appellant's evidence.

The pleadings may not exactly stand as I would draw them, but enough is stated to cover either ground I have suggested and, indeed, both grounds upon which I have suggested the action on the evidence might be maintained.

The acceptance of respondent's agency in each transaction in question is followed in each case by a fraudulent use of it to the respondent's detriment in reporting as to the business he undertook in each instance for the respondent, that which has been proven

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Idington J.

to have been false and thereby extracting from the respondent's bank account sums he, the appellant, had no right to.

The only doubt I have had in considering the case is whether or not appellant's responsibility was not to each of the vendors, but I have concluded since reading the evidence that we have nothing to do with the possible result arising from his relations with these other parties which were somewhat indefinite and in any case must rest on other facts and relations than the respondent relies upon.

The appeal should be dismissed with costs.

DUFF J.—I think this appeal should be dismissed. In the transaction relating to lot 739 the defendant appears in fact to have made the purchase after he had accepted employment as the plaintiff's agent for the purchase of that property. Under his arrangement with the plaintiff the defendant was unquestionably entitled to bargain with the vendors for and to receive from them a commission on any sale effected through his agency; and, had he in this case made such a bargain, it may be assumed that the price demanded by the vendors would have been correspondingly increased. Instead, however, of taking this straightforward course, the defendant—as the learned judge appears with quite sufficient warrant from the evidence to have found—resorted to the subterfuge of a clandestine purchase in the name of another in order to procure a profit out of the plaintiff; a profit ostensibly paid to the sham purchaser, but really passing into the defendant's own pocket. By this tortuous course, the defendant made himself as the plaintiff's agent accountable for the whole of the excess of the

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Duff J.

purchase money paid by the plaintiff over that actually received by the vendors; and clearly, I think, without the right to make any deduction as for commission—for under the terms of his agency he was to look for his commission to the vendor.

With respect to the other transaction, the evidence, I think, supports the finding that the relation of principal and agent had already been established between the plaintiff and the defendant when the defendant procured from Alvensleben the option to purchase; and that it was in fact procured by him in his character of agent for the plaintiff. The plaintiff was, therefore, entitled to the benefit of that option, and here again the defendant was, under the arrangement referred to, bound to look to the vendor for his commission.

If in the result the defendant is not entitled out of the moneys in his hands as trustee for the plaintiff to retain any sum as for commission on the transactions he negotiated, that is only the just consequence of his attempt to traffic for his own profit upon a fiduciary relation.

Appeal dismissed with costs.

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

Solicitor for the respondent: *J. N. Ellis.*

LA VILLE DE ST. JEAN (PLAINTIFF) ..... APPELLANT; 1908

*Feb. 18.
*March 23.

AND

AUGLARE L. MOLLEUR ET VIR (DEFENDANTS) ..... } RESPONDENTS.

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

Appeal—Demurrer—Final judgment—Jurisdiction.

The declaration in an action by a municipality claiming forfeiture of a franchise for non-fulfilment of the obligations imposed in respect thereof alleged in five counts as many different grounds for such forfeiture. The defendant demurred generally to the declaration and specifically to each count. The demurrer was sustained as to three counts and dismissed as to the other two. On appeal from the decision of the registrar refusing an order to affirm the jurisdiction of the Supreme Court to entertain an appeal from the judgment maintaining the demurrer.

Held, that each count contained a distinct ground on which forfeiture could be granted and a judgment depriving the municipality of its right to rely on any such ground was a final judgment in respect thereof which could be appealed to the Supreme Court of Canada.

APPEAL from the judgment of the registrar of the Supreme Court of Canada, sitting as a judge in chambers, whereby it was held that the Supreme Court of Canada had no jurisdiction to hear the appeal.

The decision appealed from was upon an application made to the registrar, in chambers, under Rule I. of the Rules of Practice of the Supreme Court of

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Canada, for an order affirming the jurisdiction of the court to entertain the appeal and the approval of the security for an appeal from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court for the District of Iberville, by which the demurrer of the defendants to three counts in the plaintiff's declaration was allowed with costs.

The circumstances of the case are stated in the following reasons for the judgment of

THE REGISTRAR.—"This is an application under Rule 1 of the Supreme Court Rules, for an order affirming the jurisdiction of the court.

"*Bisaillon K.C.* and *Geoffrion K.C.*, appeared in support of the application.

"*Belcourt K.C.* and *Roy K.C.* shewed cause.

"The facts of the case, as disclosed by the material filed, are as follows:

"Pursuant to the provisions of chapter 65 of the Consolidated Statutes of Quebec, being 'An Act respecting Incorporated Joint Stock Companies' for supplying cities, towns and villages with gas and water, a company received a charter of incorporation to supply water to the City of St. Johns. Subsequently, by the Act, 40 Vict., of the Statutes of Quebec, chapter 68, being 'An Act concerning the Water-works of St. Johns,' the said water-works company became vested in Louis Molleur, the younger, of the Town of St. Johns, and he was substituted for the company as proprietor of all its property and charged with all its obligations and responsibilities. By the

said last mentioned Act, and by the second section thereof, the said Molleur was granted the exclusive right and privilege to place pipes and water conduits under the streets and public squares of the town.

"By the third section it is provided that, if the said Molleur should refuse or neglect to fulfil all the obligations imposed upon him by the Act, after having been placed *en demeure* so to do by the said town, he and his representatives might be deprived of the exclusive privilege above mentioned.

"Section 4 provided that the water should be pure and healthy and should be sold and distributed to such of the inhabitants of the town as should be willing to receive it at the price and on the conditions which the said Molleur should establish.

"By section 5 the corporation obtained the right, without charge, to use the water from the water-works for the extinction of fires and to construct and place such pipes, reservoirs, etc., as should be necessary for utilizing the said water for fire purposes, and Molleur was bound, on the demand of the corporation, to keep a constant pressure of 50 pounds of steam per square inch in the boiler of the water-works, so that the same might be made use of in case of fire, upon the corporation paying him a sum to be fixed by arbitrators in the absence of an agreement.

"The statute also provided, by section 6, that, any time after the year 1899, the corporation should have the right to purchase the water-works by paying the value thereof, which, in default of agreement, should be settled by arbitration.

"By section 9 the corporation might pass a by-law compelling all the ratepayers of St. John to supply themselves with water from the water-works, and by

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section 10 provision was made for fixing a tariff of fees to be paid by the ratepayers in the event of the corporation and Molleur being unable to agree to the same.

"Section 12 authorized the corporation to require Molleur to lay down pipes in any street in the town in which there were none, provided that the owner of the water-works might be able to levy an annual amount equal to ten per cent. on the value of the work and material supplied.

"The present action is brought under the third section of the statute to have it declared that Molleur has forfeited all his rights and privileges for the following reasons set up in the plaintiff's declaration:

(*a*) The impurity of the water supplied;

(*b*) The lack and insufficiency of water pressure for fire purposes;

(*c*) The lack and insufficiency of pressure for the supply of water at the domiciles of the subscribers;

(*d*) The unjustifiable increase in the rates charged to the consumers of the water in the town who were bound to take their supply from the said water-works;

(*e*) The bad state of the water-works and its accessories and its present incapacity to fulfil the obligations to which the proprietors were bound towards the town and its ratepayers.

"The defendant demurred to the declaration generally, and also specifically as to each count thereof.

"The Superior Court allowed the demurrer as to the grounds above mentioned (*b*), (*c*), and (*d*), but dismissed it as against the other counts in the declaration.

"An appeal taken from this judgment to the Court of King's Bench was dismissed.

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"Under the practice in the Province of Quebec, an appeal from an interlocutory judgment lies to the Court of King's Bench (appeal side) only by leave of a judge of that court, while an appeal lies to the same court(1) where the judgment of the Superior Court is a final judgment, in all cases except:

'1. In matters of certiorari;

'2. In matters concerning municipal corporations or officers, as provided in article 1006 C.P.Q.;

'3. In matters in which the sum claimed or value of the thing demanded is less than two hundred dollars, and in which judgment has been rendered by the Court of Review;

'4. At the instance of any party who has inscribed in review any cause other than those mentioned in the preceding paragraph, and has proceeded to judgment on such inscription, when such judgment confirms that rendered in first instance."

"I understand it to be admitted by the plaintiff in the present case that according to the practice in the Province of Quebec, the judgment herein was interlocutory and for that reason they petitioned a judge of the Court of Appeal for leave to appeal from the judgment of the Superior Court, and it was by virtue of that leave that the judgment of the Court of King's Bench against which it is now desired to appeal to the Supreme Court, was given.

"The plaintiffs contend that a judgment may be interlocutory according to the procedure in the Province of Quebec, but be a *final judgment* as these words are construed by the Supreme Court. I do not find any case supporting such a contention. But the

(1) Art. 43 C.P.Q.

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contrary is to be inferred from the judgment of the Supreme Court in a recent case of *Desaulniers* v. *Payette*(1), in which the Chief Justice, Sir Elzéar Taschereau, speaking for the court, said:

'Avec la permission spéciale requise pour en appeler d'un jugement interlocutoire, ce jugement fut porté en appel à la cour du banc du roi par les opposants, mais leur appel fut débouté.

'Ils veulent maintenant en appeler de ce jugement de la cour d'appel. Mais nous ne pouvons reçevoir leur appel.

'Il n'y a appel à cette cour que d'un jugement final. Or le jugement en question n'est évidemment qu'un jugement interlocutoire, un jugement d'instruction. Les appelants eux-mêmes n'ont pas cru qu'ils pouvaient en appeler de plein droit à la cour d'appel comme d'un jugement final. Et ils avaient raison. Or, il n'est pas plus final maintenant qu'il l'était alors.'

"The plaintiff relies mainly in supporting its contention that there is jurisdiction to hear this appeal, upon the decision of this court in *Shields* v. *Peak*(2); and were it not for more recent decisions of the Supreme Court, I would have been of the opinion that that case could not be distinguished from the present. There the respondent sued for $4,000 on the common counts, and also by special count alleged that the purchase of goods had been made by the defendants when they had probable cause for believing themselves to be insolvent, and with intent to defraud the plaintiff. The defendants amongst other pleas pleaded that the contract out of which the alleged cause of action arose

(1) 33 Can. S.C.R. 340. (2) 8 Can. S.C.R. 579.

was made in England and not in Canada. To this plea the plaintiff demurred. Judgment was given in favour of the plaintiff on the demurrer to the plea in question, and this judgment was affirmed by the Court of Appeal for Ontario. The defendants thereupon appealed to the Supreme Court of Canada, and when the case was called, an objection was taken to the jurisdiction on the ground that this was not an appeal from a final judgment. The judgment of the majority of the court on the question of jurisdiction was given by Sir Henry Strong, in which he said that the case was not distinguishable from *Chevallier* v. *Cuvillier* (1), and that an appeal would lie.

"The latter case, whether distinguishable in principle or not from *Shields* v. *Peak* (2), certainly differed from that case in that the demurrer was to the entire cause of action and the judgment finally disposed of the rights of the parties. Indeed, I find on looking at the record in the Supreme Court that the judgment of the Superior Court is in the following terms:

'Maintient la dite défense en droit et déboute le dit démandeur de sa présente demande contre la dite défenderesse,' except as to certain immovables with respect to which the defendants by their pleas expressly admitted the plaintiff's rights. And in the judgment of Chief Justice Sir A. A. Dorion, he says, in referring to the judgment of the court below:

'The court below maintained the demurrer and dismissed the appellant's action *quoad* the respondents, except as to the two lots of land purchased from J. D. Bernard.'

(1) 4 Can. S.C.R. 605.

(2) 8 Can. S.C.R. 579.

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"In *Shields* v. *Peak*(1), Taschereau and Gwynne JJ. dissented, and Mr. Justice Gwynne points out in his judgment that 'In *Chevallier* v. *Cuvillier*(2), the demurrer was to a particular specified portion of the claim in the action and the allowance of a demurrer in such case was undoubtedly a final judgment as to the claim demurred to. * * * But the case here is quite different; it is a judgment allowing a demurrer to one of several pleas upon all of which issues in fact are joined, and yet to be tried. Such a judgment decides nothing as to the action or suit in which the plea is pleaded; the action remains still wholly undetermined.'

"The view of the majority of the Supreme Court as determined by *Shields* v. *Peak*(1), is not in harmony with either the earlier or later jurisprudence of the court. The first case reported is that of *Bank of British North America* v. *Walker*(3). There the declaration contained eight counts, and six of these were demurred to. The seventh and eighth counts of the declaration were so framed that a verdict thereon in favour of the plaintiff if supported by the evidence would stand, whatever might be the decision of the court upon the demurrers. An appeal was then taken to the Supreme Court from the judgment on the demurrers, but no appeal was taken from the judgment of the trial judge which ordered a judgment in favour of the plaintiffs on the verdict of the jury, the reason for this probably being that no appeal had been taken from the trial judge on this branch of the case to the full court of British Columbia. After argument the Supreme Court held that the judgment on the demur-

(1) 8 Can. S.C.R. 579. (2) 4 Can. S.C.R. 605.
(3) Cass. Dig. (2 ed.) 214.

rers was not one from which an appeal would lie and ordered it to be quashed, but further ordered that the defendants might appeal *per saltum* from the judgment of the trial judge and from the judgment on the demurrers.

"The next case is that of *Reid* v. *Ramsay*(1). This was an action for assault and false imprisonment. The defendants by their second plea justified the assault by virtue of a writ of *capias ad satisf.* issued against the plaintiff under a judgment recovered against him. To this plea the plaintiff made four replications. The defendant demurred to the second and fourth, and in addition the defendant pleaded to the fourth replication a further rejoinder to which the plaintiff demurred. Judgment was rendered for the plaintiff on all the demurrers. The defendant appealed to the Supreme Court of Canada and the appeal was quashed on the ground that the judgment appealed against was not final.

"In *Rattray* v. *Larue*(2), the appellant demurred to an intervention and the judgment of the Superior Court maintaining the demurrer, disposed finally of the rights of the parties in the intervention. The Supreme Court heard an appeal in this case from the Court of King's Bench and restored the judgment of the Superior Court. But the case is clearly distinguishable from *Shields* v. *Peak,* in that it was a demurrer to the entire cause of action and the judgment upon it finally disposed of the action.

"In *Shaw* v. *The Canadian Pacific Railway Co.*(3), in an action for a breach of contract by a railway company to carry the plaintiff's goods in safety, the de-

(1) Cass. Dig. (2 ed.) 420. (2) 15 Can. S.C.R. 102.
(3) 16 Can. S.C.R. 703.

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fendant set up a special contract limiting its liability to $100, to which the plaintiff made two replications, one of which was that the special contract could not avail against the provisions of section 25 of the "Railway Act of 1879." The defendant demurred to this replication on the ground that it was a departure from the declaration which was in contract, while the replication was in tort. The demurrer was allowed in the courts below and an appeal to the Supreme Court was quashed on the ground that the judgment was not final.

"The judgment in this case would appear to be entirely in line with the dissenting judgments in *Shields* v. *Peak*(1).

"Finally, in *Griffith* v. *Harwood*(2), we have a case which appears to me to be entirely indistinguishable from the present. Here a plea of prescription was set up as one of the defences to the plaintiff's action. The appellants urged, just as the plaintiffs do in the present case, that in so far as the issue raised upon the plea of prescription was concerned, the judgment appealed from was final and prohibited the defendant from availing himself of that defence, which went to the root of the action. The court, however, following the earlier decisions, quashed the appeal.

"I am of the opinion, therefore, after reviewing all the decisions of the court, that by the more recent decisions it is now well settled that where a demurrer is not to the entire cause of action, but only as to some pleading, and where, notwithstanding the judgment on the demurrer, the action still subsists and there remain issues which require to be tried and disposed

(1) 8 Can. S.C.R. 579. (2) 30 Can. S.C.R. 315.

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of by the court of first instance, no appeal lies from a judgment thereon to the Supreme Court of Canada.

"It is contended in the present case that the result of quashing the present appeal may preclude the plaintiff from questioning the judgment of the Court of Appeal upon the present demurrers, either in the court below or in this court, if the case subsequently came on to be heard in an appeal on the merits, and *Shaw* v. *St. Louis*(1) is cited as an authority for that proposition. Even if this were the case, the answer might be made which was made to the same argument in *Ontario & Quebec Rly. Co.* v. *Marcheterre*(2), where Sir Elzéar Taschereau, speaking for the court, said:

"The appellant argued, referring to *Shaw* v. *St. Louis*(1), that he might eventually find himself precluded from appealing to this court. Whether that is so or not, a point which of course we have not to determine here, that will be simply because the statute does not provide for an appeal in such a case."

"Later on, however, in *Desaulniers* v. *Payette*(3), there is no doubt the court, speaking through the Chief Justice, expressly holds that where an interlocutory judgment had been carried to the Court of King's Bench and disposed of there in a certain way, that judgment could not be reviewed if the case subsequently, on the merits, reached the Court of King's Bench and an appeal was taken from the second judgment of that court to the Supreme Court of Canada, the Chief Justice making use of the following argument in support of that proposition:

'And likewise, when the case came up again before

(1) 8 Can. S.C.R. 385. (2) 17 Can. S.C.R. 141.
(3) 35 Can. S.C.R. 1.

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the Court of Appeal, that court could not but hold, as it did by the judgment now appealed from, that the Superior Court had committed no error when it had simply acted in accordance with the judgment rendered upon the first appeal.

'Now, if the Court of Appeal (in its second judgment) has rendered the judgment that it had in law to give, the appellants' attempt to shew error in that judgment necessarily fails, and if there is no error in it they cannot expect us to reverse it. They seem to be under the impression that, because the first judgment ordering them to give security was not appealable to this court, *Desaulniers* v. *Payette*(1), they can now ask us upon this appeal from the last judgment, to review that first judgment. But that cannot be. As we have often said, an interlocutory judgment that cannot be appealed from is *res judicata*. But it is not merely because a judgment is *res judicata* that it is appealable, as the appellants would contend.'

"It would appear to me, however, that the recent judgment of the court in *Willson* v. *Shawinigan Carbide Co.*(2), must be taken to overrule the decision in *Desaulniers* v. *Payette*(3), for there the court says, referring to an analogous case where an appellant filed a declinatory exception to the jurisdiction of the Supreme Court:

'The judgment appealed from does not dispose of the whole case but merely an incident raised by a declinatory exception which was maintained by the trial court and rejected by the Court of Appeal. Of course in both the trial court and the Court of Appeal the question cannot be raised again. It is there *chose*

(1) 33 Can. S.C.R. 340.
(2) 37 Can. S.C.R. 535.
(3) 35 Can. S.C.R. 1.

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jugée, but it can be raised here, if after being disposed of on the merits, the case comes up again before this court.

'The reason for this ruling is that an appeal on the merits opens all the interlocutories, especially if a reservation or an exception be filed immediately after the rendering of the interlocutories.'

"The application to affirm the jurisdiction must therefore be refused with costs.

"The present motion was coupled with another to allow the plaintiff to deposit $500 in court as security for its appeal. I understand that my judgment on this application will be appealed to the full court. I will, therefore, reserve judgment on the application to allow the security until after that appeal has been disposed of which will preserve the plaintiff's rights to appeal, although more than 60 days will by that time have elapsed from the judgment below. It has been held (*Attorney-General of Quebec* v. *Scott*(1)) that the appellant cannot be prejudiced by the delay of the court in dealing with an application to allow the security."

On the appeal, counsel appeared for the parties, as follows:

Bisaillon K.C. and *Aimé Geoffrion K.C.* for the appellant.

Roy K.C. for the respondents.

The judgment of the court was delivered by

(1) 34 Can. S.C.R. 282.

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THE CHIEF JUSTICE:—The plaintiff applied under Rule 1 of the Supreme Court Rules to the registrar for an order affirming the jurisdiction of this court to hear an appeal from the judgment of the Court of King's Bench which confirmed the judgment of the Superior Court.

The registrar refused to make the order on the ground that the judgment in question is not a final judgment within the meaning of the Supreme Court Act and I was at the argument inclined to agree with him on the authority of *Griffith* v. *Harwood*(1) and other cases in this court. Further consideration, however, has brought me to a different conclusion.

By the material before us it appears that the defendant acquired by an Act of the Legislature of Quebec (40 Vict. ch. 68) the exclusive right to place, subject to various obligations, pipes and water conduits under the streets and public squares of the Town of St. Jean.

The third section of the Act provides that if the defendant *concessionnaire* refuses or neglects to fulfil any of the obligations imposed upon him he is liable to forfeit the privilege granted, and the action is brought by the Town of St. Johns claiming a declaration of forfeiture under that section. The five several breaches of the statutory obligations relied upon are set out in separate paragraphs or counts of the declaration. To this declaration the defendants fyled a general demurrer and in addition demurred specifically to each count. The Superior Court allowed the demurrer in respect of three of the counts, holding that none of these three counts disclosed facts constituting a legal

(1) 30 Can. S.C.R. 315.

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ground of forfeiture within the provisions of the Act. On appeal, the judgment of the Superior Court was affirmed and on the argument here it was not disputed that the decision of the Court of Appeal constitutes a final termination, so far as the courts of Quebec are concerned, of the matter in dispute upon the demurrer, that is to say, the question whether the facts stated in any of the counts in respect to which the demurrer is allowed constituted a ground of forfeiture of the privilege, has been finally decided in the negative; the judgment appealed from is final as to those issues, costs are awarded and nothing further remains to be done. See *Shaw* v. *St. Louis*(1), at pages 402 and 403, *per* Taschereau J. (2); none of the questions so decided in appeal can be reheard or re-examined in that court.

The question now is whether such a decision was "a final judgment" within the meaning of the Supreme Court Act. Chapter 139, R.S.C. (1906), sec. 2, sub-sec. (*e*), defines a final judgment to mean

> any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.

If the declaration contained only the counts to which the demurrer was maintained, nobody would dispute that such a judgment allowing a demurrer to the whole action would be a final judgment within the meaning of that section and inasmuch as the grounds or causes of action set out in each of these counts if

(1) 8 Can. S.C.R. 385.

(2) See *State of Illinois* v. *Illinois Central Rd. Co.*, 184 U.S.R. 77, at p. 92, and *United States* v. *Camon*, 184 U.S.R. 572, at p. 574.

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good in law are distinct grounds or causes upon any one of which the conclusions of the action claiming a declaration of forfeiture might be granted, it seems to me that a judgment finally depriving the plaintiff municipality of the right to maintain its action upon any of those grounds or causes is with respect to them a final judgment, that is to say a judgment by which the rights of the parties on the issues raised by those counts are finally determined and concluded, except in so far as we have jurisdiction to entertain the appeal. It has been argued that there can be only one final judgment in each action, that is to say, the judgment that finally disposes of the whole action; but I do not think that such a limited construction should be put upon the words "final judgment"; although it might be said that if adopted the result would be to give to these words their literal meaning. The French text-writers interpret or define the term *"jugement définitif,"* which corresponds with "final judgment," by comparison with and in opposition to *"jugément provisoire, jugement préliminaire et jugement interlocutoire,"* all of which they include under the general classification of *"jugements avant faire droit."* Colmet-Daage, in his valuable notes on Boitard, *Procédure civile* (15 ed.), vol. 1, page 255, says that Boitard is in error when he defines the final judgment as the one which puts an end to the suit and removes it completely from the court in which the judgment is rendered. Boitard says:

> Le jugement définitif dessaisit le tribunal et termine la contestation devant lui.

In his notes Colmet-Daage says:

> La définition que donne Boitard du jugement définitif est inexacte; il y a bien des jugements de cette nature qui ne terminent pas la contestation; tels sont ceux qui statuent sur des conclusions d'exception,

sur une demande en récusation, sur une demande en renvoi, ceux qui rejettent une demande en péremption d'instance, etc., etc. On ne peut définir les jugements définitifs que d'une manière indirecte, en disant: Les jugements définitifs sont tous ceux qui ne rentrent pas dans l'une des trois sortes des jugements d'avant faire droit.

Dalloz, Laurent and Pigeau all concur in the opinion that there may be several final judgments in the same case, in the sense that there may be several judgments in the same case which finally decide and dispose of particular grounds of action or issues, without finally disposing of the whole action.

Dalloz, *vo.* "*Jugement,*" ch. 3, sec. 1, paragraph 12, says:

De la nature des jugements d'avant faire droit ressortent, par opposition, les caractères des jugements définitifs. Et il résulte clairement de la distinction qui existe entre eux qu'il ne faut pas prendre le mot *jugement définitif* dans son acception rigoureusement littérale, en ne l'appliquant qu'aux décisions qui *terminent* la contestation d'une manière définitive; ce serait là une erreur. Les jugements définitifs, en effet, sont tous ceux qui ne se bornent pas à *préjuger*, mais qui *jugent* un point, une question quelconque du procès, non pas seulement lorsqu'ils statuent sur le fond, mais aussi lorsqu'ils prononcent sur les *incidents*, sur les *exceptions*, sur les *nullités*, sur les *fins de non-recevoir*, etc., en premier comme en dernier ressort.

Carré & Chauveau, t. 1, p. 565, note 1, 4th. and t. 4, p. 60 to same effect.

Laurent, vol. 20, *n.* 22, says:

Il peut dans une même affaire intervenir plusieurs jugements définitifs en ce sens qu'ils décident définitivement certains points débattus entre les parties; tous ces jugements ont l'autorité de la chose jugée.

At No. 23;—

Quand un jugement, interlocutoire en apparence, décide réellement un point contesté entre les parties, il est définitif et il a, par conséquent, l'autorité de la chose jugée.

Pigeau, Procédure Civile (2 ed., 1811), vol. 1, page 484:

Le jugement définitif est celui qui détermine la contestation.

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And then he goes on to say:

2. Il y a deux observations à faire sur les jugements définitifs:
1° La première, que le jugement peut n'être définitif que sur un ou plusieurs chefs et non sur le surplus:
2° Un jugement peut contenir en même temps une disposition définitive et un avant faire droit.

The effect of the judgment appealed from was to put an end to the issues raised by the counts with respect to which the demurrer was maintained and to that extent the action was finally disposed of and it was *"chose jugée."*

In *Shields* v. *Peak*(1), it was held that a decision on a demurrer to a part of the action only is a final judgment in a judicial proceeding within the meaning of the "Supreme Court Act."

And Mr. Justice Gwynne, who dissented, referring to *Chevallier* v. *Cuvillier*(2), says:

The demurrer is *Chevallier* v. *Cuvillier*(2) was to a particular specified portion of the claim ascertained in the action and the allowance of the demurrer in such a case was undoubtedly a final judgement as to the claim demurred to.

Here the judgment does not, because of the nature of the proceedings deprive the plaintiff of a particular specified portion of his claim; but as a result of the judgment the plaintiff's action is dismissed with respect to the grounds of action contained in the counts demurred to.

In *Baptist* v. *Baptist*(3), it was held that the judgment was *res judicata* between the parties and final on the petition for continuance of the suit and therefore appealable to this court, and speaking for the court, Taschereau J., says, at page 429:

(1) 8 Can. S.C.R. 579. (2) 4 Can. S.C.R. 605.
(3) 21 Can. S.C.R. 425.

Now though we have held that no interlocutory judgments can be reviewed by this court under that clause, and though in form, perhaps, this is, in one sense, an interlocutory judgment, yet, it is clear that, though upon a side issue, the controversy between the parties has been, as far as can be in the provincial courts, determined and concluded.

Mr. Justice Duff, to whom I am indebted for much assistance in the preparation of these notes, refers me to the case of *McDonald* v. *Belcher*(1). That was an action brought in the Territorial Court of the Yukon Territory in which the plaintiff Belcher claimed certain sums from the defendant McDonald, among them a sum of $50,000. At the trial the learned judge decided adversely to the plaintiffs in respect to this claim and directed a reference with respect to the remaining sums. Judgment having eventually been given upon the referee's report in respect to the remaining claims, an appeal was taken by the plaintiffs to the Supreme Court of British Columbia under 62 & 63 Vict. ch. 11, sec. 7 (D.), which authorized an appeal to that court from the Territorial Court of the Yukon in the case of final judgments.

On the appeal the defendant set up the contention that with respect to the item of $50,000 the judgment of the learned judge at the trial being an adjudication upon the dispute between the parties in respect of that item and not having been appealed from within the time allotted by the Act referred to, could not be reviewed. The Supreme Court of British Columbia accepted this contention. On appeal to this court, the judgment of that court was reversed. On appeal again to the Privy Council it was there held that with respect to that item the judgment or decision of the learned

(1) [1904] A.C. 429.

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judge at the trial was a final judgment. At page 433 Lord Halsbury uses these words:

> The particular matter, however, upon which the case before their lordships depends * * * is whether the question of an indebtedness by the defendant * * * to the extent of $50,000 was or was not finally disposed of by the trial which took place before the territorial judge, that is to say, whether the language used by the learned judge in disposing of the matter constituted a final judgment of the court.

This question was answered in the affirmative.

In the present case it is true that there were not separate demands. There was one conclusion only; but there were several counts, each putting forward an independent title to the relief claimed; and the effect of the judgment appealed from was as regards the counts in respect of which the demurrer was allowed precisely the same as if the action had gone to trial and judgment had been given. The controversy regarding the matters raised by them is as effectually and conclusively disposed of. And it is this quality of conclusiveness which determines the character of a judgment as a final judgment, not its relation in point of time to other proceedings. When by a judgment a distinct and separate ground of action is, to use Lord Halsbury's words, "finally disposed of" it is in the ordinary use of the words a final judgment with respect to that ground of action.

Our decision in this appeal as to the meaning of the term *final judgment* is, of course, not limited to appeals from the Province of Quebec, but is applicable to those from the other provinces as well. And when it is considered that the "Judicature Act" is now in force in nearly all these provinces and that under it many different kinds of action may be joined together and many different counterclaims submitted by the

defendants resulting possibly in many distinct issues alike of law and fact being raised it will at once be seen how illusory in many cases it would be to put the limited construction contended for upon the word final judgment.

The substantial controversies between the litigants might in many cases be decided by the provincial courts, but if a single issue of law or fact remained open on the record no appeal would lie to this court, and if an appeal eventually came here from the judgment of the provincial court on this final issue we would be precluded in such appeal from hearing or opening the judgments already given in what might well be the most substantial and important subjects of controversy.

I am of opinion that this court has jurisdiction to hear the appeal and the order of the registrar is modified accordingly.

Appeal allowed.

Solicitors for the appellant: *Bisaillon & Bossard.*

Solicitor for the respondents: *Philippe Roy.*

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*March 12, 13.
*March 23.

THE MONTREAL TRANSPORTATION COMPANY (DEFENDANTS). } APPELLANTS;

AND

THE NEW ONTARIO STEAMSHIP COMPANY (PLAINTIFFS).. } RESPONDENTS.

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

Admiralty—Preliminary act—Amendment—Collision—Evidence.

In an action in admiralty claiming damages for injury to plaintiffs' ship, the "Neepawah," through collision with the "Westmount" belonging to defendants the preliminary act and statement of claim alleged that the port quarter of the latter struck the stern of the "Neepawah." The local judge, in his judgment, held that the evidence shewed a collision between the two ships stern to stern and, against objection by defendants' counsel, of his own motion allowed the statement of claim to be amended to conform to such evidence stating that its admission had not been objected to and that defendants were not misled.

Held, that such amendment should not have been made; that it set up a new case and one entirely different from that presented by the preliminary act and statement of claim and greatly prejudiced the defence; and that the local judge was wrong in stating that the evidence was admitted without objection as it was protested against at the trial.

Held, also, that errors in the preliminary act may be corrected by the pleadings but, if not, the parties will be held most strongly to what is contained in their act.

Held, per Davies, Maclennan and Duff JJ., that the plaintiffs had not satisfactorily established that the collision, even that charged under the amendment, had actually occurred.

Per Fitzpatrick C.J., that the evidence proved that no collision between the vessels took place.

Idington J. concurred in the judgment allowing the appeal.

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

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

The material facts of the case are stated in the above head-note. The judgment of the local judge from which the appeal was taken is as follows:—

HODGINS Loc.J.—"Since the argument in this case I have re-read the evidence which I find to be conflicting in many particulars, and it has confirmed the impression I formed at the conclusion of the evidence that the plaintiffs were entitled to succeed.

"The plaintiffs' claim in this case is for damages caused to their steamer 'Neepawah's' propeller by the defendants' steamer 'Westmount,' and the main issue is whether the defendants' steamer, the 'Westmount,' bumped the plaintiffs' steamer, the 'Neepawah,' when passing her in the level between locks 23 and 24 in the Welland Canal on the night of the 20th October, 1904. The night has been described by several witnesses as 'a dark, rainy night'; and this fact and the conflicting statements of witnesses, so general in admiralty cases, have increased the difficulty of deciding to which side a preferable credence should be given.

"But the evidence as to the fact of the bumping of the 'Westmount' on the 'Neepawah' satisfies me that such bumping took place, and that together with what must have been the resultant pressure of the water on the 'Neepawah' caused by the swing of the 'Westmount' in straightening her course into the middle of the canal so as to enter the lock while passing the

(1) 11 Ex. C.R. 113.

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'Neepawah'—caused the 'Neepawah' to swing across the canal as described by several of the witnesses on both sides. See also *Cadwell* v. *The 'C. F. Bielman'* (1).

"The captain of the 'Neepawah' states that he heard the reversing bell of the 'Westmount' and that her reversing had the effect of turning her against the 'Neepawah' and moving her stern against his boat, and that he felt something touch his boat, and that his boat 'at once swung out,' the stern swinging to the bank, and the bow swinging out into the canal, and that when the stern swung over the bank the two flanges of the propeller wheel were broken by striking the stone side wall of the canal.

"The wheelsman, Laroche, states that he was at the wheel steering the 'Neepawah' and kept her straight but did not feel the bump, but was sure that the 'Westmount' had struck the 'Neepawah' 'because we changed direction instantly.'

"Legault, who was at the stern of the 'Neepawah' with a fender, states that the 'Westmount's' stern struck the 'Neepawah' between the aftermast and the boiler house about five or six feet from the stern of the 'Neepawah,' and shoved her on the bank and broke her wheel.

"McLeavy, one of the defendant's witnesses, states that when the steamers were passing their respective sterns were about three feet apart and that he saw the sterns come together and that they were coming closer together as they passed.

"Tracy, a lock tender, an independent witness on shore, states that when the 'Westmount' was head-

(1) 10 Ex. C.R. 155, at p. 156.

ing to enter the lock, she was three or four feet away from the 'Neepawah,' that the 'Westmount' was about half way past the 'Neepawah' when she began to get straightened for lock 23, and that the sides of the after part of the end of the two boats came nearest together.

"Captain Milligan, of the 'Westmount,' states that all the time he was straightening the 'Westmount' he was shifting her stern over the centre line; and that when he was straight for the lock he would necessarily be twenty feet into his port water, and therefore there would not be room for the 'Neepawah' to lie between him and the shore. And he added that he would 'let it go' that the 'Neepawah' had got as far as the centre line,—but not across it,—though he afterwards varied this. The frequent changes of the position of the models made by this witness, and his admissions that he was only guessing has affected his credibility. And similar changes of the position of the models by others of the defendants' witnesses have caused me to hesitate in accepting their fairness in giving evidence. At first some of them placed the models anglewise across the canal, but when attention was called to such positions, some of them altered the anglewise for another position.

"There is another fact which is established by the evidence of the captain of the 'Westmount' that he commenced to straighten for the lock before he had passed the 'Neepawah' and that he thereby got into the 'Neepawah's' water. The rule of the road provides that 'in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies to the starboard side of such vessel.' The 'fairway' mentioned in this

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rule has been defined by Bargrave Deane J. in *The 'Glengariff'* (1) thus: 'A fairway is practically defined by this article to be the midchannel. There is no rule which says you must keep in the fairway, but the rule says that you must keep to the starboard side of the fairway or midchannel in narrow channels.' The waterwidth of the canal between locks 23 and 24 is 108 feet; the 'Westmount's' beam is 43 feet, and the 'Neepawah's' beam is 41 feet. But the 'Westmount' began to straighten her course and thereby to get out of her starboard water and into the 'Neepawah's' water before she had passed the 'Neepawah' and thereby violated this rule of the road. I must also find that the 'Westmount' further failed to observe the rules of the road which direct crossing steam vessels to 'keep out of the way of the other.' These violations of the rules of the road led to the bumping of the stern of the 'Neepawah' which I find was the primary cause of the propellor wheel of the 'Neepawah' striking the boom or wall of the canal and breaking two of its blades.

"The defence raises an objection to the plaintiffs' preliminary act in that article 13 states that 'the parts of each ship which first came into collision were the port bow of the 'Westmount' and the port quarter of the 'Neepawah' abreast of the kitchen.' The plaintiffs' statement of claim alleges substantially the same that the 'Westmount' sheered on the 'Neepawah' and struck her on the port side abreast of the kitchen, and forced her stern against the boom along the stone wall * * * by reason whereof the 'Neepawah's' screw came in contact with the said boom and two of her propeller blades were broken.

(1) [1905] P.D. 106.

"The rule of practice is that no mistake in the preliminary act can be amended unless an application to amend is made before trial. *The 'Vortigern'*(1). But in *The 'Frankland'*(2), Sir Robert Phillimore while refusing to allow the preliminary act to be amended, allowed an amendment of the pleadings—adding that it would be competent to counsel 'to comment on the discrepancy between the pleading and the preliminary act.' And in *The 'Miranda'*(3), the same learned judge said: 'The parties in an action of damages are not bound in their pleadings to repeat any errors or omissions which may exist in their preliminary act; and it is open to them in their statement of claim, or statement of defence to state correctly any facts which may have been omitted or erroneously stated in their preliminary act.'

"Apparently from these decisions the only penalty for errors and omissions in the preliminary act is that they may be 'commented upon by counsel.' But they could be amended if an early application for leave to amend had been made.

"In the *'Dictator'*(4) the court allowed an amendment of the writ by increasing the amount of the claim after judgment; and the plaintiffs were subsequently allowed to sue out execution for the increased amount allowed by the amendment of the writ(5).

"But in *The 'Alice' & The 'Rosita'*(6), the rule that a party seeking redress for an injury can only recover

(1) Swab. 518.
(2) L.R. 3 A. & E. 511.
(3) 7 P. D. 185.
(4) [1892] P. 64.
(5) [1892] P. 304.
(6) L.R. 2 P.C. 214.

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'*secundum allegata et probata*' was held to apply only to cases where the averments alleged in the pleadings were material to the issue. While I must find that the statement of claim incorrectly states the locality of the collision between the two steamers, I think the statement of defence is rather helpful in determining the locality of the bumping by stating that the 'Neepawah's' bow, being light, fell out from the bank and across the canal astern of the 'Westmount' as the latter passed. * * * The 'Westmount' was in her own proper water, and at a considerable distance from the point (*i.e.*, the bow) which the alleged impact of the vessel is said by the plaintiffs to have taken place.'

"This pleading, I think, indicates the locality more fairly than the plaintiffs', that the impact was not near the bows of the two vessels, but somewhere near their sterns—which the evidence warrants me in finding. And as the plaintiffs' pleading has not apparently misled the defendants, and as the points as to the preliminary act and pleadings were not taken at the opening, or early in the case, I think the plaintiffs may have leave to amend their pleading, as it seems the defendants have not been prejudiced.

"After the amendment the decree will be for a reference to the registrar to assess the damages and to tax the plaintiffs their costs of the action and reference."

Geo. F. Henderson K.C. and *Francis King* for the appellants. The preliminary act cannot be amended. Errors therein may be corrected by the pleadings, but if not so corrected the act will govern;

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Williams & Bruce Ad. Prac., 3 ed., p. 369; *Secretary of State for India* v. *Hewitt*(1).

The amendment after judgment was manifestly improper. See *The "Miranda"*(2); *The "Frankland"* (3); *The "Vortigern"*(4), as to the absolute necessity of fair notice of the material facts.

Lynch-Staunton K.C. and *Logie* for the respondents. This court will not reverse on questions of fact. *The "Picton"*(5); *The SS. "Arranmore"* v. *Rudolph* (6).

The pleadings in an action in admiralty can be amended if the preliminary act cannot and the discrepancies between the two is only a ground of comment by counsel. See *The "Frankland"*(3); *The "Miranda"*(2).

The pleadings did not mislead the defendants and the learned judge was justified in allowing the amendment. *The "Alice" & The "Rosita"*(7).

THE CHIEF JUSTICE.—By the judgment appealed from, the local judge in admiralty (Toronto District), found that a collision occurred between the defendants' (appellants') ship "Westmount" and the plaintiffs' (respondents') ship "Neepawah," and that, for the resulting damage, the defendants are liable. There is the usual order for a reference to the registrar to assess the damage.

The collision is alleged to have taken place be-

(1) 60 L.T. 334.
(2) 7 P.D. 185.
(3) L.R. 3 A. & E. 511.
(4) Swab. 518.
(5) 4 Can. S.C.R. 648.
(6) 38 Can. S.C.R. 176.
(7) L.R. 2 P.C. 214.

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tween 11 o'clock and midnight on 20th October, 1904, in the stretch of water known as the level between locks 23 and 24 on the Welland Canal. This stretch is said to be 744 feet long and 110 feet wide at its widest part. The boats are each full Welland Canal size; about 250 feet long and 45 feet wide. The night was dark and rainy. This action was entered on the 5th March, 1906,—almost seventeen months after the occurrence and the witnesses were examined in April and May, 1907. The entry in the log of the "Neepawah" made at the time by the captain is:

"Broke my wheel between lock 23 and 24 at 11h 30m p :m :"

No mention is made of the "Westmount" or of a collision.

It further appears that a protest was made by the captain of the "Neepawah" and, although at the trial notice to produce was served, it was not forthcoming.

We are, therefore, without the aid of the written records usually made when a ship has been in collision.

We have this further difficulty,—that, in the plaintiffs' preliminary act, dated 22nd March, 1906, the port bow of the "Westmount" and the port quarter of the "Neepawah," abreast of the kitchen, are the parts of the ships which, it is alleged, first came in contact; and, in the statement of claim, the collision is described as having occurred in this way:

> The "Westmount" sheered on the "Neepawah" and struck her on the port side abreast the kitchen;

so that, in this respect, the parties went to trial practically on the statement of facts contained in the preliminary act. The captain of the "Neepawah" in his

examination for discovery says that the bluff of the "Westmount's" bow struck the "Neepawah's" stern.

The judge, notwithstanding all this, finds on the evidence that there was a collision and

> that the impact was not near the bows of the two vessels, but somewhere near the sterns.

It is to be observed that the evidence to support this finding was admitted against the protest of the defendants' counsel, made at the beginning of the trial, and that no application was made to amend the preliminary act or the pleadings.

In fact, the statement of claim was not amended until after the judgment and then on the invitation of the judge.

The rule requires that a preliminary act should be filed so that particulars of the rival cases set up on behalf of the two ships which are alleged to have been in collision should be given when the facts are supposed to be fresh in the memory of both parties and the rule as to amendments is stated in Halsbury's Laws of England, vol. 1, page 94:

> Alterations or amendments will not be allowed in the preliminary act at the instance of the parties who have filed them, but, where a question in a preliminary act is insufficiently answered, the court, on the application of the opposite party, may direct the question to be properly answered and the preliminary act to be amended accordingly.

The plaintiffs should have been held to be bound by their preliminary act and such an amendment as was made here, if permitted, would defeat completely the object of the rule requiring the preliminary act.

Further, on the facts, the log is, of course, no evidence for the ship; but the legitimate inference is, where there is no entry or mention in the log, that the

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circumstances of the collision were such that if the true facts were entered they would be unfavourable to the vessel and weight must be given to this fact when the testimony is conflicting. Further, it is to be borne in mind that it is upon the libellant to shew by a fair preponderance of evidence that the collision happened and that it was the cause of the injury.

Of the witnesses examined by the plaintiffs, Lagault, the second mate of the "Neepawah," is the only one who says that he saw the collision, and he indicates a contact between a point on the "Westmount" between her aftermast and boiler-house and a point on the "Neepawah" about five feet forward of the stern, back of the deck-house altogether. The plaintiffs' other witnesses came to the conclusion that there was a collision as a matter of inference. The engineer of the "Neepawah," who was on deck, was not examined, although available.

On the other hand, for the defendants, seven members of the crew observed the passage of the vessels; they were necessarily only a few feet apart and they swear positively that the "Westmount" did not touch the "Neepawah." The engineer who was on board, sent out under the builders' guarantee, was not examined because, at the time of the trial, he had returned to England.

On the facts, I am of opinion that it is abundantly proved that the vessels did not collide. I do not see how the breach of the rule as to crossing ships, referred to by the judge, can be applicable to the facts of this case; and if applicable, it is certainly not proved that a non-observance of the rule in any way contributed to the damage. The vessels were here not crossing ships; they were what is known as passing

ships, in which case there is no statutory rule; it is merely a question of good seamanship.

On the whole, I would allow the appeal with costs.

DAVIES J.—This is an appeal from the judgment of the local judge in admiralty of the Toronto Admiralty District, holding the SS. "Westmount," owned by the appellants, liable for damages to the SS. "Neepawah," owned by the respondents, arising out of an alleged collision between the two while passing each other in the Welland Canal, on the 20th of October, 1904, about 11.30 p.m.

The damage sustained by the "Neepawah" consisted in the breaking of two of her propeller blades by reason of the same coming in contact with a floating boom of timber about two feet wide at water's edge along the stone wall of the level of the canal between locks 23 and 24.

The "Neepawah" was going up the canal loaded with merchandise, drawing eight feet forward and twelve and a half feet aft. The "Westmount" loaded with grain to canal draft bound down. The steamers met and passed each other port to port in the level of the canal between the two locks, which level is about 800 feet long and 110 or 112 feet broad.

The steamers were each about 250 feet long, the "Westmount" 42 or 43 feet broad, and the "Neepawah" 41 feet. The night was dark and rainy, and there was much conflict as to the "Westmount's" contention that there was a strong breeze blowing at the time.

The plaintiffs' preliminary act was filed on the 22nd of March, 1906, some eighteen months after the

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damage occurred, and their statement of claim, on the 2nd of April, of the same year.

In such preliminary act it is stated that the parts of each ship which first came into collision were

> the port bow of the "Westmount" and the port quarter of the "Neepawah," abreast of the kitchen.

The statement of claim substantially repeated the preliminary act on this point though in somewhat different language, but without any correction of the statement in the preliminary act as to the parts of the two vessels which first came into collision and alleged that by reason of the "Neepawah" being so struck her screws came in contact with the boom and her propeller blades were broken. The captain of the "Neepawah" when afterwards giving his evidence on discovery stated that it was the bluff of the bow of the "Westmount" which struck him and drove his starboard quarter over the boom. In giving his evidence at the trial, he said that he did not know what part of the "Westmount" struck his boat, saying: "It was the stern or midships or something." As he said he did not see any collision and was only giving an impression.

The "Westmount" in her statement of defence denied that there had been any collision between the steamers as charged and claimed that the damage to the "Neepawah's propeller occurred by its coming in contact with the boom, without any contributory fault of the "Westmount."

The parties went down to trial in April, 1907, on the issues thus raised by the preliminary act and the pleadings. There was, as is often the case, much conflicting evidence and, in the result, the learned judge found that there was an actual collision between the

two steamers which caused the damage to the "Neepawah's" propeller, not, as charged in the preliminary act and the pleadings, from the *bow* of the "Westmount" striking the stern or quarter of the "Neepawah," but from the *stern* of the "Westmount" striking the stern or quarter of the "Neepawah" as the former passed the latter and was straightening in order to enter the lock 24.

This was an entirely new and different case and opened up entirely new and different grounds of negligence, but the learned trial judge held that the plaintiffs' pleading

> had not apparently misled the defendants and that the point as to the preliminary act and pleadings were not taken at the opening or early in the case and the plaintiffs might amend their pleadings as it seemed the defendants had not been prejudiced.

We are, however, clearly of the opinion that the learned judge was in error in holding that the plaintiffs' pleadings and preliminary act had not misled the defendants as to the case to be tried, and that he also fell into an error in thinking that the point had not been taken by the defendants at the opening or early in the case, and that the defendants had not been prejudiced.

The record shews clearly that the objection was taken as soon as the evidence of the first witness, Captain Patenaude, shewed that the plaintiffs were not going to stand by the statements in the preliminary act and the pleadings, but were about to put forward a new and different case. No application was made to amend the pleadings at the trial so as to enable the evidence to be given on the new and altered case. The captain of the "Neepawah" had been examined on discovery and had given his evidence confirming the case

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as put forward in the preliminary act and the pleadings. The defendants did not, therefore, have any notice of the contemplated change of front or of the new case they were called upon to meet.

That original case substantially charged the officers of the "Westmount" with so badly navigating their steamer that before her bow had passed the port quarter of the "Neepawah" it had negligently been run into or against such port quarter and inflicted the damage to the propeller by forcing it against the boom along the canal. The new case found by the learned judge and to meet which the pleadings were directed to be amended was that the "Westmount's" stern had been swung against the "Neepawah's" stern or quarter. It was an entirely new case, involving questions of negligence on the "Westmount's" part different from those involved in the case as originally stated in the preliminary act and pleadings and calculated greatly to prejudice the defendants. It was not one which, in our opinion, should, under the circumstances, and at the time, have been allowed. It is not necessary for us, in the view we take of this case, to determine whether in any case the court would allow a party at the hearing to contradict his own preliminary act. The authorities collected in Williams & Bruce's Admiralty Practice (3 ed.), at pages 368-9, seem clear that, at any rate, applications to amend mistakes in the preliminary act will not be entertained by the court. The object of the rule requiring these preliminary acts is to obtain a statement *recenti facto* of the leading circumstances of the case so as to prevent either party varying his version of the facts to meet the allegations of his opponent. The preliminary act must, therefore, remain as it was prepared

and filed and will not itself be allowed to be amended. But the same rule does not necessarily follow with respect to the pleadings.

In the case of *"The Frankland"*(1), in 1872, Sir Robert Phillimore allowed an amendment to be made in the defendants' answer, but refused to allow any in the preliminary act, saying the objection to the latter did not apply to an amendment to the answer *as the application was made before any evidence had been taken.* Afterwards, in 1881, in the case of *"The Miranda"*(2), the same learned judge in refusing an application to allow a mistake in a preliminary act to be amended, even though the application was made before the hearing of the suit, observed that he adhered to the practice he had always followed of refusing to allow amendments to the preliminary acts. But he went on to say, at page 186:

> The parties in an action of damages are not bound, in their pleadings, to repeat any error or omissions which may exist in the preliminary acts, and it is open to them in their statement of claim or statement of defence to state correctly any facts which may have been omitted or erroneously stated in their preliminary acts.

From these authorities it would appear that the statement in the preliminary acts are not absolutely binding on the parties making them if they have been corrected in the pleadings before evidence has been taken.

In the following year (1883), in the case of *"The Eugènie"*, Mr. Justice Butt is said, in a note to Williams & Bruce, Admiralty Practice (3 ed.), at page 368,

> to have intimated that if the parties in damage suits chose to avail themselves of pleadings framed in accordance with the forms ap-

(1) L.R. 3 A. & E. 511. (2) 7 P.D. 185.

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pended to the new rules so that the pleadings afforded the court no sufficient information, the parties would be held by him most strongly to the statements contained in their preliminary acts; and that any mistake or incorrect statement in the preliminary act of either party would be visited most strongly against the party on whose behalf it was filed.

It would, therefore, appear that an error or mis-statement of a material fact in the preliminary act is not absolutely fatal or binding on the party making it. Such a mistake may be rectified in the pleadings afterwards, and, if so rectified, will be a subject for comment at the hearing. But, if the parties go to trial without pleadings, or prepare pleadings which do not correct the errors or mis-statements of the preliminary act, and do not afford the court sufficient information, in those cases, the parties will be held most strongly to their preliminary acts.

Now, in the case before us, there does not appear to have been any application to amend the pleadings before trial or any chance given to the defendants to shew prejudice. The parties had gone down to trial on a clear and distinct issue respecting the navigation of their ships. The pleadings did not correct the grave and important error of the preliminary act of the plaintiffs. The evidence shewed and it is admitted that the plaintiffs' claim as formulated in the preliminary act and pleadings could not be sustained. In addition to that it appeared in the evidence that, on the occasion of the alleged collision, the captain of the "Neepawah" did not make any complaint against those aboard of the "Westmount," either to them or to the lock-master or any one else; that, in the discharge of his duty, he had shortly afterwards entered the fact of his loss and damage in his log-book, as follows:

Broke my wheel between lock 23 and 24 at 11 p.m., weather very dark, no wind; start to blow S.S. West at 1.30 a.m., Friday.

Not a word or hint of their having been any collision between the steamers or that the "Westmount" was in any way responsible for the breakage. Then, although the captain stated he had made a protest at Fort William and notice to produce it had been given, no protest was produced. In matters of this kind where serious loss and damage have been caused by collision and consequent demurrage, it is common knowledge that protests are made as soon after the accident or injury as reasonably possible, so as to record the facts officially and to enable the owners to recover their insurance.

All these circumstances combined to require a very strong and plain case to be made out before an amendment, practically substituting, at the conclusion of the trial, a new case for the one originally formulated, should have been made, and, in my judgment, no such case was made out.

But, taking the judgment as it stands, I am not able to concur in the finding of fact. One witness, and one only (Legault), pretends to speak from sight or knowledge of the actual collision having taken place as found by the learned trial judge. His evidence, however, on the point, is directly opposed to a large mass of testimony of the officers and men of the "Westmount," confirmed by that of the lock-master, Hillman and to some extent by that of the lock-master, Jordan, that the propeller was broken before the vessels could assume the relative positions in which the judgment finds they touched each other. At the moment when the propeller was heard to break, these witnesses concur in stating that the "Westmount" was one-half way or, at the most, two-thirds way past the "Neepawah," according to some of them, the bow

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of the latter had swung out, whether caused by the wind or by some other cause, and the reversing of her screw had caused it to break against the boom. The position of the bow of the "Westmount" at the time the propeller broke was, according to these witnesses, about abreast of the port quarter or stern of the "Neepawah," while the stern of the "Westmount" would necessarily not then have passed the "Neepawah's" bow. But the case, as originally framed, that the bow of the "Westmount" then collided with the stern quarter of the "Neepawah" has been abandoned as untenable and the new case attempted to be set up is absolutely inconsistent with the mass of testimony shewing that the propeller was broken before the bow of the "Westmount" passed the stern of the "Neepawah." This most important fact seems to be corroborated by the evidence of the captain of the "Neepawah" himself.

No good purpose can be gained by a critical analysis of each witness's evidence. The contradictions are impossible of reconcilement. The only witness, McLeavy, who above all others had the best chance to see whether the stern of the vessels collided at the place and moment found, distinctly and emphatically denied it and said that their sterns passed each other at least three feet apart.

The learned judge has, I venture to think, misunderstood this witness's testimony.

The effect, it seems from the judgment to have produced on his mind, was that the witness swore "he saw the sterns come together"; which, I think, from the way he quotes the statement, the learned judge understood as actually colliding. Now, a reference to this witness's evidence shews that, being a fire-

man, he ran up to see the boats passing and stood on the port quarter, opposite the towing machine, aft of all the deck-houses, leaning over the side with his arms on the rail, and did not see the "Neepawah" until they were, at least, half-way past each other. The bluff of the "Neepawah's" bow was about ten feet away from the "Westmount's" amidships, when he first noticed the other vessel. The sterns of the vessels were about three feet apart at the time they passed each other. The "Neepawah's" engines were stopped when he got abreast of her stern and he heard nothing and did not know the wheel had broken before he reached the lock. In response to the judge's question:

> Can you say definitely, now, whether the boats touched?

he answered,

> Yes. I am sure the boats didn't touch.

Now, the position this witness stood in enabled him to see and judge on this crucial point better than any one else. His evidence confirms that of the witnesses who proved that the propeller broke before the sterns came near each other at all. In point of fact, it had broken before he came on deck, as the engines had then stopped. So far from the judge discrediting this witness, he appears to have accepted him as a truthful witness, though at the same time misunderstanding what he said.

On the whole and recognizing the full difficulty of reconciling the conflicting testimony of the witnesses, I have concluded that it clearly appears the plaintiffs failed to make out the new case of negligence he was permitted to set up.

I do not desire to be understood as assenting to the assumption of the trial judge that the rules with

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respect to crossing steam vessels applied under the circumstances to these steamers, nor is it necessary for me to express any opinion whether the canal level was a narrow channel within the meaning of the rules or not.

My decision is based, first, upon the ground that there was no evidence at all to sustain a finding for the plaintiff, on the case as set out in the preliminary act and the pleadings; that, under the facts as proved, it was not proper to have made the amendments allowed after the trial and so set up an entirely new and different case from that stated in the preliminary act and pleadings, and that the preponderance of the evidence is clearly against the plaintiffs even on the new case set up.

The appeal should be allowed with costs in this court and in the court below, and judgment given for the defendants, dismissing the action.

IDINGTON J. agreed that the appeal should be allowed with costs and the action dismissed with costs.

MACLENNAN and DUFF JJ. concurred with Davies J.

Appeal allowed with costs.

Solicitors for the appellants: *Smythe, King & Smythe.*
Solicitors for the respondents: *Chisholm & Logie.*

THE QUEBEC RAILWAY, LIGHT AND POWER COMPANY (DEFENDANTS) ..... APPELLANTS;

AND

MATHILDA FORTIN (PLAINTIFF). RESPONDENT.

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*Feb. 24, 25.
*May 5.

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

Negligence—Master and servant—Duty of employee—Insulation of electric wires—Onus of proof.

An electric line-foreman in the company's employ met his death from contact with imperfectly insulated live wires while at work in proximity to them in the power-house. The evidence left some doubt whether the duties of deceased included the inspection and care of the wires both inside and outside of the power-house, or whether his engagement was to perform the duties in question in respect only to the wires outside the power-house walls.

Held, that the onus of proof as to the point in dispute was on the defendants and, such onus not having been satisfied, they were liable in damages.

Judgment appealed from affirmed, Davies J. dissenting on a different view of the evidence, and holding that the duties of deceased included the inspection and care of the interior wiring.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Quebec, whereby the plaintiff's action was maintained with costs.

The material circumstances of the case and questions at issue on the appeal are stated in the judgments now reported.

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

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Stuart K.C. for the appellants.

Alleyn Taschereau for the respondent.

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

DAVIES J. (dissenting).—This action was brought by the widow of the deceased, one Wilfrid Guimont, to recover damages from the company for the death of Guimont caused by an uninsulated wire in the power-house of the company, at Montmorenci.

The question as to the liability of the appellant company for the death of the deceased turns entirely upon whose duty it was to see that the wires were sufficiently and properly insulated.

If this was part of deceased's duty as line-foreman, then it is quite clear that his death consequent upon his failure to discharge it could not be charged against the company or held to be merely contributory negligence on his part.

In the case suggested his own neglect would be clearly the cause of his death, and of course it could not be contended successfully that a company or employer who engaged a man for the special duty of seeing that dangerous wires transmitting electricity were kept properly insulated could be held liable for his death in case that death was caused by his own neglect of duty.

I have examined and considered the evidence upon the crucial question as to the duty of the deceased with respect to the wires of the company passing into and through the power-house, and, in my opinion, the evidence of Mr. Doddridge, the superintendent of

the company, and of Langford, described as the company's master mechanic, leaves no room for reasonable doubt that it was as much the duty of the deceased to inspect and keep in repair the electric wires running into and through the power-house as those parts of the wires outside of the power-house. With respect to the latter his duty was admitted and I think the positive testimony of the officers I have mentioned as to deceased's duty in inspecting and keeping the wires in the power-house properly insulated and repaired and his frequent and regular visits to the power-house for the ostensible purpose of discharging that duty leave no room for reasonable doubt on the point or on his understanding of it.

As the death of the deceased was caused by his negligently passing or attempting to pass under a wire within the power-house which had become uninsulated and out of repair and which it was his special duty to keep insulated and repaired, I think the appeal should be allowed and the action dismissed.

IDINGTON J. concurred with Maclennan J.

MACLENNAN J.—After a very careful consideration of this case I am of opinion that we ought to dismiss the appeal.

The question is whether, upon the evidence, the condition of the wires which caused the death of the plaintiff's husband was due to his own neglect of duty; whether in fact the deceased was the person whose duty it was, as the servant of the defendants, to have inspected the wires and to have repaired their defective condition.

The company have a power-house at Montmorenci

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Falls, from which they supply light and power to the City of Quebec and other places by means of overhead electric wires.

The power-house contains a very large number of wires, some of them of very high voltage. These or most of them, are strung high overhead. A platform, three or four feet wide and fourteen feet above the floor, stretches across from side to side and is only reached by a moveable ladder.

The deceased was foreman of the company's linemen, and was subject to the orders and direction of Mr. Doddridge, the company's superintendent, and of Mr. Langford, their master mechanic. Mr. Doddridge describes his character and qualities as *"splendid,"* and Langford describes him as "a good man," "a man in whom he had every confidence," "a man that knew his business," "a very competent man," "one of our best men."

It is not disputed that his duty was, with the assistance of men under him, to keep the company's wires, outside of the power-house, in order. But the accident having occurred within the power-house, the question is whether he had any duty of inspection and repair over the wires, or those parts of them, which were within the power-house.

It is in evidence that, about six months before the accident, he had, in obedience to special directions, changed the positions of two wires in the power-house. In their changed position, these two wires crossed the platform, at a considerable angle, and about two and a half feet above it.

On the day of the accident he had been directed to change some other wires and, with an assistant, had climbed the platform, by means of a ladder, to prepare

to do the work directed. While passing under the wires, which he had placed six months before, he was killed by contact with one of them and it was found that for about ten inches, immediately over the platform, one or both of the wires had not the usual or any isolation coating upon them. But there is no evidence how that defect had arisen, or how long it had existed.

Several witnesses say that the duties of the deceased were confined to the lines or wires outside the power-house, except when he received special orders. Mr. Doddridge says that he, Doddridge, solely had charge of the linemen, including the deceased, but he does not say that the deceased had any duty of inspection within the power-house.

What he says rather suggests the contrary; he says:

> He had charge of all the linemen, what we call all *the outside linemen* of all the high tension work, of the main line work, and work around the power-house.

The only witness who says that the deceased had any duty of inspection within the power-house is Mr. Langford. He says positively that he had the duty of inspecting the wires within as well as those without the power-house, and to see that they were in good order. In cross-examination, however, he says he did not know whether there was any written agreement with the deceased, and that that would come under Mr. Doddridge's position.

> He did not know who engaged the deceased, but he was under Mr. Doddridge,

which I take to mean that the duties of the deceased must have been arranged between him and Mr. Doddridge. When pressed whether deceased was obliged to inspect the wires inside the power-house, his an-

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swer was: "He was engaged as line-foreman." Then he says he himself had charge of the power-house, had a mechanic for the power-house,

who is specially appointed to take care of the power-house, and for the inspection of the different works in the power-house, dynamos, and water-wheels, and that sort of thing.

There is no witness who says he ever saw the deceased do anything in the power-house, during all the six years of his employment, except upon special instructions.

I think the proper conclusion is that there is no sufficient evidence that the deceased, as the servant of the defendants, had the duty of inspecting and repairing the live wire which caused his death.

I also think that this conclusion is greatly strengthened by the high character given to the deceased by Doddridge and Langford, his superior officers. It is not to be supposed, without very clear testimony to the contrary, that such a man would have neglected to inspect the wires in the power-house, as well as those without, and to discover and repair the defective and dangerous wire which caused his death, if it had been his duty to do so.

The appeal should be dismissed.

DUFF J.—The only point seriously in dispute on this appeal is whether or not the husband of the respondent was entrusted with, as one of the duties of his employment, the responsibility of seeing to the safe insulation of the wires from which he received the shock which caused his death.

On this question the onus was on the appellants and, after a careful examination of the evidence, I

agree with the court below that that onus has not been satisfied.

Appeal dismissed with costs.

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Duff J.

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

Solicitors for the respondent: *Lavergne & Taschereau.*

1908

*Feb. 27.
*May 5.

ROBERT MEIGHEN (PLAINTIFF).....APPELLANT;

AND

ABRAHAM L. PACAUD (DEFENDANT).RESPONDENT.

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

Title to land—Construction of deed—Easement appurtenant—Use of common lane—Overhanging. fire-escape—Encroachment on space over lane—Trespass—Right of action.

A grant of the right to use a lane in rear of city lots "in common with others," as an easement appurtenant to the lots conveyed, entitles the purchaser to make any reasonable use, consistent with the common user, not only of the surface but also of the space over the lane. The construction of a fire-escape, three feet wide with its lower end 17 feet above the ground (in compliance with municipal regulations), is not an unreasonable use nor inconsistent with the use of the lane in common by others; consequently, its removal should not be decreed at the suit of the owner of the land across which the lane has been opened.

Judgment appealed from affirmed, Maclennan J. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, by which the plaintiff's action was dismissed with costs.

The respondent purchased several lots shown on a plan of subdivision of a block of land fronting on St. Catherine Street, in Montreal, from the plaintiff's *auteurs* "with the use in common with others" of a lane in rear, 18 feet in width, leading from Drummond

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

Street to Mountain Street, and giving access to the property from the last mentioned streets. He constructed buildings upon the lots he had purchased extending from St. Catherine Street in the front to the line of the lane in rear, and subsequently, in accordance with the requirements of municipal regulations, erected a projecting staging or fire-escape on the rear wall of the building projecting about three feet over the lane, the lower portion being about 17 feet above the surface of the ground. Several other lots in the same sub-division were sold to other persons, who were also given the right of using the lane, in similar terms. The appellant, having purchased the remainder of the land thus subdivided, brought the action to compel the respondent to remove the fire-escape, claiming that the lane had been conveyed to him with the remainder of the property and that the respondent had trespassed thereon by so erecting the overhanging fire-escape.

The action was dismissed by Dunlop J., at the trial, and this decision was affirmed by the judgment now appealed from, Bossé and Trenholme JJ. dissenting.

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

Campbell K.C. and *Brosseau K.C.* for the appellant.

Mignault K.C. and *Beullac* for the respondent.

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

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MEIGHEN v. PACAUD.

Davies J.

DAVIES J.—The controversy between the parties to this appeal is as to the proper construction to be placed upon the clause of the defendant's deed which says that it was

> the intention of the vendors to sell the land as therein described with the use in common with others of the said lane in the rear.

The premises are situated in the heart of the City of Montreal.

The appellant, who after the respondent had purchased his land became the owner of the lane in question subject, of course, to whatever rights the respondent and others had obtained over it by their deeds, claimed that such rights were simply rights of way and that the attaching by the respondent to his house of a fire-escape which for its width extended over the lane was in excess of his rights and in violation of the appellant's.

The courts below held that the respondent's rights were not limited to mere rights of way over the lane embracing access to and from his house, but that they included a reasonable use of the lane as such for all proper purposes not inconsistent with the common use of others entitled to use the lane or with the appellant's ownership of the soil. They held that the construction of the fire-escape complained of, in compliance and accordance with the municipal regulations, was such a reasonable use.

I agree that, looking at the situation of the land and the buildings and of the parties with relation to the lane and the ordinary streets of the city, this construction is a correct one. I do not think a construction which gave the respondent a mere right of way in and over the lane and denied him the right to its use for the purpose of obtaining light and air for his house, the rear of which faced on the lane, would be a

reasonable construction. As pointed out, such limited construction involved the right of the owner of the soil to build up the lane and exclude light and air from the windows of all the houses facing on it, provided a sufficient right of way was left over the soil. I cannot agree that this is a reasonable construction of the deed.

The common user by others entitled to use the lane is the test with which to measure the respondent's rights in the lane. Any user inconsistent with that common user would be illegal as would also any user interfering with the rights retained by the owner of the soil of the lane. It was not a question in this case as to the manner of the construction of the fire-escape or whether it came down too far or was too broad but simply whether or not his rights entitled him to put any fire-escape at all where he did. As far as the evidence goes, it seems to have been constructed in accordance with the municipal regulations, and the right to so construct it does seem to me to be a not unreasonable use of the lane and not necessarily to interfere with the common use of the lane by others entitled to such common use.

I agree that the appeal should be dismissed with costs.

IDINGTON J.—I think that the instrument to be interpreted when read in light of the surrounding facts and circumstances attendant upon its execution does not provide merely for a passage way over the land in question, but for the more extended use of that space implied in such uses as were then being made of the same by other owners of adjoining properties claiming in the same right and to become users in common with the respondent.

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MEIGHEN v. PACAUD.

Idington J.

The primary use intended no doubt was to be that of a passage way and anything clearly inconsistent with that possibly might be complained of.

The case launched, however, was neither confined to nor substantially founded upon such a complaint.

The contention here seems an extreme assertion of a naked right of property the maintenance of which might injure others and do the appellant no good if my interpretation of the instrument is correct.

The language used is not that usually employed for a mere right of passage way.

I think the appeal should be dismissed with costs.

MACLENNAN J. (dissenting).—I would allow this appeal for the reasons given by Mr. Justice Bossé in the Court of King's Bench, to which I may be allowed to add some further reasons.

A lane is a way, a strip of land used for passage to and fro. It may be private, but it is usually owned by one person, who, or some antecedent owner, has given the right to use it to one or more other persons. That is the present case. One Laurie subdivided a nearly square piece of land fronting on St. Catherine Street, Montreal, into twenty-three building lots, with a lane eighteen feet wide running across the centre, from Mountain Street to Drummond Street, and he or his representatives sold a number of these lots, extending from St. Catherine Street to the said lane in rear, to the respondent. In the deed, the north-west boundary of the land so sold is described as a *common lane,* and the interest in the lane which is conveyed is described thus:

with the use, in common with others, of the said lane in rear.

It is plain, therefore, that the result of the conveyance was that the vendor remained owner of the lane and the purchasers became entitled to use it in common with others, that is, to use it as a way.

Whatever right the respondent acquired was fixed once for all at the date of his deed. He has acquired no further right since.

Now I will suppose that at that time the vendor still owned, and retained for his own use, some of the land on the other side of the lane, opposite to that of the respondent. Can it be doubted that he could build upon that land, excavating vaults and cellars and extending them beneath the lane to its full width? Or that he could project the upper stories of his buildings across the lane, for its full width, at a sufficient height, not to interfere with the use of the lane as a way ?

It seems to me that there can be no doubt that he could do so. And, if he could, he could sell and dispose of those rights to any other person.

If that is so, it follows that, by the creation of his fire-escape, the respondent has been guilty of a trespass, and an illegal invasion of the appellant's property, and an unauthorized use of the lane otherwise than as a way.

DUFF J.—I concur in the opinion stated by Mr. Justice Davies.

Appeal dismissed with costs.

Solicitors for the appellant: *Brosseau, Cholette & Tansey.*

Solicitors for the respondent: *Goldstein & Beullac.*

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*March 5, 6.
*May 5.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS). } APPELLANTS;

AND

CHARLES HANSEN (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH WEST TERRITORIES.

Operation of railway—Yard siding—Sloping station platform—Private passage—Dangerous way—Negligence—Procedure at trial—Misdirection—Objections to charge to jury—Practice.

Where, on a specific objection to his charge, the trial judge recalled the jury and directed them as requested, the contention that the directions thus given were erroneous should not be entertained on appeal.

APPEAL from the judgment of the Supreme Court of the North West Territories affirming the judgment entered by Stuart J. on the verdict of the jury awarding the plaintiff $6,500 damages, with costs.

The action was to recover damages for injuries sustained by the plaintiff at Red Deer Station, on the Calgary and Edmonton Branch of the railway of the defendants, caused, as alleged, by the dangerous manner in which the approaches to the station and station-platform were constructed and the imprudence of the company in shunting a train on a yard-siding, close to the platform, without proper warning by a man placed at the end of the train.

At the first trial the jury assessed the damages at

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$3,500, and, on this verdict, a judgment was ordered to be entered from which the company appealed to the court in banc and obtained an order for a new trial (1). The judgment entered at the second trial was affirmed by the judgment now appealed from.

The principal contentions on the appeal were, that the only negligence relied on in the courts below was the character of a sloping platform at which the accident complained of occurred and, as to which, there was no evidence of faulty or negligent construction; that the case came directly within the authority of *Crafter* v. *The Metropolitan Rway. Co.* (2); that the injuries sustained resulted from the fault of the plaintiff in failing to look out for the train when he was running towards the yard-tracks and aware that the usual operations of shunting were being carried on; that the case should have been withdrawn from the jury on account of contributory negligence by the plaintiff, and that the judge's charge to the jury was misleading and had not been properly corrected after objections had been taken by counsel and the jury re-called for further directions by the judge.

W. Nesbitt K.C. and *Bennett K.C.* for the appellants.

J. Travers Lewis K.C. and *Smellie* for the respondent.

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

(1) 4 West. Law Rep. 385. (2) L.R. 1 C.P. 300.

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Davies J.

DAVIES J.—With much hesitation I have acceded to the view of the majority of the court dismissing this appeal.

I had formed a strong impression that the charge of the trial judge to the jury was misleading and was not properly corrected after objections had been taken to it by counsel.

I thought that a new trial should be granted on the ground I have stated, but, under the circumstances, will not press my views to the extent of formally dissenting.

IDINGTON J.—I concur in the opinion stated by Mr. Justice Duff.

DUFF J.—The only difficulty I have felt in this appeal concerns the question of contributory negligence, and I have come to the conclusion that the evidence does not so conclusively establish a case of contributory negligence as would have justified the withdrawal of the case from the jury.

The complaint that the learned trial judge misdirected the jury raises a topic which I think the defendants are not entitled to agitate in this court.

It is a forensic principle of some importance that a litigant is bound by the way in which he conducts his case at the trial; he may not play fast and loose. In this case a specific objection to the charge of the trial judge was taken at the trial, and the trial judge was asked to correct his charge on the point in question by giving a specific direction to the jury, and that request was complied with.

In these circumstances it would, I think, be a violation of the principle referred to as well as a depar-

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Duff J.

ture from the settled course of this court to give effect at this stage to the contention that the direction thus requested to be given, and thus given, was an erroneous direction.

Appeal dismissed with costs.

Solicitors for the appellants: *Lougheed, Bennett & Co.*
Solicitor for the respondent: *J. L. Crawford.*

1908

*March 13.
*May 5.

JOSEPH BATTLE (PLAINTIFF).....APPELLANT;

AND

HERVEY WILLOX (DEFENDANT)....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Share of profits—Absolute or conditional undertaking—Construction of contract—Damages.

A contract between W. and B. recited that W. owned land to be worked as a gravel-pit; that he was about to enter into contracts for supplying sand therefrom; and that he had requested B. to assist him financially to which B. had consented on certain conditions; it then provided that "the said W. is to enter into contracts as follows" naming five corporations and persons to whom he would supply sand to a large amount at a minimum price per yard; that B. would indorse W.'s note to the extent of $5,000 and have 60 days to declare his option to take a one-fourth interest in the profits from said contracts, or purchase a one-third interest in the property and business; that each party would account to the other for moneys received and expended in connection with the property; that if either party wished to sell his interest he would give the other the first choice of purchase; and that "each of the parties hereto agrees to carry out this agreement to the best of his ability according to the true intent and meaning of the same and to do what he can of mutual benefit to the parties hereto." B. indorsed notes as agreed. W. entered into two of the five contracts, sold a quantity of sand and then sold the property, without notice to B., who brought an action claiming his share of the profits that would have been earned if the five contracts had been entered into and fully carried out.

Held, Fitzpatrick C.J. and Maclennan J. dissenting, that the undertaking by W. to enter into the five contracts was absolute and having by the sale put it out of his power to perform it he was liable to B. who was entitled to damages on the basis of the contracts having been carried out.

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Held, also, Duff J. *hesitante*, that the clause quoted did not modify the rigour of the absolute covenant by W. to procure these contracts in any event.

Judgment of the Court of Appeal (10 Ont. W.R. 732) reversed, and the judgment of the Divisional Court (9 Ont. W.R. 48) reversing that of Anglin J. (8 Ont. W.R. 4) restored.

APPEAL from a decision of the Court of Appeal for Ontario(1) reversing the judgment of a Divisional Court(2) which reversed that of Anglin J.(3) on appeal from the report of a Master to whom the case was referred for assessment of damages.

The parties to the appeal entered into an agreement in the following terms—dated Sept. 8th, 1904.

"Whereas, the said Willox is the owner of parts of lots 4 and 17 of the Township of Stamford in the County of Welland, and the same is intended to be worked as a gravel pit.

"Whereas, the said Willox is about to enter into certain contracts hereinafter referred to for the supply to certain persons and corporations of sand from said gravel pit.

"Whereas, the said Willox has requested the said Battle to assist him financially in the development of said gravel pit, and in the carrying out of the said contracts, and the said Battle has consented upon certain conditions.

"Now this agreement witnesseth that in consideration of the hereinafter mentioned mutual covenants, promises and conditions, the parties hereto do hereby mutually covenant, promise and agree to and with each other in manner and form following, that is to say:—

(1) 10 Ont. W.R. 732. (2) 9 Ont. W.R. 48.
(3) 8 Ont. W.R. 4.

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"1. The said Willox is to enter into contracts as follows:—With the Canadian Niagara Construction Company, Limited, for the supply of from 15,000 to 25,000 yards of sand; with M. P. Davis, for the supply of about 25,000 yards; with A. C. Douglass, for the supply of about 10,000 yards; with H. D. Symmes, for the supply of about 10,000 yards; with the Electrical Development Company, Limited, for the supply of about 15,000 yards; all at a price not less than 85 cents a yard delivered at their respective works, unless otherwise agreed to between the parties hereto.

"2. The said Battle is to become indorser on promissory notes made by the said Willox not exceeding in amount the sum of $5,000 in consideration whereof the said Willox hereby grants the said Battle the right to elect at any time within the next 60 days from the date hereof, between taking a one-fourth interest in all the profits arising out of the above mentioned contracts, and to purchase upon payment to the said Willox of the price or sum of $5,000, a one-third interest in the gravel pit together with a one-third interest in all the business done or transacted since the date hereof, or in prospect of being done or transacted. The intention being in the event of the said Battle availing himself of the latter option that he will share as a one-third partner in all business done from the date hereof.

"3. The said Willox hereby agrees to give and does give to the said Battle a lien upon the gravel pit being parts of lots 4 and 17 in the Township of Stamford aforesaid for any and all moneys the said Battle may be called upon to pay because of his acting as indorser as aforesaid. In the event of the said Battle being called upon to pay as herein mentioned, and his

electing to take a one-third interest as above mentioned then the said payments shall be allowed and credit given the said Battle on account of the purchase price of $5,000 before referred to.

"4. Each of the parties hereto agrees to account to the other for any and all moneys received or expended in connection with the said gravel pit so long as this agreement shall last, and to keep proper and correct accounts of his dealings in respect of the same and to allow the other to inspect the said accounts.

"5. In the event of either party desiring to sell his share or interest he shall first offer the same to the other party for the same price or sum that the party desiring to sell has offered his share or interest for sale, and the other party shall have one week within which to purchase the same.

"6. Each of the parties hereto agrees to carry out this agreement to the best of his ability according to the true intent and meaning of the same and to do what he can of mutual benefit to the parties hereto."

The respondent, Willox, entered into contracts for supplying sand with M. P. Davis and A. C. Douglass in Sept., 1904, and considerable quantities were delivered thereunder. In Dec., 1904, he sold the property for $35,000 and out of the proceeds paid notes indorced by Battle pursuant to his agreement. The latter then brought an action claiming as damages the profits he would have received if the five contracts had been procured. The only defence pleaded was that Battle had not carried out the contract on his part and had released defendant from performance thereof.

At the trial consent minutes of judgment were filed by counsel adjudging defendant guilty of a breach of said contract by reason of his having put

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it out of his power to perform the same by selling the property and referring it to a Master to assess the damages. The reference declared that defendant should pay to the plaintiff one-fourth of all or any profit which would have arisen from the contracts in the said paragraph (par. 1 of the agreement) mentioned."

The Master assessed the damages on the basis of defendant having undertaken to procure the five contracts mentioned in the agreement absolutely and in any event considering that the judgment pursuant to which the reference was made had so determined. On appeal from his report Mr. Justice Anglin set it aside and sent it back to have the damages assessed on a different basis and evidence admitted tendered by defendant of his inability to procure three of the contracts, which the Master had refused to receive. An appeal to the Divisional Court resulted in the judgment of Mr. Justice Anglin being reversed and on a further appeal to the Court of Appeal it was restored and the decision of the Divisional Court reversed. The plaintiff then appealed to the Supreme Court of Canada.

T. F. Battle for the appellant.

Collier K.C. and *Griffiths* for the respondents.

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

DAVIES J.—The questions involved in this appeal depend upon the true construction of the contract entered into between the plaintiff and the defendant in September, 1904.

Another difficult question arose out of the reference made by the learned trial judge to the Master in order to have the damages assessed.

I feel strongly inclined to the opinion expressed by the majority of the Divisional Court that the Master was right in holding that the defendant's liability was settled by the trial judge to have been an absolute one extending to all the five contracts mentioned in the agreement sued on and that it was not open to him on the reference to receive evidence of the refusal of several of the five parties to enter into their contracts and so enable defendant to escape the damages he was otherwise liable for.

I do not desire, however, to base my judgment on that ground but upon the true construction of the agreement itself, and on this ground I concur in the unanimous judgment of the Divisional Court and the dissenting judgments of Chief Justice Moss and Riddell J., in the Court of Appeal, and think the Master bound under the contract to assess the damages as he did, on the ground that the defendant's covenant sued on was an absolute one.

The question is really whether the covenant or agreement entered into by the defendant was an absolute one with respect to the entering into of the five several contracts with the parties mentioned for the supply to each of them of the specified number of yards of sand and at the prices named, or whether it was a qualified agreement conditional on the several parties respectively entering into their contracts and binding on him to the extent only that they did so enter.

I am of the opinion that it was an absolute undertaking on defendant's part on the faith of which the

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plaintiff entered into an absolute covenant on his part to furnish the funds

necessary for the development of the gravel-pit and in the carrying out of the said contracts.

I think the fact that almost immediately after the contract sued on was entered into the defendant applied to plaintiff to carry out his covenant and indorse promissory notes made by the defendant to the amount of $5,000, and that the plaintiff indorsed these notes when requested to do so shews very strongly what the parties themselves thought was the nature of their mutual and respective covenants, which fact would be important if the language of the covenant is held to be ambiguous.

The majority judgment of the Court of Appeal is avowedly based largely upon the application to the clause of the agreement sued on of its sixth clause which provides that each of the parties agrees to "carry it out to the best of his ability according to the true intent and meaning of the same." The argument is that the general clause qualifies the absolute character of the language used in the first clause defining what the defendant bound himself to do and reduced the covenant down to one to do his best only. I cannot think that such is the meaning or intention of this sixth clause. I prefer to accept the construction placed upon it by the Chief Justice and Riddell J. who held that the clause obviously applied and should be confined to the case as it would be if and when the parties became partners as provided in the agreement. The clause never was intended to qualify the mutual covenants of the parties respecting their primary undertakings which were the essence of the contract entered into and were absolute in their terms. But it was a clause peculiarly applicable to the con-

ditions which would exist if and when these primary undertakings were carried out and the partnership relations assumed. If it had been intended to qualify the absolute language used in the mutual covenants of clauses one and two, one would have supposed that the few simple words necessary to do so would have been used in the clauses themselves or if inserted in any other part of the agreement would have been put in clear and unambiguous language. As the Chief Justice pertinently says:—

> In the case of no partnership the words have no suitability or special fitness to the plaintiff

or to his covenant, and it seems a somewhat forced construction which attempts to apply them to the defendant's undertaking to enter into contracts with five specified companies for specified quantities of sand at specified prices.

Assuming the sixth clause not to apply to the respective covenants of the parties then the question is reduced to this: Were these covenants absolute ones or were they conditional only?

This does not seem to me to be a case coming within the rule of construction formulated by Blackburn J. in *Taylor* v. *Caldwell*(1), and accepted by a majority of the Court of Appeal in *Nickoll & Knight* v. *Ashton Edridge & Co.*(2), as to this contract contemplating the continued existence of some particular specified thing in which case the perishing of the thing without default of the defendant before breach would excuse performance by the party contracting. Nor does it come within the extension of that rule in *Howell* v. *Coupland*(3). It is more analogous to such

(1) 3 B. & S. 826. (2) (1901) 2 K.B. 126.
(3) 1 Q.B.D. 258.

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Davies J.

a case as *Kearon* v. *Pearson*, 1861(1), in which the thing contracted for is possible in itself and the contracting party is unable to perform it only through causes beyond his own control such as in that case an unexpected sudden frost, and in the case before us the refusal of the third parties to enter into the contract which the defendant had covenanted would be entered into. In such case, as said by A. L. Smith, M.R., in delivering judgment in *Nickoll & Knight* v. *Ashton Edridge Co.*(2) at p. 133, it is the party's own fault for undertaking unconditionally to fulfil a promise. In the case then before him in which he was delivering judgment the promise made as the court construed it, was a conditional one only.

And so here it comes back to the question: Was the promise of defendant to enter into these five contracts an absolute or merely a conditional promise? Unless clause six of the agreement applies to and modifies the covenant it must, in my opinion, be held an unconditional promise.

The very essence of the covenant was the obtaining by the defendant of the five specified contracts set out, and the refusal of all or any of the parties to enter into them might easily have been anticipated or guarded against.

This covenant sued on formed the consideration for the covenant by plaintiff to indorse defendant's note for $5,000. That he should have absolutely bound himself so to indorse and assume all the risk of the third parties refusing to enter into their contracts would seem very strange. We cannot imply any qualification of an absolute covenant such as

(1) 7 H. & N. 386.

(2) [1901] 2 K.B. 126.

this. The nature of the covenant and the circumstances would not warrant such an implication. If the parties had intended any qualification of the language used it is their own fault not to have expressed it; but I think their subsequent conduct in obtaining plaintiff's indorsement of the $5,000 note a good indication of what they themselves thought the agreement meant.

I would allow the appeal and restore the judgment of the Divisional Court with costs in all the courts.

IDINGTON J.—I think the appeal should be allowed and the judgment of the Divisional Court of the 10th January 1907 be restored with costs of this appeal and that to the Court of Appeal for Ontario.

I read the covenant as absolute.

The reasoning relied upon to qualify such absolute terms as used was rejected in the somewhat analogous case of *Watson* v. *Charlesworth*(1) and in appeal, *Charlesworth* v. *Watson*(2).

The Courts there held that the incorporation in the covenant itself of words of similar import to those in the subsequent covenant here relied upon to qualify could not be held as qualifying or restricting a covenant otherwise absolute.

MACLENNAN J. (dissenting).—I am of opinion that we ought to dismiss this appeal. I agree entirely with the reasons for judgment given by the majority of the learned judges in the Court of Appeal, and also with those of Mr. Justice Anglin.

It was urged very strongly before us that the re-

(1) (1905) 1 K.B. 74. (2) [1906] A.C. 14.

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Maclennan J.

spondent should have pleaded that he had been unable to procure the three contracts in question, and not having done so, was precluded from proving it in the Master's office.

I think it is an answer to that argument that there is no allegation in the statement of claim that those contracts had not been procured. And it is entirely consistent with the statement of claim that they had. The case alleged by the appellant is that the respondent had sold his sand pit, and failed to sell sand to the amount of 75,000 yards; and also that by selling he made it impossible to carry out his contract. Not a word about the agreements, or some of them, not having been procured.

The respondent failed to prove the various defences set up by him, and the judgment at the trial was a declaration that the defendant had been guilty of a breach of the contract, by reason of having put it out of his power to perform it by selling the sand pit. To this was added a reference to assess the damages suffered by reason of that breach.

It is evident that the question whether the respondent could or could not have obtained the contracts, became material for the first time on the question of damages, and that the master's office is the proper place for the inquiry.

DUFF J.—Not a little difficulty arises upon the construction and effect of clause 6; and it has been with some hesitation that I have come to the conclusion that this part of the agreement does not relax the stringency of the earlier clause. Of this last mentioned clause—after the most attentive consideration of Mr. Collier's concise and forcible argument—I

think the construction advanced by the appellant is the true construction. The reasons which have led me to this opinion are compactly stated by Riddell J. in the court below; and it would be a superfluity to add anything to what he has said.

Appeal allowed with costs.

Solicitor for the appellant: *Thomas F. Battle.*
Solicitors for the respondent: *Griffiths & McGuire.*

1908

*March 11, 12.

*May 5.

ANNIE JANE MARKS (PLAINTIFF) ... APPELLANT;

AND

SUSAN ELIZABETH MARKS (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Construction of will—Description of legatee—Devise "to my wife" —Bigamous marriage—Evidence—Burden of proof.

A devise made in a will "to my wife" was claimed by two women, with both of whom the testator had lived in the relationship of husband and wife.

Held, per Idington J.—That, even if the first marriage was assumed to have been validly performed, all the surrounding circumstances shewed that, by the words "to my wife," the testator intended to indicate the woman with whom he was living, in that relationship, at the time of the execution of the will and thereafter up to the time of his death.

Held, per Duff J.—That the woman who claimed to have been first married to the testator had not sufficiently proved that fact, and that the other woman, who was living with the testator as his wife at the time of the execution of the will and up to the time of his death, was entitled to the devise.

Held, per Davies and Maclennan JJ. dissenting.—That the first marriage was sufficiently proved and, consequently, that the devise went to the only person who was the legal wife of the testator.

Fitzpatrick C.J. was of opinion that the appeal should be dismissed.

Judgment appealed from (13 B.C. Rep. 161) affirmed, Davies and Maclennan JJ. dissenting.

APPEAL from the judgment of the Supreme Court of British Columbia(1) affirming the decision by the

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

(1) 13 B.C. Rep. 161.

Chief Justice, at the trial of the issue, ordering a judgment to be entered in favour of the defendant.

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

R. Cassidy K.C. for the appellant.

J. Travers Lewis K.C. for the respondent.

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

DAVIES J. (dissenting).—I concur in the opinion stated by Mr. Justice Maclennan.

IDINGTON J.—The testator, Alfred John Marks, then resident in the Town of Nelson, in British Columbia, made his last will and testament there, on the 6th of May, 1904. He devised certain real estate described as lot No. 10, in Nelson, on trusts expressed by words I quote (so far as relative to questions raised herein), to pay, out of the rents and profits, a mortgage,

> and pay my wife, during her life, the sum of fifty dollars, monthly, * * * and while continuing the said monthly payment to my wife as aforesaid, my trustees shall pay quarterly all the surplus left out of the rents and profits so issuing and arising from said lot ten to my children, Harriet Ann, Euphia Jane, and Alfred Edwin, in equal shares.
>
> And, *after decease of my said wife,* upon trust, that my trustees shall sell and convert into money the said lot and divide the proceeds of such sale and conversion among said children * * * in equal shares.

These were children of an early marriage by a wife who had died in their infancy and previous to the alleged second marriage now in question.

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The appellant alleges she was, after the first wife's death, married to the testator in Buffalo, in the State of New York, in the year 1873.

The respondent was undoubtedly, unless for such bar as the said Buffalo marriage created, married to him in British Columbia, on the 19th March, 1902; lived with him as his wife until his death, on the 8th of October, 1904, and was fully recognized meantime as his wife.

The contention is now set up that we are bound in law, no matter what we may consider to be the intention of this testator, under all the facts and surrounding circumstances which I think we are entitled and bound to consider in the interpretation of this will, to hold that the appellant is entitled to receive the bequests made by the said will to the wife of the testator in the language expressed above, if in truth she is shewn by the evidence to have been duly married to the testator, and not legally divorced from him, and, hence, at his death, his wife in law. And, as a clear consequence, apparently (though that is not to be disposed of here), the time of distribution must be the death of appellant and not that of the respondent.

In other words, it is claimed that there cannot be any one who can answer to that description "my wife" except the one person who may in law be decided to be such.

I do not think the law so binds us.

Unless it does, I do not see why we should pervert the most obvious intention of this testator. I think we are bound to read his language in light of all the circumstances that surrounded, and were known to him when he used it and give effect to the intention it discloses when so read.

This proposition may seem to be in conflict with language that has been occasionally used by eminent authority. Expressions are here and there found to suggest that the will must first be read and if the particular language in question is free from ambiguity and in its primary or ordinary meaning consistent with all else in the will, no extraneous circumstances can be brought in evidence.

The case of *Charter* v. *Charter*(1) illustrates, better than any other I know of, how these expressions may be correctly used and applied. When they have been so applied as to exclude the surrounding circumstances, I cannot find such application to have been material or necessary for the determination of the case there in hand. Nor can I find any case that has expressly decided it would ever be improper to introduce and properly use such surrounding circumstances. I only refer to this lest such cases might be said to have been overlooked.

I am content to adopt and act upon the following language of Lord Cairns, in *Charter* v. *Charter*(1):

> The court has a right to ascertain all the facts which were known to the testator at the time he made the will, and thus to place itself in the testator's position in order to ascertain the bearing and application of the language he uses.

And substantially reiterated in the case of *Bathurst* v. *Errington*(2), at page 706:

> In construing the will of the testator * * * it is necessary that we should put ourselves, as far as we can, in the position of the testator and interpret his expressions as to persons and things with reference to that degree of knowledge of those persons and things which, so far as we can discover, the testator possessed.

Having, in light of such surrounding circumstances, come to the conclusion I am about to express,

(1) L.R. 7 H.L. 365. (2) 2 App. Cas. 698.

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it is not necessary to determine absolutely the status of either party hereto as wife.

I, therefore, assume for the present that the appellant was duly married to the testator, as she alleges; though, even if in truth so, there may be great doubt of the fact having been duly proven here.

Needless, therefore, for me to go into more detail of the history presented than what in a general outline is necessary in order to find these surrounding facts and circumstances that were known to the testator and which can be properly considered here, and hence determine what the testator meant by the words "my wife" when used in his will.

Immediately after the alleged Buffalo marriage, the appellant and the testator lived as man and wife with her father and mother in Kincardine, in Ontario, for three months and then took up house there. He was a house-painter, but so shiftless and improvident that he could not maintain his wife and sold everything in the house and left her at the end of eighteen months or a couple of years. He returned to Kincardine some months later, but in the course of a year or so he left her finally in 1878 and never saw her again.

They had no family. She then started to work as a milliner to support herself.

He wandered out west, kept thousands of miles away from her (except once when, in 1892, he was visiting in Ontario and Michigan, where she had lived meantime), and took, in course of time, to keeping tavern in Nelson, in British Columbia.

The respondent became his housekeeper in such business and they thereafter lived, from 1894, as man and wife, and, finally, got married as I have stated.

The appellant had drifted over to Michigan and there formed the acquaintance of a man named Franckboner, became his housekeeper and, in 1888, took his name and lived with him as his wife. In the place where they lived, they had so managed things that everybody, on their adopting this mode of life, assumed they had been married and treated them accordingly until Franckboner died, in 1897. She then passed as his widow and, as one result, she got their dwelling house conveyed to her. She relates all this and yet denies she ever was married to Franckboner.

In 1892, the testator for some unexplained reason visited Kincardine and saw, amongst others, the appellant's mother, whom he met apparently on a friendly footing. We are left to speculate as to the reason for this visit and the results of it; as we are in a good many other respects where we should not have been, in regard to many things, in this curious history.

It is most improbable, when we come to consider the sequel, that the mother, whom she visited occasionally (though I cannot find her doing so as under the name of Mrs. Franckboner as early as 1892), was ignorant, or that he was left in ignorance by her, and by the appellant's sisters whom he saw on the same occasion in Detroit, of the Franckboner connection the appellant had formed.

We have to connect with such probabilities as arise thereon the fact, distinctly proven, that by a letter of the 22nd of April, 1904, he wrote her, in reply to a letter of hers, and addressed her as "Annie Franklan," having, as the letter explains, not been able to make out the correct spelling of her name. He addresses

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her as "dear Annie" and signs as "your friend, A. J. Marks."

She swears she had received, but destroyed, several earlier letters than this from him within the preceding five or six months and that the earliest of these was the first she had heard directly from him since he left her in 1878.

She attempts to give the contents of these previous letters. We may assume, as against her at least, that such letters were written and that she has correctly recalled the nature of the contents.

In the light of the previous history I have set forth, I cannot read these alleged contents of the missing letters or the contents of the one of the 22nd of April, 1904, which is placed before us, without being impressed with this,—that the writer had long before not only heard of the change of name of the appellant, but also that she was no more his wife, whatever she may have been. The entire absence of any inquiry on the subject of how her change of name and all else in her situation came about leads to the conclusion that he had heard her history before then, and that, if ever he had been married to her, she had become divorced from him.

Many trifling incidents cropping out of this correspondence tend to confirm such conclusions.

The will was written on the sixth of May following the last of the said letters. The testator was ill, he was going away for his health and wrote her from Spokane on the 10th of May, 1904, four days after the date of the will and acknowledged a letter he had received from her, evidently at Nelson, and I think probably answering the one above referred to of the 22nd of April. The times, the places, the circum-

stances, including the preparation for his trip, point to the receipt of her letter as taking place a few days before the will was made. How do these people address each other? The testator continued to subscribe himself as "your friend" and address her as "dear Annie." We are asked to find that the will of the writer intended to refer to this woman as his wife.

Evidently, on this trip in 1892, he did not think it worth while, though so near to her place of abode, to try to see her. Why did he refrain? I think he may be credited with some considerations of a respectable nature prompting him to assume that she, so long abandoned by him, was married again, rather than accuse her of simple adultery.

I refuse to believe that he ever looked upon the appellant, thenceforth, as his wife. Indeed, if we know no more, I do not think it would be an unfair inference to assume that he looked upon her as the lawful wife of another man. He was fully entitled to draw that inference. Why should I say he did not?

His treatment of her entitled her, if she had sought by legal methods, to have brought about that result. She says she did not. But am I to attribute to him a knowledge of that which she now asserts, and which is the most improbable part of her story, with the result of holding that he meant to designate her, when making the provision now in question for his wife? Am I to abandon all right of reason and common sense and impute to this testator an intention to provide for this appellant when the facts and circumstances surrounding the man repel any such thought?

At the date of this will the testator was informed (by appellant's assuming to address him as a friend named Mrs. Franckboner), as plainly as if she had

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said in so many words that she had, as she was entitled to on facts well known to him, procured a divorce and married again.

He acts on that, makes devises and bequests consistent therewith, and does not think it necessary to guard his designation by using a Christian name.

It seems to me quite as clear as if he had said in his will the woman who passes as my wife, by the name of Susan Marks, when it would have been held good by virtue of many authorities.

In *Giles* v. *Giles*(1), Lord Langdale, as Master of the Rolls, held as good a bequest by a testator named Giles to his wife Ann Giles, whom he married whilst her husband lived.

But there are the following cases which maintain the respondent's case, even without that.

In *Pratt* v. *Mathew*(2), at page 338, Sir John Romilly, the Master of the Rolls, held the phrase "to my wife" carried a bequest to her whom the testator had gone through the form of marrying, but whom, by reason of her having been a deceased wife's sister, he could not legally marry. And in the same case he held void a bequest to "my children hereafter to be born" though the said wife, so-called, with whom he lived until death, was then far advanced in pregnancy. We have here illustrated the contrast between the effect of the application of *designatio personæ* and the force of the decisions as to after-born illegitimate children. Yet it had been urged that the phrase "to my wife" should be held applicable only to an after-taken wife whom he might legally have married.

(1) 1 Keen 685. (2) 22 Beav. 328.

In *Re Petts*(1) the same judge held that a woman who had a husband still living when she married the testator was entitled to legacies given "to my wife" and "my said wife," by the will of him with whom she contracted this second and void marriage.

In *Re Howe*(2), it was held, where separation by mutual consent had taken place and a ceremony of marriage gone through with another whom the testator had treated as his wife, that she took under the expression "my wife."

In *Anderson* v. *Berkley*(3), it was held by Joyce J., that a bequest "to my son's wife L., if she shall survive him" was good, though she who lived with the son was not in fact his wife. The son had held her out as his wife, but the judge declined to speculate how far this would have affected the testator's mind, if he had known the truth.

There are thus presented decisions arising upon almost every shade of description of a woman as wife when not such in law save this case which presents a choice between two I assume to have been married in good faith to the testator. Does that make any difference?

In the result, I find that there was ample ground for the testator supposing that, if he had ever married the appellant, she had become the lawful wife of another and was no longer his wife and that he could not, at all events, should not be held to have intended the words "my wife" when used in his will to designate any other than she whom he had so recently married, without any imposition on her part as to her real status.

(1) 27 Beav. 576. (2) 33 W.R. 48.
(3) (1902) 1 Ch. 936.

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We are asked to assume not only that he meant to designate, in so speaking of "my wife," the presumable widow of another man, but also to make the inheritance of his children depend, for the time of its taking effect, on the death of that presumable widow, rather than on the death of her whom he daily greeted, in their correspondence, at the very time he was making such disposition of his estate, as "dear wife," whilst greeting the other as "dear friend."

In plain English, we are invited to accept as conclusive a chopping of legal logic rather than common sense.

I prefer to read the ordinary meaning, the primary meaning, of the words used when read in light of surrounding circumstances in accordance with common sense, rather than treat as sound law, not that which has ever been so expressed, but the deductions asked to be drawn as possible from an extension of language that never yet has been so applied as asked to such an extraordinary condition as exists here.

Indeed, I prefer to follow the warning implied in so many cases not to reduce the meaning of the language used to an absurdity.

Since writing the foregoing, the report of *Re Wagstaff; Wagstaff* v. *Jalland*(1), in the Court of Appeal, reaches me and shews that a bequest by a husband to a "widow" during widowhood, was good though in law never legally married to him.

This seems to help to maintain the line of reasoning I adopt.

I think the appeal should be dismissed. As to the costs I doubt if on an issue like this we have, where they are not by the terms of the issue given us to

(1) 98 L.T. 149.

dispose of, any right to make them costs out of the estate. They should, it seems to me, have been reserved to await the determination of the issue or made by order directing the issue part of what we are to dispose of.

If ever there was a case wherein the costs should have, up to this appeal, come out of the estate, this certainly is one. The courts below have not so dealt with them, but only given the executors such costs, and I fail to see how we can interfere.

MACLENNAN J. (dissenting).—I think this appeal should be allowed.

One Alfred John Marks made his will on the sixth of May, 1904, at Nelson, B.C., and died there on the eighth of October afterwards.

By his will, he bequeathed an annuity of $50 per month to his wife, describing the legatee merely by the words " my wife," and "my said wife."

The plaintiff and defendant, respectively, claim to have been the lawful wife of the testator, at the date of his will and at the time of his death.

At the instance of the executors, an issue was directed to determine which of the two claimants is entitled to the bequest.

The issue was tried before the learned Chief Justice of British Columbia, who decided it in favour of the defendant, and his decision was affirmed on appeal to the Supreme Court. From that decision this appeal is brought.

The plaintiff's case is that she was legally married to the testator, at Buffalo, in the State of New York, on the 22nd of December, 1873; and the defendant's

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case is that she was married to him on the 19th of March, 1902, at Nelson, in British Columbia.

It is clearly proved that, on the last mentioned date, the ceremony of marriage was performed between the testator and the defendant; and it is not disputed that this was a good marriage in law, unless the testator had then another living wife.

In my view of the case the only question in the appeal is whether there is sufficient evidence of the alleged marriage of 1873.

If the plaintiff has proved her marriage in 1873, she is entitled to succeed, for, in that case, she was the legal wife of the testator when he made his will; and no evidence is admissible to shew that the expressions "my wife" and "my said wife" contained in the will, as descriptive of the legatee, mean any other person than her who was then his legal wife.

In *Ellis* v. *Houston* (1), funds were directed by the testatrix to be divided between all the children of her brother. Some of them were illegitimate, born of the brother's wife before marriage, but treated by the testatrix as if legitimate. *Held,* that evidence could not be admitted to prove that the testatrix had directed the will to be so drawn as to include the illegitimate children and that she thought it had been so drawn.

In *Re Fish; Ingham* v. *Rayner* (2), in the Court of Appeal, there was a bequest to the testator's grandniece, without naming her. He had two grandnieces, one legitimate and the other illegitimate, and it was held that evidence could not be admitted to shew that the illegitimate niece was the one referred

(1) 10 Ch.D. 236. (2) (1894) 2 Ch. 83.

to in the will, although she was the one living in his house and called by him, his niece.

In *Dorin* v. *Dorin*(1), the testator married a woman by whom he had two illegitimate children, and by his will gave his property to his wife for life, and to dispose *among our children* by will, and, if no will, to be divided equally between *my children by her*. No children were born after the date of the will. *Held*, Cairns L.C., Hatherly, O'Hagan and Selborne L.JJ., that the personal estate, after the widow's life interest, was undisposed of, quoting Lord Eldon in *Harris* v. *Lloyd*(2):

> I have not the least doubt that the testator meant illegitimate children, but I am clearly of opinion that there is not enough upon the face of this will to authorise me to carry that intention into effect.

In *Hill* v. *Crook*(3), the head-note says:

> If there is a gift to children as a class, the law, if there is nothing in the will clearly to shew a contrary intention, will apply the gift to legitimate children only.

The effect of these cases I think is to establish the principle that in a will the word "children" or "niece," or other word expressing relationship, *primâ facie* means legal relationship, and no evidence *dehors* the will can be admitted to shew the contrary.

There are other cases to the same effect which might be quoted, and the only case which I have seen which might seem to decide otherwise is *Re Howe*(4), before Butt J., on a motion for probate. There a testator had, by mutual consent, separated from his wife, who had no issue, and, in her lifetime, went through a marriage ceremony with another, and, by the latter,

(1) L.R. 7 H.L. 568.
(2) Turn. & R. 310.
(3) L.R. 6 H.L. 265.
(4) 33 W.R. 48.

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had two children. By his will, he directed his property to be

> divided equally between *my two children,* when the younger comes of age. The rest I leave *to my wife,* for her own use, to bring up the children, and after her death to be equally divided between my two children.

The motion seems to have been *ex parte,* and probate was granted to the second wife.

The learned judge seems to have thought there was enough on the face of the will, by the reference to the children, to shew that it was the second wife who was referred to.

The question then is whether there is sufficient evidence of the plaintiff's marriage to the testator in 1873. And it is proper to remark here that all the plaintiff's evidence, except that of one witness whose evidence is unimportant, was taken upon commission, and we are in a position to consider it with the same freedom as the learned judges below. This observation also applies to the defendant's examination for discovery, which was taken before the registrar and was read at the trial.

There are two classes of cases in which strict proof of a legal marriage is necessary, namely, indictments for bigamy, and actions for criminal conversation,—the one a criminal, and the other a quasi-criminal proceeding. In other cases, that is, in civil actions like the present, no such strict proof is required. Phipson on Evidence (3 ed.) 339; *Piers* v. *Piers*(1).

The learned Judge Irving, who gave the principal judgment in the Supreme Court, cites at length from the *Dysart Peerage Case*(2), at page 489, in which the

(1) 2 H.L. Cas. 331. (2) 6 App. Cas. 489, at p. 538-9.

question was which of two persons was entitled to a peerage,—depending on the validity of the earlier of two alleged marriages.

In that case Lord Watson says:

> I see no reason why the direct and uncontradicted testimony of the person alleging the marriage, if corroborated, to some extent, by the indirect testimony of others, and supported by the facts and circumstances of the case, should not receive effect. But it will always be necessary, in a case of that kind, to test very strictly the statements given in evidence, by a woman interested in establishing that she held, and holds, the honourable status of a wife, and not the degrading position of a mistress.

Mr. Justice Irving seems to have thought that this language required him to find some corroboration of the plaintiff's evidence of *the actual ceremony of marriage.* I think, with great respect, that is not so. It is her testimony generally, and not her evidence of the actual ceremony, which he thinks should be corroborated to some extent by that of others, and supported by the facts and circumstances of the case. Their Lordships do not go so far as to say that the same strict proof of the ceremony is required as in bigamy, or criminal conversation, but that the testimony of the plaintiff is to be tested very strictly, by reason of the serious issues involved.

I think it was not necessary to have any corroboration of the plaintiff's evidence of the actual ceremony, though I think even that is not wanting. There is the evidence of a marriage certificate, seen in due time afterwards by several witnesses, and references in letters of the testator written not long before his death to the plaintiff, and admitted in evidence without objection, corroborative of her story of the marriage. No attempt was made to cast any doubt upon the truth of her account of the ceremony, or upon its validity in law as related by her.

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But that is not all. The defendant admits, on her examination for discovery, that the testator told her before he married her, that he had been twice married and that his first wife was dead, and that he was separated from the second, that he shewed her a photograph which he said was that of his second wife, and which had the words "Mrs. Marks" on the back or side of it, in Mr. Marks's hand-writing.

Now I think all that is very strongly corroborative of the plaintiff's account of the actual marriage; and, when to that is added the evidence of co-habitation immediately afterwards as husband and wife, in perfect respectability, for two or three years, first for several months in the family of the plaintiff's father and mother, and, afterwards in a dwelling of their own in the same village, and their repute and reception as husband and wife in the community during the same period, all proved by witnesses of undoubted character and position, her case is, in my opinion, satisfactorily made out.

The law makes the plaintiff a competent witness on her own behalf, and, upon a careful perusal of the whole of the evidence, I see no reason why she should not be believed.

There is no suggestion that there was a divorce obtained by her or by the testator. The defendant says that she never asked the testator whether there had been a divorce; that, before he married her, he told her that the woman whose photograph he shewed her was his second wife, and she "supposed she was dead, or married, or something."

There is nothing to shew or suggest that the plaintiff was responsible for the separation which took place about three years after marriage, or for its long

duration. The testator was unsuccessful in his business, sold out and went to the west, leaving his wife behind.

I think it is not necessary to dwell upon their respective histories during their later years, save to say that there is nothing in the plaintiff's history, as frankly related by her, to lead me to think that she is other than a truthful witness, or that her evidence is not to be relied upon.

I think the appeal should be allowed and that the issue should be found for the plaintiff.

DUFF J.—An *ex facie* valid marriage between the defendant and the testator and actual cohabitation by them as husband and wife from the time of that marriage until his death in 1904, are admitted.

It is also admitted that, from the year 1876, down to the year 1904, no communication of any kind took place between the testator and the plaintiff; and a correspondence begun in that year, whatever else it shews, certainly is not the sort of correspondence one would expect to pass between people regarding themselves as united by matrimonial ties. Moreover, the plaintiff, after the date when she alleges she became the wife of the testator, admittedly lived for many years with another man as his wife; received his property, after his death, and retained his name until, on the death of the testator, she made the claim which led to the present proceedings. I have no hesitation in saying that, in these circumstances,—apart from the effect of any presumption that the testator did not, in marrying the defendant, commit a criminal act,—a heavy burden of explanation rests upon the plaintiff.

That burden has not, in my opinion, been dis-

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charged. Outside of the circumstances mentioned, I find in the plaintiff's case so many grounds of suspicion that it would, I think, be wholly unsafe to accept it as sufficient to impeach the defendant's status as the wife of the testator—a status of which, as I have mentioned, she was in the actual enjoyment at the time of his death.

Appeal dismissed with costs.

Solicitor for the appellant: *Robert Wetmore Hanington.*

Solicitors for the respondent: *Taylor & O'Shea.*

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

AND

MERGUERITE HENRIETTA JANE ARMSTRONG (SUPPLIANT) ..... } RESPONDENT.

*Feb. 28; Mar. 3. *May 5.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Negligence of fellow-servant — Operation of railway — Defective switch—Public work—Tort—Liability of Crown—Right of action—Exchequer Court Act, s. 16(c)—Lord Campbell's Act—Art. 1056 C.C.

In consequence of a broken switch, at a siding on the Intercolonial Railway, (a public work of Canada), failing to work properly, although the moving of the crank by the pointsman had the effect of changing the signal so as to indicate that the line was properly set for an approaching train, an accident occurred by which the locomotive engine was wrecked and the engine-driver killed. In an action to recover damages from the Crown, under article 1056 of the Civil Code of Lower Canada:

Held, affirming the judgment appealed from (11 Ex. C.R. 119), that there was such negligence on the part of the officers and servants of the Crown as rendered it liable in an action in tort; that the "Exchequer Court Act," 50 & 51 Vict. ch. 16, sec. 16(c), imposed liability upon the Crown, in such a case, and gave jurisdiction to the Exchequer Court of Canada to entertain the claim for damages; and that the defence that deceased, having obtained satisfaction or indemnity within the meaning of article 1056 of the Civil Code, by reason of the annual contribution made by the Railway Department towards The Intercolonial Railway Employees' Relief and Insurance Association, of which deceased was a member, was not an answer to the action. *Miller* v. *The Grand Trunk Railway Co.* ([1906] A.C. 187) followed.

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

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APPEAL from the judgment of the Exchequer Court of Canada (1) which maintained the respondent's petition of right with costs.

The suppliant, on behalf of herself and her children, claimed damages from the Crown, under the provisions of section 20(*c*) of the "Exchequer Court Act" (R.S. [1906] ch. 140), and article 1056 of the Civil Code of Lower Canada, for the death of her husband who met his death in consequence of injuries sustained while he was in the discharge of his duty as a locomotive engineer in the employ of the Crown and in charge of the engine attached to a west-bound passenger train on the "Intercolonial Railway" (a public work of Canada), at DeLotbinière station in the Province of Quebec, on the 26th of November, 1903. The suppliant charged that the employees of the Crown left the east-end switch of the siding in an unsafe condition, not properly locked nor set to take the main line; that no flagman had been placed to stop the west-bound passenger train which was being driven by the engine in charge of deceased; and that the semaphores and signals were not set at danger.

The switch in question was what is known as a "stub-switch"; the pointsman had attempted to set the switch for the siding, moved the crank and target in such a manner as to indicate that the switch was open, but, owing to some alleged defect in the connecting bar, and possibly to the effect of a snow storm clogging the rails, the swing-rails failed to act as intended and take the line of the siding. The engineer applied the brakes on approaching the siding but the train was still moving at considerable speed, the driv-

(1) 11 Ex. C.R. 119.

ing wheels mounted the track at the points, left the main line and continued to run along the ties for a short distance when the engine was wrecked and the engineer received the injuries which caused his death. The evidence shewed that the target was for the main line; the bolts of the connecting rod were broken and the swing-rails, curved by the impact of the train, were set for the main line after the accident, and there was no padlock on the switch.

The defence raised the following points of law: (*a*) that no action in tort could lie against the Crown; (*b*) that any right of action given by the statute was personal and could lie only at the suit of the personal representatives of deceased; (*c*) that deceased, by his contract of employment, had released and discharged the Crown from any claims of the nature sought to be enforced; and (*d*) that the negligence alleged to have caused the accident was that of a fellow-servant of deceased and, consequently, there could be no liability on the part of the Crown. It was also charged that the deceased, by failing to obey rules and observe certain signals set against his train, had been himself the cause of his own misfortune by contributory negligence.

The Exchequer Court judge, Burbidge J., held that there was a right of action under the 16th section of the "Exchequer Court Act," (now sec. 20) and that article 1056 C.C. applied; he found that deceased was, at the time of his death, a member of the "Intercolonial Railway Employees' Relief and Insurance Association," class C., and that, except that the suppliant had not accepted the insurance money to which she was

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entitled, the case was similar to *Grenier* v. *The Queen* (1). The learned judge, following *Miller* v. *The Grand Trunk Railway Co.*(2), and *Robinson* v. *The Canadian Pacific Railway Co.*(3), maintained the petition of right with costs.

Newcombe K.C. (Deputy Minister of Justice) for the appellant. Independently of statute the Crown is not liable; see cases cited and remarks by Strong C.J. in *City of Quebec* v. *The Queen*(4), at page 423. Section 16(*c*) of the "Exchequer Court Act" was not intended to create any liability which did not formerly exist. The full title of the Act "An Act to Amend 'the Supreme and Exchequer Courts Act' and to make better Provision for the Trial of Claims against the Crown," shews its scope and that it was not to give a remedy but to confer jurisdiction upon the court to give effect to an existing remedy. The trial judge derives the liability from the "Official Arbitrators Act"(33 Vict. ch. 23, sec. 1; R.S.C. ch. 40, sec. 6), the jurisdiction of the official arbitrators having been transferred to the Exchequer Court by 50 & 51 Vict. ch. 16, sec. 58. Whatever jurisdiction may have been transferred to the Exchequer Court by this provision it did not impose any liability, and there is nothing to warrant the Exchequer Court in entertaining a petition of right based upon a wrong in respect of which the Crown cannot be under any liability unless imposed by statute.

Section 16(*c*) of the "Exchequer Court Act" cannot be so construed as to create liability in this case,

(1) 6 Ex. C.R. 276.
(2) [1906] A.C. 187.
(3) (1892) A.C. 481.
(4) 24 Can. S.C.R. 420.

or to affect the application of the maxim *actio personalis moritur cum personâ*. See Broom's Legal Maxims (5 ed.), p. 909. The provision is apparently intended to afford jurisdiction for giving effect to claims of the kind mentioned where such claims can be independently established.

The right of action, if any, given by section 16(*c*) is a personal one and an action will only lie at the suit of the personal representatives of the deceased. That section does not by any implication give effect, as against the Dominion Crown, to the provisions of any provincial statute. A Dominion statute is not intended to receive as many different constructions as there are provinces in the Dominion. The section must receive a uniform construction all over the whole Dominion, for it was intended to operate in each part of Canada in precisely the same way and with precisely the same effect. Hence it is quite immaterial to consider the provisions of article 1056 of the Civil Code. An intention in favour of uniformity must be presumed unless a contrary intention be clearly expressed. In all the provinces legislation more or less closely corresponding to "Lord Campbell's Act" has been adopted. In all the provinces other than Quebec the right of action given by these statutes is certainly a representative one. In some of the provinces the action must be instituted in the name of the personal representatives of the deceased. In others the widow may sue in her own name. In Quebec, the Judicial Committee have considered, in *Robinson* v. *The Canadian Pacific Railway Co.*(1), followed in *Miller* v. *The Grand Trunk Railway Co.*(2), that the relatives have an independent and not a representative right.

(1) [1892] A.C. 481. (2) [1906] A.C. 187.

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There is, therefore, no uniformity of provincial legislation to which the Dominion statute can reasonably be held to have had reference, and it becomes necessary, if the Dominion statute imposed a new liability, to determine, irrespective of the various provincial enactments, what is the nature of the claim, who may be claimants, and what is to be the measure of damages. It is for the jurisprudence of the Dominion courts to construe the statute and determine the extent of the liability. In the section, the words "death" or "injury" are coupled together. In the case of injury, only the person who may have a claim can sue, although others dependent upon him may be damaged to the same or even to a greater extent than if he had been killed. Equally in the case of death it would seem that the right of action must be represented in the same manner, that is by the personal representative or those claiming under the person.

While the Judicial Committee have decided that article 1056 C.C. involved differences from the law governing actions under "Lord Campbell's Act," except in regard to such points, the law remains the same. The article is substantially the old statute of the Province of Canada (10 & 11 Vict. ch. 6, C.S.C., [1859] ch. 78); *The Canadian Pacific Railway Co.* v. *Robinson*(1), at pages 123 and 125, *per* Taschereau J.

Article 9 C.C. shews that article 1056 C.C. does not apply to the Crown. Special provisions affecting the Crown are also contained in certain articles of the Code shewing that the Crown is specially mentioned where it is intended that the Crown shall be affected. See article 1994 C.C., considered in *Exchange Bank of Canada* v. *The Queen*(2); arts. 2,222, 2,286 and 2,211

(1) 14 Can. S.C.R. 105. (2) 11 App. Cas. 157.

to 2,216 C.C.; *Maritime Bank* v. *The Queen*(1), and authorities there cited; Chitty's Prerogatives of the Crown, pp. 4 *et seq.*, and p. 25; *Attorney-General* v. *Black*(2), *per* Reid C.J.; *Monk* v. *Ouimet*(3), *per* Dorion C.J. The result will be the same if the principles of the French common law be held to apply. Burlamaqui, *"Principes du Droit de la Nature et des Gens,"* vol. 4, pp. 98 *et seq.*; Vattel's Law of Nations (Chitty's translation), pp. 15 and 16.

The deceased by his contract of employment released and discharged the appellant from any claims of the nature of the present claim. The question is not to be governed by provincial law. If the Code is not to be looked to, the suppliant can have no right of action if deceased himself never had such right, and any defence which would have been available against the deceased, had he survived, may be set up in this action. Such is the established rule in actions under "Lord Campbell's Act." Addison on Torts (6 ed.), pp. 604 *et seq.; Griffiths* v. *The Earl of Dudley*(4). Deceased was a member of the Intercolonial Railway Employees' Relief and Assurance Association, an unincorporated society, to the funds of which the Government of Canada contributes annually $6,000. It is obligatory on every railway employee to become a member of this association. One of its rules was that, in consideration of such contribution, the Government should be relieved of all claims for compensation for injury or death of any member. These rules were in force at the time of the accident, and had been in force throughout the whole period of the employment of the deceased, and the contribution by

(1) 17 Can. S.C.R. 657.
(2) Stu. K.B. 324.
(3) 19 L.C. Jur. 71.
(4) 9 Q.B.D. 357.

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the Crown to the funds of the association had continued during the whole period. It was one of the terms of the contract under which the deceased sought and obtained employment that he would become a member of the association and be bound by its rules, and he agreed, in consideration of such employment, the contribution of the Government of Canada and the advantages to which he might become entitled under the rules of the association, that the Government should be relieved of all claims for compensation arising from injury or death. He would therefore have been precluded from maintaining an action had he survived, and the suppliant is likewise precluded. *Clements* v. *London & North Western Railway Co.*(1); *Griffiths* v. *The Earl of Dudley*(2). The deceased thus obtained satisfaction, and his relatives have therefore no claim under article 1056 C.C., even if applicable.

The negligence alleged to have been the cause of the accident, was that of a fellow-servant of the deceased. On the principles just discussed, this defence is not to be judged by either English or French law, as such, but by the jurisprudence of the Exchequer Court proceeding on the principles of broad and general application, and, even if governed by Quebec law, the plea affords a good defence under that law. The principle underlying the doctrine of common employment is stated in *Hutchison* v. *York, Newcastle & Berwick Railway Co.*(3). A servant when engaging undertakes, as between himself and his master, to run all the ordinary risks of the service (*risque professionnel*), and this includes the risk of negligence upon

(1) [1894] 2 Q.B. 482. (2) 9 Q.B.D. 357.
(3) 5 Ex. 343.

the part of a fellow-servant in the discharge of his duty as servant of the common master. It is not a positive rule establishing freedom from liability of employers in a particular class of cases, but the purely negative rule that, a servant having undertaken to accept the ordinary risks of his employment, the risk of injury arising from negligence of his fellow-servants is not an exception to such risks. The doctrine, only comparatively recently established, lays down no new principles. See *Priestly* v. *Fowler*(1) decided in 1837, in which the doctrine was first laid down, and *Bartonshill Coal Co.* v. *McGuire*(2), at page 306, *per* Chelmsford L.C. The principles on which the doctrine is based are discussed by Lord Chancellor Cranworth in *Bartonshill Coal Co.* v. *Reid* (3), at page 284, and further elaborated by Lord Chancellor Cairns in *Wilson* v. *Merry*(4), at pages 331-2.

The position is that, by the statute, a certain liability is imposed upon the Crown, and it is for the court to say what limitations, if any, are to be placed upon that liability. The Crown now asks, just as the first advocates of the doctrine asked, that its liability be so limited not because it is the law in England but because such limitation is a reasonable one. The jurisprudence of England is an illustration and not an authority on the question.

The Dominion Parliament recently passed the statute, 4 Edw. VII. ch. 31, providing against contracting out by railway servants. It does not apply in the case of Government railways, although it was competent for Parliament to pass similar legislation that

(1) 3 M. & W. 1.
(2) 3 Macq. 300.
(3) 3 Macq. 266.
(4) L.R. 1 H.L. Sc. 326.

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would. Can the effect be the same? Is it immaterial whether such legislation is passed or not? If so, the effect of the "Exchequer Court Act" must be to make the Crown liable, unless the Parliament has said it will not be liable; in other words, that it is liable unless Parliament has said, not that it will, but that it will not be liable. In the *Miller Case*(1) it was decided that 4 Edw. VII. ch. 31 was valid, and (so far as the Province of Quebec is concerned) the statute only confirms the alleged existing law. But the Grand Trunk Railway Co. was, admittedly, subject to the laws of Quebec, and the Dominion is not. In the case of the Dominion Crown it is a question of creating the liability, and for this a Dominion statute is necessary.

The limitation of the liability by the jurisprudence of this court is by no means confined to the doctrine of common employment. A single other instance will suffice. Assume, as is suggested, that the Quebec law does not recognize the defence of contributory negligence(*Canadian Pacific Railway Co.* v. *Boisseau*(2)), yet it might certainly be properly and probably successfully invoked in the Exchequer Court. See *Priestly* v. *Fowler*(3); *Farwell* v. *Boston and Worcester Rd. Corporation*(4); *Hutchinson* v. *York, etc., Ry. Co.*(5); *Bartonshill Coal Co.* v. *Reid*(6), *per* Lamworth L.J., at pages 285, 298, 300; *Wilson* v. *Merry* (7), at pages 330-331; Smith's Master and Servant (with notes on Canadian law) 6 ed., pp. 183, *et seq.*

Even if the question is to be decided according to Quebec law, the plea of common employment affords a good defence under that law. It is not to be found

(1) (1906) A.C. 187.
(2) 32 Can. S.C.R. 424.
(3) 3 M. & W. 1.
(4) 4 Metcalf 49; 3 Macq. 316.
(5) 5 Ex. 343.
(6) 3 Macq. 266.
(7) L.R. 1 H. of L., Sc. 326.

in the Code, but it is not a matter *positivi juris* but is of a negative character. The law in Scotland, like the Code, is founded on the civil law. The House of Lords held that the doctrine obtained as much in Scotland as in England; and why? The Lord Chancellor, in *Bartonshill Coal Co.* v. *McGuire*(1), said: "But it is said * * * there is no such law existing in Scotland. I own I was surprised to hear the assertion made, because I had assumed that the authorities in England had been based upon principles which were not of local application nor peculiar to any one system of jurisprudence. The decisions upon the subject in both countries are of recent date, but the law cannot be considered so; the principles upon which these decisions depend must have been lying deep in each system ready to be applied when the occasion called them forth." See also *Canadian Pacific Railway Co.* v. *Robinson*(2), at page 125, *per* Taschereau J.

It has now to be considered whether or not there is anything in the Quebec jurisprudence which will support the claim that the doctrine does not obtain in that province. In 1865, in *Fuller* v. *Grand Trunk Railway Co.*(3), it was decided that a servant had no action of damages against his employer for any injury he might sustain through the negligence of his fellow-servants, that French law did not govern the case, and the Court of Review decided in accordance with the principles laid down in the English cases of *Priestly* v. *Fowler*(4) and *Hutchinson* v. *York, etc., Railway Co.*(5). This was followed, in 1867, by *Bourdeau* v. *Grand Trunk Co.*(6), where it was decided

(1) 3 Macq. 300.
(2) 14 Can. S.C.R. 105.
(3) 1 L.C.L.J. 68.
(4) 3 M. & W. 1.
(5) 5 Ex. 343.
(6) 2 L.C.L.J. 186.

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that "the plaintiff cannot recover damages from his employers, the accident having occurred through the negligence of a fellow-servant. The plaintiff in entering the service of the company took the risk of these accidents upon himself." In *Robinson* v. *The Canadian Pacific Railway Co.*(1), the question of common employment was not really raised, but Ramsay J., expressed an opinion that it was settled law in this country that the employer was liable for the want of skill of a fellow-servant, and added, "We assimilate the want of skill of the fellow-workman to defective plant." That this is precisely what the English law does. It is an essential principle of common employment that a master is only relieved of liability if he has done his own duty by providing proper plant as well as properly qualified servants. In 1896, in *Dupont* v. *The Quebec Steamship Co.*(2) the Court of Review based its judgment on the use of defective machinery and Cimon J., adds: "J'ajouterai que j'ai beaucoup de doute que Dupont puisse être considéré un *fellow-servant,* de l'équipage du Muriel."

In 1887, in *Canadian Pacific Railway Co.* v. *Robinson*(3), at page 114, we find an *obiter dictum* of Chief Justice Strong: "This point (the negligence of a fellow-servant of the deceased) however well founded in fact would be an insufficient defence in point of law, for, according to the best French authorities, the rule of modern English law upon which that defence is founded is rejected by the French law which governs the decisions of such questions in the Province of Quebec," and he cited two French text writers, 31 Demolombe, No. 368, and 2 Sourdat, No. 911. Even

(1) M.L.R. 2 Q.B. 25. (2) Q.R. 11 S.C. 188.
(3) 14 Can. S.C.R. 105.

assuming the French law were as settled as supposed, it is not correct to say that the decision of such questions in the Province of Quebec is governed by French law, especially when, as appears to be the case here, the decision of the courts depends on the express terms of the French Code. In 1894, in *Filion* v. *The Queen* (1), the above opinion of Strong C.J., is the only authority referred to by Burbidge J., for his judgment rejecting the defence of common employment, and the Supreme Court (2) on this point simply approved the judgment of the Exchequer Court. In *The Queen* v. *Grenier* (3), the Exchequer Court was reversed, the Supreme Court holding that the deceased had obtained satisfaction during his lifetime, and there is again an *obiter dictum* of Strong C.J., who says of the defence of common employment: "There is no use in referring to authorities on this point as we are bound by our previous decisions regarding it." In *The Asbestos and Asbestic Co.* v. *Durand* (4), at page 292, King J., delivering the judgment of the majority of the court, refers without comment to the previous cases of *The Queen* v. *Filion* (1), and *The Queen* v. *Grenier* (3), but he adds: "Nor was the deceased a consenting party to the excessive quantity of dynamite being deposited near him, for the evidence shews that the deposit of such a quantity was contrary to the usual course of business."

The above appears to constitute the whole body of the jurisprudence of the Dominion and provincial courts on the question of the place in the law of Quebec of the doctrine of common employment. It really comes down to an *obiter dictum* of the former Chief

(1) 4 Ex. C.R. 134.
(2) 24 Can. S.C.R. 482.
(3) 30 Can. S.C.R. 42.
(4) 30 Can. S.C.R. 285.

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Justice Strong. With all respect, this cannot be entitled to much weight in a matter involving principles of such great consequence. There is nothing in either the law or jurisprudence of the Province of Quebec which can reasonably be set against the weighty and considered decisions of the House of Lords above referred to; decisions based, as they expressly claim, not on any peculiarities of English law or jurisprudence but on principles of broad and universal application.

We also refer to *Ryder* v. *The King*(1), *per* Nesbitt J., at pages 465, 466; *Hall* v. *Canadian Copper Co.* (2); *Slattery* v. *Morgan*(3); 12 Am. & Eng. Encyl. of Law (2 ed.) 901, notes as to the French jurisprudence respecting *risque professionnel,* and authorities there cited; *Spence* v. *Healey*(4), as to satisfaction in anticipation, and 1 Am. & Eng. Encycl. of Law, *vo.* "Accord," at page 423.

R. C. Smith K.C. and *W. G. Mitchell* for the respondent. The evidence clearly shews that the accident was caused solely by the fault of the officers and servants of the Crown in the discharge of their duties as employees on the railway and that no contributory negligence can be ascribed to the deceased.

Under the circumstances the Crown cannot be discharged from responsibility. It seems that a wide distinction lies between the nature of the action instituted under "Lord Campbell's Act" and art. 1056 C.C.; *Robinson* v. *Canadian Pacific Railway Co.*(5); *Miller* v. *Grand Trunk Railway Co.*(6).

(1) 36 Can. S.C.R. 462.
(2) 2 Legal News 245.
(3) 35 La. Ann. 1166.
(4) 8 Ex. 668.
(5) [1892] A.C. 481.
(6) [1906] A.C. 187.

As to the defence of common employment, see *Filion* v. *The Queen*(1).

An action in tort lay against the Crown, under section 1 of the Act, 33 Vict. ch. 23, passed in 1870, if the claim arose from death or injury to the person or property on any railway, canal or public work under the control and the management of the Government of Canada. This Act was abrogated by 50 & 51 Vict., ch. 16, creating the Exchequer Court of Canada and, from sections 58 and 59 of that Act, any claim which could be made the subject of a decision by the official arbitrators may be subject to the jurisdiction of the Exchequer Court; a new jurisdiction was created extending to claims of the nature of a tort, like the present one, and liability was imposed on the Crown in such cases for the wrongful acts of its officers and servants.

Apart from the statute the Crown is bound by the provisions of the Civil Code and can claim no immunity except that which constitutes the attributes of sovereignty; *Campbell* v. *Judah*(2); *Exchange Bank of Canada* v. *The Queen*(3). Article 9 C.C. does not relieve the Crown from responsibility; 2 Migneault, pp. 106 *et seq.;* 2 Loranger, Civil Code, pp. 194 to 197; Chitty, Prerogatives of the Crown, page 382.

As to the claim that because, at the time of his death, deceased was a member of the Intercolonial Railway Employees' Relief and Insurance Association no action can be maintained, see *Robinson* v. *The Canadian Pacific Railway Co.*(4), and *Miller* v. *Grand Trunk Railway Co.*(5). The Privy Council laid down the rule that the right of action under art.

(1) 4 Ex. C.R. 134; 24 Can. S.C.R. 482.
(2) 7 Legal News 147.
(3) 11 App. Cas. 157.
(4) [1892] A.C. 481.
(5) [1906] A.C. 187.

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1056 C.C. is an independent and personal right and is not, as in "Lord Campbell's Act," conferred on the representatives of the deceased only. Therefore, unless deceased obtained real and tangible indemnity or satisfaction for the offence or quasi-offence, the right of action remains unimpaired in his widow and children.

In the first place, the indemnity payable in respect to the insurance did not come from the offender even in part. In this case, on reference to rule 7, it will be seen that in case of death the full amount to be raised is collected in proportion from every surviving member who pays an assessment according to the amount of his insurance. It is quite evident that the amount contributed by the Railway Department to the association is not devoted to the death fund but to the sick fund. Secondly, the Privy Council, in the *Miller Case* (1), found that the payment is independent of and bears no relation to the offence or quasi-offence and would equally have to be paid if the deceased had died a natural death. The same reason applies in the present instance. That decision supports the view that the Crown is not relieved from responsibility by reason of membership in the association. The Privy Council, in the *Miller Case*(1), merely assumed the by-law to be valid. But if the right of action, vested in the widow and children of the deceased, is separate, personal and independent, the legality of a by-law or regulation under the provisions of which the Crown could, in advance, contract itself out of responsibility and the deceased relieve the Crown of a responsibility which did not, as yet, exist to the extent of depriving

(1) [1906] A.C. 187.

the widow and children of their recourse, it can be successfully assailed.

There is no Dominion law affecting negligence; the *lex loci* must apply to the civil right to be dealt with in the province. See 2 Wharton, Conflict of Laws (3 ed.), secs. 475, 477; also other authorities cited in *Dupont* v. *Quebec Steamship Co.*(1), by Routhier J., at page 192. Art. 1056 C.C. is not a re-enactment of "Lord Campbell's Act," see *per* Pagnuelo J., in *Miller* v. *The Grand Trunk Railway Co.*(2), at page 363, and authorities cited; *Roy* v. *The Grand Trunk Railway Co.*(3). We also rely upon *Bélanger* v. *Riopel*(4), at p. 258; *Dupont* v. *The Quebec Steamship Co.*(1); *Robinson* v. *The Canadian Pacific Railway Co.*(5); *The Queen* v. *Grenier*(6), at page 51, and *The Asbestos and Asbestic Co.* v. *Durand*(7).

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

DAVIES J.—I agree in the conclusion as to the main facts reached by the trial judge that Charland failed properly to set and lock the switch. I have gone carefully over the evidence and have reached the conclusion that the switch was not at the time in good working order. Had it been so, Charland's attempts effectively to set the switch would have been successful. He brought the crank to its proper place and set the safety hasp in its proper notch. This was not

(1) Q.R. 11 S.C. 188.
(2) Q.R. 21 S.C. 346.
(3) 4 Legal News 211.
(4) M.L.R. 3 S.C. 198.
(5) 14 Can. S.C.R. 105, at p. 114.
(6) 30 Can. S.C.R. 42.
(7) 30 Can. S.C.R. 285.

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done as he says himself without difficulty and trouble, a fact which Bruce's evidence fully supports. It seems reasonably certain, however, that while Charland was successful in putting the switch crank in place and setting the safety-hasp, such action which, in the case of the switch crank and attachments in good working order, would have resulted in placing the switch-rails flush with the rails on the main line, did not do so. The switch-crank and the safety notch were set properly for the main line, and the target so indicated, but owing to some breakage or defect in the attachments, aggravated possibly by the snow which had fallen that morning to a depth of about three inches, I conclude from the evidence that the switch-rails did not move in unison with the crank and were not made flush either with the main line or the switch-line. I think the evidence of Bruce and Charland, the two men in the best position to judge, shews that the switch-crank appeared properly set for the main line and that the target so indicated, but neither of them were able to say that they looked to see whether the switch-rails had swung so as to be flush with the main rails as if the attachments had been in order would have been the case. Bruce was too far away to see as to the rails being flush, and Charland, who was on the spot, says he did not look. Considering the trouble and difficulty he had in getting the switch-crank and the safety hasp in their places, I think it was negligence on his part not to have looked and seen whether the switch-rails had, after all his labour and efforts, swung to their proper place.

If the crank and safety hasp were set as he describes, and Bruce confirms, and the target indicated that the main line was open, no blame whatever could

be attached to the deceased engineer for continuing on his course. Charland's evidence of the trouble he had with the switch lends great colour to the positive evidence of Bruce as to what he saw and the expert evidence of Houston as to how the accident occurred.

I think the evidence of Bruce, who was standing on the station platform looking at the approaching engine, of Mitchell, the conductor of the train, who saw the marks of the wheels on the ties, and of the expert witness Houston, the track master, prove that the accident started at the junction of the switch-rail with the main line rail and not at the frog as submitted by the Crown. Bruce says he saw the front wheels of the engine, at this point of the switch, mount the rails which would not have taken place had the switch-rails been set true for the main line, although the indicator or switch-signal so pointed.

I conclude from the evidence of the conductor, Mitchell, that the engineer, Goddard, as he got up to the switch observed that, notwithstanding the target indicated the main line was open, the rails were not right and that he immediately applied the brakes, which action might have had something to do in helping on but unfortunately did not prevent the accident and, in any case, is not charged as negligence on his part.

In the result, my conclusion is that the accident was neither caused nor contributed to by any negligence of Goddard's, but that, as the evidence shews, the working parts of the switch must have been out of order before the accident or were put out of order by Charland's working them at the time; that their defective working condition was probably contributed to by the fall of snow, that Charland managed, with

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effort and after trouble, to get the crank and safety hasp in their places, but was not successful in bringing the rails of the switch and main line together, and that this failure which he negligently left unobserved caused the accident, no negligence being attributable to the deceased engineer.

On all the legal points debated so fully at bar I am in agreement with the conclusion of the learned trial judge. I think our previous decisions have settled, as far as we are concerned, the construction of the clause (*c*) of the 16th section of the "Exchequer Court Act," and determined that it not only gave jurisdiction to the Exchequer Court but imposed a liability upon the Crown which did not previously exist, and also that such liability was to be determined by the general laws of the several provinces in force at the time such liability was imposed and that the case at bar is within the provision of the above cited amendment.

I also agree on the authority of *Miller* v. *The Grand Trunk Railway Co.*(1), which, in my opinion, governs this case, that the defence raised by the Crown of the deceased having obtained satisfaction or indemnity within the meaning of article 1056 of the Civil Code by reason of the annual contribution made by the Intercolonial Railway Employees' Relief and Insurance Association, Class C., cannot be sustained.

I also concur with the trial judge that our decisions are binding upon us to the effect that the doctrine of contributory negligence (so called) only applies in the Province of Quebec to the mitigation of the damages which would otherwise be recovered by

(1) [1906] A.C. 187.

the injured party and does not operate to defeat his action.

The appeal should be dismissed with costs.

IDINGTON J.—I cannot find as a fact that the deceased engine-driver so neglected his duty as to render his conduct contributory to his own death.

The application of the emergency brakes indicates he saw what, if he had seen sooner, might have averted the accident.

I cannot, however, say upon the whole evidence that his failure to see sooner was the result of negligence.

As to the other questions raised we are bound, as to some of them, I think, by decisions here, and, as to others, by the decisions in the Privy Council, and cannot interfere.

The appeal as a result fails and should be dismissed with costs.

MACLENNAN J.—I agree in the opinion of Mr. Justice Davies.

DUFF J.—The contentions advanced by the appellant are, with the exception of one which I am about to discuss, fully dealt with by the learned trial judge, and, as I entirely agree with his reasoning and his conclusions, it is not necessary that I should, save as to that exception, say anything further about them.

A contention not referred to by the learned judge and apparently but little discussed at the trial, was pressed upon us, viz., that the negligence of the deceased, Holsey Cleveland Goddard, is an answer to

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the action. That contention necessarily, in the circumstances, proceeds upon the proposition that a person situated as Goddard was, and observing the rules, must have seen that the switch was set for the siding.

There seem to be insuperable obstacles in the way of giving effect to that contention at this stage. The evidence, for example, of the witness Bruce, put forward by the Crown as a substantial part of the defence, was to the effect that the witness observed the signal at the switch immediately before the approach of Goddard's train, and that it appeared to be set for the main line. In view of that evidence it is quite impossible to say that the implied finding of the learned trial judge on this point is a finding so clearly erroneous as to justify the reversal of it.

Appeal dismissed with costs.

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

Solicitors for the respondent: *Laflamme & Mitchell.*

THE WABASH RAILROAD COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

ADA McKAY (PLAINTIFF)..... RESPONDENT.

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*March 19.
*May 5.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway—Collision—Stop at crossing—Statutory rule—Company's rule—Contributory negligence—R.S. [1906] *c.* 37, *s.* 278.

A train of the Wabash Railroad Co. and one of the Canadian Pacific Railway Co. approached a highway crossing at obtuse angles. The former did not, as required by sec. 278 of the Railway Act, come to a full stop; the latter did so at a semaphore nearly 900 feet from the crossing and receiving the proper signal proceeded without stopping again at a "stop post" some 400 feet nearer where a rule of the company required trains to stop. The trains collided and the engineer of the Canadian Pacific Railway Co. was killed. In an action by his widow:

Held, that the failure of the engineer to stop the second time was not contributory negligence which prevented the recovery of damages for the loss of plaintiff's husband caused by the admitted negligence of defendants.

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

A collision occurred between trains of the Wabash Railroad Co. and the Canadian Pacific Railway Co., respectively, at a crossing about a mile from St. Thomas, Ont., and the engineer of the Canadian Pacific Railway train was killed. At the trial of an action by his widow, on behalf of herself and

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

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children, she obtained a verdict against the Wabash Railroad Co. for $10,000, which was affirmed by the Court of Appeal.

On appeal by the company to the Supreme Court of Canada it was admitted that the defendant company was guilty of negligence in not coming to a full stop before approaching the crossing as required by sec. 278 of "The Railway Act" and the only question raised was whether or not the deceased engineer was guilty of contributory negligence because, having come to a full stop at a semaphore about 900 feet from the crossing, he did not stop a second time at a "stop post" some 400 feet further on as required by the rules of his company.

The rules as to the "stop post" are the following:—

"The following instructions concerning Standard Stop Posts and Slow Posts are issued for the guidance of all concerned: Standard Stop Posts placed 400 feet from Railway Crossings at grade and drawbridges where interlocking plants are not in operation are indications of points at which trains are required to come to a stop and be governed by rule 98(*c*)."

Rule 98(*c*), referred to in the circular reads as follows—

"Unless there is an interlocking plant in operation, trains must stop and receive proceed signal from signalman before passing over a drawbridge or a railway crossing at grade."

Rose for the appellant. A railway company is liable for the consequences of an employee's disobedience of rules. *Canadian Pacific Railway Co.* v. *Lawson*(1); Labatt on Master and Servant, p. 941, sec. 363.

(1) Cout. Dig. 1217.

The amount of the indemnity policy should have been deducted from the verdict. *Hicks* v. *Newport, Abergavenny & Hereford Railway Co.*(1), approved in *Bradburn* v. *Great Western Railway Co.*(2).

Robinette K.C. and *Godfrey* for the respondent.

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

DAVIES J.—I concur for the reasons stated by Mr. Justice Maclennan.

IDINGTON J.—I concur for the reasons stated by Mr. Justice Duff.

MACLENNAN J.—The plaintiff is the widow of John McKay, an engineer of a Canadian Pacific Railway passenger train, who was killed in a collision between his train and a train of the appellant company, at a level crossing near St. Thomas, Ont., and she sued for damages for his death. At the trial the plaintiff obtained a verdict and judgment for $10,000, which was affirmed by the Court of Appeal, and this appeal is from that judgment.

Before the accident the trains were approaching each other at an angle of 122° 55′, the train of the deceased on an up-grade, and that of the appellants on a heavy down-grade.

Section 298 of "The Railway Act" enacts that

> every train shall, before it passes over any such crossing * * * be brought to a full stop.

(1) 4 B. & S. 403n. (2) L.R. 10 Ex. 1.

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The crossing is guarded by five semaphore signals, all operated by a man stationed at the crossing, where one of those signals is placed. The other signals, called distance semaphores, are placed at varying distances, about 800 feet from the crossing, two on each line, one on each of the four directions of the lines from the crossing.

The variation in the distance of those signals apparently depends on the grade of the approach to the crossing. The signal on the side from which the train of the deceased was approaching being 815 feet, and that on the opposite side 936 feet from the crossing, and that on the appellants' line, on the side from which their train was approaching being 893 feet, and on the opposite side 703 feet from the crossing.

I think it is evident that these distance signals were intended by the respective companies to insure compliance with the section of "The Railway Act" above referred to, and to indicate the points on each line at which the full stop required by the statute is to be made before the train passes the crossing.

But, besides these semaphore signals, the Canadian Pacific Railway Company has placed a fixed post, about 400 feet from the crossing, marked STOP. It is a fixed signal, always speaking, not capable, like the others, of being opened and closed, and the appellants have no such additional signals on their line.

What then is the purpose and significance of this post? That is explained by rules of the company, 98(*c*) and 98 (*d*), and an instruction issued to its trainmen.

These rules are as follows:—

98(c)—Unless there is an interlocking plant in operation, trains must stop, and receive proceed signals from signal-men, before passing over * * * a railway-crossing at grade.

98(d) Passenger trains must not exceed a speed of twelve miles, and other trains a speed of eight miles, per hour, over railway-crossings at grade.

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And the instruction is as follows:—

Maclennan J.

Standard stop-posts, placed 400 feet from railway-crossings at grade * * * , where interlocking plants are not in operation, are indications of points at which trains are required to come to a stop, and be governed by rule 98(c).

Reading the statute and the rules and the instruction together, I think the stop-post is placed as an additional caution, and to ensure the full stop which the statute makes imperative, in case, for any reason, a train did not stop at the distance signal, and as indicating a point beyond which no train should proceed without coming to a stop.

The distance signals must be intended for the same purpose by both companies, that is, as signals for the stop required by the statute. The appellant company had no other, and there can be no reason suggested for two stops before crossing.

The jury found, as they were warranted in doing upon the evidence, although there was some evidence the other way, that the deceased's train did stop at the distance semaphore; that he received a proceed signal from that semaphore, and also from the one at the crossing; and that his speed, at the crossing, was from ten to twelve miles an hour. They also found that the speed of the appellants' train, at its distance semaphore, was forty-five miles an hour, and, at the moment of the collision, eight to nine miles an hour, and that the appellants' engine was the one which struck the other.

It was not contended before us that the appellants were not guilty of negligence, which caused the accident, and the contention was that the deceased

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was guilty of contributory negligence, in not stopping at the stop-post.

In my opinion it is clear that, having stopped at the distance semaphore and having received a proceed signal from that, and also from the one at the crossing, and having approached the crossing at a speed not exceeding ten or twelve miles an hour, the deceased was not guilty of any negligence.

I think the appeal should be dismissed with costs.

DUFF J.—It seems to me to be clear that disobedience of an instruction such as that relied upon by the defendants cannot be regarded as, *per se,* a breach of the statute or of the statutory rule. The duty of the deceased, McKay, under the statute was neither more nor less than the duty of the company which employed him; and the duty of the company cannot, I think, be measured by the terms of the directions they may give to the persons whom they place in charge of their trains. The statute, in other words, cannot be said to prescribe one standard of duty for the Canadian Pacific Railway Company and another for the defendants. Neither do I think the question whether, in bringing the train to a stop at the semaphore, McKay did make a "full stop" in compliance with the statute, involves any question of fact which the learned judge was bound to submit to the jury. On that head the sole question for them to pass upon seems to me to have been that which the learned trial judge left to them, namely, whether in fact the train was brought to a full stop; and the legal result of the finding on that point, taken together with the undisputed facts is, I think, that the statute was observed.

Then, was there any evidence of contributory negligence in fact on the part of McKay which could properly have been submitted to the jury? I think there was none.

The instruction referred to seems to be at best ambiguous, and reasonably open to a construction which would sanction the course which the jury found McKay actually took.

I should think it not open to dispute that the existence of an ambiguous instruction reasonably susceptible of a construction sanctioning a given course of conduct could not alone be sufficient evidence to support a finding that such conduct is negligent conduct. Evidence shewing that the instruction although open to such a construction was in practice acted upon in a different sense might, perhaps, alter the case. But we have nothing of the kind here. There is not the slightest evidence that McKay's conduct was not in accordance with the practice under the instruction; on the contrary the only evidence touching the point is to the opposite effect.

I would dismiss the appeal.

Appeal dismissed with costs.

Solicitor for the appellants: *H. E. Rose.*

Solicitors for the respondents: *Robinette, Godfrey & Phelan.*

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*May 5, 6.
*May 18.

EDWARD WARD SMITH (SUPPLIANT) . APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

FREDERICK DANIEL FROOKS (SUPPLIANT)..... } APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Mines and minerals—Hydraulic regulations—Application for mining location—Duties imposed on Minister of the Interior—Status of applicant—Vested rights—Contract binding on the Crown.

Under the hydraulic regulations for the disposal of mining locations in the Yukon Territory, enacted by the Governor-General in Council on 3rd December, 1898, as amended by subsequent regulations and by the order in council of 2nd February, 1904, the Minister of the Interior is charged with the duty not only of pronouncing on the question whether or not the locations applied for should be reserved for disposal under such hydraulic regulations, but also of determining the priority of rival claimants, the extent of the locations and the conditions of any lease to be granted.

Until the minister has given a decision favourable to an applicant, there can be no implied contract binding upon the Crown in respect to the location applied for, and the mere filing of an application for an hydraulic lease confers no status or prior rights on the applicant in respect to the ground therein described.

APPEAL from the judgments (dated 7th January, 1908) of Burbidge J., in the Exchequer Court of Can-

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*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

ada, dismissing the petitions of right filed by the suppliants.

His Lordship said in the judgments appealed from:

"And now the state of my health prevents me from giving the case the consideration which it deserves. However, it does appear to me to be important that the litigation should be advanced another stage and that it is in the interests of the parties themselves that it be put in a position where the questions in issue may be brought before the Supreme Court of Canada rather than that there should be a rehearing or reargument in this court. And for that I am not without a precedent. For in the case of *The Attorney-General for British Columbia* v. *The Attorney-General for Canada*(1), the decision of the Exchequer Court was taken by consent and without argument in order to facilitate the bringing of the case directly to the Supreme Court. It is true that in this case I have not the consent of the parties, but I think may take it for granted that they would consent to a course of procedure which appears to me to be so much in their interest. The main question it seems to me that I need to decide is as to the party upon whom the burden of bringing the appeal should be thrown, and in this case I think that burden should fall upon the suppliant."

The questions at issue on the appeals are stated in the judgments now reported.

T. Mayne Daly K.C. and *J. Travers Lewis K.C.* for the appellants.

Shepley K.C. for the respondent.

(1) 14 Can. S.C.R. 345.

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GIROUARD J.—I concur in the opinion stated by Mr. Justice Duff.

DAVIES J.—I also concur with Mr. Justice Duff.

IDINGTON J.—Each of these cases arises out of an application made under the mining regulations in force in the Yukon for a mining lease.

The first question that suggests itself in considering the appeal is: Can relief be given in an action taken by way of petition of right upon and for relief from the refusal of the Crown to comply with an application made under the said regulations?

Section 3 thereof, as amended on the 2nd March, 1900, is the basis of the claim and is as follows:—

> To any person who files an application in the Department of the Interior at Ottawa for a location previously prospected by him or his authorized agent at the time the location was prospected, a lease will be issued provided he is the first qualified applicant therefor. Before the issue of any such lease there shall be filed in the Department of the Interior at Ottawa a report from the Gold Commissioner to the effect that it has been proved to his satisfaction that the applicant himself, or a person acting for him, was upon and actually prospected, prior to the date of the application, the ground included in the location, and that the ground included in the location is not being worked and is not suitable to be worked under the regulations governing placer mining.

That section standing alone might in the case of a suit brought upon the filing of an application (either rejected and refused so soon as filed or when supplemented by a compliance with the proviso of the section) raise some curious questions.

It is, however, not alone but is preceded and followed by sections that confer upon the Minister of the Interior, representing the Crown, powers and impose upon him duties in regard to the granting of such

leases that give to the operation of the section or subject matter of its operation an instability, a want of uniformity and indefiniteness of possible results that render it quite impossible to say that a contract has been formed at any stage up to the last when the minister has directed the lease to issue in the form and for the quantity of land and upon the terms of rental that he in each such regard may have decided upon.

It seems impossible to find a completed contract until then.

It is suggested and pressed upon us that a duty has been created by these regulations, which have the force of a statute, rendering it possible for the Exchequer Court upon such petition of right as is before us to interfere, and to declare that the Crown is bound to issue a lease.

It is, if I understand counsel aright, only mildly claimed that such a suit might be maintained in case the Crown, immediately after the filing in priority to all others of such an application, refused to recognize it.

It is however stoutly maintained that upon the filing as required by the latter part of said section of the report therein mentioned, as was done here, there is duly established such a claim to a lease that the Exchequer Court can give relief in regard to it.

There is not created in that case any more than upon the mere filing of the application a contract or any tangible right that a court can enforce.

The case of *Farmer* v. *Livingstone*(1) presents similar features. There the applicant for a homestead presented all the statute required of such an applicant,

(1) 8 Can. S.C.R. 140.

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and made his application therefor and paid the statutory fee of ten dollars, but did not get a receipt or anything to shew he had been *granted a right of entry upon the land* yet he went into actual possession. It was held he had no claim of which the court could take cognizance. I think the reasoning upon which this court reached its conclusions in that case leads to our being bound to pause before saying that there was in these cases any right in law which could be recognized.

We need not however go so far as that reasoning might carry one.

There the court seemed to accept without limitation the theory that statutes prescribing a duty for a public officer might be treated as directory and as conferring no right.

I express no opinion on that.

I prefer to point out that this regulation, which at all events prescribed certain things to be done and pointed out certain paths for an applicant to follow, imposed upon the minister of the Crown duties to be discharged and conferred powers to be exercised by him before the applicants could have any rights enure to them or either of them under the regulations.

The non-discharge of one of these duties of the minister seems to me, when considered in connection with the peculiar facts before us, quite clearly destructive of any claim each appellant makes here. That is set forth in the second regulation which is as follows:

> Each alternate claim shall, *until otherwise ordered by the Minister of the Interior, be reserved.*

Now we find Frooks' claim preceded Smith's and the latter defined his as follows:

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Commencing at the lower end boundary of F. D. Frooks' application on Flat Creek, thence extending down a stream a distance of five miles, and in width from summit to summit.

The minister never decided that this Smith claim which I take it then became alternative to that of Frooks could be open to any one.

Until there was had such a necessary determination under the regulations he could have no right.

Then, as to Frooks, he later, by permission of the department, so amended his claim as to cover both sides of the creek, including thereby new territory.

I do not think that can be treated as such a decision of the questions raised by section 2 of the regulations as to enure to Smith's benefit for we have nothing to shew that his application was considered in that connection.

And as to this amendment of Frooks' claim, made as it was in 1903, I think it must be held as something done by him that brings him and his claim under the amended regulations of 19th May, 1902, which rendered it necessary to get the consent of the commissioner which never was given.

It seems almost impossible to render new territory, then clearly under the new regulations, subject to the administration of old and repealed regulations without at least some express declaration on the part of the Crown that such old regulations were to be held applicable thereto.

Indeed it would seem as if such a thing had by the repeal of the regulations become beyond the power of the minister to declare.

In any way one looks at the matter it is to be observed that the sanction of the minister was necessary to confer any right.

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It never was given. Nothing ever was granted. Nothing existed but uncompleted negotiations.

I think the appeal should be dismissed with costs.

MACLENNAN J.—I agree in the opinion stated by Mr. Justice Duff.

DUFF J.—The appellant, Smith, applied on the 28th April, 1900, for a lease of a tract of mining land in the Yukon Territory under the regulations then in force,

> for the disposal of mining locations to be worked by the hydraulic or other mining process,

(hereinafter referred to as the "hydraulic regulations").

On the 2nd day of February, 1904, an order was passed by the Governor-General in Council(1), by which,

> the regulations for the disposal of mining locations in the Yukon Territory to be worked by the hydraulic mining process, established by the order-in-council of the 3rd of December, 1898, and amended by subsequent orders-in-council, were rescinded and the Minister of the Interior was authorized to deal in accordance with the provisions of the said regulations with all leases already issued and with all applications which have already been granted under the provisions thereof.

The Crown contends that, by this order-in-council, the power of the Minister of the Interior to issue leases of locations for hydraulic mining was abrogated (except in respect of "applications" which had "already been granted under the provisions" of the regulations referred to); and, therefore, that since the appellant's application was not one of those which had thus "already been granted" the minister was by the order-in-

(1) Stat. Can. 1904, pp. xxxvii, xxxviii.

council deprived of authority to issue a lease in respect of it. The appellant attacks this position in two ways. He says, first, that before the order-in-counsel of February, 1904, was passed his application had been granted within the meaning of that instrument; and secondly, assuming that not to be so, he had by presenting his application merely, acquired a status respecting the land applied for, and that the order-in-council ought to be construed as not affecting that status to his prejudice.

The first of these contentions is based upon the following communication from the Secretary of the Department of the Interior to the appellant:—

OTTAWA, 9th of April, 1901.

Sir:

I beg to acknowledge the receipt of your letter of the 27th of February last, addressed to the Deputy Minister, with respect to the application made by you for a lease for hydraulic mining purposes of a tract of land situated on Flat Creek, in the Yukon Territory, and in reply to inform you that the reports required by section 3 of the hydraulic mining regulations, have now been received in this Department, and you are given six months from this date within which to file in the office of the Gold Commissioner at Dawson, the returns of the survey of the location in question, upon the conditions, however, that the ground included in the location will be open to placer mining entry, up to the date upon which such returns are filed with the Gold Commissioner.

Your very obedient servant,

P. G. KEYES,
Secretary.

E. W. Smith, Esq.,
Comptroller's Office,
Dawson, Y.T.

This letter, the appellant argues, was an acceptance of his application. It seems to be very clear that it was a distinct notice to him that the application was not accepted and would not be accepted or acted upon before the returns referred to in it should be furnished.

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In order to appreciate fully the effect of this communication as touching the appellants' contention, it is necessary to notice the terms of the 13th clause of the hydraulic regulations. That clause directed that "when it is decided to hold any ground" with a view to disposing of it under those regulations, notice of that decision should be posted in the office of the mining recorder for the district; and it was further declared by the same clause that thereafter no claim professedly located under the Placer Mining Regulations within the area affected by such a notice should have any legal validity. The statement in the letter that the tract applied for would still be open to entry under the placer mining regulations conveyed a very obvious warning that no decision of the character referred to in the 13th clause of the hydraulic regulations had yet been arrived at; and consequently that the question was yet in abeyance whether that tract would (in the words of that clause) be

> held for the purpose of being included in locations under the hydraulic regulations.

That upon any application for a lease under the hydraulic regulations there was always this preliminary question to be passed upon by the Minister of the Interior is made very clear by this clause; and indeed is, apart from this clause, manifest from the tenor of the regulations as a whole. As regards the area embraced within appellant's application, that question —thus expressly held open by the letter quoted— still remained an open question when the order-in-council of the 2nd February, 1904, was passed. In such circumstances it would appear to be beyond dispute that the appellant's application cannot be

brought within the category of "applications already granted" within the meaning of that instrument.

The second contention fails for substantially the same reasons. The appellant relies upon the language of the order-in-council of the 2nd of March, 1900, which is as follows:—

> Whereas it is provided by clause 3 of the regulations for the disposal of mining locations in the Yukon Territory, to be worked by hydraulic or other mining process, made by order-in-council of 3rd December, 1898, as amended by order-in-council dated 24th October, 1899, that leases may be issued to applicants who can furnish evidence that they prospected the location applied for prior to December, 1898, and
>
> Whereas it is now deemed that it would be in the public interest if the said regulations were amended so that in the future any person who files an application for a location may obtain a lease thereof, without competition, provided the location has been prospected prior to the date of his application:
>
> Therefore His Excellency by and with the advice of the Queen's Privy Council for Canada, is pleased to order that clause 3 of the above mentioned regulations shall be and the same is hereby amended to read as follows:—
>
> To any person who files an application in the Department of the Interior at Ottawa for a location previously prospected by him or his authorized agent at the time the location was prospected, a lease will be issued provided he is the first qualified applicant therefor. Before the issue of any such lease there shall be filed in the Department of the Interior, at Ottawa, a report from the Gold Commissioner to the effect that it has been proved to his satisfaction that the applicant himself, or a person acting for him, was upon and actually prospected prior to the date of the application the ground included in the location, and that the ground included in the location is not being worked and is not suitable to be worked under the regulations governing placer mining.

The contention is that this order-in-council constituted an offer to the world, upon the acceptance of which by the filing of an application alone, a present interest in, together with a right to a lease of, the ground applied for became vested in the appellant; and that—this interest being, as well as this right, "a right or privilege acquired, accrued or accruing" under

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the hydraulic regulations, within the meaning of sec. 19, sub-sec. (*c*) ch. 1, R.S.C. ("The Interpretation Act")— neither the interest nor the right could under the express terms of that enactment be affected by the revoking of those regulations.

I cannot accept this view for two reasons. First, the hydraulic regulations manifestly invested the minister with the responsibility not only of pronouncing upon the preliminary question already referred to —whether, that is to say, the lands applied for should be reserved for disposal under the hydraulic regulations,—but, in addition, assuming that question decided in favour of the applicant, the further duty of determining first of all the priorities among rival claimants and then the extent of the location and the conditions of the lease to be granted. In face of this, I do not see how it is possible to read the order-in-council of March, 1900, as bestowing upon an applicant in consequence of his application alone, any present interest in the land; or as making the application in itself the basis of any claim of a character sufficiently definite to enable a court to take cognizance of it. Not until the application was accepted certainly,—and perhaps not until the parties had executed a lease or done what the law would regard as equivalent to the execution of a lease,—would any such right or interest come into existence. A status so indefinite—resting so largely in the discretionary policy of a public department,—cannot I think be fairly described as a right or privilege either "acquired" or "accrued" or "accruing."

Again the interpretations ordained by the "Interpretation Act" must always yield to an unmistakable expression of intention in the enactment to be con-

strued; indeed these interpretations are by the express terms of the Act made non-applicable if "a contrary intention appears." Now the order-in-council of the 2nd February, 1904, dealt very explicitly with applications of the class to which the appellant's belonged, applications that is to say which were still under consideration when the order-in-council was passed; and it was in respect of those applications which at that date had been "already granted," and in respect of those only, that the minister was by the order-in-council authorized after that date to issue leases.

The intention was plainly manifested that save in pursuance of such an application leases should no longer be granted; as regards all other applications the powers of the minister were at once and wholly revoked. Where the law making authority has so unequivocally expressed its meaning there seems to be no room to apply the enactment of the "Interpretation Act."

The appeal should therefore be dismissed with costs.

These considerations apply also to Frooks' appeal in which, accordingly, the same order should be made.

Appeals dismissed with costs.

Solicitor for the appellants: *T. Mayne Daly.*
Solicitor for the respondent: *George J. Shepley.*

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*May 14.

AINSLIE MINING AND RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

MURDOCK McDOUGALL (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Alternative relief—Judgment granting one—Final judgment.

Where the party failing at the trial moves the court of last resort for the province for judgment or, in the alternative, a new trial he cannot appeal to the Supreme Court of Canada from the judgment granting the latter relief. *Mutual Ins. Co.* v. *Dillon* (34 Can. S.C.R. 141) followed.

APPEAL from a decision of the Supreme Court of Nova Scotia setting aside a verdict for the plaintiff and ordering a new trial.

The action was for damages resulting from the death of plaintiff's son while working in defendants' mine. At the trial plaintiff had a verdict and defendants moved the full court for an order dismissing the action, or, in the alternative, for a new trial on the grounds that the verdict was against the evidence and weight of evidence and for other reasons. A new trial was granted on the ground that there was no evidence of the negligence found by the jury though defendants might have been negligent in other respects not passed upon. The defendants appealed from this judgment seeking to have the action dismissed. The plain-

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tiff gave notice of cross-appeal to have the verdict at the trial restored.

Mellish K.C. for the appellants, admitted that the case could not be distinguished from *Mutual Reserve Ins. Co.* v. *Dillon*(1), and the court quashed the appeal, but without costs, as no notice of motion to quash had been given by respondent.

Daniel McNeil appeared for the respondent.

The judgment of the court was delivered by

GIROUARD J.—We are all of opinion that this appeal must be quashed on the simple ground that where a party appeals to the full court from a judgment at the trial, and asks for a new trial either as the sole or as an alternative relief, and such new trial is granted, in such case, having obtained the relief asked for, there can be no appeal to this court from such a judgment. In this respect we follow the judgments of this court in *Mutual Reserve* v. *Dillon*(1), and the *Corporation of Delta* v. *Wilson,* reported in Cameron's Practice, at p. 99.

Appeal quashed without costs.

Solicitor for the appellants: *W. H. Fulton.*
Solicitor for the respondent: *Daniel McNeil.*

(1) 34 Can. S.C.R. 141.

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*May 13.
*May 18.

THOMAS EAD .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Criminal law—Reserved case—Application for "during trial"—Crim. Code s. 1014(3).

By sec. 1014(3) of the Criminal Code either party may "during the trial" of a prisoner on indictment apply to have a question which has arisen reserved for adjudication by the Court of Appeal.

Held, that for the purposes of such provision the trial ends with the verdict after which no such application can be entertained.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming, on a reserved case, the verdict of guilty on the trial of the appellant for forgery.

The indictment charged appellant with forging a promissory note and the evidence at the trial shewed that he had signed a fictitious name to a blank form of note and given the document to a merchant in payment for goods. He was found guilty, and after verdict his counsel took the objection that the evidence did not warrant a conviction, and asked the judge to reserve a case for the Court of Appeal which he refused to do. On the prisoner's behalf application was then made to the Supreme Court of Nova Scotia, the Court of Appeal for the province under the Criminal Code, and that court made an order directing the trial judge to reserve a case which he did, submitting, with

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a statement of the proceedings, two questions for the Court of Appeal.

1. Does the indictment disclose any criminal offence?

2. In view of the fact that the instrument signed was a blank form of a promissory note, not filled in, was the prisoner rightly convicted of forgery of a promissory note?

The Court of Appeal, one member dissenting, affirmed the conviction and the prisoner appealed to the Supreme Court of Canada.

W. F. O'Connor, for the appellant. An application made before sentence is made "during the trial." See *Reg.* v. *Martin* (1).

The document alleged to have been forged was not a promissory note. *Reg.* v. *Harper*(2); *Reg.* v. *Mopsey*(3); *Rex* v. *Randall*(4).

A. C. Morrison K.C. for the respondent. The application for a reserved case must be made "during the trial"; Crim. Code, sec. 1014(3); and after verdict is too late.

The indictment is good on its face and any defect in the proof of the offence is cured by the verdict. *Rex* v. *Wright*(5); *Reg.* v. *Mason*(6).

The judgment of the court was delivered by

IDINGTON J.—The appellant was indicted for forgery of an alleged promissory note and tried upon

(1) Temp. & M. Cr. Cas. 8.
(2) 7 Q.B.D. 78.
(3) 11 Cox Cr. C. 143.
(4) R. & R. 195.
(5) 11 Can. Cr. C. 221.
(6) 22 U.C.C.P. 246.

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such indictment at the criminal term of the Supreme Court of Nova Scotia held by Mr. Justice Longley with a jury. The evidence to support the charge was that he signed the name "Thomas Healey" to a piece of paper of which the following is a copy:

\$14.00. Nov'r. 18th, 1907.

after date promise to pay to the order of dollars, at value received.

No. . Due . (Sgd.) Thomas Healey.

The evidence further shewed clearly that he was not the person he represented himself to be and whose name he signed and that his signing was fraudulent and to the prejudice of the private prosecutor who had sold him a coat for the price of fourteen dollars in payment of which at the sale thereof he signed and gave the vendor the paper in question.

There was no objection taken to the indictment, the reception of the evidence, or the direction of the learned trial judge, and the accused was found guilty. Thereupon and before sentence was passed, objection was taken, for the first time, that the accused could not on such evidence be convicted of the crime alleged.

The learned trial judge declined to reserve a case as requested upon this objection and sentenced the accused to three years in the penitentiary.

The Supreme Court of Nova Scotia, being the proper appellate court in the premises, was moved on behalf of the prisoner to direct the learned judge to state a case and so directed accordingly.

The learned judge stated with a brief report of the case the following points:

1. Does the indictment disclose any criminal offence?

2. In view of the fact that the instrument signed was a blank form of a promissory note, not filled in, was the prisoner rightly convicted of forgery of a promissory note?

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The Supreme Court of Nova Scotia upon hearing this appeal dismissed it, but Mr. Justice Meagher, one of the Court of Appeal that so heard the appeal, dissented in regard to the second question and held that there should be a new trial.

The prisoner has appealed from that decision.

The objection is taken here, as it was in the court below, that the prisoner had not any such right of appeal, as he was given leave to present, to the said court.

The question thus raised turns upon the interpretation of the Criminal Code, sec. 1014, sub-sec. 3, which can better be considered with and in relation to sub-sec. 2 of the same section. These sub-sections are as follows:

1014 * * * .

2. The court before which any accused person is tried may, either during or after the trial, reserve any question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the judge, for the opinion of the court of appeal in manner hereinafter provided.

3. Either the prosecutor or the accused may during the trial, either orally or in writing, apply to the court to reserve any such question as aforesaid, and the court, if it refuses so to reserve it, shall nevertheless take a note of such objection.

It is urged on the one hand that the words "during the trial" in this sub-section 3 must include everything up to and including the sentencing of the prisoner.

On the other hand, it is said that the plain ordinary meaning of the word trial must be adopted and that according to such reading the trial ends with the verdict of the jury.

I think this latter contention the correct one. A man might never be sentenced, yet he stands convicted when found guilty or acquitted when

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found not guilty and either could successfully plead respectively *autrefois convict* or *autrefois acquit* as the necessities of any later case might render necessary. Sentence so uniformly followed a conviction in olden times as to give the passing of sentence a semblance of part of the trial. It was also the point at which long ago most of the serious questions of law raised upon a trial came up for final disposition if not conclusion.

Ever since our Canadian statute (in 1869), 32 & 33 Vict. ch. 29, was passed almost all this has changed.

It was by section 32 of that procedure Act, enacted that objections to any indictment for any defect apparent on the face thereof must be taken by demurrer or motion to quash—before defendant pleaded and not afterwards.

Power of amendment was given the court by the same section in order to meet, if possible, the objection that might be so raised.

Thus far the English legislation, 14 & 15 Vict. ch. 100, was followed. Indeed, our whole criminal legislation of 1869 followed largely this beneficient English reformation of the criminal law. In this instance, however, the Parliament of Canada went a great step in advance of the other. Instead of limiting the peremptory requirement for demurrer or motion to quash to any *formal* defect, our legislation dropped the word "formal" and made the requirement apply to and prohibited the motion for arrest of judgment in any such case where demurrer might have been upheld or power to amend existed. That now stands virtually the same in our Criminal Code, sec. 898, with sub-sec. 2 as follows:

898. 2. No motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by the demurrer, or amended under the authority of this Act.

This radical difference between the English and Canadian legislation acted upon in *Reg.* v. *Mason*(1), ought always to be kept in view in reading English authorities in relation to proceedings at trial, including indictment.

The important ground left for such a motion seems to be as stated in the Code by sec. 1007, sub-sec. 1, to be founded on the ground shewn therein, which is as follows:

1007. The accused may at any time before sentence move in arrest of judgment on the ground that the indictment does not, after amendment, if any, state any indictable offence.

This is not as clear as one would wish. Is it only in the case of an amended indictment that the motion lies?

The very comprehensive language of section 989 shews how very limited a field is left for motions in arrest of judgment.

It is quite possible that after a prisoner had pleaded instead of demurring that the indictment might erroneously be amended by a trial judge in such a way as to render it bad in law.

If he should, over-confident of his own judgment, make a mistake in refusing to allow a demurrer to an amended indictment, the only recourse the prisoner would have as of right, save objecting to the amendment and noting of it, would be this motion to arrest judgment.

But is there any reason found in that for the extending of the right of appeal? The accused when the

(1) 22 U.C.C.P. 246, at p. 250.

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motion to amend has been made has every chance to object, and then thus comes within the limited meaning of the words "during the trial" and be able to insist on properly laying a foundation for appeal.

The chances of legal wrong ever being done by a trial judge to the accused after the verdict are almost infinitesimal and so easy of remedy by appeal to the clemency of the Crown that one cannot see injury likely to result from limiting his rights of appeal to that which transpired before the verdict.

On the other hand if the trial referred to in this sub-section 3 of section 1014 of the Code were extended to include proceedings after verdict then the accused would have left open to him in every case the right to keep silence and only interpose his objections after the verdict when nothing could be amended.

The door would be thus thrown wide open to almost interminable appeals nearly all of which might ultimately prove quite unfounded, yet persisted in would serve the purpose of the accused, who was guilty, but desired proceedings prolonged until he was quite forgotten, as a satirist tells us happens in the administration of the criminal law where justice is not swift of foot.

There is a marked difference between the provision made in sub-section 2 and that in sub-section 3 of section 1014 of the Code.

The first is intended to cover almost every case that a trial judge can reasonably have brought under his notice for reserving a case.

It entrusts to him the protection of the accused in any case in which the law apparently leading to his conviction may be doubtful.

The trial judge generally and, if I may be permitted to say so, properly, gives the prisoner the full benefit of any such doubt as he may have by reserving a case.

It is better that a number of cases barely arguable be remitted by this means to an appellate tribunal than that a trial judge should feel oppressed by the risk of being responsible for an illegal conviction.

On the other hand the accused is given as of right every opportunity of contesting the ruling of the trial judge on anything that arises in the progress of the trial.

If this prisoner, for example, had availed himself of this right he could easily have laid the foundation at the proper time for carrying his case to appeal.

Of course his doing so might not have led to acquittal, but might have led to amendments or other proceedings or actions of the court that might have ultimately brought about a conviction of what he was properly chargeable with.

That is, however, what the law is designed to effect.

As to the objection taken to the form of indictment, I doubt if that is properly before us.

The court below was unanimous in upholding it. It is only in case of a dissenting opinion that a prisoner can come to this court as of right.

I think the appeal should be dismissed simply on the ground that an appeal founded on the way it was did not lie either to the court below or to this court.

The case was argued fully on all points both as to the right of appeal and the merits of the objection to a conviction for forgery as of a promissory note where such a note never did exist, but a something so indescribable in law as the paper of which above is a copy.

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I have considered the possibility of holding that, as it was a case in which the learned trial judge might have reserved a case, his doing so might, though in obedience to an order of the court be treated as if originating on his own motion.

Doing so would convert what has been done into a something never intended and not within the contemplation of the Act.

Appeal dismissed.

THE BONANZA CREEK HYDRAULIC CONCESSION (DEFENDANTS). } APPELLANTS;

AND

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

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*May 7, 8.
*May 29.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Mining regulations—Hydraulic lease—Breach of conditions—Construction of deed—Forfeiture—Right of lessees—Procedure on inquiry—Judicial duties of arbiter.

Under a condition for defeasance in a lease of a mining location, made by the Crown in virtue of the hydraulic mining regulations of 3rd December, 1898, a provision that the Minister of the Interior is to be the "sole and final judge" of the fact of default by the lessee does not entitle the Crown to cancel the lease and re-enter until the fact of such default has been determined by the Minister in the exercise of the functions vested in him after an inquiry of a judicial nature in which an opportunity has been afforded to all parties interested of knowing and being heard in respect to the matters alleged against them in such investigation.

Quœre, per Idington J.—Was there not sufficient evidence in the case to shew that there had been no such breach of the conditions as could work a forfeiture of the lease?

APPEAL from the judgment (dated 7th January, 1908), of Burbidge J., in the Exchequer Court of Canada, maintaining the plaintiff's action with costs.

In the judgment appealed from, His Lordship said:—

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

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"I venture to ask the parties and any one who reads this short note not to come to the conclusion that the judgment which I am about to enter is given upon due consideration of the merits of the case. At the time when the evidence taken at Dawson was forwarded to the registrar of the court at Ottawa and the record thereby completed and since that time my other engagements were such as prevented me from taking the matter up and dealing with it in an adequate manner. And now the state of my health prevents me from giving the case the consideration which it deserves. However it does appear to me to be important that the litigation should be advanced another stage and that it is in the interests of the parties themselves that it be put in a position where the questions in issue may be brought before the Supreme Court of Canada rather than that there should be a rehearing and a re-argument in this court. And for that I am not without a precedent. For in the case of *The Attorney General for British Columbia* v. *The Attorney General for Canada* (1), the decision of the Exchequer Court was taken by consent and without argument in order to facilitate the bringing of the case directly to the Supreme Court. It is true that in this case I have not the consent of the parties, but I think I may take it for granted that they would consent to a course of procedure which appears to me to be so much in their interests. The main question it seems to me that I need to decide is as to the party upon whom the burden of bringing the appeal should be thrown, and in this case I think that burden should fall upon the defendants.

"There will be judgment for the plaintiff."

(1) 14 Can. S.C.R. 346.

The circumstances of the case material to this appeal are stated in the judgments now reported. The clauses of the regulations and in the lease calling for construction are as follows:—

"REGULATIONS"

"For the disposal of Mining Locations in the Yukon Territory to be worked by hydraulic or other mining process, approved by order in council, dated 3rd December, 1898."

"12. In case any lessee shall at any time make default in the payment of the rental or the royalty payable under these regulations, or shall make default in the performance of the conditions imposed by these regulations or by the lease, the Gold Commissioner may post a notice in a conspicuous place upon the location in connection with which such default has been made, and may mail a copy of such notice to the last address of the lessee known to the Commissioner, requiring such default to be remedied, and in case such default is not remedied within three months of the date of the posting of the notice upon the location all the rights of the lessee under the lease and under these regulations shall be and become *ipso facto* null and void."

EXTRACTS FROM LEASE,

Dated 3rd November, 1899:

"4. That the said lessee shall have sufficient hydraulic or other machinery in operation on the said demised premises within one year from the date hereof to permit of his beginning active operations for the efficient working of the rights and privileges hereby granted, which active operations he shall begin within the said period; and that if during any year of the said term hereby granted the lessee shall fail to ex-

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pend in such mining operations in, about or upon the said mining rights and privileges hereby granted the sum of five thousand dollars—of the fact of which failure the Minister shall be the sole and final judge —this lease or demise and the remainder of the term hereby granted, and all benefits, rights, and privileges hereby granted to the lessee shall become and be utterly and absolutely null and void, unless the Minister shall otherwise decide, and that in the event of such predetermination of this lease or demise and of the term hereby granted, or the remainder thereof, Her Majesty, her successors or assigns, may thereupon reenter upon the said demised premises, and have, hold, use, occupy, possess and enjoy the same and every part thereof, as if these presents had never been executed, and without any compensation or payment of any kind to the lessee for any work done or improvements made thereon; but nothing herein contained shall in anywise affect the right of Her Majesty or her successors or assigns to all arrears of rent or royalty to be paid as hereinbefore provided, or to any remedy for the recovery of such arrears of rent or royalty."

"10. That if the lessee shall at any time during the said term fail to pay the rent or royalty hereby reserved or any part thereof within sixty days after the same, respectively, shall have become due or if he shall commit any breach or default in the observance of the above conditions or of any of them other than that referred to in the clause numbered "4" of these presents, then, and in every such case the Gold Commissioner may post a notice in a conspicuous place upon the said demised premises and may mail a copy of such notice to the last address of the lessee known to the Commissioner requiring such de-

fault to be remedied and in case such default is not remedied within three months of the date of the posting of the notice upon the location all the rights of the lessee under the said lease and under the said regulations of the Order in Council of the third day of December, A.D. 1898, shall be and become *ipso facto* null and void provided that the claim of Her Majesty or Her successors or assigns for any rent or royalty then due or accruing due, or any remedy for the recovery thereof shall be in no wise affected by such cancellation."

Belcourt K.C. and *J. A. Ritchie* for the appellants.

Shepley K.C. for the respondent.

GIROUARD J.—I agree that this appeal should be allowed for the reasons stated by Mr. Justice Duff.

DAVIES J.—I agree in the opinion stated by Mr. Justice Duff.

IDINGTON J.—I agree in the conclusion reached by my brother Duff as to the necessity for a hearing of judicial nature before declaring the lease forfeited. Any right to determine without such a hearing must, if intended, be so clearly expressed as to exclude the reasonable expectation of a hearing.

The ordinary case of the builder or contractor, from long usage, from the nature of the matters to be determined, and generally incident to the possession of some expert knowledge or personal supervision in him given the power to determine, and for most part the necessities of the case, lead possibly to a different expectation in any one signing a building contract.

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The reasons I have assigned in the case of *Klondike Government Concession* v. *The King*(1), are also applicable here if it in fact was intended to assert the same wide power as I inferred and found asserted there. The inference of that fact is not so clear here as there. The margin of expenditure over the $5,000 limit in this case is so narrow the minister may have found reasons for discrediting some trifling item and proceeding merely on a correct appreciation of the amount expended.

MACLENNAN J.—I do not think it necessary to express any opinion upon the various matters which were discussed before us in this case on the question whether the appellants had or had not been guilty of such violations of the conditions and stipulations of their lease as to entitle the Crown to terminate it, being of opinion that the Minister could not do so without acting judicially and giving the appellants an opportunity of being heard.

DUFF J.—Under clause 4 of the appellant's lease, the determination by the Minister of the Interior of the fact of the lessees having failed in making the expenditure required is I think a condition of the exercise of the right of re-entry vested in the Crown. Nobody would contemplate the possibility of a re-entry on the ground of such a failure, until the fact that it had occurred should have been ascertained; and it is I think to the determination of the existence of that fact—as a step preliminary to the exercise of the right —that the provision making his finding conclusive and final applies.

(1) 40 Can. S.C.R. 294.

Is then the function of the Minister in arriving at a decision upon that question of fact—as distinct from his function in declaring a forfeiture—a function of a judicial nature? Or is his power to decide the question an absolute power which—so long only as he acts in good faith—it is permissible to exercise without regard to the principles governing judicial or quasi-judicial inquiries?

I think it belongs to the former class. The stipulation imports inquiry, and a determination as the result of inquiry. It is not one of those cases in which a question is committed to the decision of an expert, who is, solely or primarily, to use Lord Esher's phrase, "to employ his own eyes, knowledge and skill." It would be ridiculous to suppose either party to have contemplated that the minister should ascertain, from his own personal inspection of the ground and by use of his own knowledge and skill, whether a given amount had been expended by the lessees in a given year in the efficient working of their location. It must have been assumed that he would rely upon knowledge obtained at second hand—not by any means necessarily through evidence of such a character as would be admissible in a court of law—but by possessing himself of the results of the observation, knowledge, and investigations of others. Having then an inquiry of such a character provided for in an instrument *inter partes*—an inquiry which might, in the result, lead to the forfeiture of the rights of one of the parties—the proper view I think of the function of the person appointed to conduct it, there being nothing in the instrument to manifest a contrary intention, is that in the course of it he is bound to observe the requirements of substantial justice; and those requirements are not observed, if he reaches a decision adverse to the party

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whose rights may be thus affected, without first giving that party an opportunity both to know what is alleged against him, and to meet it.

It would seem that, in the case now under consideration, since the person charged with the investigation is also the person invested with authority to make the election whether or not a forfeiture is to be declared, the propriety of this view is even the less open to dispute.

The principle above indicated has been acted upon by the courts in a great variety of cases. In *Wood* v. *Woad*(1), at page 196, speaking of the expulsion of a partner under a power contained in the partnership articles which authorized also the appropriation by the remaining partners of the share of the partner expelled, Kelly, C.B. (in the course of a passage which was in *Russell* v. *Russell*(2), at page 478, adopted by Sir George Jessel as an accurate statement of the law, and has since been quoted with approval, by Lord Macnaghten speaking for the Judicial Committee in *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montréal*(3) at pages 539 and 540), said:—

> Was the alleged act of expulsion void? It is contended for the plaintiff that the language of the rules gives an unconditional and absolute power to the committee to expel a member from the society, and I agree that if the committee in fact exercised their power under the rules, their decision could not be questioned; however unfounded the reasons for it may have been, it would have been final and could not be reviewed by any court. But they are bound in the exercise of their functions by the rule expressed in the maxim *audi alteram partem*, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body

(1) L.R. 9 Ex. 190. (2) 14 Ch.D. 471.
(3) [1906] A.C. 535.

of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.

In *Edwards* v. *Aberayron Mutual Ship Ins. Society* (1), at page 579, Amphlett B. thus applied the same principle to an adjudication by the directors of a Mutual Ins. Society upon a question of the Society's liability to one of its members:—

> It is beyond doubt, however, that, when they undertook the delicate task of adjudicating between their own society and a member, their functions, if not strictly the same, were analogous to those of an arbitrator, and they were bound to act judicially and with perfect fairness and impartiality between the parties: *McIntosh* v. *Great Western Ry. Co.* (2). To come to a decision under these circumstances in favour of their own society, and against the plaintiff, without hearing him or giving him an opportunity of being heard, was contrary to every principle of justice, and ought not, I think, to be held by any court of law or equity to be binding upon him.

In *Armstrong* v. *South London Tramway Co.* (3), the Court of Appeal had to determine the validity of a certificate of the manager of the defendant company in these circumstances; an agreement between the plaintiff (a tram-conductor) and the company provided that a breach of the company's rules should render the plaintiff liable to dismissal and to the forfeiture of any unpaid wages already earned and that the certificate of the manager—who was to be "the sole and final judge" upon the question whether a breach had in fact occurred—should be conclusive evidence of that fact in any court. The manager without hearing the plaintiff in his own defence, gave a certificate to the effect that a breach of the rules had been committed by the

(1) 1 Q.B.D. 563. (2) 2 DeG. & Sm. 758, 769.
(3) 7 Times L.R. 123.

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plaintiff. The court held that the certificate was invalid. Lord Esher said:—

> A party could not be deprived of wages already earned without a hearing. It was a necessary implication that the party should be heard, and it would be monstrous to suppose otherwise.

The reported decisions afford also many examples of the application of the principle to the conduct of public officials invested by statute with authority to decide upon the existence of facts necessary to justify the exercise of a power to expel from an office, or to deprive of a benefice, or to invade private rights of property. Many such cases are referred to in the judgment of Sir Robert Collier in *Smith* v. *The Queen* (1). In that case the Judicial Committee of the Privy Council had to consider the legal validity of a proclamation of the Governor of Queensland declaring the forfeiture of a lease granted under the Crown's Land Alienation Act. The proclamation professed to be in pursuance of a section of that statute under which

> if at any time during the currency of a lease it shall be proved to the satisfaction of the Commissioners

that the lessee had abandoned his selection, it was made lawful for the Governor to declare a forfeiture of the lease. The Judicial Committee held it to be essential that a proclamation under this enactment be preceded by a decision of the Commissioners, which, to satisfy the statute, could only be arrived at after an inquiry conducted in conformity with the principles governing inquiries of a judicial nature; and that as a fair opportunity had not been given the lessee to meet the case against him, the decision of the Commissioners and the proclamation of forfeiture must be pronounced to be alike nullities.

(1) 3 App. Cas. 614.

An analogous rule was applied in the Province of Quebec in *Richelieu and Ontario Navigation Co.* v. *Commercial Union Assurance Co.*(1).

It is undisputed that in this case the act of the minister in professing to declare a forfeiture was not preceded by any inquiry which can be said upon the above principles to satisfy the requirements of the law as regards inquiries of a judicial or quasi-judicial character, and it follows that this act was inoperative.

A further contention by Mr. Shepley remains. It is said that the stipulations contained in the earlier part of the 4th clause of the lease—requiring the lessees to have upon their location within the first year of the term machinery of a character indicated in that clause, and within that year to commence active operations in working their location—are conditions subsequent; and that failure on the part of the lessees to comply with either of these stipulations having been proved the Crown is entitled to judgment declaring the forfeiture of the term.

It is not, I think, necessary to pronounce upon the question whether, on a fair reading of the lease as a whole, these stipulations are or are not justly to be regarded as conditions, or upon the question whether, assuming them to be such, a breach of either of them has been established. Conceding both of these points to the Crown still I think the claim in this action fails.

It is well settled that the effect of a condition subsequent in a lease (whether a right of re-entry be or be not expressly vested in the lessor) is not to render the lease void on a failure on the part of the lessee to observe the condition but voidable at the option of the lessor or the person entitled to the reversion; *Daven-*

(1) Q.R. 3 Q.B. 410.

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port v. *The Queen* (1); and some act on the part of the person entitled to exercise the option, definitely indicating his intention to do so, is necessary to effect the determination of the lease.

Now I think that in this lease the mode in which, upon a breach of the stipulations last mentioned, that intention is to be signified is expressly prescribed; and that to enable the Crown to take advantage of such a breach it is necessary that the course which the instrument itself marks out should be pursued.

By the 18th clause of the lease the demise is made expressly subject to the hydraulic regulations of the 3rd December, 1898; and by the 12th section of those regulations it is provided:—

> 12. In case any lessee shall at any time make default in the payment of the rental or the royalty payable under these regulations, or shall make default in the performance of the conditions imposed by these regulations or by the lease, the Gold Commissioner may post a notice in a conspicuous place upon the location in connection with which such default has been made, and may mail a copy of such notice to the last address of the lessee known to the Commissioner, requiring such default to be remedied, and in case such default is not remedied within three months of the date of the posting of the notice upon the location all the rights of the lessee under the lease and under these regulations shall be and become *ipso facto* null and void.

Moreover by the 10th clause of the instrument itself the parties have in substance contracted to the same effect:—

> That if the lessee shall at any time during the said term fail to pay the rent or royalty hereby reserved or any part thereof within sixty days after the same, respectively, shall have become due or if he shall commit any breach or default in the observance of the above conditions or of any of them other than that referred to in the clause numbered "4" of these presents, then, and in every such case the Gold Commissioner may post a notice in a conspicuous place upon the said demised premises and may mail a copy

(1) 3 App. Cas. 115.

of such notice to the last address of the lessee known to the Commissioner requiring such default to be remedied and in case such default is not remedied within three months of the date of the posting of the notice upon the location all the rights of the lessee under the said lease and under the said regulations of the order in council of the 3rd day of December, A.D. 1898, shall be and become *ipso facto* null and void provided that the claim of Her Majesty or her successors or assigns for any rent or royalty then due or accruing due, or any remedy for the recovery thereof shall be in no wise affected by such cancellation.'

I have no doubt that the "condition" described as "that referred to in clause numbered 4," to which the clause I have quoted is not to apply, is the condition which I have already considered at some length and in respect of which a right of re-entry is expressly given; that, namely, which requires the lessees to expend annually a specified amount in working their location. As regards the other stipulations in that clause (numbered 4) they must, I think, in their character of conditions be read as if the provisions of clause 10 of the lease and clause 12 of the regulations were incorporated with them.

It is conceded that the course appointed by these provisions has not been taken and consequently the option to forfeit the term must be held not to have been validly exercised.

This appears to be sufficient to dispose of the action, and the appeal should be allowed and the action dismissed with costs.

*Appeal allowed with costs.**

Solicitors for the appellants; *Belcourt & Ritchie.*

Solicitors for the respondent; *Macdonald, Shepley, Middleton & Donald.*

*Leave to appeal to the Privy Council was refused on 18th July, 1908.

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*May 8.
*May 29.

THE KLONDYKE GOVERNMENT CONCESSION (DEFENDANTS) ..... } APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Mining regulations—Hydraulic lease—Breach of conditions—Construction of deed—Forfeiture—Right of lessees—Procedure on inquiry—Judicial duties of arbiter.

Under circumstances similar to those involved on the appeal in the case of *The Bonanza Creek Hydraulic Concession* v. *The King* (40 Can. S.C.R. 281) this appeal was allowed with costs for the reason that there could be no right of cancellation of the lease or re-entry by the Crown until default by the lessees had been established upon an investigation of a judicial nature by the Minister of the Interior in the exercise of the functions vested in him by the hydraulic regulations and the terms of the lease.

Per Idington J.—The facts disclosed by the evidence could not justify the cancellation of the lease or re-entry or breach of the conditions thereof.

APPEAL from the judgment (dated 7th January, 1908), of Burbidge J. in the Exchequer Court of Canada, maintaining the plaintiff's action with costs.

The reasons for the judgment appealed from were stated by the late Mr. Justice Burbidge in terms exactly similar to those mentioned in the report of the case of *The Bonanza Creek Hydraulic Concession* v. *The King*(1), at page 282; the same clause (12) of the hydraulic regulations of 3rd De-

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

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cember, 1898, was in question, as well as clauses in the appellants' lease in the same terms as those quoted in the *Bonanza Creek Hydraulic Concession Case*(1), at page 283.

The special circumstances of the case and the questions at issue on this appeal are stated in the judgments now reported.

Chrysler K.C. and *Larmonth* for the appellants.

Shepley K.C. for the respondent.

GIROUARD J.—I agree that this appeal should be allowed for the reasons stated by Mr. Justice Duff.

DAVIES J.—I also agree in the opinion of Mr. Justice Duff.

IDINGTON J.—Parliament passed on the 13th June, 1898, the "Yukon Territory Act" setting apart the Yukon Judicial District which up to that time had formed a part of the North-West Territories, as a separate territory to be known under the name of the Yukon Territory.

The Governor in Council was given by that Act subject to the provisions thereof power to make ordinances for the peace, order and good government of the territory. It was provided subject to the provisions of the Act that the laws and ordinances as the same existed in the North-West Territories should remain in force until amended or repealed by Parliament or ordinances of the Governor in Council.

Prior to the passing of this Act there existed mining regulations applicable to the North-West Terri-

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tories and thus applicable to the New Yukon Territory. These regulations had been consolidated apparently by an ordinance of the 18th January, 1898, under the heading of—

Regulations governing placer mining in the provisional district of the Yukon, North-West Territories.

I do not find any definition of "placer mining" in these regulations or elsewhere in legislation affecting the territory in question, until 1906. Indeed I cannot find these words used in the enacting part of these regulations except in so far as they appear in the forms. One of these forms refers to "placer mining as defined in the said regulations." We must I think seek, therefore, for this definition and the meaning of "placer mining" so far as it has any meaning, in relation to the questions raised here, in the nature and quality of the rights and privileges defined in the said regulations, and the operations carried on thereunder or contemplated to be carried on thereunder. The rights or privileges provided therein were those conferred upon persons known as free miners enjoying a license (renewable yearly) from the Government under the said regulations. These licenses provided for the licensees each operating comparitively small parcels of land; 250 feet by 1,000 feet being the largest. Provisions were made for staking out such claims and for their allotment. No method of working is specified. The use of water, however, was provided for.

So far as I can see it would have been quite competent for a free miner having acquired a license conferring upon him the right to work one of these claims to have used any machinery, hydraulic or otherwise, that he saw fit. He could not receive a grant of more

than one claim in a mining district but might in addition to one such hold a hill claim acquired by him under these regulations in communication with a creek, gulch or river-claim, and any number of claims by purchases. Any number of miners might unite to work their claims in common.

It is obvious that for the purposes of working such limited claims expensive machinery would not be expedient as a form of investment. It is quite as obvious that even if no machinery or very little machinery were used in operating, the system could not attract the investment of large capital and all its use implies.

A Mr. Anderson, in December, 1897, applied to the Department of the Interior for a lease of part of the lands now in question for "hydraulic mining" purposes.

The then minister reported that in his opinion it was desirable to introduce "hydraulic mining" in the Yukon District and that Mr. Anderson should be given an opportunity to ascertain whether or not this kind of mining was practicable on the tract applied for. A lease was given him subject to certain conditions on the 24th day of December, 1898. The phrase "the method of mining known as hydraulic mining" is used in the recital describing the nature of the application for the lease. The words "hydraulic mining," "hydraulic mining operations," "hydraulic machinery," repeatedly appear in this lease. Nothing appears therein defining the meaning of these terms.

Some other territory was added shortly after to Anderson's concession.

On the 3rd December, 1898, and prior to granting this lease to Mr. Anderson, a new set of mining reg-

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ulations headed "for the disposal of mining regulations in the Yukon Territory to be worked by hydraulic *or other mining process*" was adopted.

On the 12th February, 1900, the lease now in question was made by Her late Majesty Queen Victoria represented by the Minister of the Interior of Canada thereinafter called "the minister" to the appellants. This lease was in substitution for all that which Anderson had acquired. I infer he had induced the formation of the appellants' company and made arrangements for it acquiring his rights and such further rights as the minister was induced to concede.

In this lease there are recitals almost identical with those in the Anderson lease but with this marked difference, that in the first recital the words "by hydraulic *or other mining process*" are substituted for the words "by method of mining known as hydraulic mining." In the second recital the words "hydraulic mining" stand unchanged as in the second recital of the original lease.

When we find that in this second recital the words "his own use and benefit" are continued although in this case it is a corporate body that is being spoken of, we realize fully that care had not been exercised in drafting the recital and to that may be attributed the repeating of the same phrase of "hydraulic mining" instead of "hydraulic or other mining process" as in the preceding recital and elsewhere throughout the lease, and in the regulations under which the lease is made.

The third recital seems identical except in regard to the date. It is, I think, quite clear that the parties concerned intended by the departure, thus evidenced, from the original phraseology respectively to give and

to acquire more extensive rights than the words "hydraulic mining" might have restricted the lessees to.

This lease to the appellants purports to be given pursuant to the regulations of the 3rd December, 1898, but in the order in council permitting it to be made the express exception was made that the rental of $500 per annum then being paid for the location should be charged instead of the lower rental prescribed by the regulations.

It incorporates the regulations by rendering it subject thereto "as fully and effectually to all intents and purposes as if they were set forth" in the lease.

The appellants took possession under the said lease, brought certain machinery and mechanical appliances and had them installed as required in the first year of the term on the property in question and have carried on mining operations upon such property ever since, sometimes with all such appliances, sometimes with only part thereof.

The yearly rental of $500 was paid and accepted by the Department until the declaration of forfeiture about to be referred to.

On the 21st August, 1900, the mining inspector pursuant to request reported to the Assistant Gold Commissioner, an officer appointed pursuant to the statute and regulations, and under the Minister of the Interior, that there had been prior to the date of the second lease substantial machinery and subsequent thereto also very substantial machinery brought on and installed for the purposes of operating the mining location in question.

He amongst other things said:—

I must say that the company are doing their work in an excellent way under the direction of Mr. Martin who intends doing some

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winter sluicing in a most ingenious method the start of which I have seen and hope will prove successful.

He also remarked that the company were working ground quite unsuitable for individual mining as the dirt they were getting only averaged about $6 to the cubic yard.

On the 12th November, 1902, Mr. Beaudette, mining engineer, in answer to a telegram reported to the minister that the operations conducted on this concession were of a placer nature only and the operations were not conducted on as large a scale as some of the placer mining claims on the same creek, that the machinery used was only useful in connection with placer mining operations and could not be used for hydraulicing, but there was however a pump and hydraulic pipes on the ground which were used to hydraulic a hill about a year previously but then practically abandoned and useless as the ground within the location was situated on a creek bed with no water to operate, or grade and dumping ground to deposit the tailings on, and consequently unsuitable for such purposes.

There had been, he reported, $5,000 expended as near as he could judge in actual mining operations on this location in that year.

On the 10th December of the same year, Mr. Gosselin, Assistant Gold Commissioner, certified to the same effect, and reported to the Secretary of the Department of the Interior on the same day enclosing affidavits of Anderson and others as to the work and adding that even if shewn to be in excess of $5,000 it was by the ordinary placer mining methods, that in some cases placer mining was carried on upon a larger scale, repeated what was reported above by the mining engineer, and closed by saying:

Under the circumstances I have issued accordingly my certificate to the effect that the concessionnaires have done work on the concession to the extent of at least $5,000.

Similar complaints followed the next year.

It is quite noticeable that the officials in the Yukon were somewhat in doubt as to whether an expenditure in the way of what was called placer mining could be a fulfilment of the lease or not, and in the year previous to that now in question the matter was disposed of by the direct instructions of the Department to recognize what was done as complying with the lease.

On the 26th April, 1905, Mr. Finnie, Assistant Gold Commissioner, certified accordingly as the Secretary had instructed

that it had been proven to his satisfaction that the lessees of hydraulic mining location described in Lease No. 1, which was issued on the 12th February, 1900, in favour of the Klondyke Government Concession, Ltd., of London, England, have expended in *actual mining operations*, in, about or upon the said hydraulic location, the sum of at least $5,000 during the year commencing the twelfth day of February, 1904.

Whether this was done as the result of so interpreting the power of the minister in regard to what we are now called upon to deal with or as a mode of exercising the discretion given him regarding forfeiture for default, does not appear.

On the 21st December, 1905, Mr. Gosselin, as Assistant Gold Commissioner, notified the appellants of other complaints of breaches of conditions in the lease, and took steps in respect thereto by virtue of paragraph No. 10.

On the 26th January, 1906, Mr. Anderson makes an affidavit as agent of the company as follows, amongst other things:—

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2. That during the year which commenced on the 12th February, 1905, the following amount of cash has been paid by the company in connection with mining operations carried on upon the said leasehold during the said period, viz.:

In wages	$16,056.65
In wood	4,101.55
In supplies	11,153.25
Making a total of	$31,314.45

That the mining operations represented by the said expenditure, were as follows, viz.:—

Sunk 6 shafts to bed-rock at an average depth of 30 feet each.

Drifted underground at the said average depth of 30 feet and uncovered approximately 33,000 square feet of bed-rock, hoisted and sluiced the payable gravel from said driving.

3. That the said mining operations were carried on by the company directly and not by miners working under any percentage agreements as to the gold recovered from the ground.

4. That besides those operations, about 100,000 square feet of bed-rock were uncovered, drifted, hoisted and sluiced by different parties of miners working under verbal agreements with the company, whereby those miners were permitted to work pieces of the company's property and to retain a certain percentage of the gold recovered by them in lieu of wages.

On the 2nd February, 1906, Mr. Beaudette, Government Mining Engineer, reports as follows, to the Assistant Gold Commissioner, that

there were six outfits operating on the concession during the summer and I am positive that the amount of work as represented in the affidavit has been performed. *Taking that amount of work as correct, I would estimate the cost to be* $14,666.60, *as follows:*—

33,000 square feet of bed-rock represent a cubic content of 7,533.03 cubic yards. The cost to remove a cubic yard of gravel by the ordinary placer method is estimated at $2, which is only for labour alone.

The property was operated by ordinary placer methods, the same as is found on ordinary individual claims.

There were no hydraulic operations conducted on the property during the year.

On the 30th April, 1906, the minister notified the appellants

that, after due inquiry, the undersigned Minister of the Interior has satisfied himself and has found as a fact that during the year

last past of your tenancy under your lease from the Crown * * * your company has failed to expend the sum of $5,000 in active mining operations for the efficient working of the rights and privileges granted by the said lease * * * and thereupon declares the lease void.

A statement is put in supported by evidence that from first to last those lessees had spent a very large sum of money in each year making a total of something over $523,000. In crediting the amount of money realized from the operations there would be a large sum, largely in excess of $5,000 a year, spent by the appellants over and above their entire receipts. It was stated in argument and not contradicted, to be I think $150,000 in all.

The question is raised whether the minister can, as the result of an *ex parte* inquiry, in such a case declare such a lease as this forfeited.

In this case I am, by reason of the conclusion I have come to for the reasons I am about to give, not troubled with the necessity of determining that question of mode of inquiry in this case.

The operative part of the lease is as follows:—

> Now this indenture witnesseth that in pursuance of the premises and in consideration of and subject to the rent, covenants, provisos, exceptions, restrictions and conditions hereinafter reserved and contained and by the lessee to be paid, observed and performed, Her Majesty doth grant, demise and lease unto the lessee the said tract of lands and the exclusive right and privilege of extracting and taking therefrom, by hydraulic *or other mining process*, all royal or precious metals or minerals from, in, under or upon the tract of lands hereby demised and leased with regard to which the said rights and privileges are hereby granted, which said tract is described as follows, that is to say:—

Then follows the descriptions of the properties and then *habendum* and *reddendum* clauses. Following the latter is this proviso: "provided always and this lease is subject to the following exemptions, restric-

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tions, provisos and conditions," which are numbered from 1 to 18.

Of these Nos. 4 and 10 are those upon which the questions herein turn and are as follows:—

4. That the said lessee shall have sufficient hydraulic or other machinery in operation on the said demised premises within one year from the date hereof to permit of his beginning active operations for the efficient working of the rights and privileges hereby granted which active operations he shall begin within the said period; and that if during any year of the said term hereby granted, *the lessee shall fail to expend in such mining operations, in, about or upon the said mining rights and privileges hereby granted,* the sum of five thousand dollars—of the fact of which failure the Minister shall be the sole and final judge—this lease or demise and the remainder of the term hereby granted, and all benefits, rights and privileges hereby granted to the lessee shall become and be utterly and absolutely null and void, *unless the Minister shall otherwise decide;* and that in the event of such predetermination of this lease or demise and of the term hereby granted or the remainder thereof, Her Majesty, her successors, or assigns may thereupon re-enter upon the said demised premises and have, hold, use, occupy, possess and enjoy the same and every part thereof, as if these presents had never been executed, and without any compensation or payment of any kind to the lessee for any work done or improvement made thereon; but nothing herein contained shall in any wise affect the right of Her Majesty or her successors or assigns to all arrears of rent or royalty to be paid as hereinbefore provided or to any remedy for the recovery of such arrears of rent or royalty.

No. 10 is as follows:—

That if the lessee shall, at any time during the said term fail to pay the rent or royalty hereby reserved, or any part thereof, within sixty days after the same respectively shall have become due, or if he shall commit any breach or default in the observance of the above conditions or of any of them *other than that referred to in the clause numbered "4" of these presents* then, and in every such case, the Gold Commissioner may post a notice in a conspicuous place upon the said demised premises and may mail a copy of such notice to the last address of the lessee known to the Commissioner requiring such default to be remedied, and in case such default is not remedied within three months of the date of the posting of the notice upon the location, all the rights of the lessee under the said lease and under the said regulations of the Order in Council of the 3rd day of December, A.D. 1898, shall be and become *ipso facto* null and void, provided that the claim of Her Majesty or her successors or assigns for any

rent or royalty then due or accruing due, or any remedy for the recovery thereof shall be in no wise affected by such cancellation.

It is contended in support of the minister's finding that this paragraph 4 empowered him to do what is complained of in the manner he so did. On the other hand it is contended that he should either have proceeded by directing proceedings to be taken under paragraph 10 as done in cases mentioned above or if that were inapplicable for any reason, that he should have acted under section 12 of the regulations of the 3rd December, 1898, which provides a method somewhat similar to that of said paragraph 10 for dealing with breaches of conditions.

It is replied to this contention that the terms of section 10 of the proviso in the lease indicated clearly that everything arising under or out of section 4 of the same proviso is expressly excepted from the operation of section 10 by the words

or if he shall commit any breach or default in the observance of the above conditions or of any of them other *than that referred to under the clause numbered* 4 of these presents, etc.

Can it be said that these words necessarily referred to the whole of paragraph 4? Can they fairly be referred to as having such comprehensive operation? Do they grammatically permit of any such meaning?

There is more than one breach or default possible within paragraph 4. Can it be said that the phrase *"other than that"* referred to in the clause numbered 4 can cover more than one? Read grammatically it certainly cannot and of those which is the one that is the most obviously pointed at? Is it not that of the fact of which the minister shall be "the sole and final judge" according to paragraph 4? Read thus, restricted thus, and given no wider meaning, it seems fulfilled to the letter.

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Even if paragraph 10 of the lease should be thus excluded it does not appear that section 12 of the regulations is touched thereby.

It is said however that the minister is not confined to the mere words of the latter part of paragraph 4, but that we must read the words "such mining operations" therein, in respect of which the $5,000 a year is to be spent in so expansive sense as to include all that precedes them in this paragraph 4 and thereby make the test the minister has the power to apply to be the efficient working of the rights and privileges thereby granted. In this way a man might from one cause or another have spent $10,000 in working with some hydraulic machinery and done neither himself nor the country any good yet have his lease declared by the minister to have become forfeited because his work had proved inefficient. I do not think such a thing was ever contemplated as confiding such a power to the minister.

It is to be observed that the phrase "such mining operations" has not necessarily any relation to the words "efficient working." I would say that the words "such mining operations" had relation to and referred to and were intended to be governed by the meaning of the terms "hydraulic *or other mining process.*"

We are thus brought to a consideration of the bearing of the history I have already given of these words in this connection. We have the words "hydraulic mining" adopted in the first lease. We have the words changed to express evidently some wider idea than was expressed by the words in the lease to Mr. Anderson. Why were the words "or other mining process" used? Why are they used in the regulations? Why were the regulations framed?

Was it not to give effect to the suggestion that the words "hydraulic mining" were too restricted? Was it not to give in a wider sense effect to what was the object for which the whole regulations of 3rd December, 1898, were provided? What was that object? It was clearly as was forcibly put forward by counsel for the Crown to induce capitalists to invest their money in projects for the development of the mining lands in the Yukon in a much more comprehensive and expansive way than was being done through the little grants of 250 feet by 1,000 feet renting from year to year and called placer mining. The idea originated with Mr. Anderson. The hydraulic mining method was that which occurred to him at first as being the most appropriate method by which those larger operations could be carried out, but just as clearly it appeared to him later, as the result of a year and a half's experience, that what was known as hydraulic mining might be too restricted a method to induce the investment of capital to bring about the mining development of the territory in the way in which he and the Government desired.

If we were to find any charm in the word "hydraulic" we find the placer miner regulations recognize an hydraulic process of some kind. The miners are possibly not given much to etymological derivations. But they evidently know, sometimes, how to use water when they see it. We have not been favoured in the legislation under review or even in the evidence with any satisfactory interpretation of the phrase "hydraulic mining." The officials use the term as one having to them a known meaning and that not to include sluicing though uninstructed people might call that a hydraulic process.

From what counsel and witnesses say no doubt the

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latter was known as a method of applying by a force pump water so as to resolve the hard earth and get thereby at the gold therein.

I do not suppose any one ever dreamt, in framing this forfeiting power, of it enabling the minister to determine in regard to the efficiency of the operations carried on. It seems to me the plan was adopted (and it was an ordinary business plan) of insisting upon an immediate large expenditure, and then $5,000 being spent annually in mining operations as simple tests of the earnestness of the lessees. No doubt it was supposed that self interest would in such case produce efficiency. It was not to be supposed that having spent the necessary money for equipment it would lie idle and $5,000 more be spent annually merely to duplicate the ordinary efforts of placer miners in rich territory.

The reason for the making of the lease of so large an area was its comparatively speaking poor and unproductive soil as compared with that much richer ground that was worked under the placer mining regulations.

It was to have this poor ground exploited and on the hypothesis that it could only be done profitably by the use of expensive machinery, hydraulic or otherwise, that all concerned proceeded.

It is quite evident that it was upon the supposition that the placer mining regulations and methods could not make this poorer soil productive that the new regulations as to "hydraulic or other mining process" were adopted.

It was to attract to the working of such poorer soil the necessary capital that these regulations were adopted and this experimental lease was given.

If for example the substitution of electric for hydraulic force had become possible and even superior to the latter I do not think any one would have ever had the face to submit that it did not fall within the meaning of these words "hydraulic or other mining process" in the regulations or this lease.

Such are the inferences drawn by me from the history I have set forth and applied to enable me to see if the contention set up as to the construction of this lease be tenable. I think it utterly fails.

Of course if the lease had clearly and explicitly set forth such a power in the minister as any of these several contentions maintained by respondent's counsel, we could gather no justifiable assistance from that history or inferences therefrom.

Being anything but clear and explicit we must, I think, consider everything leading up to it and immediately following it in order that we, by understanding what those concerned were about or could have had in mind and desired to have done, can in light thereof better read the purport of what they have written.

It is not at all to be marvelled at if their expectations failed and the expected application of what is written as an adequate safeguard has failed also.

That is no reason for any extending of the meaning of the language of the lease or implying greater power in the minister than is clearly written.

Above all a power of forfeiture by the adoption of *ex parte* methods is not a thing arising from implication but must rest if at all on the clearest expression thereof.

It is properly conceded that the minister's action was in good faith.

The finding gives no explicit or detailed statement

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of the grounds on which he acted. We are driven to conjecture. His good faith and the admitted facts regarding expenditure can only be reconciled by assuming that he proceeded upon the assumption that he had the right to determine in what way the work should be carried on and the efficiency thereof before considering the amount of the expenditure and had a right to discard all done that did not fall within the meaning he saw fit to attribute to the words hydraulic mining without giving any effect or force to the words "or other mining process."

In so proceeding he was, I submit, exceeding his jurisdiction and therefore his finding was void.

I was at first disposed to think the case might have been tried and a finding reached on the evidence independently of the minister's finding.

For two reasons that is not open. The facts and method of the trial hardly warrant us in so treating the case, and what appears in the views expressed (as to the need to resort to the special methods prescribed by paragraph 10 or by section 12) by my brother Duff, whose opinion in *Bonanza Creek Hydraulic Concession* v. *The King*(1), I have read since writing the foregoing. That case was heard immediately before this and turns upon somewhat similar questions arising on a lease in same form. It may be that as I agree in his conclusion as to a need of hearing which was not had here in the way one would like, the allowance of appeal here might well rest on that ground alone.

The leading facts are, however, almost entirely dissimilar and there is something of a proffered but limited hearing in this case (non-existent in that) which

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as well as the differing facts may distinguish the two cases.

I think well therefore to rest my opinion of this appeal on the grounds I have set forth as well as on non-observance of right to be heard.

I think the appeal must be allowed with costs.

MACLENNAN J.—I do not think it necessary to express any opinion upon the various matters which were discussed before us in this case, on the question whether the appellants had or had not been guilty of such violations of the conditions and stipulations of their lease as to entitle the Crown to terminate it, being of opinion that the minister could not do so without acting judicially, and giving the appellants an opportunity of being heard.

DUFF J.—This appeal is governed by the decision in *The Bonanza Creek Hydraulic Concession* v. *The King*(1). The material provisions of the appellants' lease are identical with those considered on that appeal; and, although, in this case, there is evidence of communications and discussions between the minister and the solicitor of the company before the formal declaration of forfeiture, the minister's decision that the lessees had failed in making the expenditure required by the terms of the lease was not, I think, preceded by anything which, within the principle of that case, could be described as a hearing upon that question.

The appeal should be allowed with costs.

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*Appeal allowed with costs.**

Solicitors for the appellants: *Chrysler, Bethune & Larmonth.*

Solicitor for the respondent: *George F. Shepley.*

*Leave to appeal to the Privy Council was refused on 18th July, 1908.

JAMES IREDALE (PLAINTIFF).....APPELLANT; 1908

AND *Mar. 16, 17. *June 16.

MARY JANE LOUDON AND OTHERS (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Title to land—Room in building—Adverse possession—Statute of Limitations—Incidental rights—Implied grant—License or easement.

Possession of an upper room in a building supported entirely by portions of the story beneath may ripen into title thereto under the provisions of the Statute of Limitations.

I., one of several owners of land with a building thereon, sold his interest to a co-owner and afterwards occupied a room in said building as tenant for his business. The room was on the second story and inside the street door was a landing leading to a staircase by which it was reached. I. had the only key provided for this street door and always locked it when leaving at night. He paid rent for the room at first and then remained in possession without paying rent for twelve years. The annual tax bills for the whole premises were generally, during that period, left in the room he occupied and were sent by him to the managing owner who paid the amounts. In an action to restrain the owners from interfering with his possession of said room and its appurtenances.

Held, reversing the judgment of the Court of Appeal (15 Ont. L.R. 286) and restoring with a modification that of the trial judge (14 Ont. L.R. 17) Idington and Maclennan JJ. dissenting, that I. had acquired a title under the Statute of Limitations to said room and to so much of the structure as rested on the soil to which he had acquired title.

Held, per Davies J. He had also acquired a proprietory right to the staircase and the portions of the building supporting said room.

Per Fitzpatrick C.J. and Duff J. The Statute of Limitations does not as against the party dispossessed annex to a title acquired

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by possession incidents resting on the implication of a grant. I. had, therefore, acquired no rights in the supports.

Per Idington and Maclennan JJ. The use of the landing and staircase was, at most, an easement and must continue for twenty years to produce the statutory title, and to give title to the supports there would have to be actual possession which was not the case here.

APPEAL from a decision of the Court of Appeal for Ontario(1) reversing the judgment at the trial(2) in favour of the plaintiff.

The facts are sufficiently stated in the above headnote.

W. N. Tilley for the appellant. An upper room in a building is land for purposes of the Statute of Limitations; Preston on Estates, vol. 1, pages 8 and 506; and the staircase and landing are land as well; *Rains* v. *Buxton*(3); *Bevan* v. *London Portland Cement Co.*(4); *Midland* v. *Wright*(5).

A title in fee may be acquired to a tunnel or underground way; *Bevan* v. *London Portland Cement Co.* (4); and consequently in a stairway.

The right of support is an incident to the ownership of the room and goes with the title acquired in the latter; *Harris* v. *Ryding*(6), at p. 76; *Humphries* v. *Brodden*(7).

W. D. McPherson K.C. for the respondent. The plaintiff had not the actual, continuous, visible occupation of the premises which is necessary to bar the title

(1) 15 Ont. L.R. 286.
(2) 14 Ont. L.R. 17.
(3) 49 L.J. Ch. 473.
(4) 67 L.T. 615.
(5) [1901] 1 Ch. 738.
(6) 5 M. & W. 60.
(7) 12 Q.B. 739.

of the owner. See *McConaghy* v. *Denmark*(1); *Harris* v. *Mudie*(2).

The parties here were relatives and the plaintiff never acted as if he was trying to acquire title. For both reasons his assertion of the right now will not be favoured. *Hemmingway* v. *Hemmingway*(3); *Sanders* v. *Sanders*(4).

It is doubtful if a title can be acquired in an upper room such as this. A lease of a room gives the lessee no interest in the land. *Shawmut National Bank* v. *City of Boston*(5); *Harrington* v. *Watson*(6).

In any case title to nothing more than the room itself could be acquired. See *Doe d. Freeland* v. *Burt* (7), in which it was held that the demise of a yard did not carry with it the use of a cellar under the yard.

Moreover, the right of support and the right to use the landing and staircase are easements calling for twenty years' possession to bar the owner's title. *Dalton* v. *Angus*(8); *Littledale* v. *Liverpool College*(9).

THE CHIEF JUSTICE.—I am in favour of allowing this appeal for the reasons given by Mr. Justice Duff.

DAVIES J.—I agree with the judgment of the trial judge in this case and think the appeal should be allowed and his judgment restored.

The questions to be determined are whether or not the evidence shewed the plaintiff to have had such an open and exclusive possession for such a length of time of the up-stairs flat of the building in dispute

(1) 4 Can. S.C.R. 609, at p. 632.
(2) 7 Ont. App. R. 414.
(3) 11 U.C.Q.B. 237.
(4) 19 Ch.D. 373.
(5) 118 Mass. 125.
(6) 50 Am. Rep. 465.
(7) 1 T.R. 701.
(8) 6 App. Cas. 740, at p. 792.
(9) [1900] 1 Ch. 19.

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with the passage way leading exclusively to it as gave him a statutory title to this flat and passage way as against the defendants, and, if so, whether or not as against them he had a right to an injunction restraining them from carrying out their declared intention of pulling down the lower part of the house and so destroying the upper flat and stairway.

I am unable to draw any distinction between the possession of the plaintiff with respect to the upstairs rooms and the stairway. I agree with the trial judge and with Garrow J., in the Court of Appeal, that

> the outer door, landing, stairway and workshop all formed part of one and the same parcel, the outer door of which plaintiff was accustomed to lock when leaving, forming in fact the outer door of his shop, and that his title to each and all should stand or fall together.

I also agree on the legal aspect of the case with what I would gather to have been the conclusion of Mr. Justice Osler, though he expresses it in a guarded way, that the right of support by the lower story of the building which was essential to the continued existence of the plaintiff's acquired rights in the stairway and workshop was a proprietary right in his property rather than a positive easement.

I have read and carefully considered the numerous authorities cited by counsel having more or less a bearing upon the legal questions in dispute, and, while no case can be found exactly deciding that a title to a set of chambers or rooms or flat in a building not resting on the soil directly can be acquired or gained by possession under the Statute of Limitations, still there are so many dicta on the point by distinguished and learned judges that I have reached the conclusion that such a title to such a limited part of a building can be so acquired.

Of course the rights so acquired are subject to the conditions which limit all questions of rights by length of enjoyment only.

I did not understand it to be contended that a valid grant could not be made of an upper room or flat in a building which would give the grantee such a right as amounted to ownership of the space within the room or flat or part of the building granted with, as against the grantor, a right of support and a necessary right of passage to the premises.

It would seem clear from the authorities that such is the case. *Reilly* v. *Booth*(1).

Mr. McPherson did, however, as I understand his argument, contend that the statute did not operate to enable an estate to be acquired by possession in a part of a building not connected directly with the soil and that even if it did the right to support was an easement not within the statute and could only be acquired by twenty years' possession, and not by twelve.

It is true that the Statute of Limitations does not transfer the rights of the dispossessed owner to the squatter. It only purports to extinguish by lapse of time any rights to possession which ought to have been exercised during the period limited. *Tichborne* v. *Weir*(2); *In re Nisbet and Potts Contract*(3). But nevertheless the squatter does obtain after the expiration of the statutory period a title recognized by law and the right to use the premises for all lawful purposes as against every one whose title is barred or extinguished.

Then, does such a right and title so acquired carry

(1) 44 Ch.D. 12. (2) 67 L.T. 735.
(3) [1906] 1 Ch. 386.

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with it the *right* of support from the underlying part of the building? It was laid down in the judgment of the Court of Exchequer Chambers in *Bonomi* v. *Backhouse*(1) in 1859, that the right of support for buildings, when acquired, is precisely similar in its character to the natural right of support for the soil.

By parity of reasoning it seems to me such right of support applies to the upper part of a building as against the lower. It is not contended that such right would not exist in the case of a grant of the upper part and I can see no reason why it should not exist with respect to land and premises acquired by possession unless it is held to be a *positive easement* within the 35th section of the statute and only to be acquired by the time prescribed in that section.

By that statute, land is declared to extend to messuages and all other hereditaments whether corporeal or incorporeal. It, therefore, clearly includes a flat or room or part of a house as well as a whole house. I can see no good reason or justification for confining the meaning to a part of a building directly connected with the soil. Once that conclusion is reached, that an upper room or flat is land within the statute and capable of being acquired by possession for a period of twelve years, then it appears to me we are, *ex necessitate,* bound to hold that the right of support is a proprietary right passing with the premises acquired by possession, essential to its existence and inseparable from it. If it is not so but is on the contrary a positive easement within the thirty-fifth section, then it would not be acquired until twenty years had elapsed. The result would be that an exclusive right to the use of the rooms would have been acquired under the

(1) E.B. & E. 622, at p. 655.

fourth section after twelve years' open and exclusive possession, but that such right would be made illusory and liable to be defeated at any time during the eight years between the twelve years and the twenty years by the owner, whose right to the rooms had been extinguished, pulling down the whole structure or otherwise withdrawing the support. I cannot think that a fair construction of the Act. The true construction of the two sections, I think, is to hold that the easements specially legislated for in the thirty-fifth section are positive and affirmative easements only. Otherwise we would have the strange anomaly created by two sections of the same statute, one section declaring that a title might be acquired to part of a building by twelve years of open exclusive possession, and the other that no title was acquired to that right of support which is essential to the former's existence, and that a subsequent owner whose title was extinguished to the house or part of the house above him, could destroy it altogether by taking away that which had been its natural and necessary support during the whole period necessary to acquire the possessory title.

These rights of support are doubtless of the nature of an easement, but they may be likened rather to those of a riparian proprietor in the water flowing past and bounding his land.

Surely the rights of a riparian proprietor, if a squatter became such a proprietor, would follow as a consequence upon his possession when it had ripened into a statutory title and so, I take it, a possession of a house or flat which, after the statutory period of twelve years had ripened into a title, would carry with it what was absolutely essential to its existence, namely, a right to support from the subjacent part of the same house.

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So far as the authorities are concerned since the case of *Dalton* v. *Angus*(1), in the House of Lords, the question may be considered an open one, though, as is said in Gale on Easements, p. 357, at present the balance of authority so far as the number of dicta goes must be held to be against the view that such an easement was a positive one. As I have already said, I think, so far as the right of support is concerned, in circumstances such as those now before us, it would be held to be a proprietary right and follow as a necessary incident of the land or premises to which it is attached.

IDINGTON J.—Seven persons owned some land in Toronto. Appellant was one of them and the others were his brothers and sisters. He managed the estate on behalf of all. While doing so he occupied, as a tinsmith shop, the room in question which formed part of that estate, and consisted of a second story of an old frame building having a frontage of 13 feet 6 inches on Bay street and depth of 62 feet and was adjoined on either side by other parts of the said estate. This room was reached by a stairway, closed in on one side by the outside frame wall of the building, and on the other side by a partition between it and a closed shop or shed underneath this upper room. The landing at the foot was just big enough to swing therein an ordinary door that closed, when desired, the entrance from the street. The size of the landing at the top is not clearly shewn. There was, however, between that landing and this room across the entrance thereto another door. There was in it, as well as in the street door, a slot to receive mail matter,

(1) 6 App. Cas. 740.

which might be deposited through either as found convenient.

The appellant and his co-owners agreed he should sell to them his seventh share in the whole property and he accordingly conveyed the same in 1882 to the respondents and ceased to meddle in the management.

He continued to use the room in question and stairway as he had previously done but paid rent therefor at the rate of $6 a month. There was no lease in writing.

The management of the entire property passed to the hands of his sister Martha and from the father's death in 1890 she seems to have failed to ask for rent and he, confessedly not supposing he was dispossessing any one, or acquiring any new right, as consistently failed to pay or offer to pay rent.

The appellant claimed he had acquired a title to this room and stairway by virtue of such possession as he had had and of "The Real Property Limitations Act" of Ontario and asked the Court to enjoin the owners of the soil and shop below his from altering, removing or dealing with the same in such a way as to interfere with the use of the room and stairs in question.

This was adjudged him by the learned trial judge, but the Court of Appeal reversed that judgment, dismissed the action and declared the respondents herein entitled to the possession of the premises in question.

I agree in this result which accords with the intention of all parties.

It may in one sense be truly said that intention is out of the question, for the statute provides, in the absence of an entry, for intention being expressed

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only in two ways, by payment of rent or a written acknowledgment.

Yet when we are asked to give to equivocal acts of possession such effect as to convert what was only a right in the nature of a license or easement into exclusive possession which will operate under the statute to the extinction of an owner's right we are permitted to consider the intention.

Was the use of the stairway as a means of access to the room in question anything but that which would be exercised by virtue of a mere license or easement?

Had the appellant ever any other cause, than such use, for its occupation? Did he ever occupy it in any other way? Can such a mode of occupation ever be said to be of that exclusive sort that will so satisfy the statute as to extinguish the title of the owner?

In general the right to use a stairway is only an easement. The nature of the thing is such that it can be and often is made to serve many adjoining freeholds or leaseholds. It is hardly ever used as a place of occupation though occasionally landings leading thereto in large cities may be found so used in the way of business stands.

As to a street door leading thereto how does that affect the nature of the occupation? Even if each of numerous tenants had a key and locked the street door each time one entered how could it change the nature of an occupation thus enjoyed by many? What difference can it make if only one?

It is the exclusion of the owner that is first to be considered.

The cases shew that a succession of exclusive occupancies may extinguish, when that is continued for

the requisite time, the title of the owner. These successive occupants may be one or many alternately.

Then why may not a dozen or more tenants, using one door to enter a stairway in like manner, at the end of any ten years, be held to have extinguished the owner's title to the stairway?

I put it thus as a case I suspect quite common in large blocks and as what seemed to be quite in line with the sort of occupancy the appellant first acquired here.

I should be loathe to say anything that would thus jeopardize the rights of landlords in a very large class of cases.

The mere setting out of a pot or a pan occasionally on the stairway or landing of the stairway, by or for a customer coming in appellant's absence, is to my mind evidence (if any importance be attached to it at all) more against than for the appellant.

It indicates that the door at the head of the stair may have been locked as a rule, in case the appellant left his shop. Else why not leave them inside? And further it suggests what is highly probable that the outside door was neither locked nor shut during the day.

That the appellant had a key and locked it usually at night adds nothing. A dozen tenants in a well kept place might all do so and have keys. It would be rather perilous for landlords who often rent their rooms without seeing them for years and as a matter of course treat the stair as an easement, for which no rent is exacted, but the entrance to which is enclosed by a door that prudence demands the tenant or tenants should keep locked at night.

Suppose the many combined or dwindled to one

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and the doors at each were kept locked by night, and if you please, by day, as suited the dwellers, yet using it only for a passageway, could such an easement be converted thereby without more into an exclusive occupancy that in ten years would obliterate the owner's title? Or suppose a number using in common such a stair for ten years, each using it for different rooms, but to the continuous exclusion of all others: Could they acquire thereby a title?

Suppose this stairway was only the stairway to a room on some one else's property and originally let to that some one else as a stairway, could it with every other feature that is shewn to have been peculiar to this one and to its use to serve this room ever have been dreamt of as a subject of acquisition in the way now suggested?

If the respondents had chosen to build on their land adjoining this stairway and used as a means of access to such new building the way over this stairway I would not have supposed in such a case and on the bald sort of evidence we have before us trespass would have lain at the suit of the appellants as against the respondents.

The slot in the door at the head of the stair to my mind speaks volumes in this regard. The history of the stairway so far as we have it also indicates it was for a tenant's use in getting access to the room in common with others or otherwise as might be required having regard to the general development of the property.

Having come to the conclusion that the right to use this entrance and stairway was at the beginning but that of license or in the nature of an easement I hold it remained so.

In relation to that and the intention of the appel-

lant in its use we may be permitted to consider the question of intention in the sense it was regarded in the case of *Littledale* v. *Liverpool College*(1).

Applying the evidence of intention to be derived from the annual incident of appellant looking as a matter of course to the respondents' paying the taxes, we certainly are assured that the character of the right exercised was throughout the same.

It is moreover of some significance that the assessment regularly and properly made as we may presume it to have been should have led to such results.

Doubtless the respondents appeared on assessment and tax schedules as owners and the appellant as tenant according to the requirements of the Assessment Act, or the appellant never would have thought of sending the tax bills to his sister.

His own evidence which supplements an admission that the taxes were so paid is as follows:—

> Were the tax bills ever sent to you to pay?
> A.—They were left in my shop.
> Q.—What did you do with them? A.—I either took them myself or sent them to my sister.

The only question about which I have had any concern was in regard to the landing at the foot of the stairway, but as it formed only a necessary part of the whole of which the only occupancy consisted of acts of user characteristic of the use of that of an easement, I conclude it must go with the stairway.

Hence no right has been acquired thereto. Sufficient length of time has not elapsed to give a prescriptive right to an easement in the stair or entrance.

The appellant's title, such as it is, must be in this way only if at all to the room.

(1) [1900] 1 Ch. 19.

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In regard to a novel claim thereto of this kind I think, in the entire absence of semblance of precedent for such a claim, we must, to begin with, apprehend correctly the nature of the right to support for such a room. Whose was the support? Did the appellant ever acquire any right therein?

We heard much urged of a "natural right" to support. An industrious search for legal foundation for such a claim has failed to discover any or any legal right to support, but that which the court came to rest the right on in the case of *Dalton* v. *Angus*(1), and which leaves, I submit, no well-founded pretension for any such thing as a "natural right," save in the case where two adjoining parcels of land have been acquired in a state of nature; and then this natural support is something which he digging has no right to meddle with.

Whether in the ultimate analysis of reason therefor the right is resolved or not into an implied grant or implication in the grant or an application of the legal force of the maxim *sic utere tuo ut alienum non lædas* I will not pause to inquire.

I merely notice it to say that there is a manifest difference between that case or such a right springing therefrom, and the right that may be sought to be imposed upon the artificial works of a man who, in the making or exercising of dominion over that which he has created, can hardly be said to have conferred upon any one a natural right to use or enjoy the fruits of the labour of him so creating; and especially so to rest thereupon a means of depriving him of his property. Truly it seems a queer case to which to extend

(1) 6 App. Cas. 740.

the use of the above maxim coined as the expression of a rule primarily adopted for executing justice.

It seems to me self-evident that any one seeking in any way to enjoy any right dependent on the use of such a creation, whether that creation is in turn dependent upon mother earth for a support or not, must trace his right to a grant or license of some sort, express or implied.

I am not oblivious of the fact that the use of the phrase "natural right" to support has been countenanced in some cases in a way apparently inconsistent with what I am expressing.

I think, however, that the case of *Dalton* v. *Angus* (1) should as a result of the discussion and exposition of the law therein, though possibly not necessarily of the decision, put an end to its use in that way.

The following summary of Gale on Easements (7 ed.), at p. 357, does not inaccurately express the legal result thereof to be kept in mind so far as we are concerned here, in apprehending as I have said we must the nature of the right to support that the appellant had for his alleged room and of the legal right or title the respondents had in and to that support and to its removal if and when they so desired.

The paragraph reads as follows:—

> But the decision of the House of Lords may be taken as finally establishing the rule, that twenty years' enjoyment of support to a building, whether from the adjacent or from the subjacent land, being peaceable, open and as of right, will (either by a right springing out of the enjoyment of the common law, or under the "Prescription Act," or under the doctrine of presumed grant) confer the right to have the support continued; that, if the right is based on the presumption of a grant founded on the enjoyment, the presumption is absolute and cannot be rebutted by shewing that no grant has in fact been made; and that, if notice be material, then,

(1) 6 App. Cas. 740.

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in the absence of any wilful fraud or concealment, the outward appearance of the building is sufficient notice to all persons concerned of the amount of support which it requires.

This is an affirmative statement of the result of twenty years' enjoyment and in this the converse case to be considered I may add as the result of looking into the authorities that nowhere has it been held, short of express grant or license, that such a right of support upon or derived from artificial structure has been ever held to exist merely by reason of user for less than twenty years.

Such being the case how can it be said to have been shewn that the appellant had in relation to this room that kind of occupation which this court held in *McConaghy* v. *Denmark*(1), must be the case of one setting up a possessory title under the statute, *i.e.*, "an actual, continuous and visible character" or as expressed in *Sherren* v. *Pearson*(2), at p. 585 "an occupation exclusive, continuous, open or visible and notorious."

I am unable to attribute to the acts of the appellant herein any such meaning.

A possession that depends for its daily continuance on the enjoyment of that support which is in the absolute dominion of him against whom the time is supposed to be running and which had not yet earned for the alleged adverse possessor when the full time in question is supposed to have run, the right longer to continue that support is hardly within what one must feel was the sentiment lying at the very foundation of Statutes of Limitation.

Granting as possible that the possession of a flat may ripen into a title, when the enjoyment of that

(1) 4 Can. S.C.R. 609. (2) 14 Can. S.C.R. 581.

possession rested upon some right of support already acquired and continuing as of right in the possessor during the currency of that ripening of the possession of the flat, yet this is far from that.

Nor can I see how the supposed acquisition of the upper part by that length of possession that goes *merely to extinguish* the legal estate the owner had, can ever draw to it as if appurtenant thereto any right in the easements of support necessary to the enjoyment of the upper part any more than any other mere easement as distinguished from an incident of the property unless such easement by the terms of its grant enure to or operate in favour of the actual possessor.

That other titles than those acquired by virtue of the Real Property Limitation Acts do generally carry with them a right of support helps not in the slightest degree.

One rests on express or implied consent. The other on the absolute negation of any right in another but only within certain limits of which the boundaries are defined by the acts of the trespasser thus and thereby become legal possessor.

Beyond his actual possession he takes nothing, acquires nothing, for the statute operates to extend his dominion only so far as the rights of him who has ceased to possess have been extinguished by the possession of another, and nothing beyond has been rendered subject to his will.

I did not overlook the fact that expressions exist in some authorities shewing the title acquired to be the equivalent of that held by him who had got a grant of the land and thus apparently extending this right beyond what I state.

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The case of *Tichbourne* v. *Weir*(1), where it was argued that the adverse possessor, whose possession had thus extinguished the rights of a lessee, must be held by virtue of those authorities to be as if assignee of the lease, clears up the position. It was held no such position was tenable.

Wilkes v. *Greenway*(2), bears out so far as it goes the view I have expressed and is not inconsistent with the strict meaning of the authorities referred to.

Statutes now exist giving presumptively to a conveyance of land the widest effect in regard to carrying with the title thereto all the easements appurtenances and all else used or enjoyed therewith by him conveying. That cannot prevail here by virtue of possession, yet it is in truth what seems to be claimed as the result thereof. Such was not what a mere conveyance of the land meant when the Real Property Limitations Act was enacted.

There is another view presented by some and that is that the adverse possessor must be held to be claiming by his acts of possession everything accessory to as well as the particular parcel itself.

I perceive the force of that reasoning, or assertion rather, but when it has, if ever, to be accepted as the claim made and resulting in so wide an acquisition, we must abandon I think the tests I have cited which at present ought to bind this court as to the nature of the occupancy.

But before passing the contention I have just alluded to, I may notice its relation to a point made, and doubted or denied in argument, that an estate in law can be created in an upper chamber. This point was passed with such sort of discussion without con-

(1) 67 L.T. 735. (2) 6 Times L.R. 449.

necting or pressing its relation to this contention I am now considering. It may well be that having such an estate created by grant its creation in that way implies the right to the use of the easement or support. Then it may well be argued that an adverse possession of that estate thus created may when the necessary time has run to ripen it by extinction of the owner's rights carry with it all that its original creation implied.

I do not say in the absence of argument (and as in my view it is unnecessary for this case to decide) how such a condition of things might result in law.

I merely state it thus that it may not be supposed to have been overlooked and to apply what I am about to put as its possible relation to the case in hand.

It may be said in a way somewhat analogous to the case of the estate thus granted that the tenant at will has entered by the consent of the owner, used the support as an easement whilst paying rent and when he ceased doing so the adverse possession was that which the owner had thus stamped upon it including the easement of support which he himself conceded and cannot be supposed to be separated when the statute began to run.

Assume some such position arguable at all I deny that the relation of landlord and tenant or aught implied therein can be imported into the condition of things the statute is supposed to deal with.

It is the trespasser, or he who at all events holds in law no other relation to the owner that is supposed to be acquiring by time a right, no matter how or what the relation may have been.

I prefer in any such conceivable cases to hold the

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other alternative that the statute does not effectively apply to such an alleged possession.

In any event this right of support for an upper room is a right that cannot be called accessory to anything the owner had and of which he is being deprived. It was not an easement he held. It was not by virtue of any easement which he had that he was enabled to enjoy the upper room. No such thing was dreamt of. It was part of his property as a whole. It is only to such—claiming as the appellant does—that there is need to create and then annex an easement for his supposed acquisition of property.

This aspect of his supposed rights seems supportable only by a most vicious sort of reasoning in a circle.

To repeat, it is confusing the rights that flow from grants with those which result from a statutory negation.

The surface and underground cases pressed upon us have no analogy for the reasons I have already set forth supplemented by the facts that in none of them can it be said the claim depended on any such right as set up but found non-existent here. And the result, limiting the title so acquired to that part of the estate really occupied, instead of extending it to that further up *ad cœlum* seems to make against, instead of for the contention, that something outside that actually possessed became accessory thereto, by virtue of necessity for the support thereof.

I think the appeal should be dismissed with costs.

MACLENNAN J.—I dissent from the judgment allowing this appeal.

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DUFF J.—It is, I think, too late to dispute the proposition that an upper room not resting directly upon the soil but supported entirely by the surrounding parts of a building might at common law be the subject of a feoffment and livery as a corporeal hereditament, that is to say, as land; Co. Litt. 48 b.; Sheppard's Touchstone 202; 1 Preston Estates 8, 506; *Yorkshire Fire & Life Ins. Co.* v. *Clayton*(1); or that the exclusive use or possession of such a room may validly be granted for a limited or an unlimited time; *Reilly* v. *Booth*(2).

That such a room may be the subject of a tenancy at will or for a term is not of course to be questioned by anybody.

Now I cannot understand a tenancy of a corporeal hereditament under which the tenant does not get as against the landlord the exclusive possession of some defined or definable portion of land or of a building or other structure erected upon land. I am then, I must admit with great respect, unable to follow the argument that possession of an upper room under such a tenancy, does not involve a discontinuance of possession on part of the owner as well as such a possession by the tenant as may under the Statute of Limitations ripen into a possessory title. If you have a subject which is land and such a possession of that subject I think the ground is clear for the operation of the statute. This indeed seems to be involved in the enactments both of section 8, which provides that when a person is in possession of land as a tenant from year to year or other period without a lease in writing the right of the person entitled to the land sub-

(1) 8 Q.B.D. 421.

(2) 44 Ch.D. 12, at pp. 22, 23, 26, 27 and 28.

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ject to the tenancy shall be deemed to have first accrued for the purposes of the statute at the determination of the first of such periods, and of section 7, which contains a similar provision relating to land held under a tenancy at will. The legislature seems in these sections to have recognized expressly the possession of a tenant at will or from year to year as involving a discontinuance of possession within the meaning of the statute by the person entitled to the land subject to the tenancy, and I can find nothing in the statute which detracts from the force of this recognition.

The courts have had no difficulty—if we except the technical point suggested but rejected by Mellish L.J., in the case to which I am about to refer—in applying the statute to seams of coal, although unopened, held under a tenancy at will. In *Low Moore Co.* v. *Stanley Coal Co.*(1), the Court of Appeal (Lord Cairns L.C., Lord Coleridge C.J. and Mellish L.J.) affirming the judgment of the Court of Exchequer (Bramwell, Pollock and Amphlett BB.) decided that a tenant at will of seven seams of coal who had entered upon the first two seams only, had for the purposes of the statute (by reason of his tenancy and his possession of the first two seams under it) possession of the remaining five seams, and that at the expiration of the statutory period he had acquired by virtue of that possession a possessory title. The scope of his tenancy was held for the purposes of the statute to define the scope of his possession. So here the plaintiff's tenancy is not disputed and once the subjects of that ten-

(1) 34 L.T.N.S. 186.

ancy are determined the scope of his possession is for the same purposes fixed.

It is argued that here there can be no possession within the meaning of the statute, inasmuch as the existence of the plaintiff's shop and therefore his possession of it depends upon the physical support afforded by the subjacent parts of the structure. But that argument seems to prove far too much. The upper of two strata of soil, divided horizontally, depends for its maintenance upon the support of the lower, which may in turn depend upon the support of strata below. Can it be said that the upper stratum is, because of this physical dependence, incapable of a separate exclusive possession? I confess I cannot understand how that can be maintained; indeed the case I have just cited seems to be conclusive upon the point. The seams of coal in question there depended upon the support of the soil below, which remained in the possession of the owner; *Trustees, Executors and Agency Co.* v. *Short*(1); to the same extent as the maintenance of the plaintiff's shop depends upon the support it receives from the lower story.

The decision as regards this branch of the controversy, must therefore turn upon the answer to the question: What were the premises let to the plaintiff?

After a good deal of doubt and fluctuation of opinion I agree with Mabee J. and Garrow J.A. on that point. Since there was no express agreement defining the premises let, we are left to ascertain what they were by inference from the acts of the parties and the surrounding circumstances. The entrance and stairway were during the whole period of the plaintiff's possession used as a means of access to the plaintiff's shop, and the actual use of them was as an ad-

(1) 13 App. Cas. 793.

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junct of the shop only. I think, moreover, that the proper inference from all the evidence is that there was one key only of the street door which remained in the plaintiff's possession, and I do not think the significance of these facts is affected by the circumstance that this door was usually left open during the daytime. The entrance and stairway were used by the plaintiff and his customers as such approaches would be used in the ordinary course, and I think that as much control as would usually be exercised over such approaches by any tenant to whom they should be let with the shop as part of the demised premises was exercised by the plaintiff. The view most consistent with all these circumstances would seem to be that the approaches and the shop were treated as a *unum quid,* and that the former were part of the premises let to the plaintiff.

But the plaintiff has failed to satisfy me that he has vested in him as the holder of a possessory title to the shop a right of support from the lower story. The Statute of Limitations, when the statutory conditions concerning possession are satisfied, bars the right of the owner of the paper title to make an entry or to bring an action for possession, and moreover extinguishes his title. The possession of the intruder is thus protected, but the statute does not profess to annex to a possessory title so acquired any incidental rights which rest only upon the implication of a grant or of what in law is the equivalent of a grant, and it is, I think, a settled rule that such rights cannot, as against a dispossessed owner, be derived from the statute. *Wilkes* v. *Greenway* (1).

Apart from such an implication has the owner of an upper story of a building any such right of sup-

(1) 6 Times L.R. 449.

port? I think he has none. So far as concerns this case the controversy whether such a right of support, when it exists, is properly described as an easement or as a right incident to the property in respect of which it is enjoyed is I think to quote Lord Blackburn in *Dalton* v. *Angus*(1), at page 809, "a question as to words rather than as to things." The substantial point to be determined here is whether it is a right which may arise from the natural situation of the property itself—(as the rights of a riparian proprietor in respect of the flow of a stream)—or one which must have its origin in a grant or the legal equivalent of a grant. That this last is so as regards the right of support for a building from the subjacent or adjacent soil is very clearly settled law, and I cannot resist the conclusion that the right in question here must stand upon the same footing. I venture with very great respect to say that I agree, in this, with the view expressed by Lord Selborne in *Dalton* v. *Angus*(1), at pages 793 and 794, and seemingly concurred in by Lord Watson (see p. 831).

It follows I think that the plaintiff is not entitled to prevent the defendants demolishing their part of the building merely because some part to which he has acquired a possessory title would thereby lose the support which it now receives; and I did not understand Mr. Tilley to argue that failing to establish a right of support he is on any other principle entitled to prevent the defendants destroying their part of the building.

The plaintiff is therefore not entitled to an injunction in the broad terms of the order granted by Mabee J., but he is I think entitled to an order restraining

(1) 6 App. Cas. 740.

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the defendants from interfering with so much of the structure as rests upon that part of the soil itself to which he had acquired a possessory title.

Appeal allowed with costs.

Solicitors for the appellant: *Thompson, Tilley & Johnston.*

Solicitors for the respondent: *McPherson & Co.*

MICHAEL FARRELL (PLAINTIFF) . . . . APPELLANT;

AND

JAMES MANCHESTER, ROBERT C. ELKIN AND THE PORTLAND ROLLING MILLS (DEFENDANTS) . . RESPONDENTS.

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*May, 19-21.
*June 16.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Company—Paid-up shares—Sale by broker—Prospectus—Misrepresentations—Rescission—Delay—Liability of directors.

F. in June, 1903, purchased paid-up shares in the capital stock of an industrial company on the faith of statements in a prospectus prepared by a broker employed to sell them. In January, 1904, he attended a meeting of shareholders and from something he heard there suspected that some of said statements were untrue. After investigation he demanded back his money from the broker and wrote to the president and secretary of the company repudiating his purchase. At subsequent meetings of shareholders he repeated such repudiation and demand for repayment and in December, 1904, brought suit for rescission.

Held, that his delay, from January to December, 1904, in bringing suit was not a bar and he was entitled to recover against the company.

Held, also, that he could not recover against the directors who had instructed the broker to sell the shares as they were not responsible for the misrepresentations in the prospectus.

Judgment of the Supreme Court of New Brunswick (38 N.B. Rep. 364), affirming the decision at the hearing (3 N.B. Eq. 508) reversed.

APPEAL from a decision of the Supreme Court of New Brunswick (1) affirming the decree of the judge in equity (2) in favour of the defendants.

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) 38 N.B. Rep. 364. (2) 3 N.B. Eq. 508.

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This is a suit brought in the Supreme Court in Equity, of the Province of New Brunswick, by the appellant against the respondents for the repayment to him of three thousand dollars and interest thereon from the twenty-fourth day of June, 1903, on the ground that the same was obtained fraudulently, illegally, and by false pretences.

The Portland Rolling Mills, Limited, one of the respondents, was incorporated under the New Brunswick Joint Stock Companies Act in March, 1899, and has its plant and place of business in the city of St. John. In June, 1903, the respondent, James Manchester, was president, and the respondent, R. C. Elkin, was managing director and treasurer of the company. The capital stock of the company was $90,000, divided into 900 shares of $100 each, of which the amount paid up prior to June, 1903, was $45,300, comprising 453 shares, leaving 447 shares called "Treasury Stock" held by the company and representing $44,700 unpaid at that time.

On the 26th of May, 1903, the directors passed a by-law authorizing the issue of $20,000 of treasury stock at par, and empowering the president and treasurer to employ a broker or other person to sell the stock at a reasonable commission. The president of the company, the respondent, Manchester, and the treasurer, the respondent Elkin, pursuant to the said authority, on a subsequent date, but previous to the 24th of June, 1903, employed one F. S. Sharpe, now deceased, to sell the stock at a commission of three per cent. Mr. Sharp drew up a prospectus, in which appeared the names of the directors of the company, and in which, among other things, it was alleged, contrary to fact, that with the exception of a small outside interest, the present paid-up capital of the company

was, at that time, held by the directors, and that it was understood they would increase their holdings by taking up most, if not all, of the treasury stock remaining to be disposed of. No mention was made of the liabilities of the company, which at that time amounted to about $120,000. Some time in June, 1903, Mr. Sharpe called on the appellant, read over and gave a copy of the prospectus to him, and asked him to invest in the stock of the company. The appellant, relying upon the statements contained in the prospectus, purchased, through Mr. Sharpe, thirty shares of the capital stock of the company, paying therefor the sum of Three Thousand Dollars. The appellant received a stock certificate for the thirty shares of stock, dated June 24th, 1903, and bearing the seal of the company and the signatures of James Manchester, president, and R. C. Elkin, treasurer.

The appellant attended a meeting of the shareholders of the company on the 26th day of January, 1904, when for the first time his suspicions were aroused as to the truthfulness of certain statements contained in the prospectus, upon which, among others, he particularly relied in purchasing the stock, viz.: That it was understood the directors (therein named) would increase their holdings by taking up most, if not all, of the treasury stock remaining to be disposed of, and that, with the exception of a small outside interest, the then present paid-up capital of the company was held by the directors. The appellant almost immediately interviewed Mr. Sharpe, and upon obtaining information which confirmed his suspicions, he demanded, of Mr. Sharpe, repayment of the $3,000, and on February 5, 1904, he wrote a letter to the president, in which he repudiated the stock, demanding back his money. On two subsequent occasions, in

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February and March, 1904, he attended shareholders' meetings. At one of those meetings he tendered his stock certificate, and at both meetings reiterated his demand that the money which he paid for the stock he returned to him. He took no part in the business of those meetings, nor did he at any time after he repudiated treat the stock as his own. On March 14th, 1904, the appellant wrote to the secretary of the company, requesting a copy of the last annual report. He made a similar request in a letter to the persident, bearing date of March 19th, 1904. On the 13th of April, 1907, the respondent Manchester wrote to the appellant that the condition under which he took the stock had not been changed. The respondents did not provide the appellant with a copy of the annual report as requested, nor did they return the money and the appellant issued a summons in the Supreme Court in Equity, on December 22nd, 1904.

The case was heard before the Judge in Equity, who held that the appellant (plaintiff) had a right, as against the company, upon the ground of misrepresentation, to have the contract rescinded, and the money repaid with interest, but upon the ground of delay in commencing the suit, held that he was debarred from recovering against the company, and therefore was also debarred from recovering against the individual defendants, Manchester and Elkin. He also held that the defendants, Manchester and Elkin, did not authorize the preparation of the prospectus, and did not adopt it in any way, and dismissed the bill as against all the defendants with costs. The plaintiff appealed to the Supreme Court *en banc* of New Brunswick, and that court, in a judgment delivered by the Judge in Equity (now Chief Justice), dismissed the

appeal with costs on the ground of delay in commencing the suit. Hence the appeal to this court.

Ewart K.C. and *J. M. Price* for the appellant. The plaintiff was first put on inquiry in January, 1904, and after investigation immediately repudiated his purchase of the shares. It was the duty of the company then to strike his name from the list of shareholders and return his money. *Reese River Silver Mining Co.* v. *Smith*(1), *per* Lord Hatherley, at p. 74.

The action if at law for deceit would not be barred and equity, by analogy, follow the law. *Peek* v. *Gurney*(2).

If repudiation is prompt delay in bringing suit is no bar unless the position of defendants is changed.

Greater delay than occurred here has been held no bar. See *Erlanger* v. *New Sombrero Phosphate Co.* (3); *Lindsay Petroleum Co.* v. *Hurd*(4).

The defendants Manchester and Elkin as directors by employing the broker became assenting parties to all that he did to effect sales. *Cullen* v. *Thompson's Trustees*(5); *Glasier* v. *Rolls*(6); *Cargill* v. *Bower* (7).

The plaintiff may bring one action for rescission and damages; *Bagot* v. *Easton*(8); and may recover damages from the directors as for deceit; *Vernon* v. *Oliver*(9).

Hanington K.C. for the respondent company. The statements in the prospectus were not material and

(1) L.R. 4 H.L. 64.
(2) L.R. 6 H.L. 377.
(3) 3 App. Cas. 1218, at p. 1230.
(4) L.R. 5 P.C. 221, at p. 239.
(5) 4 Macq. 424, at p. 444.
(6) 42 Ch.D. 436.
(7) 10 Ch.D. 502.
(8) 7 Ch.D. 1.
(9) 11 Can. S.C.R. 156.

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were made in good faith. *Central Railway Co. of Venezuela* v. *Kisch*(1).

Teed K.C. for the respondents Manchester and Elkin. It was incumbent on the plaintiff to enforce his claim for rescission with the greatest promptitude. *Central Railway Co. of Venezuela* v. *Kisch*(1), at p. 125. In *Re Russian Ironworks Co.; Taite's Case*(2) a delay of one month disentitled the plaintiff to relief. And three and four months' delay have been held fatal. *Heymann* v. *European Central Railway Co.* (3); *Re Cachar Co.; Lawrence's Case*(4).

Prompt repudiation of the contract will not suffice. It must be followed speedily by suit. *Kent* v. *Freehold Land & Brick-making Co.*(5). And see *In re Scottish Petroleum Co.*(6).

Even if the statements in the prospectus were material and untrue the directors are not liable as they committed no actual fraud. *Derry* v. *Peek*(7). The broker was not their agent but only agent of the company. *Wier* v. *Bell*(8).

The plaintiff cannot obtain rescission and recover damages in the one suit. *Ogilvie* v. *Currie*(9).

The judgment of the court was delivered by:

IDINGTON J.—The lucid and comprehensive judgment of the learned trial judge, now Chief Justice of New Brunswick, shews how the respondent company

(1) 3 DeG. J. & S. 122; L.R. 2 H.L. 99.
(2) L.R. 3 Eq. 795.
(3) L.R. 7 Eq. 154.
(4) 2 Ch. App. 412.
(5) 3 Ch. App. 493.
(6) 23 Ch.D.413, at p. 425.
(7) 14 App. Cas. 337.
(8) 3 Ex.D. 32, 238.
(9) 37 L.J. Ch. 541.

engaged an agent to sell stock issued or proposed to be issued by that company and, as a consequence, was responsible for the material misrepresentations made by the agent.

So far as the company is concerned and its original liability to rescission arising from these causes and to refund the appellant the money received from him by virtue of such misrepresentation, the learned judge's finding cannot be questioned.

I cannot agree, however, that the right of rescission was lost by delay.

The appellant, at a shareholders' meeting, on 26th January, 1904, had reason, for the first time, to doubt the truth of the representations made to him.

He soon saw the agent who had sold the stock and complained to him and demanded a return of his money. Then on the 5th of February, 1904, he wrote the defendant, Manchester, president of the company, to the same effect, attended a meeting on the 16th February, to demand his money back and tender a surrender of his stock, attended another time to repeat this in March, when the meeting failed to organize, and, on the 19th March, wrote a very long letter for the same purpose and to set forth what the agent's side of the story was. These tenders and letters brought no reply till a brief note of the 13th April, which I will refer to later.

The repudiation and right to rescission was asserted so promptly and so persistently pressed without eliciting any reply until 13th April, that I fail to see how respondents can conplain of delay in suing, at least till then. Contemptuous silence may be a fitting answer to a direct charge of personal fraud. But here, the complaint was of the conduct of an agent. It was the duty of the directors to have investigated. See

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remarks of Lord Hatherly, if authority needed, referred to later. It was the duty of the appellant to have awaited the result for a reasonable time.

The effect of delay or laches is stated in the case of *Lindsay Petroleum Co.* v. *Hurd*(1), at page 239, *et seq.*, as follows:—

> Now the doctrine of laches in courts of equity is not an arbitrary of a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted; in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief which otherwise would be just is founded upon mere delay, that delay, of course, not amounting to a bar by the Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

This was cited with approval by Lord Blackburn, in *Erlanger* v. *The New Sombrero Phosphate Co.* (2), at page 1278, as follows:—

> I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide and must, therefore, be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.

He also cited with approval from *Clough* v. *London*

(1) L.R. 5 P.C. 221. (2) 3 App. Cas. 1218.

and North Western Railway Co.(1), at page 35, the following:—

> We think that so long as he has made no election he retains the right to determine it either way, subject to this, that, if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind.

And he adds:

> I think it is clear on principle of general justice that as a condition to the rescission there must be a *restitutio in integrum*. The parties must be put *in statu quo*.

These quotations must be accepted as undoubtedly correct expositions of the law.

There has been no departure from these principles by any court deciding any of the cases of shareholders repudiating, in such cases of fraud, the contracts they may have entered into.

In regard to the contracts of shareholders or subscribers for shares, the nature of the act enabling the companies, in such cases, to become incorporated or incorporating them and the responsibilities assumed by virtue thereof either to fellow-subscribers or fellow-shareholders or creditors of such corporate bodies have all to be reckoned with in order that any attempted repudiation of a subscription for or acceptance of a share or shares may not be done to the unjust detriment of those third parties; or in conflict with the statutory obligations assumed by virtue of the subscription for shares or of acceptance thereof under the conditions that may have arisen before repudiation.

The statutory obligation does not exist in such a case as this. The appellant took no part in creating the company or issuing this new stock, but merely

(1) L.R. 7 Ex. 26.

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bought and paid in full $3,000 for stock subject to no further call and repudiated the purchase when he found it had been induced by fraud. Neither creditor nor shareholder is entitled to look for further assistance. What then is the third party's right that is to be affected by a rescission? What is the injury to be done such an one? How can it come about? How, by any possibility, could there spring out of the delay from April to December, in this case, any wrong or deprivation that would not have been suffered if suit had been brought in the former month instead of the latter?

The reason assigned for any distinction in regard to right of rescission between a contract to take shares and other contracts is well put by Fry L. J., in *Re Scottish Petroleum Company*(1), at page 438:—

> As regards such contracts the legislature has interposed and has provided that they shall be made known in a particular way to shareholders and creditors; notice of them is given to the world. Now, the general principle is that no contract can be rescinded so as to affect rights acquired *bonâ fide* by third parties under it. It is true that the creditors and the other shareholders have not acquired direct interests under the contract, but they have acquired an indirect interest. The shareholders have got a co-contributory, the creditors have got another person liable to contribute to the assets of the concern. So that, although in the case of voidable contracts simple repudiation is enough there must, in the case of a voidable contract to take shares be a repudiation and something more before the winding-up commences.

That relates to the contract to take shares. But what of the contract to pay for shares taken? The same reasoning answers there also.

But what of the cases where the shares have been paid up? There is no new co-contributory or obligation created by statute in favour of the creditor. The creditors stand, just as the creditors of one of the

(1) 23 Ch.D. 413.

thousand and one others whose fortune, founded on fraud, has disappeared to the grievous disappointment of the creditors.

The case of *Re Cacher; Lawrence's Case*(1), has been relied upon both in the court below and in the argument of the respondent before us.

With the greatest respect for the court, I am unable to find how any support can be derived therefrom in this judgment.

The *Lawrence Case*(1), is presented to us in the respondent's factum, as follows:—

> In *Lawrence's Case* (1) a delay of May to the 27th of September, being four months and eleven days, was held to be sufficient to deprive the appellant of any right he had to repudiate the shares.
>
> There is no question of winding-up in this case.

Being typical of other cases and arguments therefrom pressed by respondent's counsel, let us see what it means and what foundation there is to it, or possible use to be made of it for laying a foundation to decide this case.

The facts which the report of the case presents are, that when the company was being promoted, in July, 1865, a copy of the prospectus was handed to Lawrence, probably pursuant to previous correspondence in anticipation of the project; that, on the 4th of September, 1865, he signed and sent in an application for 2,000 shares, paying a deposit of 10s. per share; that the company was incorporated and memorandum of association registered on the 11th of September, 1865; that on the 7th October, 1865, he received a letter of allotment of 2,000 shares; that, on the 14th of the same month, he paid the company's bankers a further 10s. per share, giving up his letter of allotment in ex-

(1) 2 Ch. App. 421.

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change for the banker's receipt acknowledging his title to and promising delivery of certificate for such shares; that nothing more passed until 14th May, 1866, between him and the company; that on that date, he and his solicitor had in their hands the whole of the document on which variance was relied for moving to be discharged from the register; that he could *then have waived or rescinded but, instead of repudiating, though knowing the register held him out to the world, as a shareholder* in and a member of the company allowed his son to hold communication with and influence the conduct of the directors on the footing of he (Lawrence Sr.), being a shareholder. This last was enough, Lord Cairns thought, to disentitle Mr. Lawrence.

What is the possible analogy between such a case under such an Act as the English Joint Stock Companies Act of 1862, and the facts set forth and this case under the New Brunswick Joint Stock Companies Act and the facts made to appear here?

It was in dealing with that May to September space of time that is put forth in respondent's factum as if, which it is not, the entire substance of the case and a test of time permitted after repudiation that Lord Cairns used in answering such contention as could be set up thereunder, the following language, I quote from pages 424 and 425 of the report:—

> In considering this part of the case it is necessary to bear in mind the general scheme of the Act of 1862. No company can, under that Act, obtain a limit of liability for its shareholders except by registering a memorandum of association, which is the charter and limit of the powers of the company, just as the articles of association may be said to be its rules of internal government.. A copy of these documents is to be forwarded to every member on his request, at a fee not exceeding 1s. When registered they bind the company, and every member of it, as if each member had executed a deed with covenants to the effect of the provisions which

they contain. On the other hand, the test, and the only test, which other members and the outer world can have of the membership of any particular person, is the entry of the name of that person on the register as a member.

* * * * * * * * *

In this register of members, Mr. Lawrence, by the form of his application for shares, expressly authorized his name to be entered. and he must have been aware that, upon this being done, he would be held out to the world as a member of the company, whatever the form or substance of its memorandum or articles. He must be taken, in my opinion, to have known, either that the memorandum of the association was prepared and accessible at the time of his application, or that it must be prepared forthwith; and that, in either case, both it and the articles must, in their very nature, be documents differing widely in form and, in all measures of detail at least, going beyond the prospectus; and, with regard to documents of this description, on the mode of framing which consistently with the prospectus so much difference of opinion might well arise, it would, in my opinion, be contrary to the first principles of justice to hold that Mr. Lawrence was at liberty to remain wholly passive, content to trust to what was stated in the prospectus, and, while he knew that an authority to register his name and hold him out as a shareholder had been given and probably acted on, keeping himself in a position to ratify all that had been done if the company turned out prosperous, but for the first time to inquire, and, if possible, to repudiate, should a financial panic come, or the speculation turn out unsuccessful.

The language I have quoted exhibits, as usual for him who used it, such a comprehensive grasp of the whole subject matter in all its bearings, and clear exposition of the law applicable to the facts I have recited, that, if it fails to bring home to any one the wide distinction between that case and this, I cannot hope to do so by any language of my own, when the respective facts of each case and the leading features of the respective statutes upon which each creation rested are borne in mind.

The beauty of the exposition is that, without dwelling upon any needless details, the lesson is so learnt as one reads that the reader sees how to expand the application of it without adding useless words.

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I have examined every case cited or that I have been able to find, to see if there ever was a case resembling this in its leading features, where a court, whose authority would bind us, ever, *merely because of delay between repudiation and action, refused relief to a shareholder whose shares had been fully paid up and who repudiated within a reasonable time, but have found none.*

There are cases indicating the contrary view of the law.

The case of *The Directors of the Central Railway Co. of Venezuela* v. *Kisch*(1), in appeal shews that the plaintiff allowed, after knowing of the fraud, two months to elapse before he moved and six months after he might have known, if he had been diligent, and though a shareholder liable for the part unpaid on account of shares, yet on appeal the House of Lords thought little of the question of delay then set up.

The cases of *Oakes* v. *Turquand*(2), sweeps out of the way, as authorities concerning us and calling for consideration on this point of delay, all those cases under the English Joint Stock Companies Act where an order for winding-up has been made or petitioned for; and the reasoning upon which it proceeds removes, in like manner, also all those cases wherein the shareholder had not fully paid up his shares, for no one could tell when the statutory obligation under those Acts in favour of creditors, might, in the course of business, become operative, and hence the necessity for that promptitude so repeatedly urged as necessary for those repudiating or taking action to rescind,

(1) 3 DeG. J. & S. 122; L.R. 2 H.L. 99.

(2) L.R. 2 H.L. 325.

if they desired to escape the operation of that statutory obligation or to be just to those becoming entitled to invoke it.

Among many important differences there is the essential difference of far reaching importance in this connection between the English Joint Stock Companies Acts and the New Brunswick Joint Stock Companies Act, that the register ever since 1862 was in England open to all the world, but in New Brunswick it was only open, as of right, to creditors and shareholders.

A man could not well complain of becoming a creditor on faith of any register where, until he became a creditor, he had no right to look at it.

There is exhibited in the drastic and comprehensive system of the English Act of 1862, and later Acts, a scope and purpose far beyond anything that appears in the limited field covered by the New Brunswick Act.

It is part of the scheme of the English Acts to work out the rights and liabilities of the subscriber for shares and those entitled to rely thereon, by holding the subscriber to the obligation he has undertaken unless he adopt the special and speedy method provided by the Act for getting rid thereof.

Such cases as *Taite's Case*(1), are only binding illustrations of time allowed for removal from the register by the means specified by the Act.

The same legislation or similar legislation creating similar conditions might give a value to such authorities which I do not conceive they have here where the conditions legislatively and in every way render the cases so different from what we have to deal with herein.

(1) L.R. 3 Eq. 795.

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There is no peculiar quality in the property in a share, once fully paid up, and no future liability on it, whereby we can differentiate the consequences of fraud inducing sale of it, and right of rescission arising therefrom, and those consequences in relation to any other property.

There always has been and always will be, as one property differs from another, a variation in the proper measure of time to be allowed for repudiation, and following repudiation, for application to the court to enforce it.

The perishable must differ from the permanent and the chances of change in ownership and development must give rise to such varying conditions and consequent varying obligations as to render it impossible to lay down any uniform rule.

There is no greater right in a corporate body, as such, or in one of the corporators, as such, to be protected from suffering or inconvenience arising from disappointments that the fraud of servant or agent creates than non-corporate persons have who endure the same.

The distinction made in some of the corporation cases arises from the greater risk run of injuring third parties.

The conditions that the cases of unpaid shares present under the English Acts are entirely different from the property in fully paid-up shares.

I wish to refer to some cases illustrating my meaning and my understanding of the law in this regard when applied to company cases where the statutory provisions do not form a leading element in the questions to be solved.

Take the case of *Clarke* v. *Dickson* (1), where the dealing was not between the company and the subscriber for shares, but between private persons in relation to the buying and dealing with shares, when the contract of purchase was alleged to have been induced by fraud.

Lapse of time, though great, was not the special element that disentitled to relief, but the change in conditions was the bar on which stress was laid and coupled with that was the dealing of the purchaser with the property.

The case of *Aaron's Reefs* v. *Twiss* (2), is another illustration in a different way.

There the company had of its own motion removed, for non-payment of calls, the name of respondent as a shareholder. The Act provided that a shareholder, in such case, remained liable for such unpaid balances of purchase of shares subscribed for.

The company sued for the balances, and the defendant set up the fraud and succeeded, though he never, in fact, repudiated, except by his plea in answer to this suit. The dates are in this regard worthy of notice.

On the 27th of April, 1891, the shares were declared by the company to be forfeited, and, on the 5th of May, he was notified thereof. On the 27th of September, 1891, he was sued and on the 21st of December, 1891, the plea of fraud was filed.

It was argued there, as here, that he was too late, but, though the court found that he had been put on inquiry as far back as the previous March and, as a matter of fact, had formed a shrewd suspicion before the 6th of May, that he had been the victim of a fraud,

(1) E.B. & E. 148. (2) [1896] A.C. 273.

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the lapse of time was of no avail in answer to the claim for relief by reason of the fraud.

Lord Watson thought he and the company were, by the forfeiture of shares in May, remanded to the common law right of rescission. Lord Davey put the matter as follows:—

> The company thereby severed the relation between themselves and the respondent as shareholder, and the respondent became a mere debtor to the company. It is not proved by any evidence that the respondents had lost his right to repudiate at the date of the notice; and I think that, not having done any act to affirm the contract, he was not then bound to take any step for the mere purpose of getting rid of his liability to pay this call. But I am also of opinion that, if the appellants had intended to rely upon the delay, they ought to have cross-examined the respondent for the purpose of ascertaining when he learnt the facts, and to have asked for a direct finding of the jury on the subject.

Two observations are called for by this case.

Time in itself is not, when dissociated from the peculiar obligations arising from the statute, any more of a bar to repudiating for fraud a contract arising even out of a subscription for shares, than in any other contract.

The time here was, as I count it, no greater than there.

Another observation called for by that decision and remark is that in the defence herein no pleading set up the delay or laches, no contest was made at the trial over any such issue, no reason was asked for appellant's failure to move after he had repudiated the transaction.

No one, for the defence, seems to have thought of such a defence until at the close of the case, as a desperate resort the leave was asked to plead such defences.

Such evidence as, if attention had been called to it, might have been offered we are left to speculate on.

But we find that the respondent swore incidentally to answering on other issues, as follows:—

Q.—Did you ever get a balance sheet shewing a statement of the assets and liabilities? A.—Never got a balance sheet from the day I took the stock to the present day. They never advised me of the meetings, or one thing or another; everything was done in a hole and corner; never got a statement shewing assets or liabilities or anything else.

Q.—Did you ever get a statement from them shewing their liabilities? A.—Never got anything from them; ignored me altogether.

And no reply is made to this evidence.

This is not all, however, for he wrote, as already stated, the defendant, Manchester, who was president of the company, a long letter on the 19th of March, 1904, in which the following passage occurs:—

There is a lot of other things I would like to tell you, but this will do for the present. I asked Mr. Elkin the other day for the minutes of the meetings held since I bought the stock, and the last annual reports, but he told me he did not have them, they were at the mill. I went there for them yesterday, but I found Mr. McIntyre was indisposed and not able to be at his post. I told Mr. Elkin I did not want to go into law about the matter if I could help it. And *now you will allow me to tell you that the only thing that keeps me back from putting it in the court is the minutes and the reports.* You do not deserve to get another note from me. I sent you three, and you treated me with a great deal of disrespect by not answering either of them. I always thought you were a man disposed to do what was right. This is the last time that I will address you on the subject if it costs me every cent I am worth I will have my money. I will follow you and Mr. Elkin to the end of your tether, and make you do what is right. If the stock is as valuable as represented to be, why not take it up yourself?

The only answer ever vouchsafed to this letter, containing so explicit a demand for inspection and explanation, is the following:—

ST. JOHN, N.B., April 13, 1904.

Michael Farrell, Esq.,

Dear Sir,—

At a meeting of the directors of the Portland Rolling Mills, Limited, held yesterday, your letter of March 19th was placed

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before the Board, and, on motion, "the president was instructed to write in reply to Mr. Farrell and notify him that the condition under which he took his stock have not been changed."

Yours truly,

JAMES MANCHESTER,
President, Portland Rolling Mills, Ltd.

The appellant ran a risk of pressing any further demand for leave to inspect, for to do so by virtue of his standing as a shareholder might have waived his repudiation, and his persisting further might have lent a colour to the argument that his doing so was as a member of the company.

Am I to assume he was not waiting developments of evidence as to subscription of stock by the directors in accordance with the representations?

One of the accusations made as corollary to the existence of stock holdings by directors is that the directors were to have taken up the balance of the new stock pursuant to an understanding. Suppose they had done so in May or June would he have had much to complain of on that branch of his case, even if so tardy fulfilment had been effected?

I do not think it lies in the mouth of a company that acted as this one did in its dealings with the appellant for one moment to complain of delay or laches, much less to seek the benefit of such a defence, if ever open, by such way of presenting it as this.

In addition to the remark of Lord Davey, I would call attention to the remarks at pages 240 and 241, in the judgment of the Privy Council in the *Lindsay Petroleum Company Case* (1), cited above, in regard to the necessity for pleading not only laches but the allegation of facts intended to be relied upon to support it, or shew the injury that has arisen to any one by reason of the imputed delay.

(1) L.R. 5 P.C. 221.

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The following sentence is, *mutatis mutandis,* applicable here.

> In order that the remedy should be lost by laches or delay, it is, if not universally at all events ordinarily—and certainly when the delay has only been such as in the present case—necessary that there should be sufficient knowledge of the facts constituting the title to relief.

That the major part of the stock was not held by directors, the appellant may well be held as knowing from the 26th January, 1904.

But the important point, in that same connection, and the allegation of falsehood and fraud charged in relation thereto, as to the exact nature of the purpose or understanding as to future taking up of the balance of the same issue by the directors, as that of which the appellant has bought part, could only be effectually got at by an inspection of the minute books and stock books.

The same may be said as to the real financial condition in preceding years, and the allegations relative thereto.

The appellant, in his impetuosity to repudiate, possibly had not fully considered the necessity for thus arming himself, and I think, in face of respondent's way of treating him, he was well warranted in taking time after the 13th of April, 1904, to discover elsewhere or otherwise, the evidence before launching on a sea of litigation.

The case, though arising out of a sale of stock, presents few of those characteristics that differentiate the usual stock cases cited from others regarding fraud entitling to rescission, so as to render each day's delay strong evidence of that promptitude justice in some cases demands.

The company was a kind of close corporation with

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less than a dozen shareholders when it was decided to offer the new stock and so little of that was sold that I doubt if any changes in ownership of it took place between April and December, 1904, save to those well informed as to this claim as well as all else bearing on the state of the company.

The burthen rested on those setting up such an equity to plead it and prove it; at least *primâ facie.*

The financial condition of the company was probably in fact quite as good when this suit was begun as on the previous 13th of April.

No change for the worse can be said to have operated on the appellant's mind in the way that seems to have happened in some cases.

I cannot find anything to have intervened during the alleged delay in bringing the action that would have entitled any third party to complain of relief being given as of 22nd December, 1904, instead of the 14th of April, preceding.

The circumstances I have adverted to as possibly excusing more prompt action seem, when coupled with default in properly raising the objection to furnish an excuse, quite as potent as in the *Aaron's Reefs Case* (1) or the *McNeill Case* (2), to repel any objection on the score of laches when absolutely no evidence of acquiescence.

In the absence of authority, to hold mere delay itself, after clear express repudiation of a fully paid-up stock a bar, I can see no reason in accord with well understood principles for refusing the relief prayed for here as against the company.

Then, is there a case made against the defendant

(1) [1896] A.C. 273. (2) L.R. 10 Eq. 503.

directors? Is there one upon which we can properly reverse the learned trial judge's finding of fact?

I do not think so. It seems to me, without being held bound to all he may have said, that he was guided in his consideration of the evidence applicable to the case as against these individual defendants, by a correct appreciation of the law by which they should be tried.

The quotation he adopts from Lord Chelmsford's judgment in *Peek* v. *Gurney*(1), at page 390, seems supported by the authorities so far as applicable to this case.

The agent, employed by these directors by virtue of the resolution entrusting to them the disposal of these shares, by his acts bound the company. That the learned judge found, and I have adopted. It does not follow as a matter of course, that directors, appointed by and on behalf of their company to select an agent, are personally responsible for all that agent does.

No case is made on the evidence that the agent engaged was so untrustworthy or likely to resort to improper means that defendants ought to have been on their guard.

I attach no importance to his marking the prospectus as "private." Whatever he called it, I would call it the act of the company.

Even suppose it were so, and the issue of a prospectus was a thing likely to have happened, as within the scope of his authority, does it necessarily follow either that it assuredly would issue, or that the agent in issuing it would act dishonestly?

The transaction was not so large a one as to ren-

(1) L.R. 6 H.L. 377.

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der resorting to the circulation of a printed prospectus a certainty or as almost certain to occur.

Nor could any one hold as a matter of law these directors liable for wholly unauthorized verbal representations.

Then, does the evidence of knowledge of these directors of the issue and contents of the prospectus change their liability?

Had it been clear that they or either had been aware, before the sale to the appellant, of the use of this prospectus, I should have been disposed to hold as guilty him knowing the use to which his authority was being put, and who, so knowing, refrained from at once withdrawing the prospectus and, if need be, the authority of one so abusing it, and to have held him liable to answer for the consequences.

The dates when each of these directors knew of the prospectus, (and I would not be disposed to distinguish as of course the date of knowing of it from the date of reading it), and of the sale of the stock and of the receipt by the treasurer of the company of the purchase money from appellant are all left quite uncertain.

Some of the most important of these dates could easily have been fixed. It is not fair either to the accused or to the court in a trial of this kind to leave such things uncertain.

The court might suspect or speculate but could not act thereon. In this case, if the court impressed by the manner and other things that lead to distrust a witness, had inferred from some parts of the evidence a basis of fact against the defendant Elkin, and been led by such an inference, coupled with what I am about to advert to, had found against him, I do not

know that I should have felt at liberty to disturb the finding.

Manchester's case seems entirely different, in regard to these matters that appear in Elkin's case.

As to both, however, there stands on record an apparent neglect of duty such as (if authority be needed), Lord Chancellor Hatherly asserted in *Reese River Mining Co.* v. *Smith* (1), at page 74, was imposed on directors where a repudiation was made of sale of right to shares on the ground of fraud.

It was the plain duty of the directors, including these specially connected with the agent accused, to have investigated such a charge of fraud, and, if the charge made proved well founded, to have agreed to rescission at once.

Elkin's own judgment upon such a case, from what he tells as having passed between him and the agent, should have been quite enough.

He realized the impropriety of the representations made. Why did he not succeed in cancelling such a transaction? He was, as the evidence shews, clear sighted enough to know the impropriety of resting a sale of stock on such a basis.

Again the appellant has failed to present the evidence of what took place at the board meeting or meetings which led up to Manchester, the president, writing the letter of the 13th of April. If the proper spirit that Elkin evinced when the prospectus was shewn him had prevailed, as it should have done, that letter never would have been written.

But, should I, sitting in appeal, even if I could infer either of these men were at the board meeting

(1) L.R. 4 H.L. 64.

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that adopted the defiant tone and directed this letter, couple that with other evidence and find them liable? I think not.

I have referred to these things at length instead of contenting myself with simply adopting the conclusion of the learned trial judge, relative to the director defendants, because they shew that there was a case for investigation which rendered it proper to make these two directors parties defendant.

They have been given their costs below. I might not have thought they were entitled to them in the view of what I think was their duty on learning of this complaint.

They had a chance to shew they were overborne and have not done so. But as we do not, as a rule, interfere with the disposition of costs the court below has awarded, unless incidentally to a reversal, the judgment of the court below in regard to these costs must stand.

They succeed here and are entitled to their costs of appeal. But I do not think they should be taxed costs here or in the courts below beyond what were necessarily incurred in their own personal defences. I do not find in the case any answer was made by defendant Elkin—but assume he had nevertheless some costs of defence.

The general costs of the cause throughout, and of the appeals, must be given the appellant as against the defendant company, save as to such parts thereof as were occasioned by the making of the directors defendants to the cause and to the appeals.

Appeal against the defendant company allowed with costs.

Solicitors for the appellant: *Stockton & Price.*

Solicitor for the respondents,
The Portland Mills Rolling Co.: *A. H. Hanington.*

Solicitor for the respondents,
Manchester and Elkin: *M. G. Teed.*

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*May 11, 12.
*June 9.

THE DOMINION BANK (DEFENDANT) ..... APPELLANT;

AND

THE UNION BANK OF CANADA (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Banks and banking—Forged cheque—Negligence—Responsibility of drawee—Payment—Mistake—Indorsement—Implied warranty—Principal and agent—Action—Money had and received—Change in position—Laches.

A cheque for $6, drawn on the plaintiff, was fraudulently altered by changing the date, and the name of the payee, and by raising the amount to $1,000. The drawee refused payment for want of identification of the person who presented it. The defendant bank, without requiring identification, advanced $25 in cash to the forger on the forged cheque, placed the balance, $975, to his credit in a deposit account, indorsed it and received the full amount of $1,000 from the drawee. After receipt of this amount, the defendant paid the further sum of $800 to the forger out of the amount so placed to the credit of his deposit account. The fraud was discovered a few days later and, on its refusal to refund the money it had thus received, the action was brought to recover it back from the defendant as indorser or as having received money paid under mistake of fact.

Held, that the drawee of the cheque, although obliged to know the signature of its customer, was not under a similar obligation in regard to the writing in the body of the cheque; that, as the receiving bank had dealt with the drawee as a principal and not merely as the agent for the collection of the cheque and had obtained payment thereof as indorser and holder in due course, it was liable towards the drawee which had, through the negligence of the receiving bank, been deceived in respect to the genuineness of the body of the cheque, and that the drawee was entitled to recover back the money which it had thus paid under

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

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a mistake of fact, notwithstanding that, after such payment, the position of the defendant had been changed by paying over part of the money to the forger. *The Bank of Montreal* v. *The King* (38 Can. S.C.R. 258) distinguished. *Newall* v. *Tomlinson* (L.R. 6 C.P. 405); *Durrant* v. *The Ecclesiastical Commissioners for England and Wales* (6 Q.B.D. 234); *The Continental Caoutchouc and Gutta Percha Co.* v. *Kleinwort, Sons & Co.* (20 Times L.R. 403) and *Kleinwort, Sons & Co.* v. *The Dunlop Rubber Co.* (23 Times L.R. 696) followed.

Judgment appealed from (17 Man. R. 68) affirmed, Idington J. dissenting.

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

The circumstances of the case and the questions at issue on the appeal are stated in the judgments now reported.

Shepley K.C. and *D. H. Laird* for the appellant.

Ewart K.C. for the respondent.

GIROUARD J.—This appeal must be dismissed.

The amount of a forged cheque was paid by mistake by the drawee and the appellant, who received the money, although not due to it by the respondent, must refund it, unless precluded from doing so by some rules of law. I observe in *The Bank of Montreal* v. *The King*(2) at page 267:

Whatever was the jurisprudence in the old days, it has been settled by the "Bills of Exchange Act," section 54 (now section 129), which limits the liability of the acceptor to the genuineness of the signature of the drawer, *thus impliedly excluding his liability for the forgery of the body of the bill.*

(1) 17 Man. R. 68. (2) 38 Can. S.C.R. 258.

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That is still my opinion and I am very happy to learn from the factum of Mr. Ewart K.C. that long before the "Bills of Exchange Act" was passed, that was also the decision the Courts of Appeal of my province had arrived at in *The Union Bank of Lower Canada* v. *The Ontario Bank*(1), where Dorion C.J. said:

> If a bank accepts a forged cheque of its own customer and the forgery consist in the signature of its customer, it cannot recover the money, because it is bound to know the signature of its own customer. *But that does not apply to the writing in the body of the instrument, because the bank is not bound to know the handwriting in which the document is written.*

I have, therefore, come to the conclusion that the respondent is entitled to recover back the amount paid. I may add that the case of *The Bank of Hamilton* v. *The Imperial Bank of Canada*(2) supports that conclusion.

The objection is raised by the appellant that its position had entirely changed since it received the money, by remitting it, or the greater part of it, to the holder. The respondent paid the cheque under the erroneous belief that it was genuine, and the appellant received the proceeds acting under the same mistake, and, therefore, the money must be returned. But the recipient bank is guilty of, perhaps, a more grave mistake. The holder was a perfect stranger and it made no inquiry, no effort, in fact it did nothing to ascertain who he was. True, the paying bank could have found out all the circumstances of the forgery, but it was satisfied that the signature of the drawer was genuine and there its responsibility ended. The appellant could have ascertained everything connected

(1) 24 L.C. Jur. 309, at p. 316.

(2) 31 Can. S.C.R. 344; [1903] A.C. 49.

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with the cheque and the payee; it did not do so and it must suffer the loss caused by its imprudence or fault.

DAVIES J.—The Manitoba Government issued a cheque upon the Union Bank, respondent, signed by the officials authorized to draw such cheques in favour of The Consolidated Stationery Company for the sum of $6.00.

Jones, a clerk of the company, obtained possession of the cheque, misappropriated it, and fraudulently erased both the payee's name and the amount for which the cheque was drawn, and inserted instead the name of Willam Johnson and the sum of $1,000.

The forgery was very skilfully done, so much so that no ordinary care could have discovered it.

Jones, pretending to be Johnson, presented the cheque to the drawee, the Union Bank, for payment, but, being unknown and unidentified, payment was refused.

He then took the cheque to one of the branches of the Dominion Bank, the manager of which, without requiring identification, took the cheque, paid the forger $25 and placed the balance to his credit.

The Dominion Bank then indorsed the cheque and passed it through the Clearing House to the Union Bank, which paid the amount of the cheque as forged.

Before the crime was discovered, but after the Union Bank had honoured the cheque, the Dominion Bank paid to the forger Jones $800 of the amount standing to his credit.

On the return of the cheque to the drawer the forgery was discovered and the forger was at once arrested, tried, convicted and sentenced.

Under these circumstances the Union Bank sued to recover back the money paid by it to the Dominion

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Bank on the forged cheque, on the ground that it was paid by mistake, and as to the $800 paid out to the forger after payment of the cheque to them by the Union Bank and before discovery of the forgery the Dominion Bank contest their liability.

It is conceded that neither bank can be charged with negligence in not detecting the forgery by mere inspection of the cheque, but the respondent bank submitted that there was negligence on the part of the Dominion Bank in cashing such a cheque without first having had the person asserting himself as the payee identified.

The man turned out to be a forger and a thief, he was unknown to the manager, was not required to be identified, and was successful in obtaining some $825 which it seems to me would have been prevented had the usual banking business precautions been insisted upon.

The Union Bank on the other hand cannot be charged with negligence. It had declined in the first instance to pay the cheque to the alleged payee until he satisfied them of his identity, and only paid it when it came to them through the clearing house with the name of the Dominion Bank stamped across it. No negligence whatever can be imputed to the respondent bank; the names of the officials authorized to draw cheques for the Government were genuine and proper inspection would not and did not enable them to discover the forgery of the body of the cheque.

In the late case of *The Bank of Montreal* v. *The King* (1) we had a somewhat analogous case before us, and we there held that the Bank of Montreal, the drawee of the cheque, could not recover back the moneys paid

(1) 38 Can. S.C.R. 258.

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by it to another bank for a forged cheque and which moneys the receiving bank had paid out to the forger before it had any notice or knowledge of the forgery.

The great and broad distinction between that case and the one now in appeal, at any rate in the opinion of the majority of the court, was that the name of the drawer of the cheque had been forged and that the payee by paying the cheque had represented to the receiving bank that the drawer's signature was genuine and was consequently disabled from recovering back the money, the signature being a forgery and the receiving bank having acted on the faith of such representation and paid away the money to the forger.

The ground upon which I based my judgment in that case as between the disputing banks was

> that by paying the cheques to the persons presenting them the Bank of Montreal represented to them that the cheques had in fact the genuine signatures of the drawers and if upon the faith of that implied representation the holders of the cheques received the moneys, as I think they did, and subsequently paid them away to the person who deposited the cheques with them or otherwise had their positions altered to their prejudice respectively in consequence of such implied representations and in ignorance of the forgeries, they cannot be compelled subsequently by the drawee who paid the money, on discovering that the cheques were forgeries, to pay back the money.

In this case now before us the signatures to the cheque were genuine. It was only the body of the cheque which had been altered and forged. There was no representation express or implied made by the respondent bank to the appellant bank other or further than as to the genuineness of the drawer's signatures, and the ground and reasoning on which it was held the Bank of Montreal could not recover does not here apply. This case is more analogous to that of *The*

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Imperial Bank v. *The Bank of Hamilton*(1), the distinction between them being that in the latter case the payment of the money to the forger by the receiving bank was made before the paying bank had paid over the money to the receiving bank.

The question here is whether the single fact that the receiving bank did not pay over the $800 in dispute until after the paying bank had paid the cheque to them can avail to prevent the paying bank from recovering the money back on the ground of mutual mistake.

That question it seems to me must be answered by determining whether the paying bank by paying the cheque made any representation as to its genuineness other than the representation of the genuineness of the drawer's signatures and whether the receiving bank was or was not a mere agent to receive and pay over the money. If it was such agent merely and the fact was or ought under the evidence to have been known to the paying bank they cannot recover the money back.

If on the contrary the receiving bank was not a *mere* agent if it had an interest in the money paid and received the moneys simply as holders of the cheque and not as agent merely for their depositor, the fact of their having paid over the money will not avail them. *Newall* v. *Tomlinson*(2); *Continental* v. *Kleinwort*(3).

I do not think the evidence justifies a holding that the appellant bank received the money from the paying bank as agent merely. As a matter of fact they had paid the forger $25 on account of the cheque when

(1) [1903] A.C. 49. (2) L.R. 6 C.P. 405.
(3) 20 Times L.R. 403.

they first took it, and, to that extent at any rate, had an interest in it, and there is nothing to shew that the paying bank ought to have known or did know that the receiving bank were only collecting the money as agents to pay it over. The character in which the Dominion Bank presented the cheque through the Clearing House to the paying bank was as the holder of the cheque, and this I think is under the authorities a determining factor. *Kleinwort* v. *Dunlop Rubber Co.*(1).

I have already held that there was no representation made as to the genuine character of the cheque beyond that to be implied that the drawer's signature was all right.

For these reasons I think the appeal should be dismissed with costs.

IDINGTON J. (dissenting).—This appeal from the Court of Appeal for Manitoba raises the same questions as we had to decide between the Bank of Montreal and the third party banks in the case of *Bank of Montreal* v. *The King*(2) unless the forgery of a signature to a cheque is to be held as materially different in this regard from that of an entire fabrication of a cheque over a genuine signature which the forger has managed to get hold of and use.

In the decision of that case there was not that accord of reasoning in arriving at the result in which all the members of this court were agreed that would of necessity exclude the agitating anew of the bearing of this feature that distinguishes that case from this.

When the matter is approached from the point of

(1) 23 Times L.R. 696. (2) 38 Can. S.C.R. 258.

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view that the banker is supposed to know the signature of his customer there is certainly a difference.

The party presenting for payment a cheque on which the signature of the drawer is forged may in some cases have some better right to complain, if the drawee, to whom the drawer's signature was well known, seeks, after honouring it in the forged form and paying the cheque, to recover back the money paid, than in the case where the signature is genuine and the fabrication over it has been so well done that neither party imposed on had any more chance of detecting the fraud than the other.

In the absence of negligence I did not in the *Bank of Montreal Case*(1), and do not now feel much pressed by reason of the alleged duty of a banker to know his customer's signature as forming an important element or having much to do with settling the equities between such a banker and another when it comes to an issue of deciding the right of the banker so paying a forged cheque to recover the money he had paid in discharge of it.

I may remark, in passing on, that, so far as I can see, in the case of *The Imperial Bank of Canada* v. *Bank of Hamilton*(2), where the cheque in question was a raised one as here over a genuine signature and originally certified to by the Bank of Hamilton, no importance seems to have been attached to the alleged duty of knowing the customer's signature as a factor in such a case. I do not find that suggested as a reason for distinguishing that case from others.

There the bank was excused even for not having looked at its books from which it could have detected the forgery.

(1) 38 Can. S.C.R. 258. (2) [1903] A.C. 49.

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The case was determined if I understand it aright upon the broad principle that the money was paid by mistake and therefore *primâ facie* recoverable; that notice of the mistake was given

in reasonable time and no loss had been occasioned by the delay in giving it.

It is by an application of the principles that govern the right to recover money paid by mistake that the issue raised here must be decided.

I proceeded on that ground in *The Bank of Montreal* v. *The King*(1), at pages 280 and 283.

I need not repeat my reasons stated there. Discarding here, as I did there, the respective side issues raised, as of no significance there or here, I find no difference in the cases save in the length of time that elapsed between the passing of the cheque through the clearing house and the demand for re-payment.

I cannot say that I find the difference in length of time between the mistake and demand for re-payment so essential as to enable me to distinguish the cases.

The essential feature of the receiving bank having parted, as in duty bound apparently, with the money to the extent it did, relying on the paying bank having acquiesced and paid, remains here, as there, the substantial answer to what else would be a most equitable demand.

Let us go beyond in the agency cases, and get to the reason for the rule, a good method to solve legal difficulties in many cases, I submit, and reason by analogy therefrom. Doing so, I venture to think the banker's business is of that nature that it would be just as inequitable as in the case of an agent receiving and paying to ask the return of money the banker has

(1) 38 Can. S.C.R. 258.

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paid away in accordance with a duty that every circumstance that was apparent to him rendered imperative.

People have every day to discharge that duty which apparent facts render a duty when all that can be reasonably required has been done to know the facts.

The Privy Council, in *The Imperial Bank Case* (1), had under consideration the view presented by the late Chief Justice Armour of *Cocks* v. *Masterman* (2), holding that it exemplified, if it did not establish a rule of law that

> the holder of a bill is entitled to know on the day when it becomes due whether it is an honoured or dishonoured bill, and that if he receives the money and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back.

The court, in considering that, treats it not as if there were absolutely nothing in the law to support the decision of *Cocks* v. *Masterman* (2) or as if that particular case had been wrongly decided, but as if it were a proper thing to inquire in such a case as to whether or not and how the defendant may have been prejudiced by reason of want of notice of dishonour. The court says in doing so that

> the bank (meaning the Imperial Bank) was not deprived of any of its rights against him (*i.e.* Bauer, the drawer) nor *was its position altered by reason* of notice of the forgery not being given until the day after the bill was paid.

Then, as to the particular case then in hand, the court found that the stringent rule referred to did not really apply to the case, and proceeded to shew that Bauer, who was the drawer, was not entitled to notice of dishonour and said:

(1) [1903] A.C. 49. (2) 9 B. & C. 902.

There were no indorsers to whom notice of dishonour had to be given.

What does all this mean, if it does not imply that there may be cases where the party called upon to return the money may have a right to answer by shewing that he has, by reason of lapse of time, been prevented from giving notice of dishonour to those to whom he might otherwise have been entitled to look but for want of notice is no longer so entitled?

I think to that extent it is a recognition, not of the hard and fast rule as laid down in *Cocks* v. *Masterman*(1) as if of universal application, but of the principle that underlies that and many other decisions—that is, that, if the party receiving be prejudiced by reason of the drawee's payment and the consequent delay, a countervailing equity, as it were, might arise furnishing him a complete answer to the demand for a return of the money.

I do not attempt to define the limits of this possible answer to a plaintiff's equity to a return of the money.

It is made clear by the *Imperial Bank Case*(2) that they are not co-incident with those of the rules as to notice of dishonour. On the other hand it being clear that, if being deprived by reason of the delay of the right to have recourse over against another is a sufficient answer, surely the loss of the right to retain the money which has awaited the drawee's answer to presentation is equally cogent as an answer to the claim.

It is on this ground that much of the judicial opin-

(1) 9 B. & C. 902. (2) [1903] A.C. 49.

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ion rested in the *Bank of Montreal Case*(1) for refusing to that bank a discovery over against the other banks.

I submit we should, so long as *Cocks* v. *Masterman*(2) has not been overruled but, in the way I have indicated, recognized and the mass of judicial opinion I refer to seemingly upheld by refusal of leave to appeal in the *Bank of Montreal Case*(1), adopt and follow the principle that the Privy Council indicates, at least until some better indication of a departure therefrom by the court above than the refusal of leave in *The Bank of Montreal Case*(1) indicates.

As to the distinction between the *Bank of Montreal Case*(1) and this arising out of the nature of the forgery, I repeat that both in that case and this it was found that negligence could not be imputed to the drawees.

So long as that is the case, I fail to understand why there should be any distinction.

I think the law of chance, so called, probably makes it of little consequence which way the matter be decided if it can only be so decided as to be permanent and recognized by all concerned as the binding rule.

In other cases than agency or those akin to it where the party receives money by mistake he generally has it or its substance permanently on hand. No hardship exists there on being ordered to return it.

I think the appeal should be allowed with costs.

MACLENNAN J.—The question in this appeal is whether or not the appellant is entitled to retain money obtained from the respondent upon a cheque

(1) 38 Can. S.C.R. 258. (2) 9 B. & C. 902.

drawn upon the respondent bank bearing the genuine signature of the proper officers of the Government of the Province of Manitoba, but, in all other respects, a skilful forgery.

The cheque, in its genuine form, had been for six dollars and payable to a stationery company or order, and had been raised by one Jones to $1,000, and made payable to Willam Johnson, or order. The forger indorsed the name "Willam Johnson" thereon, and presented it for payment at the respondent's bank, at which the Government had an account, professing to be Willam Johnson, the payee and indorser. Being asked for identification, and none being produced, payment was refused. The forger then went to the appellant's bank and presented the cheque there, asking for a small advance in cash and a deposit for the remainder in a savings account. Being unknown to the appellant, he was asked a few questions and he said he was the payee, Willam Johnson, that he was a private detective, and resided at No 465 Jarvis Street, Winnipeg. He also wrote his name as "Willam Johnson" on a card presented to him for that purpose.

Without further inquiry the appellant complied with the forger's request, cashed the cheque, paid him $25, part thereof, and borrowed the remainder, $975, from him at interest.

This occurred on the 26th of January, 1905. The cheque had originally borne the date of 13th December, 1904, but that date had been changed by the forger to 6th January, 1905. The appellant, therefore, without further inquiry, cashed a Government cheque for $1,000, twenty days old, presented by a person unknown to it pretending to be the payee, and who

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professed to be a private detective residing at a certain house in the city. Having thus cashed the cheque, the appellant stamped it with the name of the bank and sent it to the Clearing House for payment.

I think that in doing all this without further inquiry the appellant acted with unusual want of care, and, unintentionally, set a trap for the respondent into which it fell. For I suppose that, almost invariably, when a cheque with a genuine signature comes for payment to the bank on which it is drawn, after passing through the Clearing House and having the stamp of another bank upon it, it is paid without further question, and that is what happened in this case. The respondent paid it on the 27th of January.

According to the usual course of banking business, the forgery of this cheque would not be discovered until the beginning of the following month, when it would be returned as a paid cheque to the Government. Accordingly, the discovery was not made until the 3rd of February, when it was notified to the respondent, who promptly informed the appellant and demanded a return of the money.

In the meantime, on the 1st February, the forger had drawn a cheque for $800 on his savings account, which the appellant had cashed, leaving the sum of $175 still in its hands when it was notified.

The question is: Which of the parties ought, under the circumstances to bear the loss? And I have no hesitation in coming to the conclusion that the appellant ought to do so.

The respondent exercised due care. It refused, when applied to by the forger, to pay the cheque without his being identified. If the appellant had done that no loss would have occurred.

I think the equities of the case are entirely with the respondent. The appellant was not a mere agent. It had cashed the cheque and become the owner of it. It had, in effect, paid the money to the forger and borrowed it from him again at interest. When it presented the cheque for payment, it did so as owner of it and vouched for its genuineness by its stamp, as provided by rule 6 of the Clearing House respecting indorsements.

I think the loss was due solely to the want of care of the appellant, and that there was no negligence whatever on the part of the respondent.

It is not unimportant either that the appellant has a clear right of action to recover this money from the forger, while the respondent, unless it recovers from the appellant, has no recourse against any one.

The appeal, in my judgment, should be dismissed.

DUFF J.—The action for money had and received is an equitable action; "the gist of it" in Lord Mansfield's phrase, *Moses* v. *Macferlan*(1), at page 1012 is that the defendant is obliged by the ties of natural justice and equity to refund the money.

Tregoning v. *Attenborough*(2); *Phillips* v. *School Board for London*(3), at pages 452-3; *Jacobs* v. *Morris* (4); *In re The Bodega Co.*(5); *Lodge* v. *National Union Investment Co.*(6), at pages 311, 312. Accordingly in an action for money paid under mistake of fact, or for a purpose or consideration which has failed, the defendant may meet the plaintiff's claim by shewing that there is something in the conduct of the payer or in the transaction itself, or its legal incidents

(1) 2 Burr. 1005.
(2) 7 Bing. 97.
(3) [1898] 2 Q.B. 447.
(4) [1901] 1 Ch. 261.
(5) [1904] 1 Ch. 276.
(6) [1907] 1 Ch. 300.

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Duff J.

making it inequitable that the defendant should be compelled to restore what he has received. *Bank of Montreal* v. *The King*(1); *Phillips* v. *School Board for London*(2).

But is the mere fact that the receiver, while ignorant of the mistake, has changed his position by paying the money over to a third person to whose orders it was subject, a sufficient answer in itself (within this principle) to the demand of the payer?

I think the effect of the decisions is that that circumstance alone is not an answer, unless the receiver can bring himself within the rule applicable to moneys paid to an agent in his character of agent who has paid it over or accounted for it to his principal. *Continental Caoutchouc & Gutta Percha Co.* v. *Kleinwort, Sons & Co.*(3), at page 405; *Kleinwort, Sons & Co.* v. *Dunlop Rubber Co.*(4), at page 697, *per* Lord Atkinson; *Durrant* v. *Ecclesiastical Commissioners for England and Wales*(5). That rule does not, I think, govern this case, for two reasons; first, the appellants dealt with the respondents in their character of holders of the cheque *simpliciter* and not in the character of agents of their depositor: *Kleinwort, Sons & Co.* v. *Dunlop Rubber Co.*(4), at page 697; and, secondly, the appellants were not in point of the fact intermediaries merely, but had an interest in the cheque in respect of the advance made by them to the depositor: *Newall* v. *Tomlinson*(6).

In this view the case seems distinguishable from

(1) 38 Can. S.C.R. 258.
(2) [1898] 2 Q.B. 447.
(3) 20 Times L.R. 403.
(4) 23 Times L.R. 696.
(5) 6 Q.B.D. 234.
(6) L.R. 6 C.P. 405.

Bank of Montreal v. *The King*(1). There the judgments of the majority of this court shew that they proceeded upon the ground that the receiving banks, being entitled to assume that the paying bank knew the handwriting of their customer (whose pretended signatures as the drawers of the cheques in question in that action were forgeries), might reasonably rely upon the payment of the cheque by the latter bank, as evidencing the genuineness of the signatures; and that since they had acted upon that evidence, by honouring the cheques of the depositor, drawn upon the proceeds of the forged cheques, the loss thus occasioned could not equitably be cast upon them. It is plainly implied in these judgments that the principle on which they are based would have no application to the case of the payment of a forged cheque where the forgery consists in the alteration of the body of a real cheque actually signed by the drawer; because the payment of such a cheque implies no sort of representation as to its genuineness, except in respect of the signature of the drawer: *per* Girouard J. at page 267, with whom Maclennan J. concurred (page 283); and *per* Davies J. at page 278. It was on this ground that those learned judges distinguished that case from *Imperial Bank of Canada* v. *Bank of Hamilton*(2).

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Munson, Allan, Laird & Davis.*

Solicitors for the respondent: *Fisher, Wilson, Battram & Hamilton.*

(1) 38 Can. S.C.R. 258.

(2) [1903] A.C. 49.

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*May 12, 13.
*June 9.

DONALD FRASER (DEFENDANT).....APPELLANT;

AND

ANNA DOUGLAS (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Married woman—Separate property—Liability for debts of husband —Execution of judgment—Registry law—"Real Property Act" —"Married Women's Act," R.S.M. (1891) ch. 95—Conveyance during coverture.

Where land was transferred, as a gift, to a married woman by her husband, during the time that the "Married Women's Act" R.S.M. (1891) ch. 95, was in force, the husband being then solvent, and a certificate of title therefor issued in her name under the provisions of the Manitoba "Real Property Act," the beneficial as well as the legal interest in the land vested in her for her separate use, and neither the land nor its proceeds can be taken in execution for debts of the husband subsequently incurred, notwithstanding the provisions of the second section of the "Married Women's Act" respecting property received by a married woman from her husband during coverture.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), reversing the judgment of Mathers J., at the trial, and ordering that judgment should be entered for the plaintiff, with costs.

This was an interpleader issue directed to try whether or not a stock of furs seized in execution of a judgment against one John S. Douglas, as belonging to him, was the property of the respondent, plaintiff in the interpleader issue, Anna Douglas, his wife, as against the appellant, defendant in said issue, the

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) 17 Man. R. 439.

execution creditor of her said husband. The plaintiff's husband bought a property on Jarvis street, in the City of Winnipeg, with his own money and, in February, 1893, conveyed it to her, *bonâ fide,* as a gift. This property had been brought under the "Real Property Act," the transfer was made by the husband to the wife, without the intervention of a trustee, and, under the provisions of that statute, a certificate of title issued to the wife as owner. He was then solvent and did not, at that time, owe the debt for which the judgment was recovered against him. Some time afterwards and a few days previous to the coming into force of the "Married Women's Property Act" of 1900(1), under a power of attorney from the plaintiff, he sold and conveyed the property, receiving $1,300 therefor which he handed over to one Dickson who had been acting as trustee for moneys belonging to her. The husband had, in the meantime, become insolvent and, about seven months before the coming into force of the "Married Women's Property Act" of 1900,* the plaintiff had commenced doing business as a manufacturer and dealer in furs in a small way and, as she had funds to spare from time to time, she placed moneys which she received from the business in Dickson's hands. Dickson acted as her trustee, receiving and paying out these moneys at her request, generally for living expenses, up to the time of the sale of the Jarvis street property. The proceeds of this sale were put into the business which, thereafter, continued to increase until the stock in trade became considerable. This business had from the beginning been carried on in the name of "Douglas & Company" and a certificate had been registered, as

*63 & 64 Vict. ch. 27 (Man.)

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required by the provincial statute, shewing that the plaintiff was the sole owner of the business. The premises in which the business was carried on had been rented for her by her husband, who also attended to buying, selling, banking and other matters in connection with the business and received wages from her for his services.

The appellant, defendant in the interpleader issue, recovered a judgment against the husband, in 1906 (1), in respect of an old liability, execution thereon was issued, and the stock in trade in question (appraised at $5,945.35) was seized by the sheriff, as property belonging to the husband. On the wife making claim to the goods, the interpleader issue was ordered and tried by Mr. Justice Mathers who entered judgment for the defendant, appellant. His judgment(2) was reversed by the judgment from which the present appeal is asserted.

T. Mayne Daly K.C. and *J. Travers Lewis K.C.* for the appellant.

Pitblado for the respondent.

GIROUARD J.—I agree in the opinion stated by Mr. Justice Idington.

DAVIES J.—At the conclusion of the argument at bar I felt that the crucial point of the case was the effect of the deed from the husband, Douglas, to his wife of the Jarvis street property, and the ownership of the $1,300 consideration paid for the property when sold.

This $1,300 went into the business and constituted

(1) 16 Man. R. 484. (2) 17 Man. R. 141.

practically the capital on which it was founded. Previously to it being paid in, the business was of a very limited character and there is no doubt that the $1,300 was the basis on which it was subsequently built up.

As the business was registered in the name of the plaintiff (respondent), and the evidence shewed that the credit for all goods supplied was given to her alone, and not to her husband, it seemed tolerably clear that if the capital which formed the basis of the business was hers also no reasonable doubt could exist as to the result of this action.

A careful study of the Manitoba statutes has convinced me that the construction put upon these statutes by the Court of Appeal was the correct one, and that the effect of the husband's deed to the wife given, as held by the trial judge, *bonâ fide* and not in fraud of creditors was, under all the statutes read together, to vest in her an absolute title.

The appellant relied upon the effect of the proviso to section 2 of the "Married Women's Act" R.S.M. (1891) ch. 95, which section authorized married women to have, hold and enjoy real and personal property however acquired free from the debts or control of their husbands. The proviso declared that the section should not extend to any

> property received by a married woman from her husband during coverture.

But this section did not stand alone. Sections 21 and 23 of the same Act provided as follows:—

> 21. A man may make a valid conveyance or transfer of his land to his wife, and a woman may make a valid conveyance or transfer of her land to her husband without, in either case, the intervention of a trustee.
>
> 22. It is hereby declared that the last preceding section was intended to extend, and the provisions of said section shall be held to

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have extended, from and after the first day of July in the year one thousand eight hundred and eighty-five, and shall hereafter extend to all land in the Province of Manitoba and to every estate and interest therein.

The effect of section 21 was to do away with the necessity of a trustee, and a transfer under section 21 would seem to confer upon the transferee all the title, both legal and equitable of the husband, and free from any right or claim on his part.

But apart from that the evidence shews that on the 9th day of May, 1900, when the Jarvis street property was sold by Anna Douglas, the title then stood in her name a certificate of title having issued to her under the provisions of "The Real Property Act" pursuant to the transfer of February, 1893, from her husband to her.

The provisions of "The Real Property Act" in regard to the effect of a transfer and of a certificate of title in force at the date of the transfer from Douglas to his wife, in 1893, and on 9th May, 1900, when the Jarvis street property was sold by her, were statutes of Manitoba, R.S.M. 1891, ch. 133, sec. 70, and statutes of Manitoba, 1892, ch. 38, sec. 4, amending section 57 of R.S.M. (1891) ch. 133.

The Jarvis street land was brought under the "Real Property Act," popularly called the "Torrens Act," before Mrs. Douglas sold it and a certificate of title was taken out in her name. The sections I have above referred to seem to me to determine the point in controversy as to the effect of the certificate of title. The 57th section declares that such certificate of title shall be

> conclusive evidence at law and in equity as against Her Majesty * * * and all persons whomsoever that the person named in such certificate is entitled to the land included in such certificate for the

estate or interest therein specified, subject however to any of the exceptions or reservations mentioned in sections 56 or 58 of this Act.

These exceptions or reservations do not arise in this case. The husband, therefore, having a right to convey to his wife without the intervention of a trustee; the transfer having been made *bonâ fide,* without fraud, and a certificate of title having issued under the "Real Property Act" in the name of the wife, the title was hers absolutely and the husband had no further interest therein.

The money, therefore, that was derived from this land and went into the business was the wife's, and was the basis upon which the business was subsequently built up.

As I have already stated, in my opinion these conclusions dispose of the whole case and the appeal should be dismissed with costs.

IDINGTON J.—This is an appeal by an execution creditor between whom and the wife of his debtor an interpleader issue was tried by Mr. Justice Mathers who decided the issue in favour of the creditor, and upon appeal the Court of Appeal for Manitoba reversed such judgment.

The respondent shewed that her husband having failed, in 1895, or thereabout, she took up, in his absence, the business of an insurance agent. Later, using some small surplus of her earnings as agent, she entered upon a small fur business at which she worked and which she employed her husband to manage.

After being thus engaged some seven years she had acquired the goods now seized under the execution against her husband.

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Idington J.

The people who had supplied these goods sold them to her and intended the title thereto to vest in her.

Primâ facie she is thus entitled to succeed.

It is said, however, that the money with which this business was founded and carried on was in law that of the husband.

The learned trial judge in arriving at this conclusion does not find and report that the whole course of dealing was a sham. He holds that the property from which the chief part of the money was derived that went into the business was that of the husband and that, therefore, the business and goods found therein must be those of the husband.

I agree that the Jarvis street property was the property of the husband in 1892, notwithstanding an improbable story as to the purchase money having come from the wife.

She, in the month of February, 1893, in consideration of natural love and affection, received from her husband a conveyance of this property by virtue of the provisions of the "Real Property Act." The learned trial judge finds expressly this was not made in anticipation of failure but in good faith, and when the husband, after giving the property, was in solvent circumstances. It necessarily follows that he could have given it to her by any proper form of conveyance that would have made it enure to her separate estate free from the attack of his subsequent creditors.

The proceeds of rents and sale of that property found their way into the fur business in question by virtue of a power of attorney from her to the husband. Hence, the learned trial judge holds the business that of the husband because he was entitled by virtue of his marital rights to the rents and to an

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interest in the estate for life and that would render the substantial part of the proceeds of the sale the property of the husband and not that of the wife.

There was no marriage settlement, but these moneys were, so far as possibly could be done by the simple device of an oral trusteeship, kept separate from those of the husband.

One Dickson, who undertook the duties of such trustee, received, kept and paid out all these moneys solely to the wife or for her purposes, including those of this business.

It happened that the proceeds of the sale of the Jarvis street property, with which we are here concerned, passed directly from the vendee to this trustee.

Now the ground taken as to these moneys is that in law they were, for most part, the property of the husband.

It is quite clear to my mind that the effect of a conveyance made as this was under the "Real Property Act" is to vest in the grantee the absolute property of him or her conveying free from all the rights of any one else than the grantee unless otherwise expressed.

Such is the policy of the legislation under the "Torrens Title System."

It would seem to be a monstrous absurdity in carrying out such a method of conveyancing to assume that there was by implication engrafted on to its express and positive enactments, declaring the result of the certificate of the registrar to be that of vesting the property in the party obtaining the registrar's certificate, some reservation of the husband's rights when the Act specifies the only exceptions and the supposed rights of the husband are not amongst the number.

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It seems to me there is not the slightest foundation for any such contention.

The legal consequences are that the wife had this property free from the husband's control and thus was absolutely entitled to it.

A post-nuptial marriage settlement on such findings of solvency and *bonâ fide* intention would have been valid, and what has been done was the legal equivalent.

There seems nothing else in the case; for the profits would follow these principal moneys put in, once we find a separate business was in fact carried on.

There could be no doubt of the intention to carry on a separate business and reap the fruits thereof as she was entitled to do under the "Married Women's Property Act." She had herself registered as carrying on the business under the name "Douglas & Co." from her first starting it.

Moreover, it is not the property conveyed that was attacked. It would require a case not made out here and legislation I do not find invoked by virtue of this issue to reach the proceeds.

But I think it would have puzzled a creditor very much to have reached, by any known mode of execution, the supposed marital rights Douglas had in the Jarvis street property after he had, under and by virtue of the "Real Property Act," so managed, in 1893, that the lands were certified under that Act to be the property of the claimant.

If there remained, thereafter, anything exigible at suit of the creditors of Douglas, who has taken it away?

It is only what she got she has conveyed away. When he used her power of attorney to convey away

her rights he surely was not asserting his power as her lord to convey his and her rights.

He was not the ancient lord and master of his spouse asserting rights for which he had done homage to have had recognized but her poor clerk or servant obeying her vulgar common power of attorney mandates. Such seems the evidence. We have no documents in evidence and assume from the oral evidence that he was not a party conveying.

The tempting inquiries, of how far, if ever, husband and wife were, except when specially given an estate that required such holding, only one person as regards her real estate; of the nature of his rights in regard to her rents, until he became tenant consummate of the courtesy; of whether, till then, they were his or hers or only his because no court had ever dared make him account for them or woman dared pray the court so to do; of the foundation on which rested his right of conveyance of a freehold that overshadowed her power over her own, in order that a true interpretation might be had of the effect of the words in the 20th section of the "Devolution of Estates Act" (1) abolishing the right of tenancy by the courtesy; and what, if anything, remained to the modern lord and master when this was taken away; must be laid aside for the present.

I will not, in view of the desolating effects of the radical "Torrens System," as I understand it in this case, even try to determine the limits of duty to creditors a husband of a woman owning property at common law may owe to such creditors to despoil her of her rights for their sake. In some cases the facts shew he owes much, but in this case it seems morally only a question of who should

(1) R.S.M., 1891, ch. 45.

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reap the unearned increment but for which there had been almost nothing here to contend about.

Since the argument I have found that the question of invasion, by the adoption of the "Torrens Title System" of a husband's rights at common law in his wife's estate has been discussed in the Australian courts, where this system prevails. Two cases, *In re Wildash and Hutchison; Ex parte Miskin*(1) in 1877, and *Grimish* v. *Scott*(2), indicate conclusions different from what I here reach and are worth noticing by the curious student, but the Australian Act of that time and the Manitoba Act, in the nineties, are in many respects widely different, and not least in the effect to be given the certificate, saving certain expressed objections. Besides the development of the law in each country of the powers of married women to convey or hold real estate did not, I gather, keep step so to speak so as to make comparison of view of much value for our present purpose. The case of *Le Syndicat Lyonnais du Klondyke* v. *McGrade*(3), is also, as well as the above two cases, worth looking at when occasion arises for considering what, if any, effect is to be given to the common law notwithstanding the effect of change in mode of conveyance.

The appeal should be dismissed with costs.

MACLENNAN J.—I have had no doubt at any time that there is no ground for this appeal. It is clear that the business carried on by the respondent was *bonâ fide* carried on by her as her own, separate and apart from her husband, and under a registered name, and it is equally clear that the land, from the sale

(1) 5 Queens. S.C. Rep. 46. (2) 4 Queens. L.J. Rep. 57.
(3) 36 Can. S.C.R. 251.

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Maclennan J.

of which the principal part of the capital of the business was derived, was conveyed to the respondent by her husband at a time when it was competent to him to do so, and that it became and was in law, having regard to the provincial statutes, her separate property.

The appeal should be dismissed with costs.

DUFF J.—I agree that this appeal should be dismissed with costs for the reasons given by my brother Idington.

Appeal dismissed with costs.

Solicitors for the appellant: *Daly, Crichton & McClure.*

Solicitors for the respondent: *McKerchar & Forrester.*

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*May 29;
June 1.
*June 16.

LUKE THOMPSON (PLAINTIFF).....APPELLANT;

AND

THE ONTARIO SEWER PIPE CO. (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Proximate cause—Finding of jury—Evidence.

T., an engineer, was scalded by steam escaping when the front of a valve was blown out by the pressure on it. In an action for damages against his employers the jury found that the bursting was caused by strain on the valve, that the employers were guilty of negligence in allowing the engine to run on an improper bed and that they did not supply proper appliances and keep them in proper condition for the work to be done by T., the engine-bed and room all being in bad condition; they also found that the valve was not defective.

Held, that in the absence of a finding that the negligence imputed to the employers was the proximate cause of the injury to T., and of evidence to justify such a finding, the action must fail.

APPEAL from a decision of the Court of Appeal for Ontario setting aside the verdict for the plaintiff at the trial and dismissing the action.

The facts are sufficiently stated in the above headnote.

Robert McKay, for the appellant.

Hellmuth K.C. and *Greer*, for the respondents.

GIROUARD J.—I would dismiss this appeal for the reasons given by the Court of Appeal.

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

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THOMPSON v. ONTARIO SEWER PIPE CO.

Davies J.

DAVIES J.—I agree that this appeal must be dismissed with costs. The proximate cause of the unfortunate injury which happened to the plaintiff was the blowing out of a piece of what was called a valve of the engine. The jury found the valve was not defective. They also found the defendants guilty of negligence in "allowing the engine to run on an improper bed" and also that defendants did not supply proper appliances and maintain these in a proper condition for the work to be done by plaintiff. They further found that the engine was in *bad* condition, likewise its "bed" and the "room." There is no finding connecting the blowing out of the side of the valve with these neglects or failures of the defendants, nor does it appear to me there was any evidence which would justify such a finding. It is trite law that negligences or shortcomings of the defendants in any action of negligence, however numerous, will not make them liable for injuries plaintiff may have sustained unless there is a direct connection found by the jury, with evidence to sustain it, between the injury sustained and the negligence found. The facts that the "room" where the engine worked was in bad condition and that the bed of the engine was also defective and that the engine itself was in bad condition, all combined together, go for nothing unless these negligent acts were or some one of them was the proximate cause of the accident which caused the injuries complained of. No such necessary finding exists here, nor is there any sufficient evidence to sustain one. The onus lay upon the plaintiff. He has not discharged it.

IDINGTON J.—I concur in the opinion of Mr. Justice Duff.

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THOMPSON v. ONTARIO SEWER PIPE CO.

Maclennan J.

MACLENNAN J.—I am of opinion that the appeal should be dismissed.

DUFF J.—Assuming that in this case there was evidence of negligence for which in an action by the appellant the respondents could be held responsible, that is to say that from the condition of the engine and its bed it might reasonably have been anticipated that the respondents' employees would be exposed to unnecessary danger, and that for injuries attributable to these things the respondents would be answerable in law to the appellant, still I think the appeal and the action must fail. Putting aside the defences set up I am quite unable to find in the appellant's case itself anything upon which, acting judicially, any tribunal could properly base an inference that the accident in which he received his injuries was the result of any defect in the plant or machinery mentioned.

Appeal dismissed with costs.

Solicitors for the appellant: *Johnston, McKay, Dods & Grant.*

Solicitors for the respondents: *Smith, Rae & Greer.*

JOSEPH C. GREER AND ANOTHER (DEFENDANTS) ..... } APPELLANTS;

AND

ISABELLA AGNES FAULKNER (PLAINTIFF) ..... } RESPONDENT.

1908

*May 26.
*June 16.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Damages—Trespass—Cutting timber—Sale to bonâ fide purchaser—Action by owner of land.

F. conveyed land to his wife for valuable consideration. Shortly after it was discovered that a trespasser had cut timber on said land and sold it to G. who bought in good faith and sold to another *bonâ fide* purchaser. In an action by F.'s wife against the two purchasers the money was paid into court and an interpleader issue granted to decide which of the claimants, the plaintiff or G., was entitled to have it.

Held, affirming the judgment of the Court of Appeal (16 Ont. L.R. 123) which reversed the decision of the Divisional Court (14 Ont. L.R. 160) that the plaintiff was entitled to the whole sum. Duff J. expressed no opinion on the question.

Held, also, Idington J. *dubitante* and Duff J. dissenting, that if necessary the writ and interpleader order could be amended by adding F. as a co-plaintiff with his wife.

APPEAL from a decision of the Court of Appeal for Ontario(1) reversing the judgment of the Divisional Court(2) by which the damages awarded to the plaintiff at the trial were reduced.

Mr. Justice Osler in giving reasons for the judgment in the Court of Appeal stated the facts as follows:

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) 16 Ont. L.R. 123.
(2) 14 Ont. L.R. 360.

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GREER v. FAULKNER.

"This was an appeal by the plaintiff from the judgment of a Divisional Court varying the judgment of Magee J. at the trial and holding that the plaintiff was entitled to $600 only instead of to the whole of the moneys which had been paid into court under the interpleader order.

"The question arose upon an interpleader issue and the facts are not complicated.

"The plaintiff was the owner in fee of a lot in the township of McTavish, in the District of Thunder Bay, and she was also equitably entitled on the grounds mentioned in the judgments below, from which I see no reason to differ, to a quantity of spruce and tamarac piles which had been wrongfully cut thereon by persons named Dunn and Evoy, for the purpose of carrying out an agreement theretofore made by them with the defendants. The piles were delivered to the defendants on the lake shore at Black Bay, at a point not far from where they had been cut, and were afterwards rafted by them for the defendants, who towed them to Port Arthur, where they sold them to the Barnett-McQueen Co., Limited, for $3,781.11, which was not disputed to be about their value there. The standing trees from which they were cut were found by the learned trial judge to be of the value of $600, or thereabouts *in situ*. He also found that the defendants were ignorant of the plaintiff's ownership of the piles or where they had been cut, and had dealt with Dunn and Evoy as the owners. Before the purchase money had been actually paid over to the defendants the plaintiff discovered the theft of her property and traced it to Port Arthur, and found it in the possession of the Barnett-McQueen Co., from whom she demanded possession or payment of its full value there,

warning the holders against paying over the purchase money to the defendant. Attempts to settle the differences between the parties having failed the plaintiff brought an action against the Greers and the Barnett-McQueen Co., claiming damages for cutting and taking her property or a declaration that she was entitled to the proceeds of the sale. Thereupon the Barnett-McQueen Co. applied for and obtained an interpleader order by which it was directed that the plaintiff and the defendants should proceed to the trial of an issue in the High Court, and that the question to be tried should be whether at the time of the issue of the summons in the action the plaintiff was entitled to the proceeds of the piles in question. The Barnett-McQueen Co. were ordered to pay into court to the credit of the interpleader issue the alleged proceeds of the sale, being $3,781.11, less their costs, and the action against them was thereupon to be discontinued.

"The issue was framed in the terms of the order, and upon the trial the learned judge held that the piles in question had been cut and removed from the plaintiff's lot; that they were her property in the hands of the defendants and of the Barnett-McQueen Co., and that the money paid into court was the proceeds of the sale thereof by the former to the latter. He further held that the plaintiff was entitled to the whole of such proceeds under the terms of the issue and not merely to so much thereof as represented the value of the piles at the place where they were cut, or standing in the trees, before they were cut and manufactured into piles and transported to Port Arthur. The contrary view was taken by the Divisional Court, and the plaintiff's recovery was restricted accordingly to $600."

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The action was brought in the name of Mrs. Faulkner as owner of the fee. As the trespass was committed before the land was conveyed to her, however, a question arose as to her right to recover and Mr. Justice Meredith in the Court of Appeal thought that an amendment could be allowed joining her husband as co-plaintiff but no such order was made by the court.

W. H. Blake K.C. and *Anglin K.C.* for the appellants. That an innocent purchaser is in the same position as a wrongdoer is true as respects the property itself but not as to the proceeds. See *Hollins* v. *Fowler*(1).

The plaintiff having elected to waive the tort and claim the proceeds the seller can only be regarded as her agent. See *Hovil* v. *Pack*(2); *Bristow* v. *Whitmore*(3). Evans on Principal and Agents (2 ed.), pp. 76, 82; and whatever may be her remedies she had no right of action against this specific purchase money. *White* v. *Spettigue*(4); *Brewer* v. *Sparrow*(5); *Railway Company* v. *Hutchins*(6).

The plaintiff has no title, legal or equitable, to the timber cut before she received the deed of the land. See *Attwood* v. *Small*(7); *Bell* v. *Macklin*(8).

Shepley K.C. and *C. A. Moss* for the respondent. The appellant has no higher title to the timber or its proceeds than the original wrongdoer would have had. See *Bavins Junior & Sims* v. *London & Southwestern Bank*(9).

(1) L.R. 7 H.L. 757.
(2) 7 East 163.
(3) 9 H.L. Cas. 391.
(4) 13 M. & W. 603.
(5) 7 B. & C. 310.
(6) 32 Ohio 571.
(7) 6 Cl. & F. 232.
(8) 15 Can. S.C.R. 576.
(9) [1900] 1 Q.B. 270.

GIROUARD J.—I am of opinion for the reasons contained in the judgments of Davies and Maclennan JJ. that this appeal should be dismissed.

DAVIES J.—I agree in substance with the judgment of Meredith J. in the Court of Appeal. I think in order to maintain the action the amendment asked at the trial and during the several stages of the successive appeals and now repeated in this court to add the name of the husband of Mrs. Faulkner as a plaintiff is necessary. I think further it should be granted. It does not in my opinion change, modify or alter the substantial question directed to be tried by the interpleader order. It is an amendment necessary to be made in order to determine the issue stated in that interpleader order but does not prejudice any one. As to the wife's title under the deed, to the trees cut before its execution, it seems fairly clear that the intention of the parties was to convey the land with the trees upon it. Neither grantor nor grantee, at the time of the execution of the deed, had the slightest idea that a wrongdoer had spoiled the land of the trees. The husband's subsequent action, in endeavouring to secure the proceeds of the sale of the trees for his wife and his acting in that regard as his wife's agent, is strong evidence of the common intention of the parties to transfer the trees with the land to the wife. Counsel in asking for the amendment claims to represent the husband and I cannot see any good ground why an amendment necessary to try the real issue involved in the interpleader order should not be made.

Then, as to the question of damages, I agree we cannot go behind the interpleader order or enter into the question whether it was rightly made or not. The

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Davies J.

order was not appealed from. The money being the purchase price of the ties in dispute, sold by the defendant to the Barnett-McQueen Co., is in court brought in by that company when they, as a then defendant in this suit brought by Mrs. Faulkner against them and Greer & Co., the appellants, obtained the interpleader order and so discharged themselves. We cannot go behind the issue. The granting of the interpleader order was not appealed from. We have simply to decide on that issue as formulated in the order. It reads as follows:

> The plaintiff affirms and the defendants deny that on the 29th day of September, 1905, the plaintiff was entitled to the sum of $3,788.11 now in court herein (having been paid into court to abide the result of this issue, by the Barnett-McQueen Company, Limited, pursuant to the order hereinafter referred to) being the proceeds of 1,230 spruce and tamarac piles claimed by the plaintiff to have been cut from lot number one in Donnelly's survey on the west shore of Black Bay, in the Township of McTavish, in the District of Thunder Bay, as against the defendants, who delivered the piles, so claimed to have been cut from the said lot one; to the Barnett-McQueen Company, Limited, prior to the 29th day of September, 1905, which proceeds were alleged by the plaintiff to amount to $3,788.11.

The question is what is to be done with that money. The plaintiff had the right to waive the tort of the conversion of her property by the appellants and to sue for money had and received. Had the money been paid to Greer & Co. by the purchaser that doubtless would have been the form the action would have taken. Under the issue as formulated the right to the money substituted for the ties is the substantial question to be tried. Is the plaintiff, as owner of the trees from which the ties were made, entitled to the moneys paid into court by the purchaser of the ties as against the appellants who wrongfully sold

them to the purchaser? I think the letters and correspondence shew clearly that the plaintiff did elect to waive the tort and affirm the sale; and that being so, is entitled under the authorities to recover the full amount of the purchase money without deducting the expenses of transport paid by the defendants who converted their property. There may be some hardship in adopting this rule in some cases but the hardship to the owner of only allowing him the actual value of the property when first stolen and at the place where stolen might be very much greater.

Hollins v. *Fowler*(1); *Smith* v. *Baker*(2), and the cases collected in Mayne on Damages (3 ed.), p. 343.

The appeal should be dismissed with costs.

IDINGTON J.—The appellants and a company to whom they had sold piles, stolen by those under whom appellants claim, having been sued by respondents for damages, an issue in the nature of interpleader was directed to try whether the appellants or respondent was entitled to the sum the company owed, or but for respondent's intervention would have owed, as the price of the piles and which is described as "the proceeds" of the piles.

Having regard to the nature of the action, which might have shewn at the next step an action of trover, in which the interpleader order was made, the object of the parties moving for it, the evident purpose of the court in making it, and the further facts that though, as we are told, the appellants protested against its making yet refrained from appealing and fought out the issue, we are precluded from giving effect to

(1) L.R. 7 H.L. 757. (2) L.R. 8 C.P. 350.

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Idington J.

nice distinctions about the legal meaning of the word "proceeds" or a technical application thereof.

The broad issue presented by the proceedings in this case, and fought out, was the right to the timber, and, as a result thereof, to the money in court substituted therefor by the directions of the court; and no appeal having been taken we may assume the concurrence of or submission of all parties thereto.

The timber from which these piles were made having been stolen from land which (let us assume at present) was vested at the time of the theft in respondent's husband could he have been prevented from recovering in trover the full value of the piles from the appellants or the company to whom they sold or were selling them? No case was cited to us, though urgently asked for, shewing law or semblance thereof that would have entitled the defendant in such a case to have the value of the piles *at the time of the conversion by the party sued* therefor reduced to that which the timber was worth when standing on the ground.

In some cases of trover such as the *Chinery* v. *Viall*(1) case, arising out of contract, courts have seen their way to reduce the damages below the value of the goods involved at the time of their conversion, but I have not been able to find anything that would help in that way the wilful or negligent tortfeasor much less the bare thief.

I treat the case as one where clearly the title to the piles rested ultimately in theft though I do not wish to imply that the appellants or even all those they claimed through are to be set down as thieves.

Unfortunately the appellants have no higher legal

(1) 5 H. & N. 288.

right of property than the thieves under whom in tracing title they have to claim.

The coal cases relied on are nearly all cases of trespass to land in which the court has been enabled in dealing with trespassers to weigh, or permit a jury to weigh, the circumstances for there the rule of law being to find the damages done the estate of the plaintiff enabled the distinction if we might call it so.

In truth such a trespass is entirely another case.

In the case of *Wood* v. *Morewood*(1), though a reversioner's suit, a count in trover presented for consideration from that point of view the results of the wrong done. But in that, or in any like case I have seen with like results, where good faith was assumed the only question was the value of the goods *at the time of the conversion thereof,* that is when severed from the realty.

In *Lamb* v. *Kincaid*(2), we could not find absolute good faith and a harsher rule was adopted by this court.

The piles in question remained the property of the owner of the land when the appellants first asserted dominion over them which was long after the added value (of which we now hear so much) had been given thereto by the labour of those engaged in the theft, except as to the item of transportation which I will refer to presently.

An action of replevin or trover might have been brought against appellants then but not before.

What right could they have set up to be recouped the money paid, through their mistake or negligence, to the thieves or at all events those representing them?

(1) 3 Q.B. 440.

(2) 38 Can. S.C.R. 516.

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This money in court was put there as the price or value the owner of the piles was entitled to. It never could have been supposed otherwise else another form of issue would have been presented.

The form of the issue directed in such a suit and under such circumstances precludes the splitting up process tried in the Divisional Court.

But for that I would have been disposed to have allowed the cost of transportation out of the fund.

If the appellants had been alone sued in trover it does not appear to me that any other damages than the value of the piles lying on the ice *when they first asserted* dominion over them could have been given.

The action against the company makes the same rule applied to them the test of value when they first asserted dominion and thus the matter has become so complicated that I do not see how, unless we throw all form and law on which it rests to the wind, to do the kind of justice we are asked for here.

The law bearing on the rights of those who have bought stolen property of little value, and increased, and even multiplied, its original value by many improvements and changes of situation I fear must remain as it was for the present.

This leaves nothing for us to consider but whether or not the title shewn by the respondent, who was made the plaintiff in the issue, is such as to uphold the judgment in her favour.

Notwithstanding the opinion entertained by so many, whose judgment is entitled to the greatest respect, I cannot help doubting the sufficiency of the evidence upon which this alleged equitable title rests.

The husband owned the land during all the happenings complained of but on the 2nd June, 1905, conveyed to his wife for one hundred dollars and assum-

ing she was, as possibly she was, as the result of their bargain or otherwise, the party entitled in equity to the timber when cut and remained so, he instructed, when he discovered what had been done, proceedings in her name. We are not given, as we might have been but for the loose methods prevailing in the proceedings, the title asserted by the claimant on affidavit before the learned judge who made the order. She should have been required before the interpleader order to shew what title she did claim and to adhere to it throughout, unless upon some proper application in chambers that could have been opened up on proper terms.

What happened at the trial in the way of proof of respondent's title is simply the following:

> Mr. Keefer.—Then I will put in, as exhibit 2, the abstract of title, shewing the property in Lot No. 1 west of Black Bay, in the Township of McTavish, in the District of Thunder Bay, to be equitably in Mrs. Faulkner.
>
> His Lordship. Is the abstract admitted?
>
> Mr. Keefer. I think it is, my Lord. I have the registrar here if necessary. Practically it is admitted.
>
> Mr. Blake. As the abstract shews that, yes.

An abstract of title of the lot in question forms part of the case from which abstract it appears the husband bought this lot at a tax sale in March, 1903, and on the 2nd June, 1905, conveyed to his wife the respondent for $100.00.

Is that evidence of any title whatever in these piles though made from timber on that lot in April or May preceding the deed? The husband's energetic maintenance of the title of his wife may preclude him from hereafter complaining. But how does that warrant any inference of law that a bargain preceded the deed and leading up to it or collateral to it on which to rest any right equitable or otherwise?

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Idington J.

I concede to the fullest extent that by reason of the bargain between the vendor and vendee there may have been created a right in equity to property that the deed of grant, though supposed to execute the bargain, yet failed by reason of mutual mistake to convey. Put a simpler case than this, a bargain for sale of lots A. & B. and by mistake B. is omitted from the deed, no one would deny the right of the vendee to have that rectified and pending rectification to assert as against third parties every right he ought to have had conveyed. Another case may be supposed of the vendor and vendee actually negotiating on the basis of the value of the timber yet keeping to the language of the form of a bargain for fee simple of the land which consisted of little but rocks when the chief subject matter of their mutual consideration and bargaining was the timber. Suppose that timber swept away by fire pending negotiations and then unaware of such fact the transaction is closed; I fancy it would puzzle any one to find a remedy for the unfortunate vendee. But suppose, instead of being swept by fire, pending the negotiations, thieves cut and carried it away, unknown to the parties, surely any court of equity could reach it in the hands of the thieves or any one claiming under them.

I cannot see how in law those owning and claiming such timber could ever be even partially answered by such persons as claimed under thieves, by setting up improvements made by themselves or their predecessors in title, who must ultimately rest such right as had on bare theft.

Now in what different state can the vendee be whose title is only an equitable one from that of one in whom the legal estate vested?

The equitable owner asserts an equity it is true and appeals to a court of equity which has always acted upon the maxim that he coming into equity must do equity. But for what purpose has he come into court? Not that the thief should give him a title. He had none to give. But to have the vendor convey that which by mutual mistake he had failed to pass.

He seeks to be clothed first with that title he has become entitled to by rights preceding the theft and, once clothed with that, to assert his legal title in the same court in the same action, it may be, as against the thief or the thief's successors.

Another rule of equity intervenes, as it were, quite as efficacious as the former, and that is that the court assumes that to have been done which ought to have been done and adjudges the right between the parties on that basis.

There is no room for the operation in such a case of the maxim that he seeking equity must do it.

This suggestion that he coming into equity must do equity seemed to me the strongest position the appellants might have been entitled to hold, yet, on reflection and analysis of the matter, as I have just set forth, I find it without a shadow of foundation.

I present the position, which in law I would find the parties in, if all the embarrassments this issue and the making of it have created were swept away and the action had been tried out as originally launched in such a way (including if need be the adding of the husband as a party defendant therein) as to give amplest scope for the parties to assert their equitable rights as well as legal.

I fear it comes back to an assertion of the strong though rough meaning of the common law; and after all I doubt if in the interest of society it better not remain so.

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Idington J.

I am not aware of any case save where founded on trespass to the land any modification, if it be a modification, has crept in as in the coal mining cases.

I would, if parties desire to be satisfied that the timber was intended to pass from husband to wife by virtue of the bargain or whatever right she had antecedent to the cutting, prefer giving a new trial to amending an issue such as this where I do not find we have power to do so any more than the court below which I do not think had such power.

It seems to have been assumed at one time, and as far as I can see by mutual mistake for which I cannot blame any one, that counsel's admission went further than he can strictly be held to.

I find since writing the foregoing that the majority of the court think we can amend by adding the husband and though somewhat doubtful of that and hesitating at the doing so I am, for reasons set forth above, in accord with the majority on the substantial merits of the case.

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

It was contended that the action must fail inasmuch as the wood had been cut and removed from the land before the conveyance made by the respondent's husband to her.

I think that objection would probably have been fatal if we had no power to amend by adding the husband as a party. To this there can be no substantial objection, inasmuch as the husband has been his wife's active agent in the litigation throughout.

But it is said we have no power to amend an interpleader order.

I do not see why, if we have power to amend the pleadings in an ordinary action, we may not amend

an interpleader order. The purpose of pleadings is to define the issues which are to be tried, and an interpleader order does no more. Its function is the same.

Then sections 54, 55 & 56 of the "Supreme Court Act" give this court the amplest power of amendment

> for the purpose of determining the appeal, or the real question or controversy between the parties, as disclosed by the pleadings, evidence or proceedings.

The respondent's husband has throughout treated the timber, now represented by the money in court, as the property of his wife, while it turns out that the legal title is in himself, and I think it plain that the proposed amendment can work no legal injury to anyone, and, on the other hand, that unless it be made a failure of justice would be the result.

DUFF J.—With diffidence I cannot agree that this court has power to substitute Greer for his wife as plaintiff in the issue out of which the appeal arises, and consequently, in my opinion, the appeal should be dismissed.

On the merits, assuming the amendment made, I express no opinion.

Appeal dismissed with costs.

Solicitor for the appellants: *Wm. McBrady.*
Solicitor for the respondent: *F. H. Keefer.*

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*May 29.
*June 16.

GEORGE GLENDINNING AND MURDOCK McLEOD (DEFENDANTS) .... } APPELLANTS;

AND

ALEXANDER CAVANAGH AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Principal and agent—Sale of mining land—Commission—Change of purchaser—Continued transaction.

M., owner of mining lands, agreed to give G. a commission for effecting a sale thereof. G. introduced a purchaser to M. and a contract for sale of the lands to said purchaser was executed. This was replaced by a later contract by which the sale price was reduced in consideration of an incumbrance on the property being paid off by the purchaser who borrowed the money for the purpose and assigned his interest in the contract to the lender, also signing a release in favour of M. of any claim against him on the contracts. M. afterwards sold the mining lands to a person buying for the lenders of the money to pay off the incumbrance. In an action by G. for his commission,

Held, that he was entitled to the commission on the full amount received for the land as finally sold.

Held, also that the sale of the land was not a transaction independent of the contract with the purchaser introduced by G. but was a continuance thereof.

Judgment appealed from affirmed, Davies J. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario reversing the judgment of the Divisional Court which had ordered a new trial of the action.

The facts are sufficiently stated in the above headnote.

Johnston K.C., for the appellants.

Shilton, for the respondents.

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

GIROUARD J.—I concur in the judgment of Mr. Justice Idington.

DAVIES J. (dissenting).—For the reasons given by Meredith and Riddell JJ., in the Court of Appeal for Ontario, to which I feel I cannot usefully add anything, I am of opinion this appeal should be allowed and the judgment of the Chancellor restored.

IDINGTON J.—I think this appeal should be dismissed with costs. I agree so entirely with the reasoning of the judgment of the Chief Justice of Ontario that no useful purpose can be served by repeating it here.

I, however, desire to call attention to the following evidence of defendant McLeod explaining why the agreement of 24th April, 1905, was entered into.

Q. Do you remember giving an agreement to Browning? A. Yes.

Q. Do you remember why you gave that? A. Yes.

Q. Why? A. Some time previous to *this Mr. Timmons had called me to his office at the Larose Mine and told me a certain amount of the circumstances.*

Q. And as a result of that? A. As *a result of that we were willing to give an agreement.*

Q. That was an agreement to protect these men against loss in regard to the moneys they had advanced. A. Yes, he asked me if we would accept Hanson's position and pay them back the money they had advanced for the removal of the caution. If we would they would release. *And I said no, the only thing we could possibly do then was to sell the property to them, and I agreed to do so.*

Q. Hanson wanted to protect Browning, and there is no dispute about that; that Browning wanted to be protected? A. Yes.

Q. And you would not give an agreement of that kind to Browning, except what? A. *Except we had a release.*

Q. *And you got the release?* A. *Yes.*

Q. Subsequently the property was sold to Ferguson; do you know how that was? A. Yes.

Q. Tell us how that came about? A. *Mr. Browning and Mr. Ferguson or both made representations to us that Mr. Ferguson was putting up the money or instrumental in putting up the money and*

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Idington J.

he would be the party that would be represented, and an agreement was drawn at my office. We agreed to sell.

Q. Had the sale to Ferguson anything whatever to do with any commission or any arrangement with regard to Hanson? A. No, none whatever.

There is in the case such a repetition by witnesses and others of the view that the later transaction was "an independent sale" that, until I found this explicit statement of the reason for "the independent sale," I was somewhat embarrassed. This witness also calls it so.

The "independent sale" was merely a method of carrying out exactly what the assignees of Hanson's bargain or some of them desired and were entitled to.

It was his bargain that was carried out. I prefer looking for the substance of things to adopting the mere form.

Every one got as the result all they ever had any right to expect except the plaintiffs whom the defendants seek to deprive of their commission.

To treat such an "independent sale" as a legal reason for depriving brokers of commission would, I fear, if adopted, lead to an undue development of human ingenuity.

As to the claim made before us for commission on the $20,000 of reduction made from the price fixed in the original agreement I do not see any ground to allow it. It is somewhat difficult to say exactly what the terms of the plaintiff's retainer were. I do not think the commission was payable immediately upon the execution of the agreement with Hanson. Something more effective was needed as I read the understanding such as we are left to infer it was.

The bargain by which this reduction of price came about was the effective basis upon which the only

hopes of the plaintiffs could possibly rest for a commission such as is allowed.

There is only another alternative which no doubt was present to the mind of Chief Justice Meredith in granting a new trial. I suspect plaintiffs prefer what has been adjudged.

MACLENNAN and DUFF JJ. concurred in the opinion stated by Idington J.

Appeal dismissed with costs.

Solicitor for the appellants: *A. N. Morgan.*
Solicitors for the respondents: *Shilton, Wallbridge & Co.*

1908

*March 6, 9.
*June 16.

BOW McLACHLAN AND COMPANY (PLAINTIFF) ..... } APPELLANTS;

AND

THE SHIP "CAMOSUN" (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Admiralty law—Jurisdiction of the Exchequer Court of Canada—Claim under mortgage on ship—Action in rem—Pleading—Abatement of contract price—Defects in construction—Damages.

In an action *in rem* by the builders of a ship to enforce a mortgage thereon, given to them on account of the contract price for its construction, the owners, for whom the ship was built, may plead as a defence *pro tanto* that the ship was not constructed according to specifications and claim an abatement of the price in consequence of such default and that the loss in value of the ship, at the time of delivery, attributable to such default, should be deducted from the claim under the mortgage.

APPEAL from the judgment of the Exchequer Court of Canada which affirmed an order by Martin J., local judge in admiralty for British Columbia, overruling a demurrer and objections in law to a paragraph in the statement of defence.

The action was brought by the builders and mortgagees of the ship and invoked the statutory jurisdiction of the Exchequer Court of Canada, in admiralty, in respect of their mortgage by virtue of the "Colonial Courts of Admiralty Act, 1890," sec. 2, and the "Admiralty Act, 1891," 54 & 55 Vict. ch. 29 (D.), secs. 2, 3 and 4. It was sought to enforce a mortgage against

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

the defendant ship merely, no personal claim being made under the covenants in the mortgage. The ship was arrested under a warrant and the writ served by nailing it to the mast. The Union Steamship Company of British Columbia, as the owners of the ship at the time of the arrest, entered an appearance to the action and obtained an order releasing the ship upon bail. The plaintiffs claimed £21,638, sterling, with interest and expenses, condemnation of the bail given on release of the ship and judgment against the sureties.

The owners filed a defence, and with it a counterclaim, of which the material words were as follows:

> The plaintiffs did not build the * * * ship * * * "Camosun" in accordance with * * * contract * * * but on the contrary * * * negligently and with defective work and materials, with the result that the said owners were forced to expend, in restoring and replacing defective materials and bad workmanship, £3638.

They gave particulars of the damages so claimed which were the same, and for the same amount, as the first particulars afterwards given under the paragraph, recited below, in question on this appeal.

The counterclaim was struck out on the ground that the Exchequer Court of Canada, in admiralty, had no jurisdiction to entertain claims or disputes arising out of breaches of contracts for the construction of ships, such subject matter not being within the admiralty, as distinguished from the common law or general plenary jurisdiction of the High Court in England, the admiralty jurisdiction alone of that court being attributed to Colonial Courts of Admiralty, by the "Colonial Courts of Admiralty Act, 1890," sec. 2.

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The respondents then obtained from Mr. Justice Martin leave to amend by pleading paragraph 7, now in dispute, the material allegations of which are:

> Alternatively and by way of equitable defence to the plaintiffs' action, in the event of it being held that the said owners have made default under the said agreement and mortgages and that the plaintiffs are entitled to recover from the defendant in this action, the said owners say that the plaintiffs did not build the said ship "Camosun" in accordance with the terms of the contract, plans, etc., but on the contrary the said ship "Camosun" was built by the plaintiffs negligently and with defective work and materials, etc., with the result that the said owners were forced to expend in repairing and replacing defective materials and bad workmanship * * * the sum of £3638, particulars whereof have already been delivered to the plaintiffs, (as they had been under the counterclaim), and the defendants, the owners of the said ship "Camosun," claim they are in equity entitled to, and in justice should be permitted to set off and deduct from any and all sums of money which may be payable by the said owners to the plaintiff the said sum of £3638 so expended by them as aforesaid, with interest and costs.

The plaintiffs resisted the application on the ground that the paragraph was the counterclaim over again under another name. Martin J., allowed the amendment, and his order was affirmed by the Exchequer Court.

There never was any motion, in lieu of demurrer, to strike paragraph 7 off the files. It happened that the paragraph was put on the files under the order of Martin J., before the plaintiff had time to appeal from that order, and the plaintiffs asked that

> if the said order is reversed, it be further ordered that the amended statement of defence delivered and filed herein in pursuance of the said order hereby appealed from be amended by striking out therefrom paragraph 7 thereof.

The owners gave the same particulars under paragraph 7 as they had already given under the counter-

claim, being for expenses incurred in Monte Video, San Francisco, and Vancouver, by reason of the alleged breach of contract, demurrage, etc., etc.

The plaintiffs, by their reply, amongst other matters, pleaded estoppel, set forth the mortgage sued on, verbatim, reciting that it was given by one Legg in consideration of money lent to him by the plaintiff, covenanting to pay the amount of the mortgage and interest, and, for better securing repayment, mortgaging to the said plaintiffs 64 shares in the ship "Camosun," and the respondents' right to assert that the mortgage is for other than a loan of money was denied. They also took objections in law to paragraph 7, which may be stated shortly as follows:—

That the action is *in rem* against the ship, no claim being made against the respondents, and no defence, set-off or claim, equitable or otherwise, personal to the respondents, is admissible against the plaintiffs' claim; that the action is not and cannot be treated as an action for the price of the ship, and that the court has no jurisdiction to entertain actions for the price of ships, unless the ship is under arrest at the time of its commencement, which was not so in this case; estoppel by recital in the mortgage that it is given for a loan; that the claim in paragraph 7 is not a proper subject of set-off; that the court has no jurisdiction to entertain claims or disputes in regard to breaches of contracts to construct ships or for negligent or improper construction either by way of counterclaim, set-off or otherwise, and that any cause of action in assumpsit for the price of the ship was merged in the mortgage. They also raised the question that the cause of complaint in paragraph 7 arose outside the territorial jurisdiction.

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By rejoinder it was objected that the points of law raised were not open to the appellants because they were *res adjudicata* by the orders of Martin J., and Burbidge J., respectively, putting paragraph 7 on the record and dismissing appellants' appeal from that order.

All the points of law raised were heard before Martin J., who held that paragraph 7 of the amended statement of defence constituted a good defence in law *pro tanto* to the action, that the defence could properly be pleaded and that the court had jurisdiction to entertain the questions thereby raised. On an appeal to the Exchequer Court of Canada, this decision was upheld by the judgment from which the present appeal is asserted, the late Mr. Justice Burbidge stating that he dismissed the appeal for the reasons which he had given on the former application.

Cassidy K.C., for the appellants.

Chrysler K.C. for the respondent.

THE CHIEF JUSTICE dissented from the judgment dismissing the appeal.

DAVIES J.—For the reasons given by the late Mr. Justice Burbidge, in the Exchequer Court, I agree, though entertaining many doubts, that this appeal should be dismissed.

I desire to emphasize his opinion as to the limitation set by law upon the defendant's right to claim an abatement upon the contract price of the ship in an action such as this.

In view of the claim made by the defendants in the particulars they have delivered, it may not be unde-

sirable to re-state that the defendants have no right to set-off special or consequential damages arising out of the alleged breach of the building contract. Their rights to an abatement of the contract price of the ship if established at all must be limited to the difference at the time of delivery between the ship as she was and what she ought to have been according to the contract. Their right does not extend beyond this or cover damages on account of any subsequent necessity for more extensive repairs. See *Mondel* v. *Steel*(1), at page 871.

IDINGTON J.—This is an appeal from the Exchequer Court of Canada, in admiralty, maintaining a pleading by way of a defence set up in answer to a suit to enforce a mortgage.

The respondents are the owners of the ship, which was built for them by the appellants, and a mortgage was given by respondents' trustee to appellants for the supposed balance of the price that was to be paid for the ship as and when completed according to plans and specifications.

The respondents allege amongst other things in answer to this mortgage claim that the ship never was completed, and in effect that a deduction of over three thousand pounds should be made in respect of the many omissions found to exist through failure to comply with the specification.

The wording of the pleading suggests some grounds of defence, possibly ill-founded in law or beyond the court's jurisdiction, but the late Mr. Justice Burbidge by the terms of his opinion judgment on a prior motion defined how far he thought respondents

(1) 8 M. & W. 858.

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were entitled to go and they do not claim now to be entitled to go further than he so defined. They only claim the pleading attacked will support them that distance.

The issue thus raised before us is quite distinct and clear, and it is this; the mortgagees assert their mortgage was taken for a fixed sum understood to be the balance due on account of construction and that if anything was omitted in such construction the respondents must rely on a cross-action or separate action which it is said the court below has no jurisdiction to entertain.

The pleading, whatever may be said reproachfully of it, and much might I think be well said so in view of what counsel supporting it alleges to be the real facts, shews at all events that by reason of non-completion of the construction which was the very consideration for which the mortgage was given there never was nor can be justly due to the mortgagees the amount claimed to have been fixed and that proper reductions ought to be made in respect of their failure in regard to some parts of the consideration.

The consequential damages are discarded by the court below and in deference to that judgment are abandoned by the respondents so far as this action is concerned.

I have no manner of doubt that the court has ample power if not to reform the instruments at least to so rectify the results which the stated or settled account for which the mortgage was given might lead to if adopted, that judgment will not be given for more than that amount should have been for, or can rightfully stand for, just as fully as if by reason of express fraud as to a part or mistake in the addition

of the figures entering into the computation the correct consideration had been unjustly augmented.

The proof may fail. The right to completion may have been expressly waived. Other considerations may have been substituted for the omitted parts.

That is something we have not just now to do with. Nor have we to do with the merit of paragraph 7 of the pleading as if it stood as a single plea. No point is or should be now made of that which as a mere matter of form or procedure may have been objectionable and liable to be struck out on motion so long as the frame of the whole statement discloses a defence and has not been permitted to so obscure the real issue that we should hold there is no possible defence shewn.

The sole contestation made here by appellants and deserving consideration is that the amount of the mortgage is so fixed no matter what partial failures there may have been of consideration that the wrong, if wrong there be, can only be remedied in another court and by another action.

In my view no other action is necessary. Everything within the ambit of the consideration for which or upon which the mortgage rests can be fully and effectually investigated by the court below in this action by means of any of the methods open to the court to determine such matters as may be necessary to determine the rights between the parties in that regard; saving of course the possible claims for consequential damages already disposed of and about which I say nothing.

The jurisdiction is founded upon section 11 of "The Admiralty Court Act, 1861" (24 & 25 Vict. ch. 10), which reads as follows:

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The High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of "The Merchant Shipping Act, 1854," whether the ship or the proceeds thereof be under arrest of the said court or not.

When that Act was passed even the incidental jurisdiction arising from the necessity of the Admiralty Court dealing with mortgage claims by way of mortgage against ships under arrest by process of that court had only been duly recognized for some twenty years or so by 3 & 4 Vict. ch. 65.

Then only fourteen years after the passing of the "Admiralty Court Act," in 1861, the court's jurisdiction was transferred bodily to the new High Court of Justice by "The Supreme Court of Judicature Act, 1873," brought into effect in 1875.

Under these circumstances and the further circumstance arising from the operation of the last mentioned Act, to which I will presently refer, we need not be surprised at the absence of any precedent determining the questions now raised.

The language conferring the jurisdiction is so very sweeping and comprehensive that it possibly required some temerity to raise or extraordinary conditions to justify the raising of the question that a mortgagee seeking to enforce a claim has, under and by virtue of such language, the right to deny the mortgagor his ordinary right of defence involving an investigation of the very foundation of the mortgage claim.

Whether the development of such a jurisdiction should without specific provision follow the practice of an old existing court where rights of mortgagor and mortgagees were most usually dealt with, such as the then Court of Chancery, or that which the Admiralty Court had followed in dealing with maritime liens, as

bottomry for example, it ought now, nothing in law being in the way, I venture to think, at all events since the "Judicature Act, 1873," became operative, to be administered in such a way that justice be done, circuity of actions avoided, and needless multiplicity thereof be spared the unfortunate litigants.

The language being fitted for such purposes I would act in accordance with the views I thus suggest as possible and practicable. Although it was suggested, early in the argument, to the appellants' counsel that the "Judicature Act" might be found to have thrown obstacles in the way of depriving the defendant in such a case as this of the defence claimed, the point was not argued. A reference to that Act and consideration of section 24, sub-section 2, thereof tends to confirm the impression I had.

I am unable to find anything to restrict the High Court of Justice when exercising admiralty jurisdiction from applying the said sub-section 2.

The right of defence given there, if not previously existent, is not at all the case of *The "Cheapside"* (1), where entirely separate causes of action each independent in regard to the subject matter out of which it arose were the subject of some remarks strongly impressed upon us here.

It is to be remarked that the jurisdiction of the court below is to be

> over the like places, persons, matters and things that the admiralty jurisdiction of High Court in England had (in 1890) whether existing by virtue of any statute or otherwise * * *.

That court in exercising that jurisdiction would, I assume, have acted upon the said sub-section 2 of sec-

(1) [1904] P.D. 339.

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tion 24 I cite, and surely there can be no manner of doubt as to the Court of Chancery on a mortgage suit entertaining such a defence.

Moreover, section 70 of the "Merchant Shipping Act," 17 & 18 Vict. ch. 104, which is as follows;

> A mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship or my share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt,

is worthy of consideration.

It is borrowed from the civil law, parent of so much admiralty law, and is distinctly different in this regard from the usual idea that prevails with us as to the legal rights of the mortgagee, as owner of the thing mortgaged, subject only to be redeemed, and lends a reason why the security should be measured as the law and justice of the case require before adjudging the property to be sold or become that of another. It re-appears in substance in section 34 of the "Merchant Shipping Act, 1894." The mortgage in question was given by virtue of this latter Act.

A hypothec, by the civil law, pre-supposed an obligation that a simple agreement secured. It might be conditional as to a debt to be incurred, but only became effective when the debt came into existence.

The cases of *The "Cathcart"* (1), and *The "Rose"* (2), shew that, so far as the Admiralty Court, whilst a separate and independent jurisdiction, guided by a strong hand, developed this new jurisdiction, it was in accord with the spirit which the court below has

(1) 1 Ad. & Ecc. 314. (2) 4 Ad. & Ecc. 6.

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evinced in the judgment complained of. It is in accord with that I think we ought to act.

In leaving the case I may say the parties assume the jurisdiction in question covers a mortgage given as that under the "Shipping Act," 1894, though the expression in the "Admiralty Act" of 1861 mentions only mortgages under a then prior Act. As the parties are content I need not inquire how or express any opinion upon the question of how this jurisdiction proceeded upon is affected by such conditions or made effective in regard to a mortgage under an Act not named in nor anticipated by the original Act.

I think the appeal should be dismissed with costs.

DUFF J.—I concur in the conclusion of the learned judge of the Exchequer Court and, subject to two observations, in his reasons also.

The first observation is that the rule in *Mondel* v. *Steel*(1), on which the defence impugned by the appellants is based, proceeds upon principles of English law which may or may not have a place in the law of Scotland; and I should not wish to be understood as implying an opinion that the claim of the owners to compensation for defects in the ship (by way of abatement in price or otherwise) is a claim whose validity is to be determined by the application of the law of England rather than the law of Scotland. The question does not arise on this appeal because a litigant who wishes in the Exchequer Court of Canada to rest his claim upon the law of Scotland (which in that court is a foreign law), must allege and prove it.

The second observation is, assuming the law of England—or what for this purpose is the same thing,

(1) 8 M. & W. 858.

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the law of British Columbia—to apply, the owners will, in these proceedings, be entitled to the benefit of an abatement of the price only to the extent to which they shall shew that, by reason of the failure of the appellants to fulfil their contract, the value of the ship, at the time of delivery, was less than it would have been had the appellants been chargeable with no such default. I refer to this because, in some instances, the particulars of compensation claimed by the owners would appear to be outside the limits drawn by this rule.

*Appeal dismissed with costs.**

Solicitor for the appellants: *Robert Cassidy.*

Solicitors for the respondent: *Davis, Marshall & MacNeill.*

*Leave to appeal to Privy Council was granted by the Supreme Court of Canada, on 30th June, 1908, under the provisions of sec. 6, sub-sec. 2(*a*), of the "Colonial Courts of Admiralty Act, 1890," 53 & 54 Vict. ch. 27 (Imp.).

HIS MAJESTY THE KING (RESPONDENT) ..... APPELLANT; 1908 *June 9. *June 16.

AND

FLORA LEFRANÇOIS (SUPPLIANT) .. RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Government railway—Operation over other lines—Agreement for running rights—Extensions and branches—"Public work"—Construction of statute—"Government Railways Act"—R.S.C., 1906, *c.* 36, *s.* 80—*"Exchequer Court Act"—R.S.C.*, 1906, *c.* 140, *s.* 20(*c*).

The agreement between the Government of Canada and the Grand Trunk Railway Company, made under the provisions of the Dominion statute, 43 Vict. ch. 8, giving the Government running rights and powers over a portion of the Grand Trunk Railway, from Levis to Chaudière, between two sections of the Intercolonial Railway, constitutes that portion of the Grand Trunk Railway a part of the Intercolonial Railway, under the provisions of "The Government Railways Act," as amended by 54 & 55 Vict. ch. 50(D.), and, consequently, a public work within the meaning of the "Exchequer Court Act," 50 & 51 Vict. ch. 16, sec. 16(*c*), (D.); [R.S.C., 1906, ch. 140, sec. 20(*c*)].

APPEAL from the judgment of the Exchequer Court of Canada, (Burbidge J.), delivered on the 7th of January, 1908, deciding a point of law, raised by the defence, in favour of the suppliant.

The point of law in question, raised by paragraph (*c*) of the statement of defence, was that the accident in which the deceased husband of the suppliant lost his life did not occur on a "public work" of Canada,

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

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within the meaning of the "Exchequer Court Act," 50 & 51 Vict. ch. 16, sec. 16(*c*), now sec. 20 (*c*) of chapter 140 of the Revised Statutes of Canada, 1906.

The case is stated, as follows, in the judgment appealed from.

"Burbidge J.—The petition is brought by Flora Lefrançois for damages for the death of her husband, in his lifetime a locomotive-fireman, who was mortally injured while running on an Intercolonial railway, train between Levis and Chaudière, at a point on the Grand Trunk Railway enclosed between two sections of the Intercolonial Railway where the Government of Canada has acquired running rights and powers in perpetuity and free of charge under 43 Vict. ch. 8, and over which the Government of Canada runs its trains and locomotives as on a part of the Intercolonial Railway system. It is admitted that the Intercolonial Railway is a public work of Canada, but it is argued that the place where the accident happened is not a part of a public work of Canada, and, therefore, the suppliant has no right of action under the statute, R.S.C., 1906, ch. 140, sec. 20(*c*).

"That contention raises, I think, the question as to whether or not the part of the Grand Trunk Railway over which the government has running powers may with propriety be considered an extension of the Intercolonial Railway as defined in the 80th section of the 'Government Railways Act,' (R.S.C., 1906, ch. 36), which is in these terms: 'All railways and all branches and extensions thereof and ferries in connection therewith vested in His Majesty under the control and management of the Minister and situated in the Provinces of Quebec, Nova Scotia, and New Brunswick, are hereby declared to constitute and form the Intercolonial Railway.'

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"In my view, I think that the place where the accident happened may properly be taken to be an extension of the Intercolonial Railway. I am, therefore, of opinion that the accident complained of happened on a public work, and that the question of law raised should be determined against the respondent and in favour of the suppliant."

Newcombe K.C., for the appellant.

Lane K.C. for the respondent.

GIROUARD J.—If the small portion of the railway in question in this cause is not an "extension" of the Intercolonial Railway, within the meaning of section 67 of 54 & 55 Vict. ch. 50, then I do not know what it is in so far as the Dominion Government is concerned.

I quite agree with my brother Davies.

DAVIES J.—This appeal from the Exchequer Court raises the simple question, whether or not a small part of the Grand Trunk Railway connecting the eastern and western parts of the Intercolonial Railway, and about a mile in length, is an extension of the Intercolonial Railway within the meaning of those words in section 67 of "The Government Railways Act," as amended by 54 & 55 Vict. ch. 50.

The Government, under an agreement entered into with the Grand Trunk Railway Company, confirmed by statute, possesses powers and rights over this section of the Grand Trunk Railway lines

in perpetuity and free from charge to run their trains and engines separately or combined and as frequently and at such times as the character and extent of the traffic may require under the reasonable rules and regulations of the Grand Trunk Railway Company and

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under the direction of the officials thereof, between Hadlow and Point Levis Station, to and from places between these points in the yard at Point Levis and to and from and beyond that station.

For all practical railway purposes this little section of the Grand Trunk Railway is part of the Intercolonial system. Without running rights over it, an Intercolonial train could not pass from Montreal to Halifax or from any intervening points east or west of the section in question.

Section 67, as amended by 54 & 55 Vict. ch. 50, reads as follows:

> All railways and all branches and extensions thereof and ferries in connection therewith, vested in Her Majesty under the control and management of the minister and situated in the provinces of Quebec, New Brunswick and Nova Scotia, are hereby declared to constitute and form the Intercolonial Railway.

The Intercolonial Railway is admittedly one of the public works of Canada and, if the section in question is an extension of that road within the meaning of the section just quoted, that determines the appeal.

The running rights secured in perpetuity and free of charge over the section may, I think, very well be said "to be vested in the Crown under the control and management of the minister."

It is not necessary that the rights of the Crown should be exclusive. The mere fact that its rights over the section are held and enjoyed concurrently with the Grand Trunk Railway Company and subject to the reasonable rules and regulations for its user by both railways cannot, I think, exclude it from the section quoted. The perpetual and free exercise of running rights over it are secured by virtue of the agreement quoted and are vested in the Crown and make it to all intents and purposes practically an extension within the statute of the Intercolonial Railway.

I think the appeal must be dismissed.

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Idington J.

IDINGTON J.—The respondent's husband, it appears from the pleadings and particulars, was killed in consequence of a train despatcher of the Intercolonial Railway giving conflicting orders which brought about a collision of two engines of that road, on one of which engines deceased was a fireman.

The collision took place on a part of the Intercolonial Railway system that runs over a road owned by the Grand Trunk Railway Company and over which the Intercolonial had perpetual running rights free of charge which were subject to the regulations that the Grand Trunk Railway Company, owning the road, might make from time to time.

It is urged for the appellant that it cannot be said the accident occurred on any "public work" within the meaning of the statute 50 & 51 Vict. ch. 16, sec. 16(*c*).*

I cannot agree. I think it was a part of "a public work" such as referred to in the said Act.

We must apply the plain or ordinary sense of the words and then we find that it is not the real estate title to any part of the road bed or track thereon that has to be thought of at all, but the work, that "public work" which is being carried on over that road bed owned by somebody else leased or used by virtue of some right for the public purposes of a great public work for which respondent is responsible and was intended to be held by the Act in question fully responsible in respect of such happenings as those now in question.

I think the appeal should be dismissed with costs.

MACLENNAN J.—I agree in the opinion stated by Mr. Justice Davies.

*R.S.C., 1906, ch. 140, sec. 20(*c*).

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Duff J.

DUFF J.—Having regard to the previous decisions of this court, the phrase "on a public work" in section 20, sub-section (*c*), of "The Exchequer Court Act" must, I think, be read as descriptive of the locality in which the death or injury giving rise to the claim in question occurs. The effect of these decisions seems to be that no such claim is within the enactment unless "the death or injury" of which it is the subject happened at a place which is within the area of something which falls within the description "public work." *Paul* v. *The King*(1) and the cases there cited.

But, adopting that view, I do not think it is taking any unwarrantable liberty with the language of the "Government Railways Act" to hold that the short piece of track in question here is, in the circumstances, a part of the Intercolonial Railway as defined by section 80 of that Act; and is, consequently—as part of a government railway—within the limits of a "public work."

*Appeal dismissed with costs.**

Solicitor for the appellant: *E. L. Newcombe.*
Solicitors for the respondent: *Lane & Cantin.*

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(1) 38 Can. S.C.R. 126.

*Leave to appeal to the Privy Council was refused on 18th July, 1908.

EDWARD L. GOOLD (PLAINTIFF) ....APPELLANT; 1908

AND *May 15, 18. *June 16.

J. A. GILLIES (DEFENDANT) .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Company—Sale of shares—Misrepresentation—Fraud—Action for deceit—Accord and satisfaction.

G. a director in an industrial company transferred 290 shares of the capital stock to the president to be sold for him. The president instructed an agent to sell said shares along with some of his own and some belonging to the company. The agent sold 25 shares of G.'s stock to J. G. representing, and believing, that it was treasury stock and getting a note for the price in favour of the company. The note was indorsed over to G. Later J. G. discovered that the stock he had bought was not treasury stock and had some correspondence with the secretary of the company in which he complained of having been deceived by the agent. Eventually he gave a four months' note in renewal of that given for the price of the stock but when it fell due refused to pay it the company having in the meantime become insolvent. In an action on the renewal note he filed a counterclaim for damages based on the misrepresentation and deceit. Judgment was given against him on the note and for him on the counterclaim.

Held, that G. was responsible for the fraud practised on the purchaser of his shares by the misrepresentations of the agent who sold them.

Held, also, Girouard and Davies JJ. dissenting, that the settlement of the claim for the price of the shares by giving the renewal note and thus obtaining further time for payment was not a release of the purchaser's right of action for deceit.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the defendant on a counterclaim.

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

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This action proper is upon a promissory note for $2,405.62, with interest at 5 per cent., since due. The note is dated the 29th day of December, 1904, payable four months after date, at the Bank of British North America, Halifax, to the appellant (plaintiff), as payee.

The defence is, in short, that the note was obtained from the respondent (defendant) J. A. Gillies by the fraud and deceit of the appellant and the appellant's agent. Such fraud and deceit being as follows:—

(*a*) The false representation that the twenty-five shares of common stock of the International Mercantile Agency, for which a note—of which the note sued on herein was a renewal—was given, was treasury stock of said Mercantile Agency, whereas in fact the stock was the stock of the plaintiff, one of the company's directors.

(*b*) The further false representation that, at the time of the sale of said stock, the plaintiff's agent represented to the defendant J. A. Gillies that the preferred stock of the company had already paid an 8 per cent. dividend.

(*c*) That the International Mercantile Agency was itself a swindle. That the plaintiff Goold, a director, knew its character, and conspired with the other officers of the company whereby they unloaded their stock upon the public as treasury stock.

Besides the defence, alternatively the respondent counterclaims damages for deceit, setting up the same grounds as urged in the defence.

The respondent, at the time of purchasing the twenty-five shares of common stock of the Mercantile Agency, also purchased from the same agency twenty-five shares of preferred stock of the same company. The agent who sold was under the impression, and so

represented, that both the common and preferred stock were treasury stock. The respondent signed a subscription for the stock to the company. He was led to buy by the representations of the agent, whose name was Jackson. As a matter of fact, it was proved on the trial that the common stock sold to the respondent was the property of the appellant, but the preferred stock was the property of the company, that is, treasury stock.

The respondent gave notes for both the preferred and the common stock. These notes were made direct to the Mercantile Agency. It appeared that the Mercantile Agency, by its president, had an arrangement with the appellant, one of its directors, whereby the company undertook to sell for appellant $29,000.00 worth of the company's common stock, of which appellant was owner. When the agent, Jackson, sold to respondent and took notes from him, one of the notes taken was for $2,500.00 in payment for the preferred stock. Another of the notes was for $2,250.00 in payment for the common stock; that is, for what now turns out to have been appellant's stock.

The note for $2,250.00, payable to the Mercantile Agency, was sent in by Jackson to the agency, and the company indorsed the note over to appellant in part settlement with him for the $29,000.00 of common stock belonging to appellant that the company had taken to sell. The respondent, knowing nothing of appellant in the transaction, but finding himself, at a later date, called upon to pay the note for $2,250 to appellant when the same was about falling due, supposed that appellant was the indorsee of the note and a *bonâ fide* holder for value. Accordingly, being pressed for payment, he, although protesting at the time that the representations that had been made to

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him at the time he purchased stock were untrue, and as to some of them had not materialized, nevertheless renewed the note by giving a new note for principal and interest to appellant through appellant's solicitors. Upon this note, given direct to the appellant, and under the above mentioned conditions, this action was brought to trial. The action was tried by Mr. Justice Russell, who found that the shares were the property of the appellant and were sold for the benefit of the appellant by an agent who, whether the agent was guilty in the transaction or not, had made untruthful representations while acting within the scope of his authority. But the trial judge found that, although the respondent, at the time that he gave the renewal note to the appellant, did not in fact know that the representations made to him were untrue, yet, because of certain letters which had been written to him, even though (as he found), the full significance of these letters and the real state of the facts had not been borne in upon his mind, he must nevertheless be held to have known at the time when he gave such renewal, that the representations made to him were untrue, and so he must be held to have adopted the transaction; that consequently the plaintiff must recover upon the note. But the learned judge found as a fact that there had been false representations inducing the purchase; that there was "a rogue somewhere in the transaction, and that he did not think the plaintiff could be allowed to reap the profits of his rascality." Accordingly, he gave judgment for the respondent, upon the counterclaim for damages to be assessed.

The appellant appealed to the Supreme Court, in banc, of Nova Scotia, from so much of the decision of the trial judge as gave judgment to the respondent

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upon the counterclaim. The respondent appealed to the same court from so much of the decision of the trial judge as gave judgment for the appellant upon the claim.

The appeal came on before Graham E.J. and Meagher and Longley JJ. The majority, Graham E.J. and Longley J., concurred in dismissing the plaintiff's appeal and the defendant's cross-appeal with costs. Meagher J. was of opinion that the plaintiff's appeal should be allowed, and the defendant's cross-appeal dismissed.

The plaintiff appealed to the Supreme Court of Canada; the defendant did not give notice of cross-appeal because the defence and counterclaim raise the same issues, and because he submitted that if the court should see fit to dismiss the action it had power to do so under the rules without any cross-appeal.

Matthew Wilson K.C. and *W. B. A. Ritchie K.C.* for the appellant. The renewal note and extension of time given by it to the respondent discharged appellant from liability for damages caused by the alleged fraud. See *Doherty* v. *Bell*(1); *Beatty* v. *Neelon*(2).

The respondent did not allege the facts necessary to support a claim for damages. *Squier* v. *Plunkett* (3), and he has not proved them. *Webb* v. *Roberts*(4).

The appellant was not himself guilty of any fraud and cannot be held liable. *Weir* v. *Bell*(5); Pollock on Torts (7 ed.), pp. 106-7.

(1) 55 Ind. 205.
(2) 12 Ont. App. R. 50; 13 Can. S.C.R. 1.
(3) 11 Gray 11.
(4) 11 Ont. W.R. 639.
(5) 3 Ex.D. 238.

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W. F. O'Connor for the respondent. The respondent purchased because he thought his money would be used to develop the company's business and help to make his investment profitable. The representation to this effect being untrue, entitles him to damages for deceit. *Edgington* v. *Fitzmaurice*(1).

The appellant is liable for the fraud committed, even unintentionally, by his agent. *Mackay* v. *Commercial Bank of New Brunswick*(2). See also *Gordon* v. *Street*(3).

GIROUARD J.—I dissent for the reasons given by Mr. Justice Davies.

DAVIES J. (dissenting).—The ground upon which I would allow this appeal and dismiss the respondent's counterclaim is that such claim was compromised, settled and satisfied by the giving of the note sued on.

Judgment was allowed against the respondent for this note and against that judgment no appeal has been taken.

Defendant contested the action on the ground that the note had been obtained from him by false and fraudulent representations. At the trial of the action he was granted leave to put in a counterclaim against the plaintiff claiming damages for the same alleged false and fraudulent representations on which he sought to defraud the action on the note.

In effect the respondent now says, it is true he compromised and settled appellant's claim against him on the note sued on and that he submitted without appeal

(1) 29 Ch.D. 459. (2) L.R. 5 P.C. 394.
(3) [1899] 2 Q.B. 641.

to the judgment on that note which went against him, but such compromise and settlement left open to him a right to sue for damages for the same deceit and fraud he unsuccessfully put forward to escape liability on the note, and did not operate as a compromise and settlement of the entire matter about which they were negotiating.

I am quite unable to accept the respondent's contention. In my opinion his claim for damages for the misrepresentation and deceit on which he sought to avoid liability on the note was included in the settlement and compromise made on the note itself. It seems perfectly clear to me that it was the intention of both parties to put an end to their then existing disputes and to all possible litigation which might arise out of them.

During the negotiations lasting from March 25th, 1904, till the giving of the note sued on, December 29th, 1904, and in which period the International Mercantile Agency, for stock in which the original note was given, became insolvent, the following facts appear:

Early in the spring of that year respondent became aware that the stock at the time of its sale to him belonged to appellant Goold and *was not treasury stock* as represented to him when he bought.

He also became aware that the note he had given for this stock in favour of the company had been indorsed to the plaintiff Goold. This information was conveyed to him in the clearest and most explicit language by the company's treasurer, Sterling, in his letters of April 2nd and 21st and May 12th.

Respondent was urging by correspondence with the officials of the company that he had been induced to enter into the contract for the purchase of the

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shares sold to him and to sign the note given for the purchase price by representations of the agent of the company who sold him the shares and which had not materialized. He was asking for a liberal compromise of the claim on account of these alleged misrepresentations but affirming that he did not want any litigation. He then learns that the stock he had bought was Goold stock and not treasury stock as represented to him when he bought. It was open to him then to repudiate the transaction and the note he had given on the ground of misrepresentation and deceit.

After a great deal of correspondence in which Gillies was put in possession of the material facts with reference to the stock and with respect to the payment of the notes, for which he was endeavouring to effect a compromise, he succeeded in effecting a settlement, and, on the 4th January, 1905, enclosed to the plaintiff's solicitors the notes sued upon in a letter in which he says:

> This is worse than throwing it into the sea as the transaction was an unmitigated swindle.

With knowledge that the representations made to him respecting the stock and the company "had not materialized," with knowledge that the stock sold him "was not treasury stock," but belonged to the plaintiff Goold; with belief on his part that the transaction he was settling was as he expressed it "an unmitigated swindle" but threats that if they wanted litigation he did not, but, as he says, "if I must I will," and after months of negotiation he settled the transaction, got extended time for payment and gave his note for the amount now sued on.

In my judgment respondent fully intended at the time he gave this new note to suffer the entire loss of

the amount of the claim and had no idea of asserting any claim for damages in answer to or in reduction of appellant's claim.

The question on this branch of the case is whether under all the circumstances of the case the parties intended merely to extend the time for payment of the purchase money of the stock or to settle by compromise the matters in dispute between them, and which had for months been carried on by correspondence, the one party abandoning his rights by reason of the alleged misrepresentations, and the other conceding to him a substantial concession in the shape of a long extension of credit. A careful perusal of the evidence and correspondence leaves no room for doubt in my mind that the settlement was not merely an extension of the time for payment but a settlement also of any claims the defendant might have arising out of the alleged misrepresentations.

I would therefore allow the appeal and enter judgment for the appellant on the counterclaim with costs.

IDINGTON J.— In 1901 the appellant was a director on the Board of the Sprague Collecting Agency of Chicago and also on the Board of Directors of the Sprague Collecting Agency of Ontario which was the offspring, so to speak, of the former.

This was the outcome of stock chiefly if not altogether acquired by him from one McCauley and as the appellant explains

> with the distinct understanding that the business was to be converted into the Mercantile Agency.

I assume he means the International Mercantile Agency Company now in question.

I infer therefore he joined forces with McCauley who later on became the purchaser of the various

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Sprague companies and the remains of a bankrupt concern of the same nature.

But what he paid for any or all to justify the floating of a company with a capital of $2,000,000 of which $1,200,000 should belong to McCauley and his friends such as the appellant does not appear.

The appellant aided in the promotion by a eulogy of Mr. McCauley and some of the concerns he was planning to have amalgamated in the International Mercantile Agency now in question.

The appellant was informed by a letter of the 18th January, 1902, written from New York by Mr. McCauley of the accomplishment of the new incorporation and its organization and that all the members of the boards of the old Sprague companies had thus become directors of the new company. The appellant recognizes he thereby became a director of the new company.

The evidence shews that the executive committee of this latter company did not meet very regularly or often but that the Board of Directors met as often probably as they had necessity to do so.

The appellant was, as a director, in attendance at, I think, all these board meetings.

He had as a result of foregoing events become a shareholder of common stock in this new company to the extent of $40,000. I infer as to a small part of it he was merely trustee for some relatives.

He concluded to sell 290 shares of nominal value of $29,000 of this stock and in the office in New York of the president, McCauley, on the 18th December, 1902, arranged with him who was selling stock of the company through its agents to sell this for him. He named no price. He fixed no commission.

He never paid any commission though the agent selling got on those sales four per cent. from the company.

He says he indorsed a transfer of this stock and handed it to McCauley. But we are not favoured with the production of these documents or any writing up to that time shewing what the transaction really was save the following receipt:

International Mercantile Agency,
346 Broadway, New York.

Office of the President.

Received of E. L. Goold twenty-nine thousand ($29,000.00) Common Stock to be sold on his account.

(Sgd.) T. N. McCAULEY,
President.

December 18, 1902.

The president, to whom I infer appellant trusted, though not blindly, everything, sold these shares along with others of his own and of the company by and through the agents of the company for such purposes of sale.

I do not think the appellant is done any injustice in assuming not only that he knew what was being done but that it was because he knew Mr. McCauley had adopted or was about to adopt the method he did of mixing the sales of company stock with his own for the purpose of disposing of his own shares of which these had but recently formed a part that the appellant entrusted him, as president be it noted, on the face of the transaction with such proposed sales of 290 shares of common stock.

These shares were accordingly sold by one of the company's agents who admits not that he acted fraudulently but that he made the false representation found by the court below to have been made as the result of the method adopted of handling the business.

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The appellant received, not from the man McCauley but from the auditor of the company, a letter dated 28th February, 1903, enclosing a cheque for $11,702, being the balance of proceeds of sale and the note of the respondent with other notes and a voucher to be signed and returned.

This letter contains the following paragraph:—

> You will notice that the total of Mr. Lefurgey's notes makes more than the amount due, but this was in payment of some preferred stock, and, *finding it impossible to separate these* notes, we send them to you. Also the one of R. C. Wetmore for $2,000 was made in payment for *both preferred and common*, and *as it was impossible to divide this note we have also sent it.*

It hardly lies in the mouth of the appellant who got that letter to assume and claim he did not know and could not be held responsible for McCauley's methods. Moreover it was his duty as a director to have seen that such things as happened should not have had a possibility of happening.

The appellant was clearly liable for deceit, and I hold him so, without relying on the foregoing further than to find therefrom that he clearly profited by a false statement made in the course of his (appellant's) business, and which statement had in it the necessary qualities of falsity to make it the subject of an action for deceit, and was to the detriment of another. I think he falls within the principles upon which the Privy Council proceeded in the case of *MacKay* v. *Commercial Bank of New Brunswick* (1).

But the foregoing history and inferences are, though not all necessary to fix liability, useful to have in mind as lights upon the alleged evidence, which the correspondence it is claimed furnishes of a defence, of accord and satisfaction.

(1) L.R. 5 P.C. 394.

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It is urged that by a renewal by this respondent of his promissory note given for this stock and the extension of time he got, such a defence of accord and satisfaction is made out and is a complete answer to the claim set up by way of counterclaim for the deceit referred to above.

There is no plea to the counterclaim making any such defence to it.

There never was a bargain to forego any action of deceit.

There never was put before the appellant's mind much less set up by him a cause of action for deceit from which he sought a release, when, and as part of the dealing whereby, he sought a confirmation of the sale. He never condescends to notice such charges as were made.

There never was present to the respondent's mind, when writing the letters he did, such a case as the foregoing presents. I fail to see how we can find what those concerned never supposed they were agreeing to was agreed to.

The respondent certainly used very emphatic language as to the company and the value of what he was getting by having given his note and giving the renewal secured as it was. But it was all quite consistent with his entire ignorance of the relations between the appellant and McCauley and the appellant and the company and this appellant's intimate knowledge of the dealings of both.

It is to be observed that what was presented to the respondent's mind was that he had merely got the shares of *another stockholder* who for aught that appears might have been victimized as he had been, or might in truth have bought but had not yet paid for

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actual treasury stock and thus was getting rid of it and so substituting the respondent, and after all giving respondent treasury stock.

For aught he knew appellant was an indorsee for value without notice of any fraud. He had given his note to the company and it was indorsed by the company to the appellant. Such was the face of the transaction.

There is in law on the facts no release of the action of deceit that had enured to the respondent and for which he has judgment on his counterclaim though what happened may have been as held an answer to the claim for rescission.

The adroit suppression of the appellant's position as a director and representing him merely as a stockholder when explaining how he came to get the respondent's note would, I incline to think, have made it difficult to have upheld an express release of the action of deceit if such had been got under all the facts and circumstances I have referred to.

I think, if the able man of business I take him for on the evidence, that the appellant (whatever his position may have been at the outset or earlier stages) had by this time of renewal got so much light as to the probable fate of the company and the causes of its fate as to have rendered his duty towards the respondent as a director and otherwise to think twice before pressing such a claim and involving others as sureties without disclosing the facts.

I think the appeal should be dismissed with costs.

MACLENNAN J. agreed with Idington J.

DUFF J.—In *Cornfoot* v. *Fowke*(1), it was said by Rolfe B., at page 370, that:—

> If the plaintiff * * * purposely employed an agent, ignorant of the truth, in order that such agent might innocently make a false statement believing it to be true, and might so deceive the party with whom he was dealing, * * * he would be guilty of a fraud:—

by Alderson B., at page 372:—

> It is said that this will open a door to fraud, by enabling parties in the situation of this principal, themselves conscious of objections to their premises, to appoint agents who, unconsciously, may make misrepresentations to the injury of third persons. This does not follow. If the fact could be shewn it would be a fraud on the part of the principal with such a motive to appoint such an agent:—

and by Parke B., at page 373:—

> It must be admitted that if the plaintiff not merely knew of the nuisance, but purposely employed an ignorant agent, suspecting that a question would be asked from him, and at the same time believing or suspecting that it would, by reason of such ignorance, be answered in the negative, the plaintiff would unquestionably be guilty of a fraud * * * ; for then the representation of the agent, which he intended to be made, would be the same as his own; and his own representation, coupled with his knowledge of its falsehood, would doubtless be a fraud.

These observations were quoted with approval in *Ludgater* v. *Love*(2), at page 696, by Brett L.J., and in substance re-stated by Lord Selborne, in the same case at page 697; and there is nothing in *Derry* v. *Peek*(3), which conflicts with them. The principle sanctioned by the authority of these eminent lawyers seems to me, after a careful examination of the whole evidence, to fit precisely the facts disclosed by it as touching the responsibility of McCauley for the representations of his agents; and the fraud of McCauley, for which Goold is responsible, having been a material

(1) 6 M. & W. 358. (2) 44 L.T. 694.
(3) 14 App. Cas. 337.

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inducement leading Gillies to enter into the purchase of the shares, the measure of damages is the difference between the purchase price and the value of the shares (that is to say, a fair price for them), at the time of the purchase. *Davidson* v. *Tulloch*(1); *Arkwright* v. *Newbold*(2); *Holmes* v. *Jones*(3).

The only serious difficulty arises upon the contention of the appellants that Gillies has released his right of action. The contention is based upon the correspondence which passed between him and the appellant's solicitors before the execution of the note sued upon —which was given in renewal of the note of February, 1903. Now it is plain that, Goold insisting on holding Gillies to his bargain, Gillies might after the discovery of the fraud affirm the bargain by renewing his note or paying it and still retain his right to sue for deceit. *Houldsworth* v. *City of Glasgow Bank*(4), at page 323; Kerr on Fraud (3 ed.) 352; Lindley on Companies (6 ed.) 683; *Arnison* v. *Smith*(5) at pages 372, 378. In his action for deceit the respondent can recover, as I have mentioned, only the difference between the value of the shares at the time of his purchase and the purchase price; and that right of action is not displaced merely because he has precluded himself from resisting an action for the latter. The waiver, in a word, of his right to set up the fraud in answer to this last mentioned action, does not by any rule or implication of law import a satisfaction of his substantive right of action for damages.

The appellant can, consequently, succeed in this contention only by shewing that this cause of action

(1) 3 Macq. 783.
(2) 17 Ch.D. 301, at p. 312.
(3) 4 Com. L.R. 162.
(4) 5 App. Cas. 317.
(5) 41 Ch.D. 348.

has been released. In this, I think he fails. His contention is that Gillies, in December, 1904, after the note of February, 1903, was overdue, applied for an extension of time which he granted by accepting in renewal of that note a fresh note payable some months later; and that the consideration for this extension of time, as shewn by a correspondence between Gillies and the appellant's solicitors, was the release of Goold from all liability in respect of Gillies's purchase, including the claim now in question.

I will state briefly why I am unable to accept the contention that the correspondence referred to discloses any agreement having the effect mentioned.

First of all there are the concurrent findings of the two courts below that the appellant was not, when he executed the note of December, 1904, aware of the fraud practised upon him.

These findings, it is true, seem, at first sight, inconsistent with some earlier letters (which are in evidence), between Gillies and the secretary of the company shewing that Gillies was, months before the execution of the note of December, 1904, informed that the shares allotted to him had been Goold's. But the learned trial judge and the Court of Appeal accepted Gillies's testimony that this statement made no impression upon him, partly because of his pre-occupation with other affairs and partly because he thought the writer of the letter was endeavouring to mislead him; and that, in spite of it, he remained under the belief that the shares were what they had been represented to be at the time of the purchase.

Another and I think quite sufficient ground is that Gillies was not aware at the time of the execution of the note of December, 1904, of the real character of McCauley's fraud. He did not know until months

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afterwards that McCauley and his co-directors (under the cover of the company's name, and under the pretence first of allotting to subscribers the company's unissued capital, and then of acting in behalf of the company in receiving the subscribers' payments they were acting on behalf of the company), had been getting rid of their own shares and appropriating the proceeds of the subscriptions in payment of them—and that he, Gillies, had been one of the victims of this imposition.

In these circumstances, it would not be sufficient to support this contention I am considering, that, in the letters relied upon, there should be found language sufficiently comprehensive in its broadest sense to extend to a right of action for deceit as against Goold. Once it appears that Gillies was not acquainted with the facts of the fraud in respect of which the present claim is made the appellant is bound to make out that an intention is manifested by the correspondence to include within the composition any such rights of action, whether then known or not known to exist; and the question is, whether, fairly read in the light of all the circumstances, the correspondence shews that such was the intention of the parties. I confess, with the highest respect for the views of others, that, to my thinking, that question must very plainly be answered in the negative; and, consequently, that it would be repugnant to principle to give effect to the language of the letters in the sense for which the appellant contends.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Henry C. Borden.*
Solicitor for the respondent: *William S. Gray.*

THE GREAT NORTHERN RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

AND

FURNESS, WITHY AND COMPANY AND OTHERS (PLAINTIFFS) RESPONDENTS.

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*June 16.

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

Appeal—Delay in approval of security—Jurisdiction—Extension of time—Stay of execution.

Application for approval of the security on an appeal to the Supreme Court of Canada was made within the time limited by the statute, but the hearing of the application was not completed until afterwards, and the judge made an order, after the expiration of sixty days from the rendering of the judgment appealed from, approving of the security offered by the appellants.

Held, Idington J. dissenting, that although the record did not shew that the judge had expressly made an order to that effect he impliedly extended the time by accepting the security offered, and that this was a sufficient compliance with the statute.

An objection that the security approved was not such as contemplated by the 75th and 76th sections of the "Supreme Court Act," (the amount thereof being insufficient for a stay of execution), was not entertained for the reason that the amount in controversy was sufficient to bring the case within the competence of the court and it was immaterial whether or not execution could be stayed. *The Attorney General of Quebec* v. *Scott* (34 Can. S.C.R. 282) and *The Halifax Election Cases* (37 Can. S.C.R. 601) referred to.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, varying the judgment of the Superior Court, District of Quebec,

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

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Lemieux J.(1), and maintaining the plaintiffs' action for the sum of $3,992, being the amount of a debt thereby claimed, with costs.

The judgment from which the appeal is asserted was delivered on 9th March, 1908; the notice of application to have security approved on appeal to the Supreme Court of Canada was served on the respondents on 30th April, and the application was presented to Mr. Justice Blanchet on 5th May, within sixty days from the judgment appealed from, as limited by the "Supreme Court Act." It does not appear from the papers before the court whether or not the names of any proposed bondsmen or other security were mentioned at the time of this application, the learned judge made no order at that time, but took the matter *en délibéré*. On 3rd June, the respondents were served with a further notice that a bond by a guarantee corporation would be filed as security for the appeal in the office of the clerk of appeals, at Quebec, on 9th June, and, on the latter day, the respondents appeared before the same judge and objected to the security being approved on the ground that the time limited for such proceeding had elapsed. After hearing counsel, Mr. Justice Blanchet, on the date last mentioned, approved of the security thus offered.

Surveyer, for the motion.

Cannon, contra.

The judgment of the court was delivered by

GIROUARD J. (oral).—The respondents move to quash the appeal, taking the same objection as was

(1) Q.R. 32 S.C. 121.

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GREAT NORTHERN RAILWAY CO v. FURNESS, WITHY AND CO.

Girouard J.

taken before Judge Blanchet, and also contending that the security approved by him is not the security contemplated by the 75th and 76th sections of the "Supreme Court Act," the amount being insufficient to stay execution.

The second objection cannot be entertained, the amount being sufficient to bring the case before this court under section 75, whether execution can be stayed or not is immaterial.

As to the objection based on expiration of time, we are, with the exception of Mr. Justice Idington, of opinion that the learned judge before whom the application was made on the 5th May, although the record does not shew that he expressly made an order to that effect, impliedly extended the time by accepting the security, and we think it is a sufficient compliance with the statute. *The Attorney General of Quebec* v. *Scott*(1), and *The Halifax Election Cases*(2), are in point.

The motion is dismissed with costs fixed at $50.

IDINGTON J. (oral).—I am of opinion that if the learned judge intended to extend the time he should have said so distinctly. He did not do so, consequently, I think we cannot assume that the time was extended as required by the statute.

Motion dismissed with costs.

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(1) 34 Can. S.C.R. 282. (2) 37 Can. S.C.R. 601.

1908

*March 3.
*June 16.

J. EMILIEN HÉBERT (DEFENDANT)—APPELLANT;

AND

LA BANQUE NATIONALE (PLAINTIFF) ..... } RESPONDENT.

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

Bills and notes—Material alterations—Forgery—Partnership—Mandate—Assent of parties—Liability of indorser—Construction of statute—"Bills of Exchange Act."

R. induced H. to become a party to and indorser of a demand note for the purpose of raising funds and agreed to give warehouse receipts as security to the bank on discounting the note. It was arranged that the goods covered by the warehouse receipts were to be held and sold on joint account, each sharing equally in the profits or losses on the transaction. Subsequently R. altered the note, without the knowledge or consent of H., by adding thereto the words *"avec intérêt à sept par cent. par an,"* and falsely represented to the bank that H. held the warehouse receipts as collateral security for his indorsement. A couple of months later H., for the first time, became aware that the goods had never been purchased or placed in warehouse, that no warehouse receipt had been assigned to the bank and did not, until some months later, know that the alteration had been made in the note. There was some evidence that H. had asked for time to make a settlement of the amount due to the bank upon the note after he had become aware of the fraud and the alteration so made.

Held, by Idington, Maclennan and Duff JJ. that the instrument was a forgery and could not be ratified by an *ex post facto* assent. *The Merchants Bank* v. *Lucas* (18 Can. S.C.R. 704; Cam. Cas. 275), and *Brook* v. *Hook* (L.R. 6 Ex. 89), followed.

Per Idington J.—The circumstances of the case did not shew that there had been any assent to the alteration within the meaning of section 145 of the "Bills of Exchange Act."

Per Maclennan J.—The assent required to bring an altered bill within the exception provided by section 145 of the "Bills of Ex-

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

change Act," R.S.C. (1906), ch. 119, must be given by the party sought to be bound at the time or of before the making of the alteration.

Held, also, the Chief Justice and Davies J. *contra*, that, in the special circumstances of the case, there was no partnership relation between the parties to the note for the purposes of the transaction in question and there could be no implied authorisation for the making of the alteration in the note.

Per Fitzpatrick C.J.—The transaction in question was a joint venture or particular partnership for the enterprise in contemplation of the parties and, consequently, R. had a mandate to make whatever agreement was necessary with the bank to obtain the funds and to provide for the payment of interest on the advances required to carry out the business.

Judgment appealed from (Q.R. 16 K.B. 191) reversed, the Chief Justice and Davies J. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, District of Iberville (Paradis J.), which maintained the plaintiff's action with costs.

The circumstances of the case and questions raised on this appeal are stated in the judgments now reported.

Bisaillon K.C. and *Aimé Geoffrion K.C.* for the appellant.

Laurendeau K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—In September, 1903, the appellant entered into an agreement with one Roy to buy on joint account butter to be warehoused and held for a rise in the market. Roy was a manufacturer of and dealer in that article and Hébert, the appellant, was a merchant tailor; they both resided at and carried on business in the Town of St. Johns, in the Province of Quebec, and were apparently on friendly terms. It was at the same time agreed

(1) Q.R. 16 K.B. 191.

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that the money required to carry on the venture would be borrowed from the respondents on the credit of Roy and Hébert, the warehouse receipts for the butter to be given as collateral security for the loan, and Roy was authorized to make the necessary financial arrangements with the bank. It was finally settled that the money would be advanced on their joint demand note. Roy represented to the bank agent when the note was discounted that the warehouse receipts which the bank was to receive and hold as collateral were in the possession of the appellant Hébert, whereas the latter assumed that they were transferred to the bank in pursuance of his agreement with Roy. At that time Roy pretended that he had in his warehouse about 10,000 pounds of butter. The proceeds of the note were put to Roy's personal credit.

The controversy here arises out of the fact that, when Roy came to the bank with the demand note signed by himself and Hébert, Audet, the bank agent, said that, as the loan was being made for an indefinite period, it was necessary to provide for the bank interest by adding to the note the words *"avec intérêt à sept par cent. par an."* Roy was then asked to see Hébert and get his consent to the necessary addition and he immediately left the bank, ostensibly for that purpose, and returned in a few minutes professing untruly, as found by the trial judge, to have seen Hébert and obtained the required assent and he then and there altered the note by adding the words *"avec intérêt à sept par cent. par an."* Subsequently, it was ascertained that a fraud had been perpetrated by Roy, that he had no butter in warehouse as he represented, that he did not use the money borrowed from the bank to purchase butter, and that in a word he had grossly

deceived both Hébert and the bank. In the interval, and before that discovery was made, another note for $1,000, made in the same way and for the same purpose had been discounted under similar circumstances with the same bank, and altered by the addition of the same words. That note, however, was paid to the extent of $900 by the appellant with a cheque received in payment of a sale of butter to one Bryce and as to the balance of $100, by Roy; and when fully paid the note was sent by the bank through the mail to Hébert, who destroyed it after having kept it in his possession for some days without a word of protest. I am of opinion that Hébert then knew of the alteration made in that note by Roy with respect to the interest and acquiesced in what had been done.

When some months later Hébert discovered the fraud practised on him by Roy in connection with the warehouse receipts, he obtained from the bank a copy of the note now sued on, and, without objecting in any way to the alteration by addition of the words as to interest though his attention was specially drawn to it, he consulted his counsel and instituted criminal proceedings against Roy not for forgery, but for having obtained his signature to the note on the false representation that he then had in warehouse 10,000 lbs. of butter. The respondent asserts that Hébert did not then object to the alteration, but, on the contrary, formally approved and ratified what had been done by Roy with respect to the addition of the necessary words to provide for the interest (as he had done impliedly with respect to the note for $1,000) and undertook to pay the note now sued on. Subsequently, however, Hébert repudiated all liability on the ground that the note was forged, having been

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altered in a material part without his authority or consent and he denied that he ever authorized, ratified, approved or confirmed what had been done by Roy to provide for the interest; hence this suit.

In my view the purchase of the butter was a joint venture, or a particular partnership contracted for a single enterprise; (art. 1862 C.C.) and Roy had a mandate to make an agreement with the bank to provide for the interest on the money which he was authorized to borrow and which could not be got otherwise to carry on the venture; (art. 1851 C.C.). If instead of adding the words, which were inserted in the note, Roy had simply given a joint undertaking verbally or in writing to pay the interest on the loan at 7%, can it be doubted that Hébert would have been bound? Hébert explains the negotiations with the bank with respect to the loan and the arrangement as to division of the profit or loss on the venture; interest, insurance, warehouse and other charges having first been provided for. I make this extract from his evidence:

Q. Veuillez donc dire dans quelles circonstances et pour quelles raisons vous avez ainsi signé et endossé ce billet?

R. Le 10 septembre dernier M. Roy est venu chez moi dans l'après-midi me dire que si je voulais enmagasiner du beurre, comme il en avait été question avant avec lui, que c'était le temps. Il m'a fait la déclaration qu'il avait à cette époque-là pour $2,000.00 de beurre qu'il pouvait expédier à Montréal et toucher l'argent immédiatement.

Q. Où avait-il ce beurre-là? L'a-t-il dit?

R. Dans ses entrepôts, à St.-Jean, dans sa manufacture de beurre, à ce qu'il m'a dit. En même temps, M. Roy m'a présenté un billet rempli au montant de $2,000.00 pour que je l'endosse. J'ai refusé carrément, en disant à M. Roy que ce n'était pas de cette manière que j'entendais faire de l'entrepôt. Je lui ai dit qu'il fallait voir d'abord *si la banque avancerait les fonds;* que je croyais que cela se faisait autrement que cela. M. Roy m'a dit: "J'ai été à la banque et ils sont prêts à nous avancer les fonds pour enmagasiner le beurre de septembre et d'octobre." J'ai dit à M. Roy: "Retournez à la banque et vous reviendrez demain; renseignez-vous

davantage. Mon impression est que la banque va vouloir avoir d'abord les reçus d'entrepôt, c'est une chose qu'ils exigent, et un billet additionnel, pour les garantir davantage, au cas où le beurre perdrait de la valeur pour se rattrapper sur le billet dans ce cas-là." J'ai dit que c'était là les conditions que j'entendais suivre. * * * Le lendemain, après-dîner, M. Roy est revenu et m'a présenté ce billet-ci, exhibit A, en blanc, me disant que c'était dans le sens que j'avais compris la chose, que la banque voulait que ça se passe. Il m'a dit qu'il avait été à la banque et j'en ai conclu qu'il avait vu le gérant, et il m'a demandé de remplir le billet.

Q. Dites-vous qu'il vous a dit que la banque voulait que ce soit comme vous aviez indiqué la veille?

R. Oui, que c'était comme cela que ça devait se faire et que ça devait être rempli comme je l'avais suggéré la veille. J'ai dit à M. Roy: "Comme cela vous avez pour $2,000.00 de beurre?" Il a dit: "Oui." J'ai dit: "Vous avez par conséquent 10,000 livres de beurre en entrepôt?" M. Roy a dit: "Oui."

Q. Où cela?

R. Toujours à son entrepôt, à St.-Jean. Sur cette réponse affirmative de M. Roy, j'ai dit: "Il faut maintenant s'entendre quant aux profits ou aux pertes s'il y en a. D'abord il va falloir assurer le beurre." M. Roy a dit: "Pour cette quantité-ci ce n'est pas nécessaire." Il a dit qu'il avait suffisamment d'assurance pour le couvrir; mais que si on en enmagasinait d'autre par la suite on prendrait de l'assurance. J'ai dit: "Combien allez-vous me charger pour le loyer de votre entrepôt? Je n'entends pas me servir de votre entrepôt sans rémunérer. Sera-ce au pied ou au mois ou au mille livres? Je ne connais pas ces conditions-là." M. Roy m'a dit: "J'irai à Montréal; et je m'informerai; je chargerai à peu près comme ils chargent à Montréal mais ce ne sera pas grand'chose dans tous les cas." J'ai dit: "Maintenant, c'est bien entendu que vous allez donner les reçus d'entrepôt à la banque, et une fois *les intérêts payés ainsi que l'assurance et les frais d'entrepôt*, s'il y en a, une fois toutes les dépenses en rapport avec cette transaction payées, les *pertes* ou les profits devront être divisés également entre nous." C'est à cette condition-là que j'ai rempli ce billet-là à demande. Je l'ai signé et je l'ai endossé. M. Roy l'a signé et endossé aussi devant moi. Mais je me suis aperçu quand M. Girard, mon avocat, m'a dit d'aller chercher une copie de ce billet, qu'après que je l'eusse signé, et hors de ma connaissance, il y a eu d'ajouté sur le billet "avec intérêt au taux de sept pour cent." Je n'ai pas eu connaissance de cela, je n'ai pas été consulté à ce sujet non plus et ce n'est pas moi qui l'ai écrit."

And again at page 21:

Q. Vous deviez être de moitié dans les profits?

R. Profits ou pertes.

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And at page 22:

Etant donné la société que vous avez faite avec M. Roy, vous avez signé ce billet-là pour participer dans les profits qui pouvaient être réalisés sur l'enmagasinage du beurre?

R. S'il y avait pertes ou profits, après que toutes les dépenses étaient payées, on divisait également dans l'une ou l'autre. Le beurre pouvait être vendu le lendemain si on voulait, à la première occasion favorable qu'on aurait trouvé.

From this I conclude that Roy and Hébert were undoubtedly partners in the purchase of this butter and there was undoubtedly an agreement to share the losses or profits of the venture which was to be financed by money obtained from the bank by Roy on their joint credit. To get the loan, under the circumstances, for an indefinite period, Hébert knew that interest must be provided for, and Roy had authority to bind both with respect to the payment of this interest and an alteration of the note by the addition of words to provide for the payment of interest on money advanced for the benefit of the partnership is not under the special circumstances a fraudulent alteration which constitutes forgery.

Now as to subsequent adoption and ratification. The fact that a note for $1,000 was given under similar circumstances and altered in the same way is very material. That note was paid in part by Hébert and it subsequently came into his possession; so it is impossible to believe that he did not see the alteration by the addition of the words as to interest. When he called at the bank to make a copy of the note now sued upon, Hébert saw the similar alteration in this note and without protest undertook to pay it. Here are his words, as given by witness Camaraire:

P. 83: M. Hébert a dit: "C'est mon billet, je le reconnais; je vous paierai mais M. Roy en paiera la façon. Je vais le faire

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arrêter aujourd'hui même." M. Hébert a ajouté: "La banque ne perdra pas un sou; je vais le payer, et je vais faire arrêter M. Roy aujourd'hui même."

P. 84: Il a dit: "Que sert-il à la banque de me faire faire les frais d'emprunter sur ma propriété pour un mois ou un mois et demi; lorsque je vous assure que le premier juin je paierai mon billet." J'ai dit à M. Hébert que j'allais en parler à M. Dorais, le gérant, et que j'étais convaincu que la chose allait lui être accordée; que c'était raisonnable. Il a ajouté que sa femme était peinée de voir qu'il était obligé de payer $2,000.00; qu'il avait une nombreuse famille; qu'il n'était pas riche, et qu'il connaissait ce que c'était que de gagner de l'argent. Il a dit: "J'ai dit à ma femme: 'Tu ne penses pas qu'on a $2,000.00 à retirer; de sorte que notre position se trouvera la même.'"

I would confirm because, in my opinion, there is sufficient evidence to shew that the alteration by addition of the words necessary to provide for the payment of interest on the loan made for the joint benefit of Roy and Hébert was made with authority and to conform to the original intention of the parties and that the joint maker subsequently agreed to it.

DAVIES J. (dissenting).—I agree with the Chief Justice that this appeal should be dismissed. I prefer, however, not to rest my judgment upon the ground of the existence of an implied authority on Roy's part arising out of his special partnership relations with Hébert to make the alteration in the note, but upon the ground that when Roy took the note to the respondent bank to have it discounted and added the words *"avec intérêt à sept par cent. par an,"* he did so claiming to have had the authority of his co-maker, Hébert, to add these words and that Hébert subsequently assented to the alteration and so confirmed Roy's representation of authority.

If subsequent assent to an alteration of a note made with full knowledge of the facts is sufficient to

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hold the person so assenting to his liability on the bill, I am of opinion that the evidence is amply sufficient in this case to find such assent and I concur in the Chief Justice's reasoning on this point.

Then, with respect to the law of the case, I think the case of *Merchants Bank* v. *Lucas*(1) relied on by the appellant, does not govern or apply to the facts before us. That was the case of a simple forgery of a man's name to a note and an attempt to hold the person whose name was forged liable because of a subsequent promise to pay it. Here we have a note admittedly signed by the party sought to be charged but alleged to have been altered by his co-maker, but, so far as the holder is concerned, altered professedly by Roy under the authority of the party sought to be charged. As is said in appellant's own factum, in stating the circumstances under which the respondent's manager discounted the note:

> Looking over the note he, the bank manager, noticed that there was no mention of interest on it. So he asked Roy to call upon Mr. Hébert, the appellant, in order to have the interest mentioned on the note. Roy left the bank to go to Hébert's, apparently, and came back 15 or 20 minutes later with the same note with the words *"avec intérêt à sept par cent. par an"* added to the wording of the note and without any possible doubt most evidently of the handwriting of Roy himself.
>
> Upon Roy's declaration that the appellant had acquiesced to the addition on the note, the manager, Mr. Audet, accepted his word as to this, just as he had accepted his word concerning the warehouse receipts.

The ratification or assent relied upon here is that of an act done by a person professing himself to have been for the purpose the agent of the person subsequently ratifying it. The distinction between such an act and that of a mere forgery is distinctly pointed out

(1) Cam. Cas. 276.

in the case of *Merchants Bank* v. *Lucas* (1), above referred to, in the report of the reasons for their judgment given by the learned judges of the Court of Appeal for Ontario and to be found in 15 Ontario Appeal Reports, at page 600, and affirmed in this court on appeal (1).

In the case of *Brook* v. *Hook* (2), cited and relied upon in the *Lucas's Case* (1), the Chief Baron Kelly, in delivering the judgment of the court, at page 100, says:

> In all the cases cited for the plaintiff the act ratified was an act pretended to have been done for or under the authority of the party sought to be charged; and such would have been the case here, if Jones had pretended to have had the authority of the defendant to put his name to the note, and that he had signed the note for the defendant accordingly, and had thus induced the plaintiff to take it. In that case, although there had been no previous authority, it would have been competent to the defendant to ratify the act, and the maxim before mentioned would have applied.

Apart from authority respecting the law as it stood before the codification of the law on bills and notes, I am of opinion that the subsequent assent of the defendant to the alteration is sufficient to bind him under the "Bills of Exchange Act of 1890," now chapter 119 of the Revised Statutes of Canada, 1906. Section 49 of this revised Act deals with a forged signature to a bill or note and provides that nothing therein

> shall affect the ratification of an authorized signature not amounting to a forgery;

while section 145 deals with material alterations made in such an instrument. In this latter section it is declared with respect to patent material alterations that

(1) 18 Can. S.C.R. 704. (2) L.R. 6 Ex. 89.

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where a bill or acceptance is materially altered without the assent of all parties liable on the bill the bill is voided, except against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.

Now, here are three specified and distinct exceptions from the conditions under which a material alteration is declared to avoid the bill. First; Where the party sought to be charged has himself made it; Secondly; Where he has authorized it to be made; and, Thirdly; Where he has assented to it having been made.

It has been argued that the assent must be an assent given previous to the alteration, or at any rate previous to the issue of the bill or note.

I do not see any reason or justification for putting such a limitation upon the meaning of the phrase used in the section. The first two exceptions may well relate to an alteration made before the issue of the note but are not necessarily confined to such an antecedent period; the last exception, it seems to me, was introduced for the very purpose of covering a subsequent assent to a previous alteration.

In section 49, relating to the simple forgery of a name to a bill or note, a proviso is introduced saying that

> nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

It may be argued that section 145 is to be construed as only applying to alterations under the circumstances mentioned by the learned judges who delivered the judgment in *Merchants Bank* v. *Lucas*(1), and in *Brook* v. *Hook*(2), that is, where the alteration was

(1) 18 Can. S.C.R. 704. (2) L.R. 6 Ex. 89.

an act pretended to have been done for, or under the authority of the party sought to be charged.

Even if limited to such cases (as to which I express no opinion), it is clear to my mind that it at least covers them and that this case is one of them.

I think the appeal should be dismissed.

IDINGTON J.—The appellant says he was asked by one Roy in September, 1903, to indorse for him a note of two thousand dollars to be discounted with respondents at St. John's, in Quebec, where the parties live, and to be secured by warehouse receipts covering ten thousand pounds of butter estimated worth at least twenty cents a pound.

He says the arrangement was finally agreed to between him and Roy on this basis and the further understanding that he should be compensated for his indorsement by getting half the profits on the butter when it might be realized on later and he also suffer half the loss if any.

This made it a joint venture, but nothing like a general partnership was thought of, though possibly future similar speculations may have been contemplated by appellant as possible.

He drew up a demand note and signed it jointly and also indorsed it jointly with Roy, whom he entrusted with it, and also the carrying out of the giving to the bank the promised warehouse receipts. He saw no more of Roy on the subject and always supposed until the following November that the bank had got and held the warehouse receipts. Then the bank agent surprised him by calling upon him for the warehouse receipts and explaining that Roy had put the transaction through with the bank by representing that

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Hébert was to get and hold the warehouse receipts as security for both himself and the bank.

Roy was enabled by this double fraud to get the money without the security of warehouse receipts.

His story is that Hébert signed merely for accommodation, never demanded security, never asked compensation for indorsement or joining in the note, and that the bank never asked for nor were offered any security but that of Hébert signing.

He says future possibilities of speculation may have been spoken of between him and Hébert, but they had no relation to this business.

The line of reasoning upon which the courts below proceed renders it necessary the foregoing evidence should be prominently borne in mind.

The note as made in Hébert's handwriting was found by him in the following April to have been altered by Roy adding the words "with interest at seven per cent. per annum."

This alteration, the bank agent and Roy agree, came about by reason of the suggestion of the agent that as it was a demand note it should bear interest on the face of it.

The agent says Roy at once acceded to the suggestion when made and left the bank to get Hébert's sanction to it and returned in fifteen minutes or half an hour with the note thus altered. In one way he puts it as if Roy had reported on his return that Hébert had expressly assented to this particular alteration, but in another, and, when repeating the words that passed, he puts it as if he had simply taken Roy's word that the bill was all right now.

In my view there is no difference under the circumstances in question here.

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The appellant swears Roy never saw him on the subject or spoke to him on the subject of alteration.

Roy says that on the occasion of presenting the note to be discounted the appellant was at the bank and had left before the agent had observed the omission to provide in this way for the interest, but instantly it was mentioned he followed and caught Hébert as or before reaching the pavement, just outside the bank, and explained what the agent had said as to interest, got Hébert's instant assent to the change being made, returned inside and, in the agent's private office and his presence, wrote the alteration.

All this circumstantial but somewhat improbable story of getting and acting on the authority of Hébert in the manner just related is denied by both the agent and Hébert.

The courts below seem to have discredited Roy. The learned trial judge proceeded on the assumption that the business being a joint one Roy had an implied authority and that Hébert, after he had knowledge of the alteration, acquiesced therein and recognized his responsibility and promised the respondent to pay the bill. The only judge in appeal who gives reasons does not hold that he consented, but that the whole question was, had he acquiesced? And he finds he did.

These several positions are taken by respondent here, and also that Roy professing to act as an agent or on behalf of Hébert, as *agent* his acts could be and were ratified.

The bank never looked upon appellant in any other light than that of a mere surety as Roy had represented and still represents him.

How can we impute to the parties for the purposes of this case that relation which is denied by him whose act is being enquired into?

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How can we find he in truth acted or represented he acted as an agent in making the alteration?

In the first place he in reality only said *"tout correct"* and the agent accepted his word. That did not imply he had the authority to write the alteration. It rather implied in the face of what had proceeded that Hébert had finished the writing.

In the next place he was doing nothing but simply completing the fraud which is the essence of every forgery either of making or altering, and implies a representation that it is the act of another or done by the express or implied authority of another.

To adopt such a refinement as suggested and is required in order to impute to the act in question the nature of agency, in order that the rules relative to the ratification of an act of supposed agency might apply and thus escape the consequences of holding this to be a forgery, would be to go beyond any case I have seen or principle of any case that exists, and do much to break down the useful rigour of the law maintained so long for the protection of business men.

No doubt Roy was afraid to disturb appellant again lest doing so would lead to inconvenient inquiries or a possible meeting of the agent and Hébert.

Let us now see exactly what the appellant did thereafter and try to assign to it only its true legal weight, in shewing the question of his liability.

The appellant had under consideration the prosecution of Roy for the fraud alleged in relation to the representations as to the warehouse receipts and desired a copy of the note.

He went to the bank and got a copy there.

On this occasion the accountant of the bank tells that the appellant, even after he had, as the account-

ant infers, seen the alteration, used expressions indicating his intention to pay the note.

No court, I should hope, would hold him liable upon that evidence alone even if it stood quite unimpeached, but here it is absolutely contradicted, and as it stands does not seem at all the probable result of a man who appreciated the discovery he had made and understandingly intended to give that effect to the words imputed to him that is now claimed ought to be given. Acquiescence and ratification must be founded on a full knowledge of the facts.

This was on the 4th April or thereabout.

The same witness relates that ten days later, as he and appellant returned from court where Roy had been up for examination on the charge of false pretences laid by the appellant, he asked him (the accountant) if he would be good enough to ask Mr. Dorais (meaning the then agent of the bank) if he would wait until the first of June for payment. He alleges appellant referred to some life policies he had as falling in then.

There was no assent or promise surely in this interrogative conditional remark. The utmost that can be said is he may have had by that time a recognition of the facts. This witness says he reported this query and more as to the policies, and explained to Mr. Dorais he had better see appellant for himself as the time asked would not be long to wait.

Dorais, the agent, pursuant to this went next day and saw appellant at his shop, and as what he relates is the strongest thing which appears to be relied upon as indicative of an assent by appellant, after he had seen or known of the alteration, I copy here, from this agent's evidence, its material parts:

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Le soir même, ou le lendemain je suis allé voir monsieur Hébert dans son magasin, dans la ville de St. Jean, et là monsieur Hébert m'a dit qu'il avait une police d'assurance qui devanait due dans le mois de juin. Il m'a dit: "Si la banque voulait m'attendre jusqu'a ce temps-là, cela m'éviterait les dépenses d'une hypothèque ainsi que les dépenses d'une quittance." Il m'a alors dit que si la banque voulait lui donner une chance et l'attendre jusqu'alors il nous paierait; là-dessus je ne lui ai pas donné de réponse affirmative.

Q. Avez-vous eu d'autres conversations avec le défendeur Hébert au sujet de ce billet-là, après cette date-là, ainsi qu'au cours des procès que M. Hébert a eu avec M. Roy, alors qu'il a fait arrêter ce dernier.

R. Non, mais j'ai vu M. Hébert plusieurs fois au bureau avant l'arrestation de M. Roy. A partir du mois de janvier ou du mois de février, j'ai eu plusieurs visites de la part de M. Hébert. Il a même été question dans le temps d'acheter les garanties que nous avions. M. Hébert m'a dit en differentes circonstances "quand la banque voudra être payée elle sera payée."

All these promises preceding the arrest of Roy of course go for nothing, as no one pretends now, except possibly Roy, that Hébert had the slightest knowledge of the alteration before April.

The respondents are thus reduced to depend on a proposal made subject to a condition and never accepted or assented to.

I am at a loss to know how these expressions can be twisted into any assent such as the Act requires or even if ratification was permissible to render a void instrument valid.

Suppose such a proposition had been made to Roy by appellant after the agent had required an alteration and suppose Roy had before altering reported it to him as a condition of this appellant's consent, could the agent take from Roy and hold a bill altered in his presence by virtue of no greater authority than implied in such a question without first yielding an acceptance of these conditional terms? Surely no one could venture to claim so. Yet this is that in substance.

Calvert v. *Baker*(1) is a case of a defendant whose acceptance had been so altered as to place of payment from being at his house to some place else. His solicitor wrote for him after it was due and he fully realized the change and ended

he has been prepared for payment and the party may have his money by calling at Bulbrook.

It was held this was not such an acknowledgment as would support either the bill or a claim for account stated, but was a mere conditional proposal. That case illustrates what I mean as to a conditional offer.

The case of *Perring* v. *Hone*(2), in 1826, is valuable here by reason of its having arisen out of a note given for a partnership liability and which was intended to have been joint and several but was written only as joint when defendant signed, and altered to conform to words used in one of which it was part renewal, and which was joint and several. The defendant on its falling due was asked *by letter to pay his joint and several note.*

He replied that the communication should have his earliest attention.

The court held that the defendant was not liable. Best C.J., in his judgment, remarks,

giving attention to a matter is a very different thing from giving assent.

There was no question of forgery for all was done apparently in good faith, in short a case where ratification could legally have been given.

I might well rest here, but the case suggests the desirability of a full examination of the law respecting "assent," which with great respect I submit has been quite misapprehended.

(1) 4 M. & W. 417. (2) 4 Bing. 28.

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The court below so far as appears relied solely on an American text book. Daniel shews that English and American cases differ. Certainly American cases exist widely different from the results this court has reached heretofore on the subject of ratifying forged bills of exchange.

Moreover, our law resting on English and Canadian authorities has been codified in language appropriate thereto, which as a rule is not identical with such codification as arrived at in some of the United States. We must be guided by ours, now known as "The Bills of Exchange Act," R.S.C. 1906, ch. 119, of which sections 49 and 145 are identical with sections 24 and 63 of the former Act under which this case falls. For convenience I will refer to the sections as they now stand.

The first, and for this case material, part of section 145 is as follows:

> 145. Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is voided, except as against a party who has himself made, authorized, or assented to the alteration and subsequent indorsers.

It is upon getting us to give the words "assented to" therein such an extensive meaning as they have not yet been given in England or Canada that the hope of respondent lies.

Some formidable difficulties stand in the way. In the first place for the reasons already stated there was no assent and none in the way at all events of consent which is to be implied in what I will for the present and as a convenience call the primary meaning of assent which the law required or had in view.

In the next place, if the word "assent" is to be given a wider and I will call secondary meaning such as

involved in ratification, then this was clearly a forgery and incapable of ratification.

I will deal with the primary meaning first and later take up the secondary.

This quotation from section 145 is but a declaration of the law as it had existed for at least a hundred years prior to the "Bills of Exchange Act."

The case of *Master* v. *Miller*(1), put beyond all doubt that a material alteration of a bill of exchange after acceptance rendered it void.

This rule extended to or had been extended long before this legislation to all written instruments. It was not confined to an alteration made before issue of the bill or the coming into operation of the contract or instrument.

The case of *Davidson* v. *Cooper*(2), where no explanation was offered, leaves us to infer the like results if alteration take place after the due date or right of action had accrued.

It was not necessary that it should alter the contract.

Each of these propositions is, I submit, supported by the decision in *Suffell* v. *Bank of England*(3), 1882, in the Court of Appeal, which was a case in regard to the erasure of a number on a Bank of England note.

The statement of Chief Justice Dallas in the case of *Sanderson* v. *Symonds*(4), that

> the original rule was not intended so much to guard against fraud as to insure the identity of the instrument and prevent

(1) 4 T.R. 320; 1 Sm. L.C. (11 ed.) 767.
(2) 11 M. & W. 778.
(3) 9 Q.B.D. 555.
(4) 1 Brod. & B. 426.

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the substitution of another without the privity of the party concerned,

is quoted with approval in that case by Cotton L.J.

Unless we can infer, for which we have no warrant, that a radical change of the law was intended by the Act, such a decision as *Suffell* v. *Bank of England*(1) by the Court of Appeal, about four months before the passage of the "Bills of Exchange Act, 1882," from which ours is taken, sheds a flood of light on the meaning to be attached to the words "altered" and "alteration" in section 84 of that Act, which is identical with section 145 of our Act as above quoted.

Can there be any question but that the meaning of these words, set in the context as they are, was intended to be the law that had thus recently been declared?

Then we find in the several opinions of the eminent judges who agreed in that decision no fault found with the rule there quoted from *Pigot's Case*(2), and which was in fact the modern root of the law and, as said by Jessel M.R., in his judgment, never had been doubted.

The quotation thus both explicitly and tacitly affirmed is as follows:

> That when any deed is altered in a point material by the plaintiff himself or by any stranger *without the privity of the obligee*, be it by interlineation, addition, raising or by drawing of a pen through a line or through the midst of any material word, the deed thereby becomes void.

We find moreover in the plea used, to set up this defence of alteration, that the allegation in the approved forms was invariably that it was so altered "without the consent of the defendant."

(1) 9 Q.B.D. 555. (2) 11 Rep. 27*a*.

We find text-writers such as Mr. Leake treat of it under the head of discharge, and we find the "Bills of Exchange Act, 1882," classify it under the head of discharge and our own Act treat of it under the head of discharge of the bill.

In face of all that, must we not say this note was void and appellant as a maker of it discharged at least from the 11th of September, 1903, until 4th April, 1904.

And how could he then become bound again by something then said or done unless it came up to the full meaning of a ratification?

Then in this application of what I have called a secondary meaning or that of ratification if, as I will for the present assume, such a thing is within the intended scope of the words "assented to" in this section, the respondent is face to face with the rule of law that forgery cannot be ratified.

The case of the *Merchants Bank* v. *Lucas* (1) binds this court. There the defendant's firm name had been forged by a brother of a member of the firm who recognized it as a forgery and at last promised to send next day a cheque for the amount.

The Court of Appeal for Ontario held that the defendants there were not liable, that a forgery could not be ratified, and that there was not enough shewn to create an estoppel, and thereby the defendants were discharged and this court upheld that.

The case here is as against the appellant infinitely weaker than that case was against the defendants unless we distinguish forgery by alteration as different in effect in this regard from a forging of the sig-

(1) 18 Can. S.C.R. 704.

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nature. Is there in principle room for such a distinction? I cannot see how, if due regard be had to the essential nature of the things dealt with. Why discriminate so between things, so essentially requiring the same treatment, in laying down rules for the guidance of men?

At common law forgery was defined to be the fraudulent making or alteration of a writing to the prejudice of another man's right.

This remains good law though supplemented by statute and is applicable to the making or alteration of bills falling respectively within sections 49 and 145 above referred to.

Moreover, we have to bear in mind that, when the English "Bills of Exchange Act, 1882," from which ours is taken was passed, the case of *Brook* v. *Hook* (1), in 1871, had declared that forgery could not be ratified.

This court in like manner had, immediately preceding our "Bills of Exchange Act, 1890," decided the case of the *Merchants Bank* v. *Lucas* (2).

Now let us consider both sections together and see if there is any room for distinction in this regard. Each of these sections respectively declares the forgery or alteration void.

The language is just as strong in law in the one case as the other. The subject about which it is used being different makes all the difference there is.

In both cases there are exceptions to the absolute operation of the voiding words and these exceptions when examined in detail and viewed in light of history

(1) 6 Ex. D. 89. (2) 18 Can. S.C.R. 704;

of the law on the subject have the same general purposes in view.

In section 49 the exception turns upon the word "precluded" which Chalmers in his comment on it tells us was substituted in the passing through committee of the English Act, from which ours is taken, for the word "estopped" which had not in Scotch as in English law a technical meaning.

Have we not thus a key to the secondary meaning to be put upon the words "assented to" in the section 145?

There are also provisos following the main part of each section. These seem to have for a common purpose the protection of the innocent holder and to rest upon what is essentially at bottom but a recognition of that which is akin to the principle of estoppel and in truth, in many cases, but that principle itself and a statutory declaration defining certain limits of application thereof which mercantile experience had developed as found necessary in the business world.

It is to be observed that there is not in regard to alteration an express provision in section 145 like unto that which there is in section 49 in regard to a forged signature, for preserving rights springing from "ratification of an unauthorized signature *not amounting to a forgery.*" Why is this so? Is there no substitute for it?

It seems to me that the words "assented to" are apt words to expressly cover not only the use or meaning of the words "consented to" which imply a privity to the act itself, but also the cases of ratification of an alteration made by an agent or one professing to act as an agent, in any innocent way. I say in any inno-

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cent way, because we find in the section relative to a cognate subject this expressed, and we cannot impute to the legislature an intention to carry into such words as we are interpreting what was regarded up to that moment as utterly repugnant to the policy of the law.

Giving the words "assented to" this application we harmonize the otherwise apparently discrepant purposes of the two sections when dealing with that which in either case is void and is so declared.

There can be no more reason for rehabilitating the one void act than the other. Nor can there be any reason for making that rehabilitation more extensive or comprehensive in the one case than in the other.

The principle of acquiescence relied on below and running through many cases has never been effective of itself when attempted to be applied to validating a forgery. What has been and, short of a new agreement, has alone been made effective in such cases, is where the acts or words, or either, of the party having a right to repudiate the forgery, have led another party to rely on such acts or words and act on the faith thereof.

Unless such estoppel could be shewn there could be, before the "Bills of Exchange Act," no dependence put upon ratification of a forgery and certainly it never was intended thereby to imply differently by using the words "assented to" therein.

The fraudulent purpose which is the essence of forgery is here only too apparent.

It has long been laid down that there cannot be in law the ratification of a forgery. The reasons assigned therefor have varied. The existence of the rule has even been questioned.

It has been determined in this court affirmatively. To apply that affirmation to one form of forgery and deny it to another would seem like making a travesty of legal principles.

In any form this case presents or in which it can be presented to escape this rule, we must either ignore the forgery, self-confessed as it stands, or find that an alleged promise not relied upon, not accepted, nor shewn to have been acted upon, is an estoppel that bars the right to appeal to the rule.

I would for a clear statement of the rule and reasons of or for the same refer to Daniel on Negotiable Securities (5 ed.), sec. 1352(*b*), which follows a review of English and American cases.

I think the appeal should be allowed and the judgments in the courts below reversed with costs in all and here to the appellant.

MACLENNAN J.—I think this appeal should be allowed. The first question is whether the addition made to the note was a forgery.

I think it was. The addition made was material. Originally the note contained no stipulation for the payment of interest, and was payable on demand. The alteration was the addition of the words *"avec intérêt à sept par cent. par an."*

The relations of the parties were not such as to authorize Roy to make the alteration without express authority. They were not partners. The appellant was merely an accommodation maker, for which it was agreed he should share the profit or loss on the sale of certain goods of Roy. Roy did not pretend to have authority to make the alteration. He pretended to go and get authority, and then pretended he had obtained it, and I agree with the learned judges below

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that it was not true that he had, as he pretended, obtained authority.

The banker discounted the note, and nothing further happened until the beginning of April, more than six months afterwards, when the appellant went to the bank to obtain a copy of the note. During all that time the note was, in my opinion, an undoubted forgery, and, on the authority of *The Merchants Bank* v. *Lucas*(1), affirmed in this court(2), incapable of ratification.

But it is argued that section 145 of the "Bills of Exchange Act, 1906," is applicable, and that certain alleged promises of the appellant, after he became aware of the alteration, have made him liable.

That section, so far as applicable, is as follows:

> Where a bill or acceptance is materially altered, without the assent of all parties liable on the bill, the bill is voided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.

In what sense is this word *alteration* here used? The word itself is ambiguous. It may mean the doing of the act or it may mean the act done. The statute speaks of an assent to an alteration. Does that mean assent to the making of the alteration, or does it mean an assent to it after it is made? A bill to which three or more persons are parties is altered. One of the parties made the alteration, that is, did the act. He is not discharged, he remains liable. Another authorized it, that is, as before, authorized the doing of the act. Then comes another who has neither done the act nor authorized the doing of it, but has assented to it. Assented to what? Plainly, as before, to the doing of the act. The word *alteration* must have the

(1) 15 Ont. App. R. 573. (2) 18 Can. S.C.R. 704.

same meaning in all three cases, that is, the doing of the act, the making of the alteration.

The statute says, in effect, voided except as against a party who has himself made, who has himself authorized or who has himself assented to the making of the alteration.

The use of the perfect tense also favours the same construction. The bill which the legislature declares to be voided, is a bill materially altered without the assent of all the parties. Then it says that any party who *has assented* to that alteration is still to be bound. It is not any party who *assents,* but who *has assented.*

The statute, in effect, declares that a bill altered without assent is voided, but, if altered with assent it is binding on him who has so assented.

The appeal should be allowed with costs here and below.

DUFF J.—The construction of section 145 of the "Bills of Exchange Act" presents considerable difficulty. Read grammatically, the section would seem to enact that a material alteration of a bill has the effect of nullifying it, as against all parties except the party who made the alteration and such as, at the time of or before the making of it, had authorized or assented to it. But I do not think it necessary for the purpose of this appeal to decide whether that is or is not the true effect of the enactment. Assuming that, under it, an assent may in some circumstances take effect, though given after the alteration is a completed act, it by no means follows that such an assent would give validity to an alteration amounting to a pure forgery. The legislature appears (section 49) to have

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adopted the view of the majority of the Court of Exchequer in *Brook* v. *Hook*(1), that a forgery consisting in the false making of a bill is incapable of ratification —a view acted upon by this court in *Lucas* v. *The Merchants Bank*(2). Having regard to the legislature's manifestation (in the section last mentioned), of this view of the policy of the law, it would, I think, involve an unwarranted expansion of the strict grammatical sense of section 145 to hold that a simple *ex post facto* assent can by the force of that section give legal effect to a fraudulent alteration amounting to forgery and, apart from the enactment in that section, incapable of ratification.

With great respect for the opinions of those who take a contrary view, I am unable to escape the conclusion that the alteration in question here was simple forgery and (within the principle of the decisions referred to), legally incapable of adoption by the appellant as his act. Neither in making the alteration nor in negotiating the promissory note did Roy intend or profess to act on behalf of the appellant. On this point the whole of the evidence is in a very narrow compass, and it shews plainly that, in negotiating the notes, Roy presented himself to the respondent bank as a borrower on the security of the appellant's indorsement—representing, at the same time, that the appellant held certain warehouse receipts as security against his liability as accommodation indorser. There was, at the time, no suggestion that Roy and the appellant stood to one another in the relation of partners or in any other relation implying that in the transaction Roy bore a representative character. The agent

(1) L.R. 6 Ex. 89.

(2) 18 Can. S.C.R. 704. Cam. Cas. 275.

who acted for the bank in the business does not say that he received any such impression; nor, I think, could anything that Roy said or did—as related in the agent's testimony—convey such an impression. According to that testimony, Roy's conduct would, I think, appear in this light only, that, on his own behalf with a view to the negotiation of the promissory note for his own purposes, he had made the alteration required by the agent and that the appellant, as his accommodation indorser, had assented to it; or that he had procured the appellant himself to make it. That was a very different thing from professing that what he had done was done for the appellant and as the appellant's act, or for the joint behoof of himself and the appellant and as their joint act.

It seems equally clear, moreover, that Roy did not in fact, in making the alteration or in negotiating the instrument, intend to act for the behoof of the appellant or of the appellant and himself jointly. The appellant had, it is true, lent his indorsement on the understanding that the bank should be secured by a deposit of warehouse receipts in furtherance of an adventure which Roy had proposed, and in which he supposed himself to be engaged as the associate of Roy. But the substratum of this adventure—the merchandise which was to stand as security for the loan, and which was to be held and sold for their joint benefit—was a pure myth; and this proposal, a mere device on the part of Roy, to enable him, by the use of the appellant's indorsement, to obtain an advance from the bank for his own benefit.

Everything which Roy did—including the making of the alteration in question—from the time of his interview with the appellant, was done in further-

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ance of this fraudulent design; and not, of course, at all in furtherance of the mythical speculation in which Hébert supposed himself to be a party.

Roy's act in making the alteration in these circumstances, without Hébert's consent, and with the intent, moreover, of tendering it to the agent of the bank as made by Hébert or with his assent, bears all the characters of a forgery; and, in the view I have expressed, the subsequent sanction of it in fact by Hébert could not give it legal validity either as an assent within the meaning of the statute or as ratification apart from the statute.

Appeal allowed with costs.

Solicitors for the appellant: *Bisaillou & Brossard.*

Solicitor for the respondent: *J. S. Messier.*

MARGARET McGARVEY (PLAINTIFF) . APPELLANT; 1908

AND

WILLIAM McNALLY, ÊS QUALITÉ (DEFENDANT) . . . . . RESPONDENT.

*June 10, 11
*June 30.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Will—Powers of executors—Winding-up estate—Time limit—Legacy—Special legislation—Extension of time—3 Edw. VII. c. 136 (Que.)—Construction of statute.

The provisions of the Quebec statute, 3 Edw. VII., ch. 136, have not the effect of extending indefinitely the time limited by the will of the late Owen McGarvey for the investment of $50,000 for the appellant's benefit as directed by the will.

Judgment appealed from (Q.R. 32 S.C. 364) reversed.

APPEAL from the judgment of the Superior Court, sitting in review, at Montreal(1), which affirmed the judgment of the Superior Court, District of Montreal (Fortin J.), dismissing the plaintiff's action with costs.

The case is stated as follows in the judgment of Mr. Justice Mathieu in his dissenting judgment delivered on the appeal to the Court of Review.

"Mathieu J.—The plaintiff inscribed in review, from a judgment of the Superior Court (Fortin J.), rendered at Montreal 24th October, 1905, maintaining the pleas of the defendant, William McNally *ês qualité,* and dismissing her action, with costs.

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) Q.R. 32 S.C. 364.

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"The plaintiff is the daughter of the late Owen McGarvey and Margaret Cooper.

"On the 23rd of May, 1894, Owen McGarvey made his will, in authentic form, before Labadie, N.P.

"The will contains, among others, the following provision:

'I give and bequeath after the death of my said wife, to my said daughter, Margaret McGarvey, during her lifetime, the income or revenue of the capital sum of fifty thousand dollars, current money of Canada, which capital shall be invested with first-class security by my executors for the best advantage of my said daughter; and at the death of my said daughter, the said capital I give and bequeath to her lawful children and descendants, to be divided amongst them, share and share alike by families, *par souche,* according to law, and to be then their own and absolute property forever.'

"The will also contains the following order: 'I wish and direct that my estate be settled and wound up within one year from the day of the death of my said wife.'

"The testator and his wife were common as to property.

"Owen McGarvey died on the 7th July, 1897.

"On the 9th day of July, 1898, his widow, Margaret Cooper, made her last will, in notarial form, before Cox, N.P.

"She appointed as executors the defendants, William McNally, her son-in-law, and Joseph Cooper, of Lindsay, Ontario, her brother, who had been appointed executors of the estate of her husband, in the place of the executors mentioned in his will, who had resigned.

"As regards the plaintiff, the will of Margaret Cooper contains the following disposition:

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'Inasmuch as, by his last will and testament, executed before J. E. O. Labadie and colleague, notaries, on the twenty-third of May, eighteen hundred and ninety-four, my deceased husband gave and bequeathed, after my death, to my daughter, Margaret McGarvey, during her lifetime, the income or revenue of the capital sum of fifty thousand dollars, should it appear to my executors, either at my death or at the time fixed for the winding up of his estate, that his estate would not be sufficient to pay in full the various legacies bequeathed by him under his said will, and that, in consequence, my said daughter, in common with the other legatees, would be obliged to suffer a proportionate diminution of her legacy, I direct my said executors to pay, out of my estate, to my said daughter, Margaret McGarvey, such sum of money as my said executors may deem sufficient to make up the deficiency in the bequest to her made by my husband's will, should there be any, so that my said daughter, Margaret McGarvey, shall, with the sum of money to be set aside for her advantage, by the executors of his will, with, in addition, the sum of money to be paid to her by my executors, in the event of there being any deficiency, as above mentioned, be assured of obtaining the revenue or interest of the sum of fifty thousand dollars.'

'In the event of there being any diminution in the bequest to my said daughter, under my husband's will, and my executors paying to her such sum as may, in their opinion, be necessary to cover such deficiency, such sum as shall be paid to my said daughter, Margaret McGarvey, by my executors, shall be her own and absolute property, and shall be used, enjoyed and disposed of as she may think proper.'

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"Margaret Cooper died on the 31st October, 1902, and, under the provision hereinabove cited in her husband's will, the estate of the latter was to be wound up on the 31st October, 1903.

"The wife of defendant McNally, Annie McGarvey, is the residuary legatee, under the will of her father, and, also, residuary legatee, together with the plaintiff, her elder sister, under her mother's will.

"On the 25th April, 1903, a bill was passed by the Legislature of Quebec (3 Edw. VII. ch. 136), 'to interpret the will of the late Owen McGarvey, to extend the powers of the executors, provide for the payment of legacies and make provision for the administration and winding up of the estate.'

"The only dispositions of the said statute of 1903, which might have any bearing on this cause are the following:

'1.—The said executors or their successors in office duly appointed are hereby declared seized and possessed of all the property, movable and immovable, of the estate and succession of the late Owen McGarvey, until the complete execution and fulfilment of the said will is accomplished, or until the same is otherwise disposed of under the provisions of this Act, and are declared to be vested with and to have the fullest and most unrestricted power in respect of such property and estate for the following purposes, to wit:

'(*a*) To sell all or any portion thereof, by private sale or otherwise upon such terms and for such prices as they see fit without the necessity of judicial authorization, but with the consent or the assistance of the tutor to the minors or of the curator to any substitution under the said will; to join with others in all deeds of partition or otherwise concerning property held

jointly or forming part of any community; to grant good and effectual title to all or any of the same; to lease, mortgage, hypothecate or in any other way dispose of or alienate the same or any part thereof; to make any and all conveyances, transfers or assignments and all contracts and agreements of and concerning the same which they may see fit; to grant all receipts and discharges necessary in the premises and all delays for payment or otherwise which in their discretion they may deem necessary or advisable; to borrow upon the security of such property or any part thereof all sums they may deem necessary in the interest of the estate; to invest all moneys now in their hands or hereafter realized and collected and the proceeds of all sales in such manner as they may deem advisable, and until such time as the same are paid or handed over to the legatees entitled thereto under the said will or otherwise disposed of according to the provisions of this Act.'

'(*b*) To pay over, out of the cash assets of the estate and the amount realized from any sales of the property of the succession to the legatees named in the said will, the respective amounts of their legacies on the basis hereinafter provided at such time or times and in such amount or amounts as the executors shall have on hand; provided, however, that, at the date of distribution of any moneys in payment of legacies, each legatee shall receive a *"pro ratâ"* amount of his or her legacy.'

'(*c*) To capitalize the annuity of five hundred dollars per annum payable to Miss Jane Cooper and the annuity of one thousand dollars per annum payable to Dame Theresa Heney, widow of the testator's son, the late John McGarvey, at five per centum inter-

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est, to wit: ten thousand dollars and twenty thousand dollars respectively; the revenue upon which capitalized sums shall represent the annual value to each of the said legatees of her legacy respectively, whether the amount derived from the same is equal to the amounts mentioned in the will or not. The legacy of the annuity of five hundred dollars per annum shall be due and payable to Miss Jane Cooper on and after the 31st October, 1903.'

'3.—All the legacies of whatsoever kind, other than that of the testator's share in the immovable lot No. 910 of St. Antoine Ward of the City of Montreal, shall be subject to a uniform reduction in proportion to their respective amounts in the event of the estate not realizing sufficient to pay them in full.'

'This section shall not apply to the legacy to Dame Theresa Heney and Margaret McGarvey before the 31st of October, 1903,'

'4.—The said executors are authorized to pay and hand over to the residuary legatee, Dame Annie McGarvey, wife of the said William McNally, and she is authorized to receive, and hold upon such security as the Superior Court or any judge thereof shall, upon application of the executors or the said residuary legatee, determine, the capital of all annuities and amounts which may form part of the residue of said estate until her death, or her handing over thereof according to law and the provisions of the said will.'

"As we have just seen, the Act, 3 Edw. VII. ch. 136, sec. 3, states no reduction will be made in the plaintiff's legacy, before October 31st, 1903. We must remember that the 31st October, 1903, is the date fixed by the will of Owen McGarvey, for the winding-up of his estate.

"The defendants took possession of the estate of Owen McGarvey, as executors, and Joseph Cooper, being a resident of Lindsay, Ontario, had very little, if anything, to do with the administration of the estate, and defendant McNally, on the other hand, left the whole administration in the hands of John W. Grier, of Montreal.

"It appears, from the evidence, that the defendants did not change, in any manner, the investments made by the late Owen McGarvey, in his lifetime, and did not invest or set apart $50,000, for the plaintiff; and the plaintiff complains that she received considerably less than the legal interest on the sum of $50,000, even during the year immediately following the decease of Margaret Cooper, during which year, according to the statute of 1903, there was to be no reduction.

"The plaintiff caused her attorneys to write, on the 18th of October, 1904, a letter, whereby she asked that the legacy upon which she depends be invested, as provided for in the will, and, in the second place, that she should receive a regular income, at stated intervals.

"The defendant McNally having refused to meet her wishes, she took the present action. The plaintiff alleges in her declaration, that, in and by section 3 of the said Act of 1903, it was ordained and decreed that all legacies, with one exception, should be subject to a uniform reduction, in the event of the estate not realizing sufficient to pay them in full, said reduction, however, not being applicable to the plaintiff, in any event, before October 31st, 1903; that the plaintiff has not been notified, by the defendants, of any reduction being necessary, as regards her said legacy, and is entitled to have the full benefit thereof; that the

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said defendants have always failed and neglected to invest the said capital sum of $50,000 with first-class security, as bound and obliged to do by the said last will and testament of the said Owen McGarvey, although duly requested so to do, particularly, by letter bearing date October 18th, 1904; that the said defendants, *ès qualité* have failed and neglected to pay and satisfy to the said plaintiff the interest on the said sum of $50,000 at the legal rate of 5 per cent. per annum, and the said plaintiff has only received, on account of the said annuity, for the years ending October 31st, 1904, the sum of $3,725, leaving a balance due to her, for the said years, of $1,275; that the said plaintiff has just cause to fear that, unless the said sum of $50,000 is invested in first-class security, as provided for in and by the said testament and Act, she will lose her claim and sustain damage. And, by her conclusions, the plaintiff prays:

'(*a*) That the said defendants, *ès qualité,* be adjudged and condemned jointly and severally, to pay and satisfy to her, out of the assets of the said estate, the sum of $1,275, with interest, on the sum of $350, from 31st October, 1903, and, on $925, from 31st October, 1904.'

'(*b*) That, in the event of the said defendants, *ès qualité,* being unable to pay and satisfy to the said plaintiff the said sum of $1,275, with interest, as aforesaid, out of the assets of the said estate, the said defendants be personally condemned, jointly and severally, to the payment of the said sum, or such part thereof, as may not be paid by the said estate.'

'(*c*) That the said defendants, *ès qualité,* be ordered and condemned, jointly and severally, to invest the said sum of $50,000, with first-class security,

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for the benefit of the said plaintiff, within such delay as the court may fix, and to pay her interest on the said sum, at the legal rate of 5 per cent. per annum, on the 31st of October of each year, or at such date or dates as the court may decide.'

'(*d*) That, in the event of the said defendants declaring themselves unable to set aside the whole of the said sum of $50,000 for the purpose and in the manner aforesaid, they be, jointly and severally, adjudged and condemned to render to the said plaintiff a true and faithful account of the estates of the said late Owen McGarvey and Dame Margaret Cooper, with receipts and vouchers (*pièces justificatives*), indicating why the whole of the said sum of $50,000 cannot be set aside, as aforesaid, the whole with costs.'

"The defendant James Cooper has not pleaded to the action, but the defendant McNally pleads, as executor of the estate of the late Dame Margaret Cooper, by demurrer, that plaintiff's action is premature, inasmuch as she is only entitled to her bequest, under the will of the Dame Margaret Cooper, in the event of her having suffered a diminution of her legacy under the will of the late Owen McGarvey and no such diminution is alleged.

"By a further plea, he admits, in substance, the making of the wills, their contents, the death of the testators, defendants' appointments, and the passing of the Act, 3 Edw. VII. ch. 136, and denies that the defendants have failed to invest the capital sum of $50,000, and alleges that the plaintiff has always received the full income and revenue of her legacy, and he further says that the late Dame Margaret Cooper, and Owen McGarvey, were in community as to property, the assets of which community consisted almost

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wholly of real estate held and administered in undivided ownership by the executors of their respective estates; that the sale or division of the properties, if forced, would entail great loss, and the defendant would be unable to carry out the provisions of the will of the said late Margaret Cooper, and that defendant, in the exercise of his discretion, deems it advisable to dispose of the said property only as the demand for the same may arise and at prices nearly representing their value, and that, until the final sale and division of the said properties, it is impossible to say what sum, if any, may be due to the plaintiff, under Dame Margaret Cooper's will.

"As executor of the will of the late Owen McGarvey, defendant McNally pleads, making substantially the same admissions and denials as in the foregoing plea, and, especially, invoking the whole of the Act, 3 Edw. VII. ch. 136, and alleges that plaintiff's legacy, together with the residue of the said two estates was invested in hypothecs upon real estate and real estate chosen by the testator himself, and that the plaintiff has always been paid the full revenue of her legacy; that the assets of the said estates consisted, for the most part, of real estate which can only be divided at a loss, and the defendant, in the exercise of his discretion, admits the advisability of selling the said real estate to the best advantage, only when a demand for the same arise, in accordance with the terms of the said will, and with the Act, 3 Edw. VII. ch. 136.

"On the twenty-fourth day of October, 1905, the Superior Court, at Montreal, Fortin J., dismissed plaintiff's action, with costs, for the following reasons:

'Considering that plaintiff has not established the allegations of her declaration, and that defendant McNally has established his pleas.'

'Considering that, neither by the will of the late Owen McGarvey, nor by the statute, 3 Edw. VII. ch. 136, are the executors bound to sell and dispose of the assets of the testator's succession, within any specified delay, or to change the nature of the investments made by said deceased.'

'Considering that plaintiff has received, from the said succession the revenue of the said sum of $50,000.'

'Considering that plaintiff, as legatee by particular title, cannot compel defendants to render, at the present time, an account of their administration of said succession.'

'Doth maintain defendant McNally's pleas, and dismiss plaintiff's action, with costs.'

"McNally pretends that the part of the plaintiff's action, and her last conclusion, relating to the estate of the late Margaret Cooper is premature, inasmuch as she is only entitled to her bequest under the will of the said Dame Margaret Cooper, in the event of her having suffered a diminution of her legacy under the will of the late Owen McGarvey, and no such diminution is alleged.

"The plaintiff alleges, and it is shewn, in the record, that the defendants, as executors of the will of the late Owen McGarvey, are not now in a position to invest the whole of the sum of $50,000 for the plaintiff, as directed by the will of the late Owen McGarvey, and, consequently, her demand of an account seems pertinent.

"Defendant McNally denies that he has failed to invest the said sum of $50,000, and alleges that the

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plaintiff has received the full income or revenue of her legacy.

"I am not prepared to say that the defendants could not, in executing the will of Owen McGarvey, set apart some property of his estate, as an investment of the whole or of part of the said $50,000, because, by article 981 C.C., investments can be made in real estate; but I say that, to execute the will of the late Owen McGarvey, the defendants must set apart, for the plaintiff, some property of the estate, or make an investment otherwise according to law.

"The defendant maintains that the plaintiff has received the full income or revenue of her legacy.

"The defendants have not proved that; and they are not in a position to prove what was the income or revenue of the investment of $50,000, because they have made no investment. And, having made no investment, I believe they are bound to pay to the plaintiff the legal interest on the said sum of $50,000, as compensation for the revenues of the investment which they were bound to make and which they did not make.

"The defendant says that this is not the proper time to dispose of the real property.

"This might be said in the interest of the defendant's wife, who is the universal legatee of Owen McGarvey, but the defendants must execute the will.

"I have already cited a clause of the will of Owen McGarvey expressing a desire and direction that his estate be closed, within one year from the death of his wife. The same direction is expressly given later: 'As to the balance or remainder of my estate, I give and bequeath the enjoyment and usufruct thereof to my daughter, Annie McGarvey, wife of William Mc-

Nally, during her lifetime, from the close and final settlement of my estate, which is to be within one year after the death of my wife.'

"'Winding-up' means the realization of the assets and investments, as in the case of corporations (R.S.C. ch. 129).

"'Wind up' is defined in the standard dictionary, 'to bring into a conclusion or a settlement.' Surely this is not done by leaving everything *in statu quo.*

"The executors' obligation to invest is further expressed by clause 11 of the will:

'I desire that, in so far as regards the investment of any money, which they should deem necessary to make, my said executors shall not be restricted to investments in which, by law, executors are bound to invest, and that they shall not be responsible for any loss which may happen in consequence.'

"Such clause is hardly necessary, if defendants can leave everything in abeyance.

"McNally contends that the clear and imperative terms of the wills of both Mr. and Mrs. McGarvey were rendered inexistent by the bill which he obtained from the Legislative Assembly, in Quebec, and for which he saddled the estate with the sum of $1,918.41.

"The parties have not submitted to us the question whether the Legislature of Quebec, had the right to pass this extraordinary bill. It seems hard to believe that our legislators in Quebec have any mandate from the electors to change wills. We might perhaps properly say that they are sent there to administer the public affairs of the province.

"The object of the bill, as appears by the title and preamble, is threefold:

"To extend the powers of the executors;

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"To provide for the payment of legacies;

"To make provision for the administration and 'winding-up' of the estate.

"Clause 1, and sub-section (*a*) thereof, leave no doubt as to the powers of the executors to sell the real estate; but do not, in any way, relieve them from the obligation of investing $50,000, to pay the plaintiff as prayed for in the conclusion (*c*) of her declaration.

"Sub-sections (*b*) and (*c*) of clause 1 provide that the legacies will suffer a shrinkage, their total amount being $86,729.15, as against $80,167.34, being the assessed or estimated value of the estate, which consists mainly of immovable property.

"Moreover, by clause 3, the reduction does not apply to plaintiff's legacy before October 31st, 1903.

"What would be the use of such a clause, if the legislature, as well as the testator, had not had in view the proceeds invested before the 31st of October, 1903? Thereafter, of course, any diminution in the value of the properties in which the fifty thousand dollars ($50,000) would be invested, and of the revenue derived therefrom, would fall upon the plaintiff.

"Moreover, how could the amount be completed with funds accruing from Margaret Cooper's estate, if the whole of the two estates remained intact, and no investments were made, for the purpose of paying plaintiff the income, revenue or interest thereof?

"The bill contains no provision regarding the winding-up of the estate, save clause 4, which empowers the executors to hand over to Mrs. William McNally the residue of the estate which may not have been otherwise invested for the carrying out of particular legacies, upon giving proper security.

"On the whole, I say that the executors were bound to sell enough of the real estate of Owen McGarvey to

put aside for the plaintiff a sum of $50,000, or such portion thereof as may correspond to the proportion between the assets of the estate with the amount of the particular legacies, or to set apart, for her, properties to that amount, and, in any event, to complete the said amount of $50,000, by means of a sum realized out of Margaret Cooper's estate.

"I also believe that it is in the interest of all parties concerned that this estate be wound up as soon as possible; for the administration which is made of the same is not an advantageous administration. One of the executors resides at Lindsay, Ontario, and he takes no part in the administration. The other executor, McNally, resides at Montreal, but he, as well, does not bother himself much about the estate. He knows nothing of the affairs of the estate, and, when he is asked what are the revenues, he answers that he does not know, and to ask John Hyde, an accountant, a stranger, who, of course, will ask Mr. Grier. Grier seems to administer that estate as he pleases, and he gets ten per cent. on the gross revenues, when that administration could be better attended to by responsible companies who charge only five per cent.

"In conclusion, I say that the plaintiff has good grounds of complaint, and that it is the duty of the court to come to her relief.

"I am of opinion to reverse the judgment of the Superior Court, and to dismiss the pleas of the defendant McNally, *ês qualité,* with costs, and to maintain the demand of the plaintiff, and condemn the defendants, *ês qualité,* as executors of the will of the late Owen McGarvey to pay to the said plaintiff the sum of $1,275, with interest, on the same, from 10th day of September, 1904, the date of the service of this action,

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and to order and condemn the defendants, *ês qualité,* to invest within six months from this date, the sum of $50,000 or so much as the plaintiff is entitled to have from the estate of the late Owen McGarvey, with first-class securities, for the benefit of the said plaintiff, and to condemn the defendants to pay the costs of the plaintiff's demand in the Superior Court and the costs in this court, reserving to adjudicate hereafter on the other portions of the plaintiff's demands, and reserving also to the said plaintiff all other recourse which she may have in the premises."

Surveyer, for the appellant.

Atwater K.C. and *Duclos K.C.*, for the respondent.

GIROUARD J.—We are again invited to give effect to a statute of the Legislature of Quebec undertaking to substitute a will of its own for the will of the testator, Owen McGarvey, in his lifetime, furniture manufacturer, of Montreal, and this in spite of the strongest enactment made by the Imperial Parliament as early as 1774, in 14 Geo. III., ch. 83, generally known as "The Quebec Act," which is the first Imperial charter of Canada outside the capitulation and the Treaty of Paris.

Section 10 of that Act provides that it shall be lawful for any person freely to "devise or bequeath * * by last will and testament" any property he may have or leave at his death. This enactment has been reproduced in the Civil Code, forms the general law of the province and has always been looked upon as one of the dearest rights of every British subject. Mr. Owen McGarvey has made a will under these laws; but, after his death, the provincial legislature was

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requested by his heirs to make another will or at least materially change the same. Mr. Justice Mathieu, who dissented in the Court of Review, observes that

it seems hard to believe that our legislators in Quebec have any mandate from the electors to change wills.

But, as long as these extraordinary bills are not disallowed by the Government of Canada, which is the constitutional guardian of the liberties of the people of the Dominion, we must accept them as binding laws. The Imperial Parliament always could and still can change these laws, but, with regard to property and civil rights, a provincial legislature is as omnipotent as the Imperial Parliament, subject to the veto power.

I do not intend to review all the facts of the case. They are fully set forth in Mr. Justice Mathieu's dissenting judgment in which I concur and I merely refer to it to ascertain what they are.

We are unanimously of opinion that the judgments of the two courts below are wrong and must be reversed. It is contended by the respondent that the time for winding up the estate has been extended indefinitely, just as the executors deem expedient. This court does not entertain that view; and, although I have some doubt upon the point, it is not strong enough to induce me to dissent from the majority, and, as usual in cases like this, as I observed in the case of *Prévost* v. *Lamarche*(1), that doubt should be given in favour of the will of the testator.

With regard to the second point involved in the appeal, viz., that the sum of $50,000 be invested for the benefit of the appellant, no doubt is possible. The clause of the will is clear and is not in any way

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

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changed or affected by the Quebec statute. Here it is, word for word:

> I give and bequeath, after the death of my said wife, to my said daughter, Margaret McGarvey, during her lifetime, the income or revenue of the capital sum of fifty thousand dollars, current money of Canada, which capital shall be invested with first-class security by my executors for the best advantage of my said daughter, and at the death of my said daughter, the said capital I give and bequeath to her lawful children and descendants, to be divided amongst them, share and share alike, by families, "*par souche*" according to law, and to be then their own and absolute property for ever.

We are, therefore, of opinion that the appellant is entitled to the main conclusions of her action. If the estate of the late Mr. McGarvey be not sufficient to bear the investment of the whole amount, then the deficit should be met by the estate of his late wife.

The appeal should be allowed with costs and, adopting the formal judgment suggested by Mr. Justice Mathieu, the demand of the appellant should be maintained with costs in all courts and the defendants, *ês qualité,* as executors of the will of the late Owen McGarvey, as amended by the Quebec statute, 3 Edw. VII., ch. 136, are condemned to pay to the said appellant (plaintiff in the court below), the sum of $1,275 with interest on the same from the 10th day of September, 1904, the date of the service of this action , and they are further ordered and condemned *ês qualité* to invest, within six months from this date, the sum of $50,000, or so much as the plaintiff is entitled to have from the estate of the said late Owen McGarvey, with first-class security for the benefit of said plaintiff, reserving to adjudicate hereafter on any other portion of the plaintiff's demand and reserving also to the said plaintiff all other recourses she may have in the premises.

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The motion to quash should be dismissed with costs, as the amount involved in this appeal is the investment of a sum of $50,000, which is quite sufficient to give us jurisdiction.

DAVIES J.—I am to allow this appeal.

I do not think the statute enlarges the express limitations of the will as to the time within which the estate should be wound up.

I think there should be judgment accordingly and a declaration to that effect and also that the executors should proceed without delay to administer the estate and render full accounts to the appellant (plaintiff) of their administration in the proper court.

IDINGTON J.—I think the conclusions arrived at by Mr. Justice Mathieu, who dissented in the court below are correct.

I adopt, speaking generally, his reasoning save as indicated hereunder and that questioning the right of the legislature as to amending wills. In this latter regard, I neither approve nor disapprove of what may have been done. The clear purpose of the testator was that, at least within the year next after the death of his wife, the estate would be wound up.

The legislation got facilitated this being done.

The same legislation as clearly as possible indicates that the appellant's rights should not be interfered with.

It seems idle to talk of the testator's real estate as he left it being such an investment as he contemplated when he directed as follows:

I give and bequeath, after the death of my said wife, to my said daughter, Margaret McGarvey, during her lifetime, the income or

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revenue of the capital sum of fifty thousand dollars current money of Canada, which capital shall be invested with first-class security by my executors for the best advantage of my said daughter; and, at the death of my said daughter, the said capital I give and bequeath to her lawful children and descendants, to be divided amongst them, share and share alike, by families, "*par souche*" according to law, and to be then their own and absolute property forever.

The will also contains the following order:

I wish and direct that my estate be settled and wound up within one year from the day of the death of my said wife.

I venture to say that the testator's language is so clear in respect to the duty to be discharged by the executors as regards appellant's rights in the estate that, if they delayed obeying the directions given thereby so that the appellant has suffered any loss, they must make it good.

I should suppose that five per cent. could easily have been got in good safe investments and, for that reason, assent to the conclusion of Mr. Justice Mathieu that no investment having been made the legal rate may properly be adopted as the measure of appellant's claim in the absence of such investment.

I would not desire to be bound to that holding as a rule of law under all circumstances.

Primâ facie it may well be accepted as a guide.

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

Since writing the foregoing, I have concurred in the form of judgment drawn up by Mr. Justice Girouard, the acting Chief Justice.

MACLENNAN and DUFF JJ. agreed with Mr. Justice Girouard.

The formal judgment, concurred in by all the judges, was as follows:

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The appeal is allowed with costs; the demand of the appellant is maintained with costs in all courts and the defendants, *ês qualité*, as executors of the will of the late Owen McGarvey, as amended by the Quebec statute, 3 Edw. VII., ch. 136, are condemned to pay to the said appellant (the plaintiff in the court below), the sum of $1,275 with interest on the same from the 10th of September, 1904, the date of the service of this action, and they are further ordered and condemned *ês qualité* to invest, within six months from this date, the sum of $50,000, or so much as the plaintiff is entitled to have from the estate of the said late Owen McGarvey, with first-class security, for the benefit of said plaintiff, reserving to adjudicate hereafter on any other portion of the plaintiff's demand and reserving also to the said plaintiff all other recourses she may have in the premises.

The motion to quash is dismissed with costs fixed at fifty dollars.

Motion dismissed with costs and appeal allowed with costs.

Solicitors for the appellant: *Casgrain, Mitchell & Surveyer.*

Solicitors for the respondent: *Atwater & Duclos.*

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*May 18, 19.
*Oct. 6.

UNION BANK OF HALIFAX (DEFENDANTS) ..... } APPELLANTS;

AND

THE INDIAN AND GENERAL INVESTMENT TRUST (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Pleading — Purchase for value without notice — Onus — Evidence— Affirmative and negative evidence—Weight of evidence.

The plea of purchase for value without notice must be proved in its entirety by the party offering it; it is not incumbent on the opposite party to prove notice after the purchase for value is established.

Where a conversation over the telephone was relied on as proof of notice, the evidence of the party asserting that it took place, and giving the substance of it in detail, must prevail over that of the other party who states only that he does not recollect it.

APPEAL from a decision of the Supreme Court of Nova Scotia reversing the judgment at the trial by which the plaintiffs' action was dismissed.

The question in this case is as to the validity of a specific security created by a trading company in the ordinary course of business as against the floating security created by a previous trust deed to secure bonds issued by the company. The company in question is the Acadia Pulp & Paper Mills Company, Limited, incorporated by special Act of the Legislature of the Province of Nova Scotia, being ch. 95 of the Acts of 1897, giving the company power among other things:

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

"2 (*c*). To carry on a general manufacturing business, including the manufacture of lumber, wood, pulp, paper, and all sorts of wooden goods, and in connection therewith to purchase, supply, dispose of and sell the usual commodities, goods and supplies incidental to any business undertaken by the company.

"(*d*) In connection with the foregoing, to have all the rights, powers, franchises and privileges that a private individual would possess and enjoy."

The company by trust deed dated the 1st day of May, 1897, conveyed to the respondent, therein called "the present trustees" as trustee for bondholders, its freehold lands, hereditaments, water, and other rights and premises respectively specified and referred to in schedule with the mills, buildings, fixed machinery, and other fixtures, boilers, engines, machines and plant affixed or appertaining thereto, to hold the same unto and to the use of the trustee, subject nevertheless as thereinafter provided. The trust deed also contains the following clause:

"3. The company hereby charges in favour of the present trustees its other assets whatsoever and wheresoever for the time being both present and future including its uncalled capital with the payment of all monies for the time being owing on the security of these presents and such charge shall rank as a floating charge and shall accordingly in no way hinder the company from selling, alienating, leasing, paying dividends out of profits or otherwise disposing of or dealing with such assets in the ordinary course of its business and for the purpose of carrying on the same but the company shall not be entitled to mortgage or

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charge the same in priority to or *pari passu* with the security hereby constituted."

The company carried on its business until June, 1903.

In September, 1901, the company arranged with the appellant for a loan of $40,000 security to be given under the Bank Act upon its pulp wood piled at various places. This loan to the extent of $33,753 was required to pay for pulp wood, and the balance for carrying on the company's business, *i,e.,* to convert the wood into pulp and market same.

The loan was advanced in two sums, of $16,000, October 3rd, 1901, and $24,000 November 11th, 1901. For the $16,000, security under the Bank Act was given.

The company made all payments secured by the trust deed till May, 1903. $10,000.00 of the $16,000.00 was then and is still due to appellant.

The appellant, when the balance of the $40,000 loan, *i.e.,* $24,000, was advanced November 11th, 1901, received from the company an agreement to give security on its pulp wood.

The security in accordance with this agreement was no doubt given, but it has been lost. Of this $24,000.00, the sum of $16,000.00 remains unpaid.

The bank, when the company defaulted its bonds, took possession under its securities of the pulp wood on hand. The trustee thereupon claimed to be entitled to the pulp wood under the trust deed.

Pursuant to agreement this pulp wood was manufactured and converted into money, without prejudice to the rights of either party, realizing $14,661.00, which is the fund in question in this action.

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The action was brought by the respondent hereinafter called The Trustee against the appellant, hereinafter called "The Bank," The Acadia Pulp and Paper Mills Company, Limited, hereinafter called "The Company," and Walter G. Jones, receiver and manager for the bondholders, plaintiff claiming a declaration that the fund in question is subject to the lien of the trust deed and that same is a first charge thereon and that the receiver is in duty bound to pay over the fund to plaintiff. The action was defended by the bank, which also counterclaimed for a declaration that the fund in question was subject to the lien of securities under section 74(2) of the Bank Act (53 Vict, ch. 31), given by the company to the bank, and that such securities have priority to lien or charge created by the trust deed, and that the receiver is in duty bound to pay over the fund to the bank. The action was tried before the Judge in Equity (Mr. Justice Graham) at the April sittings, 1907, at Halifax, and he subsequently filed a decision in favour of the bank upon which an order for judgment was taken out on the 10th day of July, 1907, dismissing the action of the trustee and adjudging that the fund in question is subject to first lien in favour of the bank upon securities under the Bank Act for a sum exceeding the amount of the fund, and adjudging and decreeing that the receiver and manager for the bondholders do pay over the fund, with interest, to the bank. From this decision and order thereon, the trustee appealed to the Supreme Court of Nova Scotia *in banco,* and the appeal was heard before three judges of that court, namely: the Chief Justice, Mr. Justice Meagher, and Mr. Justice Longley, in February, 1908, and subsequently the judges who heard

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the appeal pronounced their decision allowing such appeal and reversing the judgment and order appealed from and ordering payment of the fund to the trustee, and on the 14th day of March, 1908, order was taken out in accordance with this decision. From such decision and order the present appeal has been taken by the bank.

W. B. A. Ritchie K.C. for the appellant. The trust deed prevents the company imposing a general charge on its property but not the giving of a special security such as that in favour of appellants. See Lindley on Companies (6 ed.), p. 321; *In re Old Bushmills Distillery Co.*(1).

The advances from the bank were for the purpose of carrying on the business of the company which was not a violation of the terms of the trust deed. *Wheatley* v. *Silkstone and Haigh Moor Coal Co.*(2); *Government Stock Investment Co.* v. *Manila Railway Co.*(3).

The bank was a purchaser for value and the burden of proving notice of the restriction in the trust deed was on the respondents. *Robson* v. *Smith*(4). The conversation over the telephone, even if proved, was too late to amount to notice. See *English and Scottish Mercantile Investment Co.* v. *Brunton*(5).

Newcombe K.C. and *J. J. Ritchie K.C.* for the respondents. The security given to the bank is clearly within the prohibition contained in the trust deed.

The only question is whether or not the bank had

(1) [1896] 1 Ir. Ch. 301.
(2) 29 Ch. D. 715.
(3) [1895] 2 Ch. 551; [1897] A.C. 81.
(4) [1895] 2 Ch. 118.
(5) [1892] 2 Q.B. 700.

notice of this prohibitive clause, and if the onus of proving notice is on the respondents it has been satisfied. See Lindley on Companies (6 ed.), pp. 321-2. *Cox* v. *Dublin City Distillery Co.*(1).

The manager of the company gave affirmative evidence of the conversation by which notice was given to the bank manager. Such evidence must prevail over that of the manager who merely swore that he had no recollection of the conversation. *Lefeunteum* v. *Beaudoin*(2).

GIROUARD, DAVIES and MACLENNAN JJ. agreed in the opinion stated by Duff J.

IDINGTON J.—I think this appeal should be dismissed for the reasons that appear in the judgments of the Chief Justice of Nova Scotia and others in which reasons I fully concur.

I may add that I think it quite probable that at the time Mr. Jones says he read over the paragraph of the contract now in question to Mr. Thorne, the latter supposed that the remote contingency of the floating security beoming mature and enforcible before the pulp wood taken by the bank as security had been fully realized upon and the loan it secured repaid was not worth much consideration. In such case, a matter so dismissed would not likely impress his memory.

Probably that way of looking at the matter was, as things then appeared, quite reasonable.

If the security receipts had been enforced as the

(1) [1906] 1 Ir. Ch. 446. (2) 28 Can. S.C.R. 89.

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notes fell due, it may well be that the respondents never would have intervened.

It seems to me a case where of two respectable men one might have no reason to be impressed and the other, from his point of view, felt so impressed, that, unless he made the explanation he says he did, he might be in the way of becoming a candidate for the penitentiary.

It was urged upon us that the following part of a paragraph of the floating security deed, that is,

but the company shall not be entitled to mortgage or charge the same in priority to or *pari passu* with the security hereby constituted,

did not extend to such a charge as usual security receipts. I do not see why not. The mode of reasoning that would exclude it might be applied to any number of other securities of which each covered only a part of the available assets of the company, and thus render the debenture security worthless.

If it had become necessary to hold otherwise, I should have felt pressed to consider thoroughly, as I have not done, section 74 of the Bank Act on which the appellants' claim rests and the company's Act of incorporation.

I think the appeal should be dismissed with costs.

DUFF J.—The respondents are the trustees under a trust deed to secure the debentures of the Acadia Pulp Company, dated 1st May, 1907. The deed contains the following clause:

The company hereby charges in favour of the present trustees its other assets whatsoever and wheresoever for the time being both present and future, including its uncalled capital and the payment of all moneys for the time being owing on the security of these presents, and such charge shall rank as a floating charge, and shall, accordingly, in no way hinder the company from selling, alienating,

leasing, paying dividends out of profits or otherwise disposing of or dealing with such assets in ordinary course of its business and for the purposes of carrying out the same, but the company shall not be entitled to mortgage or charge the same in priority to or *pari passu* with the security hereby constituted.

The question in the action out of which the appeal arises, and the sole question in the appeal, is whether or not certain pulp wood acquired by the pulp company, after the issue of the debentures, is subject to the charge created by this clause to the exclusion of the claim of the appellant bank.

The bank's claim is based upon a security, dated 3rd October, 1901, given to it under section 74 (now section 88), of the Bank Act, which professes to charge in its favour the pulp wood in question with the re-payment of an advance of $16,000. There was a further advance in the following month, with respect to which different considerations might apply, but they need not concern us as the proceeds of the pulp wood mentioned, assuming them to be applicable in liquidation of the bank's claim, are less than $16,000, the amount of the first advance.

The grounds on which the bank bases its appeal are two:—First, it is argued that the instrument creating the security upon which its claim rests, is not one which, within the meaning of the clause I have quoted above, professes to "mortgage or charge" the subject of the security "in priority to or *in pari passu* with the security" constituted by the trust deed; and secondly, the bank sets up the defence of purchaser for value without notice.

As regards the first of these contentions, after a close consideration of Mr. Ritchie's ingenious argument, I do not think that one fails to do justice to it in saying that a sufficient answer appears to be that

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the bank's security is within the plain meaning of the words quoted, and I am quite unable to discover any adequate reason for so restricting their meaning as to exclude that security from their operation.

The point of substance arises out of the second ground. It is not disputed that before making the advance, in respect of which its security was taken, the bank had notice of the fact that the pulp company had issued debentures and had executed an instrument of some character charging its property or some of its property with the payment of the debentures. At this point, however, agreement on the facts ends and controversy begins. The general manager of the bank said he had no knowledge of what property of the company was affected by this charge. The manager of the pulp company says that, on the day on which the security was given, he had a discussion with the general manager of the bank in which he called the attention of the latter to an *addendum* to the printed form of the security he had executed, quoting section 75 of the Bank Act; and to the statement in the security itself to the effect that the goods comprised in it were free from any charge; and asked that, if in view of the existence of the debentures, and of the mortgage securing them, it was right that he should commit himself to that statement; and he says he was assured by the general manager that the bank understood the circumstances, and the course taken was quite usual. He added, that later on the same day, at the request of the general manager of the bank, he read to him over the telephone the clause referred to. The general manager denies that the first of these interviews took place; as to the second he was unable to say that the clause

referred to was not read over to him; he could only say that he did not remember it.

In this state of the evidence it is, perhaps, unfortunate that we have not any findings of the learned trial judge dealing expressly with the point whether through its general manager the bank had or had not actual notice of the material provisions of the trust deed. The language of the learned judge seems to imply that he accepts the evidence of the manager of the pulp company, but I am not entirely satisfied that it was his intention to pass upon the point. The full court, taking the view that the onus in this controversy is with the respondents, unanimously accepted that evidence and held it sufficient to determine the question of notice or no notice against the bank. In these circumstances it would, perhaps, be sufficient to say that (assuming the view of the court below on the question of onus to prevail), the credibility of neither of the witnesses referred to being seriously impugned, there is a great weight of probability in favour of the view that the witness who related in detail an occurrence which he says he recollects is not mistaken; and that, as regards the second and more important incident, there is really no ground on which a court of justice can properly refuse to accept his testimony as against a bare want of recollection on the part of the other witness; at least it may be said that there is no sufficient ground for disturbing a decision of the court of appeal based upon these considerations.

There is another ground upon which the decision of the court below may be sustained. The respondents were the holders of a floating security which created a charge on their property but, subject to that charge, giving the company the right in the course of its busi-

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ness to dispose of its property subject again, however, to a particular qualification. The qualification was that the company was not to create any mortgage or charge ranking in priority to or *in pari passû* with the debentures. Such a charge is an equitable charge. It prevails by virtue of its priority in time as against subsequent equitable charges, if the equities of the two incumbrancers are otherwise equal. *Re Castell & Brown Limited*(1). It prevails also against any subsequent incumbrancer acquiring the legal estate who does not fall within the category of purchaser for value without notice; any incumbrancer, that is to say, who does not make out, to adopt the language of Sir Francis Palmer, Company Precedents (9 ed.), part 3, page 71

(*a*), that he was not aware of the existence of the floating charge; or (*b*) that though he was aware of the charge he was not aware of the qualification.

The learned judges below, as I have mentioned, have dealt with the question of notice upon the assumption that in that controversy the onus was upon the respondents; that, I think with very great respect, is a misapprehension of the law.

The plea of purchase for value without notice is (to quote Farwell J. in *Re Nisbet & Potts Contract*(2), at page 402) a single plea to be proved by the person pleading it; it is not to be regarded as a plea of purchase for value to be met by reply of notice.

That is perfectly well established by the authority to which Mr. Justice Farwell referred, namely the decision of the Court of Appeal (James, Baggallay and Thesiger L.JJ.), in *Attorney-General* v. *Biphosphated Guano Co.*(3), at page 337; and the opinion of Farwell J. himself was expressly approved in the Court

(1) [1898] 1 Ch. 315. (2) [1905] 1 Ch. 391, at p. 402.
(3) 11 Ch. D. 327.

of Appeal(1), at page 404, *per* Collins M.R.; at page 409, *per* Romer L.J., and at page 410, *per* Cozens-Hardy L.J. I have not overlooked the expressions in the Irish Court of Appeal, in *Cox* v. *Dublin City Distillery Co.*(2); but the authorities I have mentioned do not appear to have been brought to the attention of the court, and, with great respect for the learned judges who took part in that decision, the observations there made cannot, I think, in view of these authorities, be accepted as correct statements of the law.

The onus is, then, upon the bank to shew that it acquired a legal title to the goods in question; and that the advance, which in this case constituted the consideration, was made without notice of the restriction which the trust deed placed upon the power of the pulp company to deal with its own assets. It is not necessary, I think, for the purposes of this case, to consider whether notice of the fact that there were debentures, and a trust deed affecting some sort of a charge upon the company's property, would, in itself, be sufficient to preclude the bank from setting up this defence. There is a dictum of Lord Esher, in *English and Scottish Mercantile Investment Co.* v. *Brunton*(3), at page 711, to the effect that that alone would not be sufficient; there is a dictum of Lord Bowen, in the same case, that it is

> possible that he (the person setting up the defence) might escape, if in respect of a deed or debenture, such as is in question here, he does not know or honestly think, that the instrument was one which must affect his right.

Kay L.J. expressly abstains from accepting these views. Whether, however, Lord Esher is right in say-

(1) *Re Nisbet & Potts Contract;* [1906] 1 Ch. 386.

(2) [1906] 1 Ir. Ch. 446.

(3) [1892] 2 Q.B. 700.

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ing that what the subsequent incumbrancer has to prove is absence of actual notice of the particular restriction which is being infringed; or whether the suggestion of Bowen L.J., that, given notice of the deed or debentures, the reasonableness of abstaining from further inquiry is the true test; or whether, given such notice, the failure to inquire entails the consequences of actual notice of the contents of the instrument,—these are questions which, in this case, may be put aside and upon which I desire to reserve any expression of opinion. I ought, perhaps, to add that the decision of Swinfen Eady J., in *Re Valletort Steam Laundry Co., Limited*(1) proceeds upon the view that, in the special circumstances of that case, the subsequent incumbrancers had a stronger equity than the debenture holders.

In this case, accepting the view of the law most favourable to the appellant, that expressed in the dictum of Lord Esher, that the bank has cast upon it the burden of proving only that it was not aware at the time it made the advance of the existence of the clause in question, and having regard to the evidence to which I referred, it seems quite impossible to hold that this burden has been discharged.

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

Appeal dismissed with costs.

Solicitor for the appellants: *H. C. Borden.*

Solicitor for the respondents: *W. B. Ross.*

(1) [1903] 2 Ch. 654.

THE C. BECK MANUFACTURING COMPANY..... APPELLANTS;

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*May 26.
*Oct. 6.

AND

J. A. VALIN AND THE ONTARIO LUMBER COMPANY..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Mandamus—Lumber driving—Order to fix tolls—Past user of stream —Appeal—R.S.O. [1897] *c.* 142, *s.* 13.

By R.S.O. [1897] ch. 142, sec. 13 the owner of improvements in a river of stream used for floating down logs may obtain from a district judge an order fixing the tolls to be paid by other parties using such improvements. On application for a writ of mandamus to compel the judge to make such an order:

Held, affirming the judgment of the Court of Appeal (16 Ont. L.R. 21) Davies J. *dubitante* and Idington J. expressing no opinion, that such an order had effect only in case of logs floated down the river or stream after it was made.

Held per Idington J.—As sec. 15 gives the applicant for the order an appeal from the judge's refusal to make it mandamus will not lie.

Held, per Duff J.—The mandamus could issue if the judge had jurisdiction to make the order though he refused to do so in the belief that a prior decision of a Divisional Court was *res judicata* as to his power.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court which sustained the refusal of a judge in chambers to issue a writ of mandamus.

In 1903 the C. Beck Mfg. Co. obtained an order from the judge of the District of Nipissing fixing the tolls to be paid on logs floated down a stream called

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) 16 Ont. L.R. 21.

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Post Creek. This order was set aside by a Divisional Court on the ground that it related to operations before it was made and that the judge had not the necessary evidence before him to make a proper order and had not considered certain matters required by the Act. A fresh order was then obtained fixing the tolls, as the respondents, the Ontario Lumber Company, claimed, for future operations. The C. Beck Company claimed to be entitled under this to payment of tolls for logs floated before it was made and brought action to recover the same, but failed in all the courts. The decision of the Court of Appeal in that action is reported(1), and affirms that of the Divisional Court(2).

In 1906 the C. Beck Co. applied to the district judge to take evidence for the purpose of fixing tolls which might be charged for logs driven on Post Creek in 1903 and on his refusal to hear the evidence or make the order they applied to a judge of the High Court for a writ of mandamus to compel him to do so. The writ was refused and the refusal sustained by the Divisional Court and the Court of Appeal. The company then appealed to the Supreme Court of Canada.

Bicknell K.C., for the appellants. The respondents, the Ontario Lumber Co., in floating their logs down the stream and taking the benefit of the appellants' improvements must be held to have done so subject to payment of reasonable tolls therefor under the statute. See *Burnett* v. *Lynch*(3); *Moule* v. *Garrett* (4); *Kelloch* v. *Enthoven*(5); *Woodhouse* v. *Walker* (6).

(1) 12 Ont. L.R. 163.
(2) 10 Ont. L.R. 193.
(3) 5 B. & C. 589.
(4) L.R. 5 Ex. 132.
(5) L.R. 9 Q.B. 241.
(6) 5 Q.B.D. 404.

If the statute had not provided a mode for fixing the tolls the reasonableness or otherwise of appellants' demand would have been a question for the jury. Gunning on Tolls, p. 61.

If the judge has jurisdiction to make the order asked for, the judgment of the Divisional Court was wrong and cannot be *res judicata* against us. The judge may, in that case, be compelled by mandamus to exercise the jurisdiction he possesses. See *Attorney-General for Trinidad and Tobago* v. *Eriché*(1); *Toronto Railway Co.* v. *City of Toronto*(2); *Reg.* v. *Judge of Southampton County Court*(3); *Sawyer Massey Co.* v. *Parkin*(4).

Shepley K.C. and *A. G. F. Laurence,* for the respondents. The statute by its terms only authorizes tolls to be fixed for the future. See judgments in *C. Beck Mfg. Co.* v. *Ontario Lumber Co.*(5), and in appeal(6).

The only remedy given to appellants for user of their improvements when no tolls are fixed is the lien on the logs passing through or over the same. *Vestry of St. Pancras* v. *Batterbury*(7); *Atkinson* v. *Newcastle & Gateshead Waterworks Co.*(8); *The Queen* v. *County Court Judge of Essex*(9).

GIROUARD J.—I would dismiss this appeal. It involves a mode of taxation, and as I read the statute its language does not justify the imposition of tolls for the past. I agree with Mr. Justice Meredith.

(1) [1893] A.C. 518.
(2) [1904] A.C. 809.
(3) 65 L.T. 320.
(4) 28 O.R. 662.
(5) 10 Ont. L.R. 193.
(6) 12 Ont. L.R. 163.
(7) 2 C.B.N.S. 477.
(8) 2 Ex. D. 441.
(9) 18 Q.B.D. 638.

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Davies J.

DAVIES J.—At the close of the argument in this case my inclination was to concur in the construction of the Act reached by Mr. Justice Garrow in the Court of Appeal and to hold that the fixing of what was a reasonable rate of toll to be charged for the use of the river improvements by those who used them applied as well to past as to future uses.

I also reached the conclusion that in obedience to what he considered the judgment of the Divisional Court had declared the law to be the district judge had declined to hear or consider the application made to him to fix rates under the statute for the past user of the applicant's river improvements.

I afterwards gave the case much consideration without changing the inclination I had reached after the argument at bar.

I have since carefully read the judgments prepared by my brother judges and confess that their consideration has left my mind in some doubt on the main question of the construction of the statute authorizing rates to be fixed.

Under these circumstances I do not feel justified in reversing the judgment of the Court of Appeal or in dissenting from the judgment now proposed to be given.

IDINGTON J.—We are asked, as it seems to me, under the guise of an application for an order by way of mandamus, to sit in appeal upon not only an opinion of a Divisional Court of the High Court of Justice, but also by way of anticipation upon what that or another Divisional Court might see fit hereafter to hold; and that in a case in which the legislature created certain rights and deliberately decided that

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such rights should in the measuring of the same abide by the arbitrament of a power or powers the legislature saw fit to entrust with the determination in regard thereto.

I decline to express any opinion upon any phase of the question raised save so far as to the necessity for, or right to make an application for writ of mandamus.

The applicants, now appellants, seem to have found a great deal of difficulty in getting to the point they set out to reach.

I see none. It applied under R.S.O., [1897] ch. 142, for an order settling certain tolls which that Act provided for being paid, upon certain things happening, and according to a scale to be determined by the district judge. He made an order on appellant's application which provided, it is alleged, for tolls for uses of the stream improvements anterior to the application under the Act as well as posterior thereto. This was set aside. The reason for setting aside did not of necessity give rise to the consideration of the questions whereon the Divisional Court, setting it aside, passed an opinion. The learned judge thereupon made an order of the 30th March, 1904, upon the application of the appellants herein and in presence of counsel for all parties, but in accordance with the expressed opinions of the learned judges of the Divisional Court as he understood them, confined his order, it is said, to future uses of the improvements. Just here I would remark that if the appellants supposed this judgment erroneous they should at once have appealed to the court of appeal duly appointed by the said Act to hear any appeal from such erroneous decision, and have asked that the order be amended so as to decide as to, and if possible in law

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to embrace, the establishment of tolls for these anterior services.

That appellate jurisdiction was given by the following section fifteen of the said Act as follows:

> In case a party interested is dissatisfied with the order or judgment of the judge or stipendiary magistrate, he may within fifteen days from the date thereof appeal from the order or judgment to a Divisional Court of the High Court; and a judge of the said court shall determine the time within which the appeal shall be set down to be heard, the security (if any) to be given by the appellant, and the persons upon whom notice of the appeal shall be served, the manner of service and all such other matters as he may deem necessary for the most speedy and least expensive determination of the matter of the appeal.

Instead of asking the learned judge in disposing of that application to formulate a judicial order setting forth (which I have not the slightest doubt he, if asked, would have done) his reason for refusing, in such a way as to remove, if any doubt existed thereupon, all question of right to appeal to the proper court, the appellants dropped the application there, failed to take out any order, failed to appeal to the Divisional Court and applied afterwards for an order by way of mandamus which was refused and hence this appeal. I think section 15, quoted above, wide enough to have covered all and everything that could arise and which the legislature ever intended should arise in the way of regulating or enforcing the rights created by the statute.

The right to assert an appeal against a court asserting jurisdiction where it has none is a very common case, and I have not the slightest doubt of the right to appeal on the converse ground of failure to assert jurisdiction.

Prohibition and mandamus are useful remedies but not in either alternative the only remedies, where

so wide and comprehensive an appellate right is given as here.

The appellant has not shewn any real difficulty to have arisen. It merely seems to have shied at the appearances in its way.

If authority be needed for the proposition that an objection for want of jurisdiction may be taken successfully in appeal though overruled in the court appealed from, I may refer to the case of *Ferguson* v. *Corporation of Howick*(1), and the numerous authorities therein cited.

The original theory was that the court when it found itself without jurisdiction or was found by an appellate court to be so, could neither make an order, nor be directed to make an order even as to costs.

Howard v. *Herrington*(2) illustrates the later development.

I am not concerned to do more here than shew that, where the words conferring appellate jurisdiction are unrestricted, no words specially dealing with the question of the inferior court's jurisdiction are needed.

The question of its jurisdiction is the first one an inferior court has to determine, whether arising on demurrer, or by plea in abatement as of old, or thrown in as an ingredient in the mixture composing a statement of defence under the modern system, or upon the mere suggestion that reaches the ear of the court in any regular way, or taken by the court, of its own mere motion.

I cannot accept the theory that where the very essence of the matter over which jurisdiction is given

(1) 25 U.C.Q.B. 547. (2) 20 Ont. App. R. 175.

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is so limited in its sphere of existence or of operation as in this section, and that a jurisdiction is conferred, and is conditioned upon certain things having been done, it could ever have been intended to exclude from an appellate inquiry all that relates to such conditions or otherwise affects the limits of power.

An application for mandamus or for prohibition may not be merely discretionary when it comes to a question of having right done and no other way open.

But assuredly we should be slow to lead suitors to feel at liberty to travel beyond the assigned path for asserting rights created by a legislature that designated the path to be travelled to assert such rights.

I do not think that path has been properly tried and for that if no other reason I would as already intimated reject this attempt to enlarge the sphere of action of this court.

I think the appeal should be dismissed with costs.

MACLENNAN J. concurred in the dismissal of the appeal for the reasons stated by Duff J.

DUFF J.—This appeal arises out of an application of the appellants for a mandamus directing the respondent Valin, the judge of the district court of the District of Nipissing, to hear an application by the appellants for fixing tolls to be charged by them in respect of logs driven on Post Creek in the year 1903 under chapter 142, R.S.O. [1897]. The courts below have upheld the order of Mr. Justice Mabee in chambers dismissing the appellants' application. The appellants admittedly effected certain improvements in Post Creek in the years 1900 to 1902 which are improvements within the meaning of the statute refer-

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red to. It is not disputed, either, that an order, made by the respondent upon the application of the appellants fixing the tolls to be exacted from persons using these improvements for the floating of logs after the date of the order, was properly made; but it is contended that the statute confers no authority upon him to fix any toll in respect of any use of the improvements anterior to the fixing of the toll; and consequently that the learned judge has now no jurisdiction to hear any such application as that which the appellants ask the court to direct him to hear.

Two questions arise. The first is a question of substance, viz.: whether the statute does or does not authorize the maker of such improvements to exact tolls for the use of them anterior to the fixing of the tolls in the manner provided by the statute; the second is the question whether or not, assuming the point just stated to be decided in favour of the appellants, they are entitled, in view of the proceedings which have taken place, to be heard upon an application to fix tolls in respect of the use of their improvements during the years 1902 and 1903.

To deal first with the last-mentioned question. At the outset I am unable to entertain any doubt that the learned district judge refused to hear the appellants' application. What he did shews, I think, that he intended to decline to entertain it, and to decline on the ground that he had no jurisdiction. It follows that the appellants are right in the course they have taken to test the question of their right to a hearing.

The principal difficulty which in this branch of the argument the appellants have to meet is a difficulty which arises out of a previous judgment of the Divisional Court pronounced on the 10th of March,

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1904, in an appeal under the statute referred to from an order made by the respondent Valin on the 25th of January, 1904. The last-mentioned order, which was made upon the application of the appellants, professed to fix generally a toll to be paid by the respondents, the Ontario Lumber Company, to the appellants in respect of timber transmitted through their improvements. This order was rescinded by the Divisional Court in the judgment just mentioned. The formal order set aside the order of the district judge,

> without prejudice to a further application by either party to the judge to fix a proper rate of tolls to be taken for the future by the Beck Company under the further evidence necessary.

The Divisional Court, therefore, did not profess to decide finally upon the merits of the application before the learned district judge; but they, assuming that the order of the learned district judge had the effect of fixing a toll in respect of a past user, did profess to determine finally that the district judge had no power under the statute to make an order with respect to such user. I think we may assume, for the purposes of this discussion, that the Divisional Court was right in its view of the scope of the learned judge's order; still I do not think that their decision touching the point of jurisdiction finally concludes the appellants in respect of it.

The right of appeal from the county or district judge given by the statute is an appeal from an order fixing the "amounts which any person entitled to tolls under the Act shall be at liberty to charge"; without stopping to consider the extreme view that the function of the Divisional Court on the appeal is limited to a review of the decision of the judge upon any

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question of the amount of the toll, it does appear to me that, having regard to the provisions of the Act, it is hardly possible that the legislature could have intended the decision of a Divisional Court on such an appeal finally to conclude every question of law as well as of fact touching the power of the judge under the Act. It would have been easy to frame a statute in such terms as to make the decision of the county or district judge conclusive on every such question, subject only to an appeal to the Divisional Court. If the legislature had intended that I think some language would be found indicating it more pointedly than anything one finds in the Act. Indeed, I am quite unable to see how such a view can be taken of this statute consistently with what nobody of course disputes—that the proceedings of courts of special statutory jurisdiction are (notwithstanding a right of appeal now almost invariably given from the decisions of such courts) every day the subjects of process in prohibition and mandamus.

Moreover, here the case against such a construction appears unusually strong because of the circumstance that (for reasons to be mentioned presently) it seems clear that an order fixing tolls under this statute is very much in the nature of an order *in rem,* affecting quite conceivably, and I should think not uncommonly, people who hear of it for the first time long after the time prescribed by the Act for appeal has expired. I do not, of course, suggest that the Divisional Court may not have to consider, as the judge himself must have to consider, the scope of the judge's powers under the Act, but that is a very different thing from saying that every judgment of theirs upon such a question is necessarily decisive.

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If the judge assumes through a misconception of the statute to exercise a jurisdiction which the statute does not give him what he professes to do is I think a nullity; and the Divisional Court cannot, I think, by concurring in the misconception make that nullity a valid proceeding. If he declines jurisdiction where the statute enjoins him to act the remedy of the party aggrieved is, I think, to be pursued through an application to the general jurisdiction of the High Court.

It was argued indeed that the appellants' application ought not to be granted because the learned district judge would be bound on the hearing of the application by the decision of the Divisional Court already on appeal from him. It is quite clear, however, that no order for a mandamus could be granted except as the result of a determination that the respondent has the jurisdiction which the Divisional Court has held he has not; and it is not to be supposed that in such circumstances he would feel himself at liberty to disregard such a determination. It follows that if in substance the appellants are right there is nothing in the previous proceedings to prevent this court making the order which they ask.

I think, nevertheless, that the appeal must fail because the construction placed by the Divisional Court upon the Act is the true construction.

Under the statutes in force at the time the Act was passed the law of Ontario was that all persons had the right during freshets to float timber down rivers and streams; and, to facilitate the floating of timber, to remove obstructions and construct such works as might be necessary.

The Act under consideration affirms these rights, but in another respect alters the law. The earlier

statute in effect gave to all persons the right for the purpose of floating timber down stream to use without compensation improvements made by others; the law was thus settled by the decision of the Judicial Committee in *Caldwell* v. *McLaren*(1). The statute upon which the present dispute arises affirms this right also, but declares that it shall be subject to the payment of reasonable tolls to the person who has made the improvement; and the judge of the county court or the judge or stipendiary magistrate of the district where the improvement is situated is required, upon the application of the "owner thereof or of any person who may desire to use the same" to fix the amounts of such tolls, which amounts the judge, or stipendiary magistrate, as the case may be, is authorized to vary from time to time; and (section 13) the statute directs that

> the judge or stipendiary magistrate in fixing the tolls shall have regard to and take into consideration the original cost of the construction and improvements, the amount required to maintain the same and to cover interest upon the original cost, as well as such other matters as under all the circumstances may seem just and equitable.

It would seem to be reasonably clear (although the language might have been perhaps a little more apt to the purpose) that the toll to be charged under the Act in respect of the use of a given improvement is to be a general toll equal in its operation; and what the judge or magistrate is authorized to fix is the amount of such a toll which, until varied under the power given by the Act, shall be chargeable uniformly against all persons alike who come under the statutory liability to pay. The power conferred upon these

(1) 9 App. Cas. 392.

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judicial officers is the power to determine the sum to be payable by the public in respect of the exercise of that which the statute declares to be a public right; and I think that the rule of construction applicable to such an enactment is that, in the absence of express provision, or at all events reasonable implication to the contrary, the statutory power is not to be exercised with reference to individuals as distinguished from the whole of those members of the public to whom the enactment may be applicable.

The construction placed by the Divisional Court upon the enactment is that the use of an improvement does not subject the user to any liability to the payment of tolls unless the amount of the toll was ascertained in the manner prescribed by the statute anterior to the use; and this construction the appellant impugns.

A very little consideration will shew that the adoption of the appellant's construction will lead to rather startling results. It is common ground that the amounts payable in respect of tolls are not exigible until fixed by the statutory method. The statute prescribes no limitation upon the retrospective operation of an order fixing a toll; if such an order may operate retrospectively at all it may, it seems very clear, so operate over an unlimited period. Mr. Justice Street in delivering the judgment of the Divisional Court, to which reference has already been made, suggests a limitation of six years after the use of the improvement upon actions for tolls; but I think this is putting the case too favourably to the appellants' contention. Since the cause of action would not arise until the amount is fixed one does not easily see why until then the Statute of Limi-

tations should begin to run. It is not unimportant to observe here that where the statutory conditions are fulfilled, that is to say, where there is an improvement within the meaning of the statute, the proper judicial officer is required to entertain the application and to make the order fixing the amount of toll. If the construction contended for by the appellant be the true one it would, I have no doubt, lead to the conclusion that the judicial officer would have authority in fixing the amount of a toll to be exacted in respect of a given improvement to distinguish between the sums chargeable for a past use and those chargeable for the future; but if the liability to pay for a use anterior to the fixing of tolls is created by the statute, then I think the statute must be held imperatively to require the proper judicial officer upon application to fix the amount of such tolls; and, as I have already said, there is nothing in the statute, expressly or impliedly, limiting the time within which the application is to be made.

Again, if the liability imposed by the statute upon persons making use of such improvements be such as is contended for one would naturally have expected—in the view I have indicated that the incidence of the toll is general and equal—that the legislature is empowering the owner of the improvement to make the application at any time after the use would have put it in the power of persons using an improvement to take steps themselves in the same circumstances to have the amount of the toll ascertained. It is not easy to believe that the legislature could have contemplated as a result of their legislation that the amount of this impost, levied in respect of the exercise of what it was at pains to declare to be a public right, might remain

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undetermined for an indefinite period during which persons who should have incurred liability to pay it, should be unable to relieve themselves from that liability or definitely to ascertain its extent. Yet it seems to be very clear that as regards users the legislature did not contemplate any application for the purpose of fixing the amount of tolls in respect of a past use; the language employed points very clearly to future use only. It may be said that the intended user has it in his power to have the toll fixed before incurring any liability; but many cases might occur in which this would be impracticable or altogether impossible.

There are in the statute other indications, mentioned in the judgment of Mr. Justice Meredith in the court below, telling against the appellant's contention. I will not dwell upon these, but say simply that if that contention were accepted, the exaction of this impost might be attended with circumstances of inconvenience, to say nothing of injustice, wholly disproportionate to any sort of public advantage that can be conceived as possibly arising from the *ex post facto* operation of orders fixing tolls. A statute creating a liability of this kind ought not, I think, to receive a construction having that effect unless, as a matter of interpretation, the case in favour of it be overwhelming. Here I do not think that is so. I see no difficulty in reading the 11th section, which creates the liability in such a way as to make the ascertainment of the amount anterior to the use a condition of liability.

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

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Appeal dismissed with costs.

Solicitors for the appellants: *Bicknell, Morine, Bain & Strathy.*

Solicitors for the respondents: *Laurence & Wadsworth.*

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*June 2, 3.
*Oct. 6.

EVA BRENNER, AN INFANT BY HER NEXT FRIEND AND HARRIS BRENNER (PLAINTIFFS) ..... } APPELLANTS;

AND

THE TORONTO RAILWAY COMPANY (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Negligence—Street railway—Rules of company—Charge of judge—Contributory negligence.

A rule of the Toronto Ry. Co. provides that "when approaching crossings and crowded places where there is a possibility of accidents the speed must be reduced and the car kept carefully under control. Go very slowly over all curves, switches and intersections; never faster than three miles an hour * * ." A girl on the south side of Queen Street wished to cross to University Avenue which reaches but does not cross Queen. She saw a car coming along the latter street from the east and thought she had time to cross, but was struck and severely injured. On the trial of an action for damages the judge in his charge said: "It is not a question, gentlemen of the jury, as to the motorman's duty under the rule, it is a question of what is reasonable for him to do." The jury found that defendants were not guilty of negligence; that plaintiff by the exercise of reasonable care could have avoided the injury; and that she failed to exercise such care by not taking proper precautions before crossing. The action was dismissed at the trial; a Divisional Court ordered a new trial on the ground that the judge had misdirected the jury in withdrawing from their consideration the rules of the company; the Court of Appeal restored the judgment at the trial.

Held, affirming the judgment of the Court of Appeal (15 Ont. L.R. 195) which set aside the order of the Divisional Court for a new trial (13 Ont. L.R. 423) Idington J dissenting, that the action was properly dismissed.

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*PRESENT: Girouard, Davies, Idington, Maclennan and Duff JJ.

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Held, per Girouard and Duff JJ.—The judge's charge was open to objection but as under the findings of the jury and the evidence plaintiff could not possibly recover a new trial should be refused.

Per Davies J.—There was no misdirection. The jury were not led to believe that the rules were not to be considered, but only that they should not be the standard as to what was or was not negligence, which question should be decided on the facts proved.

Per Maclennan J.—The place at which the accident occurred, where University Av. meets Queen Street, is not a crossing nor intersection within the meaning of the rules and they do not apply in this case.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the order of the Divisional Court for a new trial (2) and restoring the judgment at the trial by which the action was dismissed.

The material facts of the case are stated in the above head-note.

G. F. Henderson K.C. for the appellants.

D. L. McCarthy K.C. for the respondents.

GIROUARD J.—I concur in the opinion of Mr. Justice Duff.

DAVIES J.—The findings of the jury in this case are all against the plaintiff. They negative negligence on the part of the company and its mortorman and they find that the plaintiff could by the exercise of reasonable care have avoided the injuries she sustained and that she neglected to take precautions in crossing the road. The trial judge on these findings entered judgment for the defendant. The Divisional Court on appeal, thinking there had been misdirection in the charge to the jury in having withdrawn from

(1) 15 Ont. L.R. 195. (2) 13 Ont. L.R. 423.

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their consideration the rules of the defendant company, directed a new trial. On appeal to the Court of Appeal the judgment was unanimously reversed and the judgment entered by the trial judge restored.

I have read and re-read the judge's charge most carefully and have reached the conclusion that as a whole it was a painstaking and careful summing up of the facts and is not open to the charge of misdirection. I do not think the jury were misled into the belief that they were to banish these rules from their minds. What they were told was that they should not accept these rules as their standard or guide as to what was or was not negligence but should decide that question upon the facts as proved before them.

The crucial question was whether or not the motorman had his car under control at the time or was going at an improper rate of speed.

The learned judge charged: "It is not a question, gentlemen of the jury, as to the motorman's duty under the rule, it is a question of what is reasonable for him to do." That again is another way of saying the rules are not the standard to guide you to your conclusion as to the speed of the car or its control, but the determination of what was reasonable under the circumstances as proved. He may have obeyed the rule and still have been guilty of negligence. He may again have disobeyed the rule under circumstances and conditions which did not make him so guilty. The question was whether or not, under the proved facts, negligence on his part was shewn. I think this was the substance of his charge and I think it was right in law and was properly understood by the jury.

I agree with the Court of Appeal and would dismiss the appeal.

IDINGTON J.—This is an accident case in which the motorman of respondent company ran down the appellant, a young woman whom he saw from the time she stepped off the south sidewalk on Queen Street to cross to the north side of that street in order to reach University Street or University Avenue running at right angles to the north side of Queen Street, until she was hit by the fender of the car he was driving with such force that she was tossed to one side and run over.

It so happened that she, in order to avoid a car running in a contrary direction to that of the one in question, had walked past the line of the point of junction of these streets and therefore had to cross so obliquely to reach her destination that her back was turned towards the motorman who saw her.

She says she had seen the car coming and had supposed she could have reached her destination on the north side of the track before the car in question, travelling at an ordinary rate, would overtake her.

She evidently miscalculated, and I am not going to pass any opinion upon whether that miscalculation was negligence or not when coupled with her failure to keep an eye on the moving car.

The only point in the case for present consideration is whether or not the motorman was negligent and whether or not the learned trial judge properly directed the jury in this regard.

One of the rules of the company for guidance of conductors and motormen is as follows:

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Rule 58. Curves and Crossings—When approaching crossings and crowded places where there is a possibility of accidents, the speed must be reduced and the car kept carefully under control.

Go very slowly over all curves, switches and intersections; never faster than three miles an hour, and extra caution must be used in handling double truck cars at such places.

An intersection must never be taken when another car is approaching.

Cross streets must not be blocked nor must any crossing be taken until the road ahead is clear.

The company called a witness named Whitehead who had been in their service for fourteen years as a motorman and previous to that had served in the same capacity in Cleveland.

He gave the results of his long experience and of his experience as an instructor of motormen for the company in the following evidence:

Q. In the special instructions to motormen on page 16 of the Rules, it says, "The moment any person, waggon or obstacle is seen to be in danger on the track, bring car under perfect control." Are you familiar with that? A. Yes.

Q. And you drum that into your men when you are training them? A. All ever I can.

Q. Then I notice Rule 55, "Reversing is a severe strain on the apparatus, especially when the car is under high speed, and should never be resorted to except when absolutely necessary." I suppose you also impress that on your men? A. Yes.

Q. Not to resort to the reverse unless it is absolutely necessary? A. Yes.

Q. Not till the last moment? A. Not until it is necessary.

Q. And is not there a rule that you shut off the power on approaching a street? A. Yes, they are supposed at all cross streets to shut off the power and ring the gong.

Q. How far? A. A reasonable distance; it depends on the speed you are travelling at.

Q. You will have to tell me, you know; how far do you consider a reasonable distance? "When approaching crossings and crowded places where there *is a possibility of accidents*, the speed must be reduced and the car *kept carefully under control.*" That is 58, do you impress that on your motormen? A. Yes.

Q. Then at what distance from a crossing do you consider that a man should shut off his power and begin ringing his gong? A. It *depends on the speed at which he is travelling.*

Q. Suppose he is travelling six miles an hour? A. He should

shut off his power *sixty, eighty or a hundred feet away from the street crossing.*

Q. And at *ten miles an hour?* A. *A little sooner.*

Q. How much sooner? A. *Not necessarily much sooner.*

Q. How much sooner? A. *I could not tell you for a few yards,* if a man knows when he has his car under control he knows what distance he can stop in.

Q. I want an answer to that question. You say if a man is travelling at six miles an hour he should shut off his power from eighty to a hundred feet. Now if he is travelling at ten miles an hour when should he shut it off? You say a little sooner? A. Well, twenty or thirty feet.

* * * * * * *

Mr. Smythe: Q. Now, I suppose we may put you down as a thoroughly competent efficient motorman, or you would not occupy the position you do occupy? A. I think so.

Q. You know this car? A. Yes.

Q. Would you advocate this car 736 running down Queen Street from York to University at a speed of fifteen miles an hour at nine o'clock in the evening? A. Well, I don't know; if all was clear, and there was nothing to obstruct me, and the car would run fifteen miles an hour, I might.

Q. How far away from Osgoode Hall corner would you throw off your power and slacken the speed? A. I could not get to a speed of fifteen miles an hour going from York Street to University.

Q. Assuming that you had your power on full where would you turn it off? A. A car is not always running at full speed when the power is on full.

Q. If you had your power on full after leaving York Street where would you turn it off? A. I would shut it off forty or fifty feet back from the corner of University Street, or whatever you call it.

Q. Is that your answer? A. Yes, sir.

Q. That is what you are telling me now? A. Yes.

Q. And you would not shut it off before? A. That would be quite enough to slow down, you are not supposed to stop unless it is necessary.

Q. That is your answer now, is it? A. Yes.

Q. If you saw a girl walking toward the track with her back toward you, would you consider it your duty to get your car under control and ring the gong? A. Yes.

* * * * * * *

Mr. Smythe: Q. If a competent man were operating a car, and saw a girl approaching the track with her back towards him, at what distance should he get his car under control, it being obvious that she did not see him, at what distance from the girl should he get his car under control, running at a speed of, say six miles an

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hour? A. Well, he should get his car under control say within fifty or sixty feet of where the girl was.

Q. Say he was running ten miles an hour at what distance from the girl should he get his car under control? A. Then he would want twenty-five feet more.

Q. And at fifteen miles an hour? A. An equal ratio, about twenty-five feet more.

Q. And that is what a careful, competent man should do? A. Yes.

Q. Now, I understand you to say to my learned friend, that with the car under control, by the use of the reverse a car of this type could be brought to a dead stop in fifty feet? A. I said about fifty feet, running at six miles an hour.

* * * * * * *

Q. Now, would a competent motorman who says he had applied the reverse a moment before or at the instant of striking a person in the street allow his car to be run 150 feet after that? A. I would naturally think he would stop his car as soon as he could.

Q. Could he not stop it long before 150 feet? A. I should think, as I told you, about fifty feet.

Q. And if it ran 150 feet? A. It might be a bad rail.

Q. Would a competent motorman under those circumstances allow his car to run 150 feet? A. I have seen the rail when you could not stop in less than 150 feet, when the reverse bit the car would slide along the rail. A good deal depends on the rail.

Q. We are speaking now of a moderate rail. Would a competent motorman who had applied his reverse at the moment of collision permit his car to run 150 feet after? A. I should not think so.

* * * * * * *

Q. Then there is no such rule, Mr. Whitehead? A. I don't think so.

Q. There is a rule that you have to throw off your power before approaching intersections? A. At intersections you have to stop.

Mr. Smythe: My learned friend has insisted throughout that the instructions to motormen were not to be found in that book. This witness is an instructor, and I asked him if it was part of the instructions to throw the power off, and he said yes.

The Witness: As a precaution.

* * * * * * *

His Lordship: Q. Do I understand there are instructions to motormen to stop at cross streets? A. Decidedly not, only at intersections of other tracks.

Q. You did not mean to say at all cross streets? A. No, but a man naturally, as a precaution, shuts off the power when coming to a street, but he is not supposed to stop unless it is necessary.

Mr. Smythe: Q. He has to shut the power off? A. Well, I do it at every cross street as a precaution.

Q. Coming to every cross street you shut it off? A. I shut off my current.

Mr. McCarthy: Q. For what purpose is that? A. Just as a precaution, in case of anything happening, not that I am expecting anything, but we never know what is coming.

Q. Would you do that when approaching a crossing at five or six miles an hour? A. Yes, decidedly.

Mr. Smythe: Q. And much more so if you were approaching it at fifteen miles an hour? A. I would not approach a crossing at fifteen miles an hour, if I knew it.

Another witness of the company corroborates a great deal of this.

The learned trial judge in an exceedingly painstaking charge failed to direct the jury as to this evidence and its important bearing on the issue raised thereby of the negligence of the company.

It is true he spoke in general terms of the duty of the motorman to have his car under control.

But what that meant or he intended to convey by it does not appear.

A great deal was said and no doubt in view of the complexity of the case properly said about the rate of speed the car had been going at between York Street and University Street.

But the relation between the speed, whatever it was, and the necessary steps to control that speed, and all else, when and where such throwing off the power as indicated had become necessary, according to the evidence above, was not, I submit, referred to or direction given as to it. We have not a word directly bearing on it unless covered up in the phrase relative to having the car under control. Nay more, we have the following passage in the charge which shews all that was present to the learned judge's mind "up to the approach of the girl." He says:

Apart from the condition of the car, the excessive speed, and the not ringing of the gong there is no other allegation of negligence made against the defendant until the approach of the girl.

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The approach of the girl part of the case relates to what the motorman did when the ringing of the gong failed.

He reversed, when within ten feet of the girl, after he had gone far past the point at which the above evidence indicates power ought to have been thrown off.

The needful elaborateness of the charge which had to deal with many issues raised besides the one I am dealing with, tended to obscure the one I now deal with, and the evidence on the point.

At the close of a charge of that character counsel for respondent objected as to this, and the learned judge's remarks supplementing his main charge appear, in response to these objections as follows:

Mr. Smythe: Then I would ask your Lordship to charge the jury that in addition to the original negligence you spoke of, there was evidence from the motorman himself that he had not the car under control, according to the proper method of running as given by the witnesses for the defence themselves. Your Lordship will remember that the witnesses Whiteside and Cosgrove both said that the proper way to run the car was to turn off the power 100 feet east of Osgoode Hall corner, and the motorman himself says he did not turn off the power until immediately before the accident. They both also said that the proper way to run it was to get the car under control when approaching the corner, by slackening the speed. The motorman says he did not put on the brake until he saw the girl would be run over.

His Lordship: "It is not a question, gentlemen of the jury, as to *the motorman's duty under the rule*, it is a question of what is reasonable for him to do. *He may break the rules four hundred times a day*, but the question is whether under the particular circumstances of the case he acted reasonably, just as any other man going on the road. You heard, however, what he said, that he sounded the gong before he got to the west fence of Osgoode Hall, and then you heard that he had not slowed down because he was not going at a speed which *he thought called for that.*

Mr. Smythe: There was the evidence of the witness who said that he ought to have taken off the power.

* * * * * * *

His Lordship (to the jury): It is said that ordinarily it would be the duty of the motorman to throw the power off before approach-

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ing the corner, so as to let the car roll, that he would then be in a better position to have the car under control, and, if necessary, to stop. Under the rules and under the practice of the company it is the duty of the motorman to throw off the power ordinarily, before approaching a corner, so as to be ready to get the car under control, and more readily to have it under control. *But the question is, was he going at such a speed as was excessive? It is not a question of what the rule was, but was he acting improperly in going at an excessive speed at the time?*

* * * * * * *

Mr. Smythe: Then I would ask your Lordship to charge the jury that there was evidence that the motorman *should have had his car under control at an earlier period than the period when he had it under control.*

His Lordship: I think I have already said that.

This, I think, might well be taken by the jury as a withdrawal of the evidence in question.

It seems to me quite clear that the jury did so treat it.

It was uncontradicted evidence coming from a source the respondents could not question and did not question.

If regard were had to it at all I think it was impossible not to find negligence on the part of the company.

The motorman did not pretend he had observed the means this evidence points out as his duty, that is, by throwing off the power.

That the rules of the company and the experience of the company are not the law of the land is true. But what the experience of this and the like companies have discovered to be necessary as reasonable precaution in carrying on their business in the like conditions presented in any given case is evidence of the very highest value.

The remarks anent the reversing of power are all beside this question, for, as already remarked, that took place when within ten feet of the girl and a con-

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siderable distance beyond the street junction relative to approaching which, part of the evidence speaks.

Had the car been rolling along, with the power off from the point indicated it should have been, it would in all probability never have reached the girl. There possibly never would have been any collision or any need for the consideration of the alleged contributory negligence.

It is but a second of time that is involved in the inquiry.

And again, had the power been off and consequently, both the momentum of force propelling the car and the speed been reduced, the reversing operation, if it had ever become necessary, would have had more decided effect and probably avoided any collision. The jury should have had a fair chance to deal with all this.

In a sense the matter is, when analyzed, a question of speed, as the learned judge truly said, but he did not make that analysis for the jury and shew the bearing of his remark if he intended it to have any such relation to the evidence in question. If the speed of the car had, for example, been only a snail sort of pace no need possibly for a throwing off of such power. But it clearly was moving at so high a rate of speed that consideration directed to the point and the evidence upon it, was much needed in this connection.

The trial had proceeded on the particulars of negligence that dealt with excessive speed, but the evidence of the expert motorman, Whitehead, as counsel for respondents frankly admits, was a surprise.

He had two alternatives before him on this disclosure of very unexpected evidence. One was to

object to the evidence as not admissible within the specified particulars.

This he did not adopt.

Probably he wisely foresaw an amendment and that thereby increased prominence might be given the point.

The other alternative and which he adopted was to take his chances of war, and of the possible escape in the confusion that might ensue, seeing it was only other things that were specified as negligence, and this the gross act of negligence apparent on the evidence, as a whole, and which should have been made earlier apparent might come to be, as it was, overlooked.

Wisdom has its reward sometimes. But it cannot now be said, nor was it attempted on Mr. Smythe's objection or in argument here, to set up that this negligence was not pleaded. After treating it as fairly before the court at the trial and afterward, the issue thus raised is to be treated as if specified in the particulars.

It is not the case of any ultimate negligence that concerns me. That might have arisen for consideration or never have been reached.

I, in face of what, with the greatest regard, I conceive to be a serious error in the way of misdirecting the jury, cannot find any consolation or way of escape from a new trial in the finding of contributory negligence, for if the primary negligence was found on the above evidence the really proximate cause of the collision the plaintiff's negligence could not be so.

The jury if properly directed in light of this evidence might never have reached the point of contributory negligence.

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The motorman asserts he threw off the power when some distance past the street line, but being like much else in his evidence not very definite I need not for the present purpose deal with it. I mention it merely lest expressions used relative to the reversal of power might indicate I had overlooked it. I might guess it immediately preceded reversal.

Since writing the foregoing the report of the case of *Toronto Rly. Co.* v. *King*(1), has come to hand and shews how very differently from this charge the Judicial Committee of the Privy Council dealt with the very rule in question here; though it was not there supplemented by evidence such as above and though the rule was unexplained or extended as by the said evidence given in this case and quoted above.

Another point of difference is that there the motorman never saw the man or cart his car struck at the crossing whereas here the motorman not only saw the girl in question, but describes her manner of carrying herself with great minuteness.

The judgment, in that case, I submit supports what I have written.

I think the appeal should be allowed with costs and the order of the Divisional Court for a new trial be restored.

MACLENNAN J.—I think the judgment appealed against in this case is right, and for the reasons given therefor by the learned judges of the Court of Appeal.

The argument of the appellants' counsel appears to me to rest upon a misconstruction of the company's rule, No. 58. This rule is as follows:

(1) [1908] A.C. 260.

Rule 58. Curves and Crossings—When approaching crossings and crowded places where there is a possibility of accidents, the speed must be reduced and the car kept carefully under control.

Go very slowly over all curves, switches and intersections; never faster than three miles an hour, and extra caution must be used in handling double truck cars at such places.

An intersection must never be taken when another car is approaching.

Cross streets must not be blocked nor must any crossing be taken until the road ahead is clear.

I am unable to agree with the opinion of the learned judges of the Divisional Court, that the place where this accident occurred is either a crossing or an intersection within the fair meaning of this rule. There is no crossing and there is no intersection of any kind. University Avenue, and University Street, and the several paths and ways there meet Queen Street, but do no more. They do not cross it, nor intersect it. A vehicle or a pedestrian coming down University Avenue or street may turn east or west upon Queen Street and go his way with perfect safety, without crossing either the rails of the company or the street. The citations from the dictionaries, in my opinion, are clearly against the interpretation of the Divisional Court.

Mr. Nix, the roadmaster of the company, called by plaintiffs' counsel, at page 56, speaking of University Street, says it is not a cross street, that the rules for ringing the gong and having his car down to a low rate of speed apply to cross streets, and that an intersection is a cross street.

He further says that, as between a street which merely meets another and one which crosses it, the duty to slacken speed and sound the gong exists in the one case and not in the other, and, finally, that the company had a right to run past the place where the accident occurred without slackening speed.

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The only seeming qualification of this is in the evidence of Whitehead, another roadmaster of the defendants, and called on their behalf. In cross-examination by the plaintiffs' counsel he is being questioned as to the practice and duty of motormen when approaching crossings under rule 58, and the following questions were put and answers made:

Q. You know this car? A. Yes.

Q. Would you advocate this car, 736, running down Queen Street, from York to University, at a speed of fifteen miles an hour, at nine o'clock in the evening? A. Well, I don't know; if all was clear, and there was nothing to obstruct me, and the car would run fifteen miles an hour, I might.

Q. How far from Osgoode Hall corner would you throw off your power and slacken your speed? A. I could not get to a speed of fifteen miles an hour going from York Street to University.

Q. Assuming that you had your power on full where would you turn it off? A. A car is not always running at full speed when the power is on full.

Q. If you had your power on full, after leaving York Street, where would you turn it off? A. I would shut it off forty or fifty feet back from the corner of University Street, or whatever you call it.

Q. Is that your answer? A. Yes, sir.

Q. That is what you are telling me now? A. Yes.

Q. And you would not shut it off before? A. That would be quite enough to slow down, you are not supposed to stop unless it is necessary.

Q. That is your answer now, is it? A. Yes.

Now, I do not think this evidence can be construed as a statement that University Street was a crossing or an intersection within rule 58, or a place where it was necessary to ring a gong or slacken speed, when approaching it. He is not asked that question, but only, at what point he would turn off power if he wanted to stop at University corner. That is, evidently, how he understood it, for he says he might, if all was clear and nothing to obstruct and the car would run so fast, from York to University street, at fifteen miles an hour. And that you are not supposed to stop unless it is necessary.

I, therefore, think the fact that this place was where two streets met each other had no bearing upon the case at all. The motorman was approaching the place of accident just as if there had been no avenue or other street at that point, and the unfortunate plaintiff was intending to cross just as she might have done at any other point not a crossing nor intersection.

Viewed in that way, as I think the case ought to be, I think there was no misdirection or non-direction of which the appellants can complain, and that the appeal fails.

DUFF J.—I agree that the learned judge's instructions to the jury upon the appellants' contention that the motorman was negligent in not sooner bringing his car under his control is not satisfactory; but although, upon this head the appellant may have some cause of complaint, I cannot convince myself that, in view of the finding of the jury on the issue of the contributory negligence, she can be said to have suffered any substantial wrong entitling her to a new trial.

The contributory negligence charged against the appellant and found by the jury was that in crossing the street she attempted to pass in front of an approaching car without taking proper (that is to say, reasonable) precautions. The appellant being on the south side of Queen Street, wished to cross to the north side. As she left the curb she observed the car which ran her down (on the north track some distance to the eastward) heading in her direction; but assumed that she would have time to cross before it reached her line of march. On this assumption she proceeded to set foot on the track on which she knew the car was approaching, without again looking in the direction of it.

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Duff J.

It was no doubt this last mentioned act—the act of going upon the track along which she knew a car was, within a short distance, approaching—without first looking to see the position of the car, that in the opinion of the jury constituted the contributory negligence they attributed to the appellant. Given this finding—that this act of the appellant (by which she passed from a position of perfect security into a position in which, in the circumstances of the moment, a collision with the respondents' car was inevitable) was an act of negligence—I am unable to see any ground on which she could hope to recover. The principle is too firmly settled to admit, in this court, any controversy upon it, that in an action of negligence, a plaintiff, whose want of care was a direct and effective contributory cause of the injury complained of, cannot recover, however clearly it may be established that, but for the defendant's earlier or concurrent negligence, this mishap, in which the injury was received, would not have occurred. *The London Street Railway Co.* v. *Brown*(1); *Spaight* v. *Tedcastle*(2) at page 226; *The "Bernina"* (3) at pages 88 and 89.

It was not argued that the question of the contributory negligence was not fairly left to the jury; as indeed it could not well be, since at the trial no objection was taken to the charge upon the head.

Appeal dismissed with costs.

Solicitor for the appellants: *Samuel King.*

Solicitors for the respondents: *McCarthy, Osler, Hoskin & Harcourt.*

(1) 31 Can. S.C.R. 642. (2) 6 App. Cas. 217.
(3) 12 P.D. 58.

ISABELLA ELIZA BEATTY, JOHN D. BEATTY AND THE WILLIAM BEATTY ESTATE (DEFENDANTS) } APPELLANTS;

AND

WILLIAM MATHEWSON (PLAINTIFF) ..... } RESPONDENT.

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*June 4.
*Oct. 6.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Construction—Sale of timber—Fee simple—Right of removal—Reasonable time.

In 1872 M., owner of timber land, sold to B. the pine timber thereon with the right to remove it within ten years. In 1881 another agreement replaced this and conveyed all the timber standing, growing or being on the land to have and to hold the same unto the said party of the second part, his heirs and assigns "forever" with a right at all reasonable times during years to enter and cut and remove the same. B. exercised his rights over the timber at times up to his death in 1893 and his executors did so after his death, M. not objecting. In 1903 persons authorized by said executors entered and cut timber and continued until 1905. The following year B. brought an action for an injunction against further cutting, a declaration that the right to take the timber had lapsed and for damages.

Held, affirming the judgment of the Court of Appeal (15 Ont. L.R. 557), Davies and Duff JJ. dissenting, that the instrument executed in 1881 did not convey to B. the fee simple in the standing timber but only gave him the right to cut and remove it within a reasonable time and that such time had elapsed before the entry to cut in 1903 and M. was entitled to damages.

APPEAL from a decision of the Court of Appeal for Ontario(1) affirming the judgment at the trial in favour of the plaintiff.

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) 15 Ont. L.R. 557.

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Under the agreement mentioned in the above headnote the executors of William Beatty, the grantee therein, authorized certain persons who were defendants in the action but not parties to this appeal, to enter on plaintiff's land in 1903, 1904 and 1905, and cut timber. Plaintiff did not protest against this until 1905, and brought his action in March, 1906, by which he claimed damages for trespass during the previous three years. At the trial he recovered damages, a declaration that the rights of defendants had lapsed before the trespasses complained of in 1903, and an injunction. This judgment was affirmed by the Court of Appeal and the defendants then appealed to the Supreme Court of Canada.

Hodgins K.C. and *H. E. Stone* for the appellants. The agreement is clear and unambiguous and the sense in which its provisions were intended by the parties cannot affect its construction. *North Eastern Railway Co.* v. *Hastings*(1).

The grant of the right to enter and cut is a grant of a license for profit to be exercised according to commercial requirements. See *Wickham* v. *Hawker* (2).

The words "during the term of * * years" can be struck out of the document. See *Inglis* v. *Buttery* (3).

If the appellants were bound to exercise their rights within a reasonable time such time must be fixed by the commercial necessities of the transaction and the evidence shews that the timber could not have been profitably cut before the years 1903-1905. See *Carvill* v. *Schofield*(4).

(1) (1900) A.C. 260.
(2) 7 M. & W. 63.
(3) 3 App. Cas. 552.
(4) 9 Can. S.C.R. 370.

F. R. Powell K.C. for the respondent. As the agreement only conveyed the timber standing at the time it was made and not the future growth it necessarily meant that it should be removed within a reasonable time. Challis on Real Property p. 224.

As to what is a reasonable time see *Dolan* v. *Baker* (1); *McRae* v. *Stillwell, Millen & Co.*(2); Am. & Eng. Ency. of Law, 2 ed., vol. 28, p. 542.

Hodgins K.C. in reply referred to *Hick* v. *Raymond & Reid*(3); *Dahl* v. *Nelson, Donkin & Others* (4); *Patterson* v. *Graham*(5).

GIROUARD J. agreed in the opinion stated by Idington J.

DAVIES J. (dissenting).—The dispute in this case arises out of the proper construction of the deed under which the appellant Beatty claimed and exercised the right of cutting the trees on respondent Mathewson's land. It is not the case of a *mere right to cut* trees being given but one where a grant of the trees themselves is given. Where a right to cut merely is given I can well understand either the document itself containing a clause restrictive as to the time within which the cutting was to take place or in its absence the necessity arising for a judicial determination of a reasonable time within which the right was intended under all the circumstances to be exercised.

(1) 10 Ont. L.R. 259.
(2) 111 Ga. 65.
(3) [1893] A.C. 22.
(4) 6 App. Cas. 38 at p. 59.
(5) 164 Pa. 234.

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Davies J.

Authorities were cited at the argument in support of this latter position with which I do not propose to quarrel. I cannot however accept these authorities as applicable to a case where a grant of the trees themselves is made in or over a parcel of land.

In such case where apt words are used an estate of inheritance in the trees is vested in the grantee together with the necessary incidents of such an estate.

That is the case in the deed before us and which we are called upon to construe. It grants and conveys to Beatty all the pine, oak, birch, hemlock and other timber at the time of the execution growing or being in or upon the land described to hold to the grantee his heirs and assigns forever.

Under English law as laid down in authorities which I do not think we have the right to disregard this language vested in Beatty an estate of inheritance in the timber described and as a necessary incident the right to enter upon the land at all reasonable times for the purpose of cutting and removing the timber.

The subsequent clause now in dispute professing to confer this incidental right upon the grantee was in my view necessary. No negative words were introduced into the clause prohibiting the cutting of the trees after a specified time but the clause which was in a printed form professed to confer such a limited right. In the case before us the blank left for stating the limited time, months or years, was not filled up, and so the clause merely professed to confer this right for *blank* years. The court below assume under these circumstances the right to insert in this blank what they hold must have been intended under the circumstances, namely, a reasonable time from the date of the deed.

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Davies J.

I do not think if I am right in my construction of the clause that we have any right to read such a limitation into the deed. It certainly would be inconsistent with the estate granted and might well be held bad for that reason even if it had been inserted by the parties themselves.

For these reasons I am of opinion that the appeal should be allowed and the action of the plaintiff dismissed.

IDINGTON J.—This appeal depends upon the interpretation to be given to a deed drawn by the party under whom appellant claims title, and like most ill-drawn documents, as it is, gives rise to some puzzling questions.

Inasmuch as it relates to what has been held to be an interest in land the difficulty arises of reaching a conclusion that will not infringe on the one hand on well-known rules of interpretation applicable to deeds of conveyance of real estate, or on the other hand, frustrate the intentions of the parties to it, or defeat the reasonable expectations of either of the parties who may have misconceived the rigid rules applicable to the conveyance of real estate.

The document is ambiguous. The surrounding facts and circumstances may therefore be looked at and borne in mind in the task of interpreting it.

One very essential thing in this regard is that the vendee had previously bought the pine timber on this same land with a right to take it in ten years from the purchase, and as that happened not to have been practicable, he desired the time extended. In coming to an agreement for such extension of time, the vendee desired to extend the subject matter of it so

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as to include timber of other kinds named, in addition to the pine, and that part of the price originally agreed on for the pine alone should form and be part of the aggregate price, to be made up of such part of the original consideration and a further small sum named.

The transactions are so intimately connected, that this one now in question may be well said to form but a continuation of the prior one with some modifications in same.

Let us consider the scope of the entire document. Let us observe also that there is a blank in which evidently it had been intended something should be agreed on and inserted specifying the number of years the vendee should have to remove the timber.

Must we, under such conditions, say as we are asked by the appellants to say, that an unconditional estate in fee simple has been granted?

This would so clearly defeat the obvious intentions of the parties to be inferred from the external circumstance as well as that within the document itself when considered as a whole, and lead to such unjust results, that I pause to see if we are driven to adopt such contention.

In the first place I do not admit that the terms of the premises and habendum necessarily imply an estate in fee simple. To begin with, it is not of the timber for all time grown upon the lot that a sale is made, but of that "now standing growing or being in or upon" the land described. We know that timber such as named does not live and remain obtainable for any useful purpose for such length of time as an estate in fee simple *primâ facie* implies, or as the expression "forever" used in this habendum implies,

apart altogether from what the words immediately preceding the word "forever" imply.

This is not the case of any conditional fee dependent on the life of man or tree or other thing.

The premises and habendum are indeed inconsistent and insensible when we consider the life of the tree, that lives longest of those sold, as the utmost term that by any possibility can have been intended.

We cannot, as might happen in a differently drawn instrument dealing with such a subject matter, reject that following the habendum which had so clearly granted an estate such as would render it imperative to reject what followed the habendum as inconsistent with or repugnant to it.

The case of a grant of a fee conditioned on the life of the longest lived of the trees in question would not need the provision for the right of entry to make roads to take the timber.

That being expressly provided for implies also that such a conditional fee was not intended.

The case of *Re Hammersly*(1), presents a document not unlike this one. The court rejected the word "heirs" as inconsistent with what the parties were contracting for.

In this case there is evidently an imperfect document. Its condition in that respect must also be borne in mind.

In the case of a limitation to "A" and his heirs for a term of years, it is said only a chattel interest is conferred, and it passes to the executor on death of "A". See Elphinstone, Blackstone edition, p. 245, and the authorities cited there, and the recent Norton edition, at p. 299 and the authorities cited therein.

(1) 11 Ir. Ch. 229.

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I think, for these reasons and those set forth above, that this curiosity of an inapt use of words cannot be held to be a grant of any such estate in the land as would make it imperative to reject the later part of the document, and that it is to be taken as of a kind that we can, as was done in the *Hammersly Case*(1), reject the word "heirs" entirely, or hold that it is impossible to give a greater effect to it than the later expressions imply should be given it.

It thus comes, I think, to what was a reasonable term of years, as implied in the document as it stands, and giving effect to its entire scope for removal of the timber in question. I agree with the learned trial judge that that limit of time had been so far passed before the acts complained of, that the rights the vendee once had under the agreement in question had then expired.

I think though *Dolan* v. *Baker*(2) may not be binding on us, the reasonable time adopted there was the proper measure and could well be followed here.

I may observe that I have not overlooked the fact that the instrument purports to be made in pursuance of "the Act respecting short forms of conveyances," and was made after the "Act respecting the transfer of real property" as it stood in R.S.O. of 1877, ch. 98, and before the later Acts on the same subject in 49 Vict. and 50 Vict.

The argument put forward by the appellants' counsel that the commercial conditions of the case are to be considered, and that a time when it would be profitable to remove the timber ought to govern, is unsound.

(1) 11 Ir. Ch. 229. (2) 10 Ont. L.R. 259.

Such a thing clearly was not within the contemplation of the parties.

The judgment ought, I think, to stand and the appeal be dismissed with costs.

MACLENNAN J.—I would dismiss for the reasons given in the Court of Appeal.

DUFF J. (dissenting).—The action out of which this appeal arises was brought by the respondents to recover damages from the appellants for alleged trespasses consisting of the cutting and removal of timber from the respondents' land.

The appellants, who are trustees under the will of one William Beatty, justify under a deed of conveyance dated 15th September, 1881, made between the respondents and Beatty.

The question to be determined turns wholly upon the true construction of this deed. It was not argued on behalf of the respondents that upon the evidence there is any sufficient ground for holding that the instrument was not executed by the parties with the intention of thereby recording the transaction between them, or that it is not binding on the parties as failing to record that transaction truly; and no such point appears to have been taken in the courts below or finds a place in the pleadings. We have consequently to ascertain the rights of the parties from the language of the instrument with such assistance as may be obtained from the relevant circumstances under the rules of law governing the interpretation of written instruments.

By the deed in question the respondent, who was the owner of lots 115 "A" and 116 "B" in the Township of Foley, Parry Sound, professed to

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grant, bargain, sell and assign unto (Beatty) his heirs and assigns, all the pine, oak, birch, hemlock and other timber now standing, growing or being in or upon all and singular that certain parcel or tract of land and premises situate lying and being (describing them). To have and to hold the same unto the said party of the second part his heirs and assigns forever, together with full power, liberty, right and authority for the said party of the second part, his servants, workmen and agents from time to time and at all reasonable times hereafter during the term of years to fell, cut down, grub up, saw, dress, hew and work up the said timber, and together with full and free ingress, egress and regress, for the said party of the second part his servants, workmen and agents with or without horses, oxen, waggons, carts, sleighs, trucks and teams to enter into and upon and over the said lands and premises for the purposes aforesaid, and also for the purpose of taking and carrying away the said timber with liberty also to make all such roads as may from time to time be necessary for getting out and removing the said timber, and for that purpose to cut, fell, hew and remove such trees, logs and brush as may be deemed necessary.

Further the grantors entered into covenants—in the form prescribed by the schedule of the Ontario "Act respecting short forms of conveyances," save that in the deed the word "timber" is substituted for the word "land" appearing in the form—for quiet possession; for further assurances; and that the grantors have done no act to encumber the subject of the grant. Finally the grantors profess to release to the grantee "all their claims upon the said lands in so far as the same may affect the said timber."

The respondents put their case thus:—They say the deed in its true construction is to be read as an agreement for the sale of standing timber to be cut and removed by the vendee; and inasmuch as the instrument itself fixes no time within which the work of removing it is to be completed the law implies an agreement between the parties that it shall be removed within a reasonable time; and that after the expiry of a period which in fact is in the circum-

stances reasonable for that purpose, the appellants' rights under the agreement must be held to have lapsed. In a word the instrument provides, according to the respondents, for a sale of timber conditional upon the cutting and removal of it by the vendee within a reasonable time.

The courts below have held in substance that this is the true construction of the document; and further that the appellants' rights had lapsed at the time the acts were done in respect of which the action was brought and consequently that the respondent cannot justify under the deed. With great respect I have come to the conclusion that another construction must be given to the instrument; and in my view of its legal effect the last mentioned point—whether a reasonable period for cutting and removing the timber has or has not elapsed—which the courts below have decided in favour of the respondent, is a point which it will not be necessary to consider.

It will be noticed that the instrument at the outset professes to grant to the grantee his heirs and assigns all the timber "standing, growing or being" upon the lands referred to. I think it is quite important to determine the legal effect of this part of the instrument; that is to say, to ascertain what the words in themselves mean, and what their legal effect would be, if they stood by themselves in a deed without any other provision. I think it is very clear that such words in such a document would have the effect of vesting in the grantee an estate in fee simple in the growing timber described. I do not know that anybody disputes that the owner of an estate of fee simple in land on which trees are growing may by an appropriate assurance vest in another an estate of

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inheritance in one or more of the trees. My own view is clear, and it may be, I think, of some importance to emphasize it. The law touching the point is I think correctly stated by two modern text writers, and I quote the passages. The first, from Mr. Leake's Uses and Profits of Land at page 30:

> A grant or an exception from a grant, of the trees growing in certain land, creates a property in the trees, separate from the property in the soil; but with the right of having them grow and subsist upon it. (*b*) An estate of inheritance in a tree may thus be created.

The second, from Washburn on Real Property at page 16:

> But if the owner of land grants the trees growing thereon to another and his heirs, with liberty to cut and carry them away at his pleasure, forever, the grantee acquires an estate in fee in the trees, with an interest in the soil sufficient for their growth, while the fee in the soil itself remains in the grantor.

The views of these writers seem to be fully supported by authority. Those cited by Mr. Challis at p. 229 of his book on the Law of Real Property establish beyond question that a determinable fee may be validly limited to a man and his heirs "as long as such a tree shall grow" or "as long as such a tree stands"; and the reason why such limitations are good is given in *Liford's Case*(1), and is there said to be "because a man may have an inheritance in the tree itself." In the same case at page 49*b* there occurs this passage:

> If I by deed grant all my trees within my manor of G. to one and his heirs the grantee shall have an inheritance in them,

although it is quite clear from *Liford's Case*(1), as well as from other authorities; *Ive's Case*(2); *Whilster* v. *Paslow*(3); that by a grant of trees *simpliciter*

(1) 11 Coke, 46*b*, at p. 49*a*. (2) 5 Coke 11*a*.
(3) Cro. Jac. 487.

no soil passes but "sufficient nutriment to sustain the vegetative life of the trees" only.

It seems nevertheless to be indisputable that growing timber may be so granted as to vest it *in situ* in the grantee as a chattel; *Stukeley* v. *Butler* (1); *Herlakenden's Case* (2); *Anon* (3); Shepherd's Touchstone, 471; Williams, Executors, 543; notwithstanding the vigorous criticism by Chitty J. in *Lavery* v. *Pursell* (4), at pp. 515-517, I think it is too late to dispute that doctrine. I have however been unable to find any shred of authority or any suggestion of a good reason for doubting the proposition stated by Mr. Leake and Prof. Washburn—in the passages I have quoted—that growing timber *in situ* may as such by apt words be vested in a grantee for an estate of inheritance apart from the property in the soil.

It follows from this that the words last quoted from the instrument in question would if they stood alone unquestionably have the effect of vesting in the grantee an estate in fee simple in the timber described. I think moreover that when you have a grant of timber *in situ* in fee simple the law confers as one of the legal incidents of the grant the right to go upon the land to enjoy the timber, including of course the right of cutting and removing it. In *Liford's Case* (5) it was resolved (52*a*):

> When the lessor excepted the trees, and afterwards had an intention to sell them, the law gave him, and them who would buy, power, as incident to the exception, to enter and shew the trees to those who would have them; for without sight none would buy, and without entry they could not see them.

(1) Hob. 168, at p. 173.
(2) 4 Coke 62*a*, at p. 63*b*.
(3) Owen 49.
(4) 39 Ch.D. 508.
(5) 11 Coke 46*b*.

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and it is further said:

> If I grant you my trees in my wood, you may come with carts over my land to carry the wood, *temp.* Ed. 1, Grants 41. *Lex est cuicunque aliquis quid concedit, concedere videtur, et id sine quo res ipsa esse non potuit.*

In *Stukeley* v. *Butler*(1), Hobart C.J. gives many examples of the application of this principle, and it was there held that even when the timber is sold as a chattel such a right is vested in the grantee of standing timber as incident to the grant.

The majority of the court below have held that this principle is not applicable here, and this view appears to be based upon two distinct grounds; first, that the principle itself, stated broadly as I have stated it, is no longer law, but that, when from the facts of the case it can be gathered that the removal of the timber was contemplated by the parties, then, in the absence of a specific stipulation to the contrary, the law places a restriction upon the implied right of entry requiring it to be exercised within a reasonable time; and secondly, that assuming the rule to be still applicable to cases where there is no express right of entry given by the instrument of grant, it has no application in cases where, by the instrument of grant itself the parties expressly stipulate—as it is said they have in the instrument in question here stipulated—for a right of entry; in which case it is said the grantee's right in that regard must be ascertained from the terms of the instrument.

It will be convenient to consider these two grounds in the order I have stated them.

The question raised by the first is whether, given a grant of standing timber in fee, the fact that the

(1) Hob. 168.

parties have contemplated the removal of the timber is in itself sufficient to limit the right of entry in the manner stated.

Stukeley v. *Butler*(1), at page 173, is an authority directly in point; and the question stated cannot be answered in the affirmative without repudiating the authority of *Stukeley* v. *Butler*(1). For whatever may be said of that case as an authority on other points its ratio obviously involves this; that a grant of the absolute property in standing timber *in situ* without more confers by implication a right of entry for the purpose of cutting and removing it so long as the grantee's interest lasts.

Now *Stukeley* v. *Butler*(1) has stood for some hundreds of years; and the principle upon which it proceeds must have been acted upon in thousands of transactions. These circumstances together afford very powerful reasons against refusing at this date to follow it; and in my opinion they are conclusive reasons unless it can be shewn that by some competent authority the law has been declared in a different sense.

The court below adopted the decision of the Divisional Court in *Dolan* v. *Baker*(2). In that case the Divisional Court proceeded in part upon the principle of a long series of decisions in the state courts of the United States and in part upon the authority of a series of decisions in the courts of Ontario. These last mentioned decisions, however, (which are collected in the judgment of Magee J. at p. 271), appear to rest in every case upon the view that on the true construction of the transaction under consideration the vendee had acquired only a right to take away such of the

(1) Hob. 168.

(2) 10 Ont. L.R. 259.

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timber as he should remove within a limited time. Such decisions plainly have no bearing upon the question I am now considering. On the other hand some of the American decisions relied upon in *Dolan* v. *Baker*(1) do unquestionably proceed upon the principle that a grant of standing timber apart from the soil is in the absence of express stipulation to the contrary subject to a condition that it is to be removed within a reasonable time; but the American decisions are by no means in harmony; and I can find in them no satisfactory grounds for impugning the authority of *Stukeley* v. *Butler*(2). Neither does the actual decision in *Dolan* v. *Baker*(1) itself seem to touch very closely the point now under consideration. The instrument there dealt with did not profess to grant a present interest in the timber which was the subject of the sale; it provided for selection by the vendee and vested in the grantee the property in so much of any of the timber referred to "as he should see fit to remove." (See Boyd C. at p. 265.) Until selection and removal, I gather from the report, the property was not to pass. The ratio of the decision is stated by Magee J. at pp. 270 and 271 in these words:

> There was here an implied condition that the timber should be selected and removed within a reasonable time. It would be intolerable that the vendee should be left for an unreasonable time without the use either of his land or his money and in ignorance even of what trees the purchaser might select and so unable to sell or clear off any.

Such reasoning, appropriate and cogent as applied to the facts of that case, seems to have little bearing upon the questions raised by the instrument now before us.

(1) 10 Ont. L.R. 259. (2) Hob. 168.

There are however in the judgment of Boyd C. in *Dolan* v. *Baker*(1) observations which lend support to the view that as a general rule in grants of growing timber the stipulation suggested is implied by law. Boyd C. indeed accepts "as a reasonable doctrine" the doctrine laid down in some comparatively recent decisions in Georgia—that it is "incumbent upon the grantees to cut and remove such timber within a reasonable time from the sale and that on failure to do so their interest ceases"; and that the question of reasonable time is a question of fact in the circumstances. No English authority is referred to in support of this position except a dictum of Parke B. in *Hewitt* v. *Isham*(2), cited from the report of that case at page 79 to this effect:

> Wherever trees are excepted from a demise, there is, by implication, a right in the landlord to enter the land, and cut the trees at all reasonable times. If, indeed, he leaves them on the land for an unreasonable time, he does more than the law authorizes him to do.

This, the learned chancellor suggests, contains the germ of the doctrine he adopts from the American cases.

A reference however to the report of that case in the Law Journal(3) shews that Parke B. was speaking only of the duty of the grantee of the timber to remove it within a reasonable time after it is felled. In that report the passage appears thus:

> If the trees were excepted out of the lease, the lessor had a right to go upon the land and enjoy the trees and cut them down. If indeed he saws them upon the land and leaves them an unreasonable time, he does more than he is justified in doing, and is liable to an action.

(1) 10 Ont. L.R. 259. (2) 7 Ex. 77.
(3) 21 L.J. Ex. 35.

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With unaffected great respect for the opinion of the learned Chancellor of Ontario, I am compelled to come to the conclusion that the principle I have stated (for which *Liford's Case*(1) and *Stukeley* v. *Butler* (2) have for so long stood as authorities unquestioned in England), still stands, and ought to be applied in jurisdictions where the law of England prevails.

In considering the second ground referred to, the first question which naturally arises is, whether or not, assuming the blank in the clause relating to the right of entry to be filled in and the exercise of that right, so conferred, expressly limited to a specified term of years, such a clause could have any legal effect in derogation of the rights vested in the grantee under the grant expressed in the earlier part of the instrument. If I am right in my view that the right of entry incident to the grant is a right which the law annexes to the interest passing under the grant then it would seem to follow that any attempt in one and the same conveyance to grant the interest and to withhold the incidental right is an attempt which the law will not permit to succeed. The condition or stipulation professing to effect the deprivation of the right is in the language of the law void, as repugnant to the grant.

I do not, however, think the appellants depend for their success in this appeal upon this rule of law. Treating the question as a matter of interpretation simply, and assuming that a clause giving a right of entry for a specified period could be held to displace the right of entry incident to the grant itself, still I can find nothing in the clause before us to justify the conclusion that the grantee's right of entry is

(1) 11 Coke 46*b*. (2) Hob. 168.

more limited than it would be if that clause were not found in the deed. What in view of all the facts is the fair inference from the omission of the parties to specify the term of years? The learned trial judge says:

> This land, it appears, is poor farming land. Far the greater part of it is rocky and unfit for farming. During the thirty-five years of Mr. Mathewson's ownership there has only been some thirty-five or thirty-seven acres cleared. The rest of it is unfenced, and has only been used by him for pasturing cattle with occasional taking of timber.

At the date of the execution of the deed there was admittedly no market for a good deal of the timber; for over twenty years after that date the parties acted upon the view that the deed imposed no limit of time in respect of the grantee's right of entry. These circumstances seem to me to point to the conclusion that the blank was not filled in because the parties never touched the point in their transaction, and never thought of it. If then one discard the blank from consideration and treat the clause as one conferring a right of entry without specific limitation, I do not understand on what principle it can be held that, so read, it displaces the implication arising from the grant. The right of entry is given as accessory to the grant, which is a grant of an interest in perpetuity; on what ground is it to be held to limit or condition that interest? Are we first to imply a condition that the exercise of the right of entry is to be limited in time; and then with that implication deprive the grantee of a right which otherwise would pass to him as a legal consequence of the grant? To me the weight of argument lies in the suggestion that such right of entry conferred in general or equivocal terms takes its character from the interest to which

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it is accessory. I think that in such a case the rule which implies a stipulation that things agreed to be done *inter partes* shall be done within a reasonable time has no application. That rule must always yield where the terms of the instrument are on their true construction sufficient to manifest a contrary intention; and in this case such contrary intention would seem to be sufficiently manifested by the terms of the grant itself.

The appeal should be allowed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Pirie & Stone.*

Solicitor for the respondent: *F. R. Powell.*

McGUIRE v. FRASER.

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*June 9, 10.
*Oct. 6.

Builders and contractors—Responsibility for faults in construction —Negligence—Latent defect—Installations in constructed building—"Automatic sprinkler system"—Damages by flooding—Injury sustained by subsequent purchaser—Right of action—Assessment of damages—Expertise—Arts. 1055, 1688, 1696 *C.C.*

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, Tellier J., District of Montreal, which maintained the plaintiff's action with costs.

The plaintiff's *auteur* employed the defendant to install an "automatic sprinkler system" in his building, (subsequently sold to plaintiff,) and, in executing the work, the defendant made insufficient connections with the city water-mains by means of a pipe already existing in the building. As the result of this fault in construction the pipes became disjointed and the plaintiff's goods, consisting largely of cases containing wines in labelled bottles, were damaged. The plaintiff notified defendant that he would hold him liable for the damages thus sustained and requested him to attend at an expert valuation to be made by fire insurance adjusters and valuators, but plaintiff disregarded the notification and did not attend. The experts assessed the damages, in the manner usually adopted in similar cases of damages caused by fire, at $3,397.11, and the plaintiff's action was maintained for this amount with amounts added for

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) Q.R. 17 K.B.

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expenses incurred in repairs to the pipes, fees to the experts and costs of protest. The court below by the judgment appealed from(1) affirmed the judgment of the trial judge, Tellier J.(2), which maintained the action for the full amount demanded, and held that, under the provisions of articles 1055, 1688 and 1696 of the Civil Code, the contractor was responsible for the damages sustained, that the plaintiff, as subsequent purchaser of the building, had a right of action against the contractor as he was the person injured through the latent faults in construction, that the method of assessment of damages adopted was a proper mode to follow, under the circumstances, and that the repairs, experts' fees and costs of protest were items of damages which could properly be recovered in the action.

After hearing counsel on behalf of the parties, on the appeal, the Supreme Court of Canada reserved judgment and, on a subsequent day, dismissed the appeal with costs, Davies J. *dubitante.*

The following notes were delivered by the judges.

GIROUARD J.—Il s'agit dans cette cause plutôt de questions de fait que de questions de droit. L'intimé réclame des dommages de deux chefs; d'abord à raison de la garantie du constructeur en vertu de l'article 1688 du code civil: et en deuxième lieu à raison de la négligence du constructeur dans l'exécution de ses travaux en vertu de l'article 1055 du même code. Les tribunaux inférieurs sont arrivés à la conclusion que l'appelant était responsable des deux chefs pour des raisons amplement données dans leurs jugements et

(1) Q.R. 17 K.B. .

(2) 14 R.L. (N.S.) 174.

auxquelles j'adhère entièrement. Je suis donc d'avis de renvoyer l'appel avec dépens.

DAVIES J.—I entertain considerable doubt in this case but will not dissent from the opinion of the majority of the judges that the appeal should be dismissed.

IDINGTON J.—I think, for the reasons assigned in the Superior Court and by Mr. Justice Bossé and Mr. Justice Trenholme in appeal, this appeal should be dismissed with costs.

MACLENNAN J.—I think that this appeal should be dismissed for the reasons given in the court below.

DUFF J.—I agree in the reasoning of the learned judge, in the Superior Court, and in the opinions stated by Bossé and Trenholme JJ. in the court appealed from. I am of opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Atwater K.C. and *J. Wilson Cook* for the appellant.

T. P. Butler K.C. and *Lafleur K.C.* for the respondent.

1908

*June 11, 12.
*Oct. 6.

THE MONTREAL LIGHT, HEAT AND POWER CO. (DEFENDANTS)... } APPELLANTS;

AND

MARY REGAN, ES NOM ET ES QUALITE (PLAINTIFF)..... } RESPONDENT.

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

Negligence—Dangerous works—Protection of employees—Evidence—Questions for jury—Judge's charge—Findings of fact—Inferences.

An experienced employee of the defendants was killed by an explosion of illuminating gas while discharging his duties in the meter-room at the defendants' gas works. It was shewn that there might possibly have been an escape of gas from the controllers or other fixtures in the room or in the blow-room adjoining it; that, there had been no special precautions by the defendants to detect any such escape of gas that might occasionally happen; and that the meter-room had always been and, at the time of the accident, was lighted by means of open gas jets. There was no exact proof of any particular fault, attributable to the defendants, which could have been the whole cause of the explosion, and its origin and course were not explained. In an action for damages by the widow and representatives of deceased, the jury found that the explosion had resulted from the fault and imprudence of the defendants in lighting the meter-room by open gas jets, and contributory negligence on the part of deceased was negatived.

Held, affirming the judgment appealed from (Q.R. 16 K.B. 246), Davies and Maclennan JJ., dissenting, that, in the circumstances, the jury were justified in finding that there had been such negligence and imprudence on the part of the defendants, in such use of open gas jets, as would render them responsible for the injury complained of.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment ren-

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) Q.R. 16 K.B. 246.

dered in the Superior Court, sitting in review, at Montreal(1), which ordered that judgment for the plaintiff should be entered upon the findings of the jury at the trial, in the Superior Court for the District of Montreal.

The circumstances of the case and the questions at issue on this appeal are stated in the judgments now reported.

R. C. Smith K.C. and *G. H. Montgomery* for the appellants.

Oughtred K.C. and *W. H. Butler* for the respondent.

GIROUARD J.—I am of opinion that this appeal should be dismissed with costs, for the reasons stated by Mr. Justice Duff.

DAVIES J. (dissenting).—The conclusion which I have reached with respect to this appeal is that it should be allowed and the action dismissed.

The findings of the jury on all of the questions asked them are not apparently consistent, but I do not think that reading them together there can be any reasonable doubt as to their meaning.

The form in which the 8th question was put to them is doubtless responsible for the answer given. Indeed it is difficult to see how any other answer than the one given could have been given unless indeed the answer was divided so as to cover separately each of the periods they were asked to cover. The question read:—

(1) Q.R. 30 S.C. 104.

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8. Was the plant and machinery in use in the said building in perfect running order at the time the explosion occurred and immediately afterwards?

The answer is "No."

If the gas fittings and pipes were understood by the jury as being part of the plant and machinery in use, of course as they were all wrecked and destroyed by the explosion they could not be said to be in perfect running order immediately after it occurred. The jury may or may not have understood these gas fittings and pipes to have been part of the plant and machinery. Nor does it appear to me that standing alone even if it had been limited to the time when the explosion occurred a categorical answer, yes, or no, would have been of much service. Something other and further than such an answer would be necessary to found any reasonable inference of fault or negligence on the company's part for which they could be held liable in this action.

If the gas pipes for the lighting of the power house were not considered by the jury as part of the plant or machinery then the answer seems to me to be one impossible under the evidence to uphold.

It is argued that, reading the judge's charge with the answer given, the meaning of the jury was that they intended to find there was a leak in the plant but the uncontroverted evidence of the perfect condition of the plant immediately after the explosion is inconsistent with any such meaning being read into the jury's finding. Probably their meaning was that which they subsequently stated in answer to the 12th question that the plant was not in perfect running order with the use of the gas jets to light the room. In their answer to this latter question they find that the explosion was caused by the fault, negligence,

want of care and imprudence of the defendants "by lighting the meter and blow-rooms by ordinary gas jets" and negative any such fault or negligence either in the ventilation of the room or in the sufficiency of the plant or machinery. As I construe their answers to the 12th question they negative any fault or negligence other than that expressly found of "lighting the meter and blow-rooms by ordinary gas jets."

They also expressly negative contributory negligence on the part of the deceased.

With these findings of the jury the question is: Was there any evidence from which the jury could as reasonable men conclude that the method adopted and maintained for nearly half a century of lighting the room by gas was in itself fault and negligence on the defendants' part?

The evidence of the experts was that this method of lighting the meter-room was, with the exception of one establishment in or near Boston, the method and practice adopted everywhere in Europe as well as America. There was no reason whatever as I gather from the evidence why a leak or escape of gas should occur in the meter-room any more than in any other room in the establishment, and the jury were unanimous in the finding that the explosion was not caused by "insufficient plant or machinery" which I construe as meaning was not caused by any *defective* plant or machinery.

The cause of the presence of gas in explosive quantities in the room is left by the evidence and the findings of the jury a mystery unsolved.

The alleged faults and negligence of the defendants in the matter of ventilation and plant and ma-

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chinery being negatived and eliminated we are left alone with the finding of negligence in the fact of the lighting of the room with gas jets.

Is this alone negligence? It does not appear to me to be so in the absence of any evidence shewing special damage to be reasonably apprehended in this meter-room beyond that of other rooms, and in the presence of the evidence that the practice of so lighting the room was one almost universally adopted by gas factories throughout the world without so far as the evidence shews any explosions such as the one we are considering having occurred.

Some observations of the Judicial Committee in the case of *McArthur* v. *Dominion Cartridge Company*(1), at page 76, have been relied on. But any such observations must, of course, be read in the light of the facts of the case then before their Lordships and as found by them.

Their Lordships in that case say, with reference to the mechanism of the cartridge machine the working of which was being considered:—

> But these automatic fingers occasionally at any rate acted in an uncertain not to say an erratic manner. Up to the time of the explosion though no doubt less frequently at the last than at the first cartridges were now and then presented in a wrong posture and the blow or punch fell sometimes on the side of the cartridge and sometimes on the metal end in which the primer or percussion cap had been inserted. The evidence was that a considerable number of these failures occurred from time to time and that the injured cartridges were collected and sent away to be scrapped or broken. It seems to be not an unreasonable inference from the facts proved that in one of these blows that failed a percussion cap was ignited and so caused the explosion. *There was no other reasonable explanation of the mishap* when once it was established to the satisfaction of the jury that the injury was not owing to any negligence or carelessness on the part of the operator. The

(1) [1905] A.C. 72.

wonder really is not that the explosion happened as and when it did but that things went on so long without an explosion.

Now the ground of that decision seems to me to be the proof of existing defects in the working of the machinery which experience had brought to the notice of the company and which from time to time caused failures in the loading of the cartridges from which danger ought reasonably to have been anticipated and (other possible causes having been eliminated) from which it was not an unreasonable inference actually did cause the explosion there in question.

But where in the case before us are the analogous facts from which it might reasonably be inferred the explosion here in question occurred.

I am unable to find any. The evidence as to the lighting of the room with gas jets being negligence in itself or likely to cause an explosion is all the other way. It is true, no explanation of the presence of explosive gas in the room is or can be given, and that the deceased operator is absolved from any negligence. There is, in fact, no explanation of the said mishap at all. It remains an unexplained mystery. But the facts and findings from which a "not unreasonable inference" should be drawn that the mishap was occasioned by fault or negligence on defendants' part are wanting. In the face of the jury's finding of the condition of the plant and the machinery, and of the evidence as to its being put into successful operation again immediately after the explosion without any defect being shewn and also of the evidence of universal experience with the method of lighting condemned by the jury, I would say any such inference attributing the mishap to defendants' negligence would be unreasonable.

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The burden of proof which lay upon the plaintiff has not been discharged and under the circumstances and on the findings actionable negligence cannot be imputed to them.

Idington J.

IDINGTON J.—I think for the reasons that appear in the judgments of Chief Justice Tait, in the Superior Court, in review, and of Mr. Justice Carroll in the Court of King's Bench, in appeal, that this appeal should be dismissed with costs.

I may add that I have felt much pressed by the form of the questions framed before trial for the submission of the case to the jury. There has been a consequent difficulty in considering the answers made by the jury.

Taking, for example, that to part of the 12th question, it appears at first sight as if the use of gas to light a room was an act of negligence in the opinion of the jury.

Taking the answer to the 8th question it might be doubtful whether it was before or after the explosion that it was found that the plant and machinery were not in good running order.

I think the charge of the learned trial judge in dealing with this 8th question, whereby he directed the attention of the jury to finding in their answer to the question whether or not there "was a leak, that necessitated the explosion" must be kept in view in considering the question and the answer made.

The same need arises for considering the charge in relation to the 12th question, and of trying to understand the answer in light of the charge.

The jury are not to blame. It is the frame of the question they had to deal with. The appellant was

not entirely blameless in allowing such questions to be submitted to the jury without making some better effort than appears to have been made to rectify the matter.

The evidence, the charge, and the answers, when read together, leave little doubt however as to the meaning of the findings.

The deceased was exonerated entirely from blame and so clearly was he entitled to be so exonerated that the appellant assented to it being done.

In face of that we were troubled with suggestions of how he might have brought about the explosion. Diverting attention to that question, which ought to be considered as absolutely settled, only helps to confuse matters already confused enough.

There can be no doubt that the jury found that there was a leak through somebody's fault or some defect of the apparatus used whereby the gas escaped into a room where there was fire to light it.

The evidence furnished such a case for plaintiff as could not in law be withdrawn from the jury, when deceased was exonerated.

That is all we have to do with, unless by reason of misdirection the trial should be set aside. As a whole I do not think the charge did in fact prejudice any one.

It was urged upon us that legal negligence is a mixed question of law and fact and that the jury ought not to be allowed to pass upon it, but merely find the facts upon which the court should pass.

This sort of objection has been, in a former case, ineffectually brought before this court. There should be no difficulty in the matter. The trial judge is supposed to direct the jury as to the law bearing on the

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facts, and the jury is bound to follow the instruction they get in this way. If the learned judge fail to direct aright, on the law, then the party affected, objecting, can have the verdict set aside. And on the other hand, if the jury fail to follow the law thus properly and correctly given them, their verdict will be set aside.

The common case of larceny usually presents no difficult question of law, but yet it may. There can only, as a rule, be one issue of guilty or not guilty presented to the jury. Yet no one ever was heard to raise any doubt as to the propriety of submitting such questions of mixed law and fact to a jury.

There is just about as little difficulty in making a jury understand the law of negligence (which is but the outcome or growth of law derived in the last analysis from the common sense of the common people) as in the law regarding larceny.

MACLENNAN J. (dissenting).—I agree in the opinion given by Mr. Justice Davies.

DUFF J.—The respondent's husband, John Douglas, was killed in an explosion in the gas works of the appellants in Montreal. The explosion occurred in a compartment of the works comprising two rooms connected by a door, known as the meter-room and the blow-room, respectively; and was admittedly the result of gas which had escaped from the appellants' pipes coming in contact with the open flame of the gas jets by which these rooms were lighted.

The jury found that the disaster was attributable to the negligence of the appellants in lighting the rooms by means of a flame exposed to the atmosphere,

and the judgment for the plaintiff in the Court of Review, based upon this finding, was affirmed by the Court of Appeal.

The appellants assail this judgment in two ways: —First, there is, they contend, no evidence to support the finding that the practice of lighting the rooms by the means employed was a negligent practice; and,—Secondly; assuming the appellants to have been at fault therein, the evidence does not, it is argued, afford any basis for a conclusion that it was that fault which led to the catastrophe.

Either of these contentions would, of course, if accepted, be sufficient to maintain the appeal; but, in my opinion, they ought both to be rejected. The questions raised by them being perfectly distinct I will discuss them separately.

By the law of the Province of Quebec an employer is bound to take reasonable care that his employees shall not in the prosecution of their duties, by reason of any defect or insufficiency in his plant or appliances, be exposed to any risk of injury which, having regard to the character of the work, is an unnecessary risk; and it is but a corollary to this rule that where the work in which the employee is engaged is of such a character that a reasonably prudent and competent employer would anticipate that, in the prosecution of it, his safety may be endangered it is the duty of the employer to take all reasonable measures to protect him from that danger.

I do not stop to consider whether the law of Quebec imposes upon the employer any higher obligation; it is enough, I think, for the purposes of this appeal, that unquestionably the obligation, as I have stated it, does rest upon him; and it will (in the view I take

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of the case) be a sufficient test of the first of the above contentions to ascertain whether a finding that the appellants have failed in the discharge of this obligation is a finding which, upon the evidence, can be sustained.

I shall state very briefly why I think the evidence is sufficient; but before doing so I wish to touch upon a question which gave rise to some controversy in the court below, and upon which there was not a little discussion before this court.

Counsel for the appellants pressed upon us the view that the question of fault or no fault, in so far as it involves a judgment upon the conduct of the appellant, is a question of law in the sense that it is a question for the court and not for the jury; and, in view of the urgency with which their contention was advanced, it may be worth while stating why in my opinion that is a proposition which cannot be maintained.

More than once the Judicial Committee of the Privy Council has said that the question of negligence under the law of Quebec is a question of fact for the jury: *e.g.* in *Lambkin* v. *South Eastern Railway Company*(1), by Sir Robert Collier, at page 354; and in *Tobin* v. *Murison*(2), by Lord Brougham, at page 126; but I do not in the least disagree with the view of the learned judge who delivered the judgment of the majority of the Court of Appeal that the question of negligence or no negligence is a mixed question of law and fact when that phrase is understood in the sense in which it was used by him. It is for the court to state to the jury the rule of law which prescribes the standard of care by which the defendants'

(1) 5 App. Cas. 352. (2) 5 Moo. P.C. 110.

conduct is in such an action to be tested; it is for the jury in any given case to say whether he has or has not come up to that standard. It was, in this case, the duty of the jury to accept from the court and to act upon the instructions given by the court concerning the character of the duty which an employer owes to his employees as touching the safety and sufficiency of his plant and appliances; it was on the other hand a question exclusively for the jury whether, in lighting the rooms in question by the means employed, the appellants made default in the performance of that duty.

As regards this last question (assuming the evidence to be such that as to the effect of it more than one reasonable view be possible) the jury are the constitutional tribunal appointed to determine it and upon it their judgment is decisive. If, on the other hand, the evidence be in such a state that one reasonable view only is admissible, and the verdict of the jury is incompatible with that view, the verdict, of course, may be set aside; but it is well perhaps once again to repeat that the question for the Court of Appeal upon an application for such a purpose is not whether the view of the jury is right or wrong, but whether it is a view that jurymen, regarding the question as persons appointed to decide a question of fact —to try a question of conduct in the light of every day experience—may reasonably and fairly take.

The respondent's case was that owing to one cause or another there was a foreseeable danger of an escape of gas from the appellants' pipes into the rooms in question; and that although gas of that character, when escaping in the open is quite harmless, it may, when introduced in considerable quantities into a

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confined space filled with atmospheric air, become a dangerous agent; and that, consequently, upon the principle stated above, it was the duty of the appellants to take reasonable care to protect their employees against injury from it. Especially, they say, it was, in the circumstances, their duty to protect their employees from the danger which might arise from the accumulation of gas in such quantities as with the atmosphere of the room would form an explosive compound.

It is not disputed that the chances of an explosion ensuing upon such an accumulation of gas might have been almost if not wholly eliminated by lighting the rooms with properly protected incandescent electric lights instead of gas jets necessarily exposed to the atmosphere; or that, if the appellants ought to have anticipated the danger of such an accumulation of gas, it was their duty, in the circumstances, to protect their employees from the consequential risk of an explosion by adopting the safer method of lighting their premises.

The point, therefore, upon which the controversy before the jury turned was whether or not the risk of an escape of gas in such volume as, in this manner, to endanger the safety of the appellants' employees, was a risk which the appellants as reasonably prudent employers ought to have foreseen; and the question for us is whether or not the evidence reasonably supports a finding upon that point in the affirmative.

The meter-room contained two large meters for measuring the gas supplied to the consumers in the city; two large appliances known as controllers for regulating the pressure of the gas in the company's mains; and one small controller for regulating the

pressure in the pipes supplying the works themselves. Through all these appliances gas, of course, necessarily passed. Appreciable risk of its escaping from the meters themselves does not appear to have been suggested; but the respondent gives evidence to shew that there was considerable risk of escape from the controllers.

In the blower-room it was said that there was some danger of escape from the pipes connected with the blower, a large fan devised for the purpose of increasing the pressure of the gas in the mains; and some support for this contention was afforded by the fact that since the mishap giving rise to these proceedings an accident to a valve attached to one of these pipes led to an escape of gas in such volume that an employee entering the room was overpowered by it and rendered unconscious.

The escape of gas from the controllers in the meter-room was in the ordinary course prevented by the presence in each of them of what is technically known as a water-seal. So long as these seals remained intact an escape of gas was admittedly impossible; and the appellants offered expert evidence to the fact that the protection thus afforded could only be impaired by the evaporation of the water. There was moreover a good deal of evidence to the effect that gas is generally employed as a means of lighting the meter-rooms of gas works. On the other hand the appellants' witnesses did not speak with any clearness when pressed with the question whether pressure controllers are generally placed in meter-rooms when these rooms are lighted with gas; nor did the appellants offer any evidence to shew the character of their own experience with the controllers in

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question as regards the possibility of an escape of gas from them.

The respondents, moreover, at the trial advanced the contention, which they supported with positive evidence, that long before the mishap in question experience had shewn that the pressure of gas in the mains and pipes might be so great as to break the water-seals in the controllers; and that in the case of the smaller controllers this was a contingency so likely to happen that it ought to have been anticipated and provided against. In support of this contention they called as a witness one Power, who for seventeen years had been the superintendent in charge of the appellants' station at Ottawa Street, in Montreal. The effect of his uncontradicted testimony was that at that station it was not an uncommon thing for the water in the larger controllers to overflow as a result of the pressure of the gas, and that the smaller controller sometimes became from the same cause wholly unsealed. A more significant fact disclosed by this witness (and on this point also there was no contradiction) was that at its Ottawa Street station the gas company had an employee whose special duty it was to remain in the meter-room for the purpose of taking steps to prevent any evil consequences from an accidental escape of gas. These statements, let me repeat, were uncontradicted; and it was not suggested in cross-examination or otherwise that the controllers which had been under the superintendence of Power differed in any way from those in use where the explosion occurred.

In this state of the evidence, and especially in view of the absence of any evidence shewing the actual experience of the appellants as touching the possi-

bility of the escape of gas at the station where the accident in question took place, I am unable to say that the jury had not before them material from which they might reasonably conclude that the presence of gas in that part of the works in sufficient quantities to create a risk of explosion was a danger which the appellants ought to have anticipated; and that they had failed to take reasonable precautions for the protection of their employees against that danger.

The second contention remains. That contention, if I am right in the views I have expressed, admits of a short answer. If the fault of the appellants consists in that which I have just indicated, namely, that they failed to make reasonable provision for the protection of their employees from a danger which they should have anticipated, and that danger was the presence of gas in such quantities as to create the risk of explosion, then the jury were unquestionably entitled to find that the disaster in which the deceased John Douglas lost his life was attributable to that fault as one of its effective causes. We have not here the case of an accident due to some injury to the plant or appliances of an employer through the operation of *force majeure* or through the wilful intervention of a third person for whom the employer is not responsible or of the injured person himself; in such cases it might be necessary to consider whether chain of liability ought to be held to be interrupted by the *novus actus interveniens;* but it is here unnecessary to express any opinion upon any such hypothetical case.

By consent, the verdict of the jury negatived any fault on the part of Douglas; and there is no hint in

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the evidence of the presence of either of the other causes mentioned.

Appeal dismissed with costs.

Solicitors for the appellants: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Filion & Butler.*

FRANCIS C. ABBOTT.....APPELLANT; 1908

AND *May 21. *Oct. 6.

THE CITY OF SAINT JOHN.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Constitutional law—Municipal taxation—Official of Dominion Government—Taxation on income—B.N.A. Act, 1867, *ss.* 91 *and* 92.

Sub-sec. 2 of sec. 92 B.N.A. Act, 1867, giving a provincial legislature exclusive powers of legislation in respect to "direct taxation within the province, etc.," is not in conflict with sub-sec. 8 of sec. 91 which provides that Parliament shall have exclusive legislative authority over "the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada." Girouard J. *contra.*

Held, therefore, Girouard J. dissenting, that a civil or other officer of the Government of Canada may be lawfully taxed in respect to his income as such by the municipality in which he resides.

APPEAL from the judgment of the Supreme Court of New Brunswick discharging a rule *nisi* for a writ of certiorari to quash an assessment.

The City of St. John, N.B., assessed the appellant, an official of the Dominion Government in the customs service, on his income as such. He obtained a rule for a writ on certiorari to quash the assessment on the ground that under the provisions of the B.N.A. 1867, no power exists by which a provincial legislature can authorize a municipality to impose such taxes. The Supreme Court of New Brunswick, in refusing the writ, followed the decision of the Judicial Com-

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mittee of the Privy Council in *Webb* v. *Outrim*(1) a case from Australia and held that there is no substantial distinction between the constitution of the Australian Commonwealth and that of the Dominion of Canada in respect to the matter in question.

Powell K.C. for the appellant. The court below erred in saying that there is no distinction between our constitution and that of Australia. The Australian States had power, before the federation, to impose these taxes and such power was expressly reserved to them by not being given to the Federal Parliament. In Canada the provinces could only have the power, under the B.N.A. Act, by its being expressly bestowed which was not done.

At common law a public office could not be sold and the salary attached to it could not be assigned. Hence the salary could not be taken away by process of law. See *Flarty* v. *Odlum*(2); *Arbuckle* v. *Cowtan*(3); *Crowe* v. *Price*(4). The power to tax it, therefore, must be expressly given by the constitution or it does not exist.

And property used in the public service is exempt from taxation at common law. *Amherst* v. *Sommers* (5); *The King* v. *Cooke*(6).

Skinner K.C. for the respondents.

GIROUARD J. (dissenting).—The appeal involves a very important question of constitutional law which has already received the attention of the provincial courts of the Dominion on several occasions and has

(1) [1907] A.C. 81.
(2) 3 T.R. 681.
(3) 3 B. & P. 321.
(4) 22 Q.B.D. 429.
(5) 2 T.R. 372.
(6) 3 T.R. 519.

obtained the same solution, almost unanimously, so much so that the counsel of the City of St. John in this case relies only upon the judgment appealed from and also upon the recent decision of the Privy Council in *Webb* v. *Outrim*(1), an appeal from Australia. None of these cases has ever reached our own court. For at least twenty years the decisions of the provincial courts were accepted throughout the whole Dominion as being settled law. It is high time that the point involved should be carried to the Privy Council in order to set at rest what is becoming now the unsettled condition of the courts. I do not intend to review all those decisions. They number about twelve or fifteen. I will merely indicate some of them: *Ex parte Owen*(2); *Ackman* v. *Town of Moncton*(3); *Coates* v. *Town of Moncton*(4); *Ex parte Burke*(5); *Ex parte Killam*(6); *Evans* v. *Hudon*(7); *Crevier* v. *DeGranpré*(8); *Leprohon* v. *City of Ottawa*(9); *Bucke* v. *City of London*(10); *Reg.* v. *Bowell*(11).

I am not prepared to say that all these decisions, rendered by the most eminent judges of our country and accepted by the whole community, are wrong. I will wait till the Privy Council so declares under our own constitution. The New Brunswick judges in this case, without, however, offering any reasoning, express the view that the rule laid down in this very long array of decisions has been disapproved by the judicial committee in *Webb* v. *Outrim*(1). There the Privy Council held that the respondent, an officer of

(1) [1907] A.C. 81.
(2) 20 N.B. Rep. 487.
(3) 24 N.B. Rep. 103.
(4) 25 N.B. Rep. 605.
(5) 34 N.B. Rep. 200.
(6) 34 N.B. Rep. 530.
(7) 22 L.C. Jur. 268.
(8) 5 Legal News 48.
(9) 2 Ont. App. R. 522.
(10) 10 Ont. L.R. 628.
(11) 4 B.C. Rep. 498.

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the Australian Commonwealth, resident in Victoria, and receiving his official salary in that state, is liable to be assessed in respect thereof for income taxes imposed by an Act of the Victorian Legislature. This decision has been severely criticised in the Law Quarterly Review (vol. 23, pages 129, 373), and has given very little satisfaction in Australia, especially in the High Court of that Commonwealth whose former decisions in *D'Emden* v. *Pedder* and *Deakin* v. *Webb*(1) were disapproved. On a subsequent occasion, in *Baxter* v. *Commissioners of Taxation*(2), and *Commissioners of Income* v. *Cooper*(3), the High Court of Australia refused to follow *Webb* v. *Outrim*(4). This may be strictly correct as it was not rendered on appeal from that court. On more than one occasion the courts of appeal in England refused to follow the rules laid down by the Privy Council, as that tribunal does not form part of the judicial hierarchy of the kingdom, although some, if not the majority of the learned judges sitting in that tribunal frequently sit in the House of Lords; see *Dulieu* v. *White*(5). The Commissioners of Taxation thereupon applied for special leave to appeal from that judgment of the High Court, but the Privy Council refused to interfere upon the ground that since the decision in *Webb* v. *Outrim* (4), the Commonwealth had passed a statute especially authorizing the states to impose taxation of the kind in question, so that the controversy was at an end.

If in the above cases the decisions of the Privy Council upon the Constitution of Australia were not

(1) 1 Commw. L.R. 91, 585.
(2) 4 Commw. L.R. 1087.
(3) 4 Commw. L.R. 1304.
(4) [1907] A.C. 81.
(5) 2 K.B.D. 667.

binding upon all the courts of that Commonwealth, *a fortiori,* it cannot be binding upon us, unless clearly applicable to our own constitution; and that is exactly the point upon which, with due deference, I cannot agree with the court below.

Section 91 of the British North America Act, 1867, declares that

> the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—
>
> Par. 8. The fixing of and providing for the salaries and allowances of the civil and other officers of the Government of Canada.

And the same clause of the Act adds:—

> 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.

The power of a province to impose this tax must be found in section 92 of the British North America Act, 1867, which enumerates all the powers given to the provinces under our system, which, in that respect, differs entirely from the Australian system.

Whatever is not given by the British North America Act, 1867, to the provincial legislatures rests with the Parliament of Canada. Newcombe, p. 193. In the Commonwealth Constitution the states retain exclusive control on all subjects, authority which has not been conferred even on the Commonwealth. Teece Companion, p. 34.

As I read clause 91, I believe the provincial legislatures have no power to do anything that may interfere with the "fixing of and providing for the salaries," etc.; and, if they do so, their legislation is *ultra vires.* The power of direct taxation as provided for in para.

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2 of section 92 cannot mean taxation of these salaries as the effect of that taxation would, undoubtedly, be the reducing of the same more or less as the legislature or the municipality might deem proper, and this, I submit, is contrary to para. 8 of section 91. The local legislatures and municipalities might by levying excessive taxation on the salaries of federal government officers either make it impossible for the government to maintain the present scale of renumeration or make it impossible to retain their present officials. That is the view taken by our own courts.

In the application on behalf of the Crown for leave to appeal to the Judicial Committee in the case of *Armstrong* v. *The King,* involving the question under the "Exchequer Court Act" of the liability of the Crown for negligence and other questions, Lord MacNaghten stated as a ground for refusing the application—"This seems to have been the law for eighteen years."

His Lordship was referring to the decisions of the Supreme Court of Canada in the case of the *City of Quebec* v. *The Queen*(1), and *Filion* v. *The Queen*(2). This application is, therefore, a distinct precedent for the position that the committee will not grant leave to appeal from a decision, right or wrong, where it is in accordance with the law which has been observed in the colony for many years.

The case of *Leprohon* v. *The City of Ottawa*(3), is a distinct authority which has been uniformly followed for many years that the local legislatures cannot tax salaries of the Dominion officials. The deci-

(1) 24 Can. S.C.R. 420. (2) 24 Can. S.C.R. 482.
(3) 2 Ont. App. R. 522.

sion proceeds upon reasons which are fully elaborated by the various judges who pronounced opinions in that case. Their conclusions may be right or wrong, but the fact remains that it was acquiesced in for a long period, and the only thing which has now happened to disturb it seems to be the decision of the Judicial Committee in the Australian case of *Webb* v. *Outrim*(1).

That decision, however, is not, owing to the difference of constitutional provisions, in anywise inconsistent with the *Leprohon Case*(2), and if the Supreme Court of Canada were to follow the latter decision, the committee could not, consistently with what they state in the *Armstrong Case,* grant leave to appeal.

For these reasons, I am of opinion that the appeal should be allowed with costs.

DAVIES J.—This appeal raises for the first time before this court the important constitutional question of the right of the provinces of the Dominion to impose income taxes upon the Dominion officials resident in the respective provinces in respect of the official salaries paid to them in those provinces by the Dominion.

The same question had been raised years ago in several of the provinces and had been decided by the provincial courts adversely to such right. In the Province of New Brunswick the Supreme Court of that province so decided in the cases of *Ex parte Owen*(3) in 1881, and in *Ackman* v. *The Town of Moncton*(4) in 1884. When the case now in appeal came before that learned tribunal, the Chief Justice,

(1) [1907] A.C. 81.
(2) 2 Ont. App. R. 522.
(3) 20 N.B. Rep. 487.
(4) 24 N.B. Rep. 103.

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speaking for the full court, held that its previous decisions had been practically overruled by the Judicial Committee of the Privy Council in *Webb* v. *Outrim* (1), and that, as they could not distinguish that case from the one then before it, they were bound to reverse their previous decisions and uphold the constitutionality of provincial legislation imposing income taxation upon Dominion Government officials which they held that Act in dispute did.

On the argument before us it was contended that the radical and underlying differences in the constitutions of the Dominion and the Commonwealth were so great that little weight ought to have been given to a decision upon any one of them when sought to be applied to the other. Speaking generally, there is no doubt weight in the contention and care has to be taken, of course, so as to avoid necessarily applying observations alike apt and applicable to one constitution when the proper construction of the other is under consideration. In every case it is a question as to the proper construction of the language of the constitutional Acts and, in reaching such construction, due weight must, necessarily, be given to the general scheme involved in the construction so far as that is apparent. But with this general and probably trite observation in every case the *meaning* of any clause is a simple question of the construction of the language used. Chief Justice Barker in his judgment correctly summarizes, in my opinion, the cardinal distinction between the two constitutions when he says:

> In the case of Australia, general powers were carved out of the powers which the provinces had previous to federation, and given

(1) [1907] A.C. 81.

to the federal parliament, the residuum of power remaining in the provinces. In Canada, specific powers of legislation were given to the provinces and the residuum of power was given to the Dominion.

And so it has been laid down by the Judicial Committee as a canon of construction for the British North America Act, 1867, that, in order to ascertain whether any claimed power of legislation belongs to the provincial legislature you must seek and find it in some one of the various sub-sections of section 92. If you cannot find it there, then it must be held not to exist. But, even if you have found it there, you must go further and see whether the same or an equivalent power is not given to the Dominion Parliament under section 91. If it is not, then, of course, provincial legislation on the subject is constitutional. But, if it is found in section 91 also, then, at any rate in cases where the Dominion Parliament has legislated and to the extent it has legislated, the local legislature is incompetent to legislate.

Now, it seems to me the questions before us are: First—Whether or not the power to legislate upon the subject of taxation given to the provinces are wide and broad enough to cover the cases of Dominion officials resident within the province; and, if they are, whether or not such power is in conflict with or inconsistent with the powers given to the Dominion Parliament under the 91st section?

Section 92 gives the provincial legislatures

power exclusively to make laws in relation to matters coming within the classes of subjects next hereinafter enumerated.

Sub-sec. 2. Direct taxation within the province in order to the raising of a revenue for provincial purposes.

Now, it does not seem to me open to argument that these words are large and broad enough to cover

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a provincial income tax reaching all residents of the province.

Unless, therefore, there is some implied exception, or some conflict with a power given to the Dominion Parliament in the 91st section, there would be an end to the case.

Such conflict, however, it is contended is found in sub-sec. 8 of section 91:—

> The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.

I am unable, however, to see any necessary conflict between the two powers conferred.

The Dominion fixes and provides the salary and the province says "you shall pay to us the same income tax upon your salary as all other residents of the province have to pay upon their incomes." The conflict is, to my mind, an imaginary one. The province does not attempt to interfere directly with the exercise of the Dominion power, but merely says that, when exercised, the recipients of the salaries shall be amenable to provincial legislation in like manner as all other residents.

But, then, it is suggested, the power, if conceded to the provincial legislature, may be so exercised as to practically defeat the power of the Dominion Government in fixing the salaries. In other words, the power which exists in plain language in sub-section 2 must be limited by the courts for fear of its improvident exercise by the legislature. Time and again the Judicial Committee have declined to give effect to this anticipatory argument or to assume to refuse to declare a power existed in the legislature of the province simply because its improvident exercise might bring it into conflict with an existing power of the Dominion.

It is said, the legislature might authorize an income tax denuding a Dominion official of a tenth or even a fifth of his official income and, in this way, paralyze the Dominion service and impair the efficiency of the service. But it must be borne in mind that the law does not provide for a special tax on Dominion officials but for a general undiscriminatory tax upon the incomes of residents and that Dominion officials could only be taxed upon their incomes in the same ratio and proportion as other residents.

At any rate, if, under the guise of exercising power of taxation, confiscation of a substantial part of official and other salaries were attempted, it would be then time enough to consider the question and not to assume beforehand such a suggested misuse of the power.

Then, it was argued that inasmuch as at common law the salaries of officials of the Crown were incapable of being assigned, pledged or charged by the acts of the officials or by process of law any attempt to make them liable, like other residents, as income-tax-payers would be an illegal interference with the prerogative of the Crown as executive head of the Dominion.

I confess myself quite unable to follow this argument.

The question before us has nothing to do with the common law privileges or immunities of office holders. It is a question of statutory construction. Has the statute or has it not conferred the power claimed? It is admitted it has so far as provincial officials are concerned, and I am unable to appreciate the fine distinction which admits the King's prerogative was constitutionally interfered with in right of the province

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while it was excepted in right of the Dominion. The words conferring the power are, to my mind, too clear and broad and general to admit of the exception sought to be read into them.

I fail to find any provisions in our British North America Act exclusively vesting in its Parliament or withdrawing from the provincial legislatures the power of taxing incomes earned within the state whether by Dominion officials or others.

Then, as to the argument as to the implied exemption of Dominion officials' salaries sought to be supported by the decision of Chief Justice Marshall in *McCulloch* v. *The State of Maryland*(1), the Judicial Committee have in the case of *Webb* v. *Outrim*(2), while declaring (page 89),

> that it was obvious there was no such analogy between the two systems of jurisprudence

of the United States of America and the Australian Commonwealth as the learned Chief Justice of the latter suggested did exist, and that, therefore, the reasoning of Chief Justice Marshall and his conclusions did not apply, went on to say:

> The enactments to which attention has been directed do not seem to leave room for implied prohibition—*expressum facit cessare tacitum;*

and, again, at page 91, their Lordships say:—

> The 114th section of the Constitution Act sufficiently shews that protection from interference on the part of the federal power was not lost sight of. It is impossible to suppose that the question now in debate was left to be decided on an implied prohibition when the power to enact laws on any subject whatsoever was before the legislature.

The 114th section of the Commonwealth constitu-

(1) 4 Wheaton 316. (2) [1907] A.C. 81.

tion to which the Judicial Committee call attention, reads as follows:—

> A state shall not without the consent of the Parliament of the Commonwealth raise or maintain any naval or military force or *impose any tax on property of any kind belonging to the Commonwealth* nor shall the Commonwealth impose any tax on property of any kind belonging to a state.

For the purposes of determining such a question as we have before us now as to reading into the subsection 2 of section 92 an implied prohibition upon the taxation of Dominion officials' salaries, I am unable to discern any substantial distinction between the 114th section of the Commonwealth Act and the 125th section of the British North America Act, 1867, which reads:—

> No lands or property belonging to Canada or any province shall be liable to taxation.

For these reasons I am of opinion that, upon the true construction of the British North America Act, 1867, the power of

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

having been given to the provincial legislatures, and the 125th section of the same Act having exempted the lands and property of the Dominion from liability to taxation, the argument seeking to read into the power a further prohibition and an implied one cannot prevail but that the fair and reasonable construction of the words conferring the power must be held to include resident Dominion officials and their salaries as well as all other residents.

IDINGTON J.—The question is raised in this appeal of the power of a municipal corporation to tax the appellant (in common with other ratepayers taxable

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for income), in respect of that part of his income derived from salary for services in the civil service of the Dominion Government.

It was decided over thirty years ago in the case of *Leprohon* v. *The City of Ottawa*(1), first by the learned trial judge and, on appeal by the Court of Appeal for Ontario, that the municipalities had no such power. The late Chief Justice Spragge, in that case at page 526, put this holding on the ground of the incompatibility between the power of the Dominion, under the British North America Act, to fix a salary and the exercise of a municipal taxing power derived from the province to tax for municipal purposes such a salary in common with all other incomes by way of salaries.

It is a fundamental principle that must be observed in the exercise of any municipal power, either of taxation or otherwise, that it must be exercised uniformly and without discrimination of persons or corporations or classes. Such had been the exposition of municipal law in this country before confederation.

It therefore seems hard to conceive of it being intended that there should be implied (for it is not expressed) in section 92 of the British North America Act, in assigning to each province the exclusive power of making laws in relation "to municipal institutions in the province" that there must be one class which was to have this partial discrimination reserved in its favour. That, up to 1867, incomes had not been assessed or incomes derivable from this or other specified sources had not been assessed seems to me quite an irrelevant consideration.

(1) 2 Ont. App. R. 522.

Municipal institutions such as those conceived of could only be carried on by some taxing power being confided to the municipal authorities by the legislature creating them and, when such comprehensive language was used as I have referred to it seems to me that it must have been intended that such subjects of taxation and modes of levying such necessary taxes thereon as the legislature saw fit to empower, was the only limit thereto save that reserved in the veto power given the Dominion Government.

It is said, however, that the power of taxation does not rest upon that which might, I submit, be very reasonably assumed as the basis upon which to have rested it, but upon the power of direct taxation given the provinces.

Let us, if need be, assume that to be so; then, if it has been delegated to the municipality created by such legislature, what difference can it make in the disposition of this question? No one questions the right of taxation in either municipal or school corporations, however it be derived.

Then why, if incomes be taxable, should not the salary of the civil servant be so also? If we assume the salary is given for a civil servant to live upon, then must we not suppose he has been given it to help to bear the burthen of the daily necessary expenses of living; such as educating his children; as clearing and making a road to his dwelling; as lighting; watering, or cleaning and keeping in order such road when so made; as trunk sewers for the common benefit; as the maintenance of the poor and the sick; and as the payments of what the Dominion has imposed, by virtue of its powers held to exist, in the imposition, through these very municipal organizations,

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of a tax directed by the Dominion to meet the demands of railways for providing and guarding street crossings; and, in short, the entire expense of municipal government. That expense flowing from the Dominion impositions I refer to is as yet trifling but it may grow and it illustrates in principle better than the others how little there is in the reasoning from incompatibility relied upon in the *Leprohon Case*(1).

Surely, at least in the absence of express declaration of the Dominion to the contrary, it must be assumed that, at all events in those cases where the civil servant is prohibited from earning by other means of livelihood than his salary, the Dominion has given or intended to give a sufficient salary to meet the ordinary expenses of living, and that not to the extent of a single cent is the Dominion servant to live upon the products of the labours or incomes of other fellow townsmen.

He is entitled to live upon and be supported by the labour or at the expense of all those he serves that is of the inhabitants of the entire Dominion, not at the expense of the other persons in some particular places therein. It does not, I imagine, comport with the dignity of the Crown or the proper observation of justice on the part of the Dominion Parliament that any other rule should obtain.

I will not impute to the framers of the British North America Act the intention of creating a condition of things that in principle is fraught with inequality and injustice.

The Dominion is and has always been able to keep in respectable condition all her civil servants and

(1) 2 Ont. App. R. 522.

not to make them dependent on the bounty of any one part of the Dominion more than another.

These matters all bear upon the construction of the Act as an instrument of government.

Nor does this construction interfere with these questions of the expediency of taxing these incomes when such considerations of state or municipal interest may arise as to lead to a proper modification or abandonment of the exercise of the right.

The expediency of an income tax as a method of taxation and the risks of unjust results therefrom are also entirely another matter.

One thing is quite clear that the subject of taxation so far as it might call for exemptions which were within the range of vision which the framers of the Act had, was foreseen and considered and the line drawn deliberately at the taxation of government property.

The express provision thus made was, I think, an exclusion of this exemption now contended for.

The case of *McCulloch* v. *Maryland*(1) cited and relied upon in nearly all the cases decided on this question since, as well as in, the *Leprohon Case*(2), seems to me to have little to do with the matter. The history leading up to the former decision is not to be overlooked in weighing it.

Besides; the case of *The Bank of Toronto* v. *Lambe* (3), has, (if the line of argument in the *McCulloch Case*(1) can have any bearing on the question, since that case was first thus used) conclusively established the right of the province to tax banks created by and solely within the creative power of the Dominion and

(1) 4 Wheaton 316. (2) 2 Ont. App. R. 522.
(3) 12 App. Cas. 575.

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yet doing business within the province seeking to tax it.

I am not at all clear that *Webb* v. *Outrim*(1) relied upon here and in the court below can be said, upon close analysis, to have very much to do with the question presented here.

I am unable, notwithstanding the array of judicial authority supporting and following the judgment in the *Leprohon Case*(2), to find that it proceeded upon a correct interpretation of the British North America Act.

I think the appeal should be dismissed with costs.

MACLENNAN J.—I am of opinion that this appeal should be dismissed. Even if *Webb* v. *Outrim*(1) had been otherwise decided it would not, in my opinion, necessarily govern the present case, inasmuch as the act establishing the Australian Commonwealth differs in a very important respect from the British North America Act.

I think the tax in question is within the powers conferred on the Canadian provinces by section 92, sub-sections (2), (8) and (13) of the latter Act, and is not affected by anything contained in section 91.

By those sub-sections jurisdiction is conferred upon the provinces, within their respective limits, over property and civil rights, direct taxation, and municipal institutions.

The Act contains no definition of "municipal institutions." That was unnecessary, inasmuch as such institutions had existed in the several provinces for many years, and their nature and functions were well known and understood.

(1) [1907] A.C. 81. (2) 2 Ont. App. R. 522.

These institutions included city and town corporations, which had numerous public duties to perform for the benefit of their respective inhabitants, and which required the annual expenditure of large sums of money, which was raised by taxation of real and personal property, and also of income.

The City of St. John is probably the oldest municipality in the Province of New Brunswick, and its present charter of incorporation is the statute, 52 Vict. ch. 27, which makes provision for the levy of the taxes required for the public service by a number of sections, beginning with number 112, and of which those bearing on this appeal are numbers 115, 116, 120, 149, and a "Schedule A."—"Title Income."

Section 120 provides that all taxes shall be raised by an equal rate upon the value of the real estate situate within the city, and upon the personal estate and the income of the inhabitants, being the income derived and coming in any manner except from real or personal estate actually assessed.

Section 149 declares that income shall mean the annual gross sum arising to any male inhabitant, or rateable person, from any place, office, profession, trade, calling, employment, etc., except from real or personal estate actually assessed.

Section 115 provides that the Board of Assessors shall on or before the first day of April in each year publish a notice within the city, requiring all persons liable to be taxed to furnish to the assessors true statements of their real estate, personal estate, and income, on forms obtainable at the office of the assessors.

Section 116 requires every person liable to be rated, within thirty days after the foregoing notice,

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to furnish the assessors with a written statement, under oath, of his real and personal estate and income, in the form expressed in Schedule A.

Schedule A. (Income) defines the income to be taxed as follows:

> Income derived from office, profession, work, labour, trade, business, place, occupation, employment, skill or ability, during the twelve months next preceding the first day of April, and which has not before this date been invested in property subject to taxation. This amount has not been offset by household or personal expense.

From all this it is apparent that the tax to be levied in any year is not a part of the income, as such, of the inhabitant, but a sum of money to be measured by, or in proportion to the amount of his income during the preceding year. It is the inhabitant who is taxed for his fair and reasonable share of the expenses incurred by the municipality on his behalf, and on behalf of all the other inhabitants, and his income for the preceding year is referred to solely for the purpose of ascertaining what it is just and reasonable that he should be required to pay. No attempt is made to seize or appropriate the income itself, or to anticipate its payment. He receives it, and applies it as he thinks fit, in discharge of his obligations. Or if he invests it in real or personal property liable to taxation, then to the extent of such investment his income is exempt.

Such being the nature and purpose of what is called income tax, I see no ground whatever on which the appellant, merely because he is a civil servant of the Dominion Government, can claim exemption.

He is a citizen, an inhabitant of the municipality enjoying his due share of all the advantages of municipal government, in common with all other inhabitants, and if he were exempt, his exemption would be

a plain injustice to the other inhabitants. *Qui sentit commodum sentire debet et onus.*

The same thing may be said of the other taxes, the taxes upon real and personal property, or the poll-tax or the dog-tax. It is not the property, or the poll, or the dog, which is taxed, but the individual inhabitant or property owner, and I think there is absolutely nothing in the "British North America Act" which gives any ground for the exemption claimed on behalf of the appellant.

The appeal should be dismissed and with costs if asked for.

DUFF J.—It is no longer open to dispute that by the combined operation of clauses numbered 2 and 8 of section 92 of the British North America Act, 1867, a province may confer upon a municipality the power to tax persons resident within the territory subject to its control in respect of their incomes. Any question which might have been raised concerning that point was finally put at rest by the decision of the Judicial Committee in *The Attorney-General of Ontario* v. *The Attorney-General of Canada*(1). The question presented by this appeal, therefore, is the question whether any of the enactments of section 91 of that Act have the effect of creating an exception in favour of officers of the Dominion Government in respect of the allowances paid to them by that Government.

The appellant argues that the authority vested in the province to impose taxes in respect of income does not extend to such allowances because the whole of the authority to legislate in respect to them (as

(1) [1896] A.C. 348.

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subjects of taxation or otherwise) is exclusively conferred upon the Dominion by sub-section 8 of section 91, which assigns to the Dominion as a subject of legislation

> the fixing and providing for the salaries and allowances of civil and other officers of the Government of Canada.

It is said that the attempt by a province to impose taxes in respect of such salaries and allowances is an invasion of the field defined by this sub-section. I am quite unable to perceive that the power thus conferred in any way restricts the operation of the power of taxation committed to the province. The fixing and providing for salaries seems to be, as a subject of legislation, quite distinct from the power to levy taxes in respect of income. The principle upon which the burden of the fiscal contributions exacted by a municipality or a province shall be distributed among those persons subject to its fiscal jurisdiction seems to be a subject as far removed as possible from that dealt with in sub-section 8 of section 91. If one were to speculate upon the intentions of the framers of the Act, I should suppose nothing further from their intentions than the exemption of federal office holders as a class from the fiscal burdens incident to provincial or municipal citizenship.

I do not think it would be profitable to examine in detail the decisions of the provincial courts to the opposite effect. Those decisions were largely founded upon reasoning of the Ontario Court of Appeal in *Leprohon* v. *The City of Ottawa*(1), which was decided in 1877. Judicial opinion upon the construction of the British North America Act has swept a rather

(1) 2 Ont. App. R. 522.

wide arc since that date; to mention a single instance only, it would not be a light task to reconcile the views upon which *Leprohon* v. *The City of Ottawa* (1) proceeded with the views expressed by the Judicial Committee in the later case of *The Bank of Toronto* v. *Lambe*(2). Indeed, although *Leprohon* v. *The City of Ottawa*(1) has not been expressly overruled, the grounds of it have been so thoroughly undermined by subsequent decisions of the Judicial Committee, that it can,—I speak, of course, with the highest respect for the eminent judges who took part in it,—no longer afford a guide to the interpretation of the British North America Act.

Appeal dismissed with costs.

Solicitors for the appellant: *Powell & Harrison.*
Solicitor for the respondent: *C. N. Skinner.*

(1) 2 Ont. App. R. 522. (2) 12 App. Cas. 575

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*June 5.
*Oct. 6.

THE ESSEX TERMINAL RAILWAY COMPANY ..... } APPELLANTS;

AND

THE WINDSOR, ESSEX AND LAKE SHORE RAPID RAILWAY COMPANY..... } RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Board of Railway Commissioners—Jurisdiction—Location of railway —Consent of municipality—Crossing—Leave of Board—Discretion.

On 12 Aug., 1905, the Township of Sandwich West passed a by-law authorizing the W., E. etc., Ry. Co. to construct its line along a named highway in the municipality but the powers and privileges conferred were not to take effect unless a formal acceptance thereof should be filed within thirty days from the passing of the by-law. Such acceptance was filed on 12 Sept., 1905. This was too late and on 20 July, 1907, the council of Sandwich West and that of Sandwich East respectively passed by-laws containing the necessary authority.

In April, 1906, the location of the line of the E. T. Ry. Co. was approved by the Board. In June, 1906, the Board made an order allowing the W. E. etc., Ry. Co. to cross the line of the C.P.R. In March, 1907, another order respecting said crossing was made and also an order approving the location of the W. E. Ry. Co., the municipal consent being obtained three months later.

The E. T. Ry. Co. applied to the Board to have the orders of June, 1906, and March, 1907, rescinded and for an order requiring the W. E. Ry. Co. to remove its track from the highway at the point where the applicant proposed to cross it to discontinue its construction at such point or, in the alternative, for an order allowing it to cross the line of the W. E. Ry. Co. on said highway. The applicants claimed to be the senior road and that the W. E. Ry. Co. had never obtained the requisite authority

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

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for locating its line. On a case stated to the Supreme Court by the Board.

Held, that the Board had power to refuse to set aside the said orders; that the by-laws passed in July, 1907, were sufficient to legalize the construction of the W. E. Ry. Co.'s line on said highway; and that the Board can now lawfully authorize the latter company to maintain and operate its railway thereon.

Held, further, that leave of the Board is necessary to enable the E. T. Ry. Co. to lay its tracks across the railway of the W. E. Ry. Co. on said highway.

Held, also, that the Board, in exercise of its discretion has power by order to authorize the maintenance and operation of the W. E. Ry. Co. along said highway and to give leave to the E. T. Ry. Co. to cross it and the line of the C.P.R. near the present crossing and to apportion the cost of maintaining such crossing equally between the two companies instead of imposing two-thirds thereof upon the E. T. Ry. Co. as was done by a former order not acted upon; and to order that if the E. T. Ry. Co. finds it necessary in its own interest to have the points of crossing differently placed it should bear the expense of removing the line of the W. E. Ry. Co. to the new point of crossing.

APPEAL on a case stated by the Board from a decision of the Board of Railway Commissioners for Canada(1), on application of the Essex Terminal Co.

The material facts are stated in the above headnote. The text of the questions submitted will be found in the judgment of Mr. Justice Idington.

Armour K.C. and *Coburn*, for the appellants.

Matthew Wilson K.C. for the respondents.

GIROUARD J.—I agree in the opinion stated by Mr. Justice Duff.

DAVIES J.—I agree with the general reasoning of the late Chief Commissioner Killam when proposing the judgment of the Board of Railway Commissioners

(1) 7 Can. Ry. Cas. 109.

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on the application of the appellant and, in answer to the sixth question submitted to us in the stated case, I would say that the order proposed to be made by the Board is one which, in the exercise of its discretion, the Board has power to make.

I would also answer questions two, four and five in the affirmative. In view of these answers, it does not seem necessary to answer questions one and three.

IDINGTON J.—This is a case submitted by the Board of Railway Commissioners in the lifetime of the late Chief Commissioner.

We are asked to answer some half dozen questions submitted.

In order to understand thoroughly the bearing of these questions one would have to read the case and the judgment of the late Chief Commissioner.

Briefly put, however, the contest between the two railway companies is to have the senior right of the one over the other determined.

Incidentally to that determination, it is said that by reason of settled jurisprudence of the Board there ought to flow results much different from those settled by the Board in the order now in question.

I am not prepared to assent to this contention.

However desirable it may be to observe as a general rule as between contesting railway companies that, presumptively, a senior may or even should have advantages over its junior in settling such questions as have arisen between those before us, it would never do for us to treat such settlement of prior right in regard to such contests as so determined and fixed by law as to remove all discretion from the Board in the consequent results of such a matter as adjust-

ing the respective burthens to be borne by the contestants. It was quite competent for the Board to have said here, as the judgment of the late Chief Commissioner practically does say, that, assuming the legal status of the respondent company was not technically that of senior, yet, in substance, it might by reason of the march of events be treated as in such a position as to have claimed seniority but for an unfortunate mistake made in the legal proceedings that were designed to complete its title and to give it that seniority.

This position of the Board was the more apparently right when we consider that so much had been done on the faith of a supposed acquired right as to give rise to quite exceptional considerations and quite exceptional treatment which was given.

The respondent company, in my opinion, had not until the 20th of July, 1907, acquired, as it supposed it had, the right to build upon the highway.

But, notwithstanding that, I agree with the late Chief Commissioner in thinking that if an application were made to the Board merely to approve of plans locating a proposed railway and the order were confined to that approval of location and in no way to be assumed to be a determination of right to proceed to build, regardless of all other considerations, or consideration such as the title in law to go upon or over any property covered by the location adopted and build thereupon, it could be properly made.

The orders complained of so far as before me (for they are not all copied in the copy of the case I have), do not seem expressly confined to this question of location and might be read as going beyond it, but for the explanation given in the judgment I have referred to,

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and the statutory declaration in section 159 of the Railway Act as to the meaning of such an order.

That section, sub-section 2, reads as follows:

> The Board by such sanction shall be deemed to have approved merely the location of the railway and the grades and curves thereof, as shewn in such plan, profile and book of reference, but not to have relieved the company from otherwise complying with this Act.

I doubt if this entirely covers this case. It is not a question here of relief from otherwise complying with the "Railway Act" that is to be guarded against, but that the respondent company "should not be relieved from" otherwise complying with the Dominion Act which declared the work in question to be for the general advantage of Canada.

It is not the "Railway Act," but this latter Act that prohibited the laying down of a railway upon any highway without the consent of the municipal council, which was not effectively got till after the 20th of July, 1907.

If the orders in question are to be construed as the following quotation from the judgment of the late Chief Commissioner indicates they were intended to be construed, then I see nothing in them to complain of.

> The land across which a railway is sought to be located may belong to the Crown, or be a part of an Indian Reserve, and the consent of the Governor in Council to its use or occupation by the company may be necessary under sections 172 or 175 of the Railway Act, or it may have been reserved for naval or military purposes, when the license and consent of the Crown under the hand and seal of the Governor-General is required by section 174. It may belong to another railway company, in which case the new company cannot use or occupy it without the leave of the Board under section 176, which, in approving the location plan, would not bind itself to grant such leave. The line may cross navigable waters, when the site, as well as the plans, must be approved by the Governor in Council, under section 233.

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In deciding whether to sanction plans and profiles shewing the proposed location of a railway, the Board does not usually consider matters of this kind or questions as to the existence of public highways along the route, or whether such highways or railways shall be crossed by the proposed new railway, or, if so, where or how, or the measures to be taken for the safety of the public or otherwise in connection with such crossings, or whether, or where, the railway shall be operated upon or along a highway, or on what portions thereof, or the provisions to be made in connection with the same; and orders sanctioning such locations should not be considered as impliedly authorising obstruction of highways by railway works.

This is the settled jurisprudence of the Board.

And it was not a necessary condition precedent to the approval of the location plans that the party should first have the consent of the municipal authority to the construction of the railway upon the public highway. This might be left until the company ascertained whether the proposed location would meet with the approval of the Board from an engineering standpoint.

Can we say, however, that the orders do not go further?

Are they in such shape as to enable us to categorically answer the questions put regarding them?

I still adhere to the interpretation I gave in the case of the *Montreal Street Railway Co.* v. *The Montreal Terminal Railway Co.*(1), at page 391, to what, in substance, is now in sections 54 and 56, sub-section 9, of the "Railway Act," Revised Statutes of Canada, 1906, ch. 37.

We are told that a much wider effect is given by some courts to unauthorized orders of the Board that I am disposed to give and that a danger exists unless the orders in question are repealed that they may have such a wider effect than intended by the Board as above set forth.

Having regard, however, to the limitation, by section 159 above quoted, in regard to the meaning of

(1) 36 Can. S.C.R. 369.

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such orders as within its scope, and the cognate nature of the orders in question, I think they can be similarly limited and ought to be read as so limited. As to the rescinding of any order beyond the jurisdiction of the Board, the doing so must be to a certain extent a matter of discretion.

In the view I have taken and referred to as above expressed, there may be for the protection of those who acted under such an order, as exceeded the jurisdiction of the Board, a duty to let the order stand for that purpose.

I assume, of course, that in default of such need or similar proper purpose, it is desirable to rescind any order found not to have fallen within the jurisdiction making it.

I would answer, therefore, the questions submitted, as follows:

Q.(1)—Whether the Board of Railway Commissioners had jurisdiction, prior to the 20th day of July, 1907, to make the orders above complained of and each of them?

A.—Yes, so far as approving merely the location of the railway and the grades and curves thereof as shewn in a plan, profile and book of reference such as the "Railway Act" contemplates, but not to operate in the way of relieving the company from the condition imposed upon it of obtaining consent of the municipality or municipalities having jurisdiction over the highway in question.

Q.(2)—Whether the Board of Railway Commissioners had power to refuse to set aside its said orders so complained of?

A.—Yes.

Q.(3)—Whether, in view of the said by-law of the said Township of Sandwich West, passed in the year 1905, and the acceptance thereof at the time and in the matter herein above set forth, and the construction of the railway of the Windsor-Essex company

upon and along the said gravel road, without objection on the part of the said municipality of Sandwich West, the Windsor-Essex company is now entitled to maintain and operate its railway upon and along the said gravel road?

A.—No.

Q.(4)—Whether the said by-laws of the said municipalities of the Townships of Sandwich East and Sandwich West, respectively passed on the 20th of July, 1907, are valid and sufficient to make lawful the construction and operation of the railway of the Windsor-Essex company upon and along the said gravel road; and whether the Board of Railway Commissioners may now lawfully authorize the Windsor-Essex company to so maintain and operate its said railway upon and along the said gravel road?

A.—Yes.

Q.(5)—Whether the leave of the Board of Railway Commissioners is necessary to enable the Terminal company to lay its tracks across the railway of the Windsor-Essex company upon the said gravel road?

A.—Yes.

Q.(6)—Whether the order proposed to be made by the said Board as aforesaid is one which, in the exercise of its discretion, the said Board has power to make?

A.—Yes.

I think there should be no costs to either party.

MACLENNAN J.—I agree in the opinion stated by Mr. Justice Duff.

DUFF J.—The late Chief Commissioner of the Board of Railway Commissioners has summarized the views expressed by him in his judgment in the following passage:

Then the position which we have is this:—The railway of one company has been constructed along a public highway without the necessary authority from the municipality or the Board; the required consent of the municipality or the municipalities has since been obtained, but not the requisite leave of the Board; with the authority of the Board it crosses, upon that highway, another railway; another company, having its location plan properly sanctioned by the Board and the leave of the Board to cross the highway on the line of that location, seeks to have the existing railway removed

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from the highway or to be allowed to cross it at the expense of the former, and to have the orders sanctioning the location plans of the first company and giving that company leave to cross the previously existing railway, set aside.

While, as I have said, I think the Board has jurisdiction to require the removal of the rails from the highway at the point where the Essex Terminal Railway Company has leave to cross, I do not think that we are bound to do this. I think that we are entitled to exercise our discretion, in view of all the circumstances; that, in the fair exercise of that discretion, we may now authorize the maintenance and operation of the Windsor, Essex and Lake Shore Rapid Railway Co. along the gravel road, and give leave to the Essex Terminal Railway Company to cross it and the Canadian Pacific Railway Company's line, near the present railway crossing in such manner and with such protective applicances as our engineer shall recommend, but varying the condition as to the apportionment of the cost of maintenance and operation by dividing it equally between the two companies, instead of imposing two-thirds upon the Essex Terminal Railway Company. But, if the Essex Terminal Railway Company still finds it necessary in its own interests to have the point or points of crossing differently placed, that company should bear the expense of removing the line of the Windsor, Essex and Lake Shore Railway to the new point of crossing.

In such a case as this, I do not think that we are bound to recognize that an absolute right of priority in regard to such crossings is acquired by priority of sanction of location plans, or priority of leave to cross or run along highways. The two railways were being constructed almost simultaneously. The original by-law of the Township of Sandwich West failed to take effect only through one day's default and, possibly, through a slip in the method of attempted acceptance, but for which the railway would have been lawfully upon the highway when the Dominion Act was passed, and long before the Essex Terminal Railway Company obtained the Board's leave to cross the highway. The case appears to be one for the exercise of the Board's discretion.

With every word of this passage I agree.

It follows that questions two, four, five and six should all be answered in the affirmative; and, in this view, there would appear to be no necessity for expressing any opinion upon either of questions one or three.

Solicitors for the appellants: *Cunningham & Lyon.*

Solicitors for the respondents: *Purdom & Purdom.*

LA VILLE DE ST. JEAN (PLAINTIFF) ..... APPELLANT;

AND

AGLARE L. MOLLEUR ET VIR (DEFENDANTS) ..... RESPONDENTS.

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*June 12.
*Oct. 6.

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

Waterworks—Statutory contract—Exclusive franchise—Condition of defeasance—Forfeiture of monopoly—Demurrer—Right of action by municipality—Rescission—Art. 1065 *C.C.*—40 *V. c.* 68 (*Que.*).

By the Quebec statute, 40 Vict. ch. 68, Louis Molleur and others, now represented by the defendants, were substituted as sole owners of the waterworks of St. John's in the place of "The Waterworks Co. of St. John's," incorporated under R.S.C. (1859) ch. 65, charged with all the obligations and responsibilities of said company, and, by the said Act, 40 Vict. ch. 68, the new proprietors were granted the exclusive right and privilege of placing pipes or water conduits under the streets and squares of the Town of Saint John's (now the City of St. John's, the appellant), under certain other conditions and obligations in the last mentioned statute recited, and the monopoly created was, by section 3, liable to be forfeited in case of neglect of refusal in the discharge of the obligations thereby imposed.

Held, that the contract existing between the parties, in virtue of the above recited statutes, was liable to rescission under the provisions of article 1065 of the Civil Code of Lower Canada, upon default in the specific performance by the defendants of the obligations thereby imposed, and that, upon proof of default in the specific performance of any of the said obligations, the municipal corporation was entitled to maintain an action in its corporate capacity to have the exclusive right and privilege granted by the statute declared forfeited, surrendered and annulled.

The judgment appealed from (Q.R. 16 K.B. 559) deciding that the action would lie only for breach of obligations expressly declared to involve forfeiture, was reversed, Davies J. dissenting.

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

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APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of the Superior Court, District of Iberville (Paradis J.), allowing a demurrer to the plaintiff's action with costs.

The plaintiff's action was for a declaration that the defendants had forfeited certain exclusive privileges in respect to the construction and operation of a system of waterworks in the City of St. John's, Quebec, vested in them by virtue of an agreement under the Consolidated Statutes of Canada, 1859, ch. 65, and the Act 40 Vict. ch. 68 (Que.).

The portions of the statutes referred to, which affect the issues on this appeal, and the procedure in question, are referred to in the judgments reported on the appeal from the decision of the registrar(2) upon the application for an order affirming jurisdiction and approving the security in this case.

Bisaillon K.C. and *Aimé Geoffrion K.C.* for the appellants.

Belcourt K.C. and *J. F. St. Cyr* for the respondents.

GIROUARD J.—Voici une cause qui nous a causé beaucoup d'embarras. Nous ne sommes qu'au début de l'instruction, et déjà nous sommes en présence d'un dossier de cent pages d'impression. La déclaration couvre vingt-quatre pages; les plaidoyers au fonds aussi vingt-quatre pages; et dix pages de défense en droit partielle. Puis viennent une réponse en droit partielle de la demanderesse et une autre au fond qui

(1) Q.R. 16 K.B. 559. (2) 40 Can. S.C.R. 139.

couvre vingt-quatre pages. Il n'est pas surprenant que les parties aient fait des efforts pour en réduire le volume par des procédés préliminaires. Par le jugement de la cour de première instance, la défense en droit à toute l'action a été renvoyée, aussi bien que la réponse partielle de la demanderesse, et l'inscription sur la défense en droit partielle de la défenderesse a été maintenue en partie. Voilà pourquoi les deux parties ont interjeté appel à la cour du banc du roi, qui a confirmé le jugement de la cour inférieure. L'appel devant cette cour est seulement du jugement qui a maintenu la défense en droit partielle.

Sans entrer dans les détails nombreux de cette cause, qu'il nous suffise de dire que l'action intentée par l'appellante est en déchéance d'une franchise exclusive de construire et opérer un aqueduc dans la ville de St. Jean concédée par 40 Vict. ch. 68, des statuts de Québec. Ce statut forme ce que l'on est convenue d'appeler la charte de la compagnie et a toute la force d'un contrat entre elle et la ville de St. Jean, avec le monopole du service de l'eau que la municipalité ne pouvait octroyer sans l'autorisation de la législature. Par cette charte, la compagnie représentée aujourd'hui par l'intimée, en considération de la concession de ce "droit et privilége exclusif," s'est engagée à fournir à la ville de St. Jean et à ses habitants "une eau pure et saine," non-seulement pour les usages domestiques et leurs besoins en général, mais aussi pour la protection contre les incendies; et à défaut par elle de le faire, la charte décrète qu'elle sera déchue et privée "du privilège exclusif ci-dessus établi." L'appelante allègue que la compagnie n'a pas rempli cette obligation imposée par la charte, et comme preuve, elle énumère plu-

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sieurs faits, conventions et arrangements intervenus pour arriver au résultat prévu par la charte, qu'elle a tous violés, dit l'appelante; puis elle conclut à la déchéance. Le savant juge en chef Taschereau, parlant au nom de la cour, a résumé la situation entre les parties en quelques mots que voici:

> Le tribunal de première instance a fait reposer sa décision sur la distinction entre les obligations de Mme. Roy, imposées par la loi à peine de déchéance de ses droits, et celles dont le défaut d'exécution ne devait avoir d'autres conséquences que celles prévues pour les cas ordinaires d'inexécution d'obligations. Nous croyons qu'il a eu raison.
>
> Il y aurait une autre distinction à faire entre les devoirs et obligations imposés par le statut et ceux qui résultent de conventions particulières. Il n'y a que la violation des premiers, et encore, comme je viens de le dire, seulement dans les cas où elle est prononcée expressément, que la déchéance peut avoir lieu.
>
> L'inexécution des autres obligations, de toutes celles nées des conventions et de celles imposées par le statut où la déchéance n'est pas prononcée, ne peuvent donner ouverture qu'au recours en dommages ordinaires.

Avec toute la déférence possible, je ne puis accepter cette distinction, bien qu'elle ne soit pas importante pour décider le litige. Il me semble que s'il est un point bien établi dans notre jurisprudence, c'est que, dans certains cas, l'inexécution des obligations stipulées dans des conventions peut emporter la résolution du contrat, ce qui dans l'espèce est la même chose que la déchéance décrétée par le statut, car dans les deux cas il faut que la révocation soit prononcée en justice. L'article 1065 du code civil se lit comme suit:

> Toute obligation rend le débiteur passible de dommages en cas de contravention de sa part; dans les cas qui le permettent, le créancier peut aussi demander l'éxécution de l'obligation même, et l'autorisation de la faire exécuter aux dépens du débiteur, ou la résolution du contrat d'où naît l'obligation; sauf les exceptions contenues dans ce code et sans préjudice à son recours pour les dommages-intérêts dans tous les cas.

Puis l'article 1066:

Le créancier peut aussi, sans préjudice des dommages-intérêts, demander que ce qui a été fait en contravention à l'obligation soit détruit, s'il y a lieu; et le tribunal peut ordonner que cela soit fait par ses officiers, ou autoriser la partie lésée à le faire aux dépens de l'autre.

Je crois que ce principe fut appliqué dans une cause de *Valiquette* v. *Archambault*(1). A la page 54, l'on trouve les *considérants* de ce jugement dont je détache le suivant:

Considérant que bien que l'article 1184 du code Napoléon qui énonce que la condition résolutoire est toujours sous-entendue dans les contrats, pour le cas où l'une des parties ne satisfera point à son engagement, n'ait pas été reproduite en termes exprès dans notre propre code civil, nos codificateurs ont pourvu au même cas et exprimé le même principe dans l'article 1065 de notre dit code civil, qui permet, même en l'absence de la condition résolutoire expresse, de demander la résolution du contrat d'où naît l'obligation qui n'a pas été accomplie. (Voir rapport des codificateurs, 7 DeLorimier, Bibl. du Code civil, pp. 626 et 627):

Considérant que les dits auteurs de notre code n'ont dérogé à ce principe et n'ont fait exception à cette règle générale, applicable à tous les contrats, que dans le cas de vente d'immeubles.

Ce jugement, il est vrai, a été renversé par la cour de revision, mais sur un autre point: voir 8 *id.* 174.

Dans une cause récemment décidée et rapportée dans le dernier numéro des rapports judiciaires de la cour du banc du roi, *Corporation of the Town of Grand'Mère* v. *L'Hydraulique de Grand'Mère*(2), la cour d'appel, composée de Taschereau J.C., Bossé, Blanchet, Lavergne et Cross JJ., a reconnu l'existence d'une action comme celle-ci. Il ne s'agissait pas de contravention à des obligations imposées par un statut, mais uniquement d'inexécution des obligations stipulées par les parties. Le juge Cross, parlant au nom de la cour, dit:

(1) Q.R. 7 S.C. 51.

(2) Q.R. 17 K.B. 83.

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In such circumstances, the action in revocation of the privilege was a form of recourse properly open to the appellant.

La révocation ne fut pas prononcée vu le consentement des parties qu'un délai de neuf mois soit accordé au propriétaire de l'aqueduc pour compléter ses travaux. Le juge Cross n'hésite pas à déclarer que cet ordre de la cour n'est pas le meilleur remède. A la page 92 du rapport, il observe:

It is not to be overlooked that the supply of drinkable water is a matter of the most important necessity, that the appellant had alienated its rights respecting water supply and could do nothing to provide water to its people while this concession stood in the way. Under such circumstances, an action to coerce the respondent to fulfil its obligations in the many respects in which default had been made would have been an unsatisfactory recourse.

Le principe de l'article 1065 du code civil n'est pas particulier à la province de Québec. On le trouve aussi dans l'article 1184 du code Napoléon. Dans la note 4 à cet article, Gilbert sur Sirey nous donne l'historique de ce principe, aussi bien qu'une longue liste d'autorités.

Reste une difficulté qui a été soulevée pour la première fois devant nous. L'appelante n'a pas demandé par son action la résiliation ou la révocation des dits contrats et conventions. Elle va même plus loin; elle se réserve tout recours qu'elle pout avoir pour faire prononcer la résiliation d'un de ces contrats, le marché du 1er. juin, 1892. Elle demande seulement que tous les privilèges qui appartiennent à l'intimée en vertu de l'acte de Québec, 40 Vict. ch. 68, soient déclarés déchus, nuls et annullés, et cela suffit dans mon humble opinion. Il ne s'agit en effet que de la franchise exclusive conférée par le statut.

Nous croyons que tout ce qui se rattache à l'exécution des obligations de la charte peut et doit faire la matière de l'enquête.

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Citons un exemple, peut-être le plus favorable aux prétentions de l'intimée, celui de la compagnie "Singer," qui a été exlus par les tribunaux inférieurs. Elle n'est pas mentionnée dans la charte, pas plus que les autres habitants qui, à l'origine de l'aqueduc, formaient la population de St. Jean, ou y sont venus depuis ou y viendront pendant les quarante-six ans de l'exercise de la franchise. Ils sont tous compris dans l'obligation de fournir l'eau aux habitants de la ville, et, si c'est pour des fins industrielles, comme dans le cas de la "Singer," que la ville etait anxieuse d'avoir dans ses limites, les parties peuvent faire des arrangements pour mieux remplir l'obligation de la charte. Et puis, pendant ce long espace de temps, la ville se développera, de nouvelles méthodes d'opérer un aqueduc, des améliorations, en un mot, seront découvertes, peut-on raisonnablement refuser aux parties le pouvoir de les adopter, toujours afin de mieux atteindre le but de la charte(1). Ce que la demanderesse a toujours demandé, ce fut le service d'un eau pure et saine pour les besoins de ses habitants, ce qu'elle a le droit d'avoir par la charte, et ce qu'elle n'a pu obtenir jusqu'a ce jour. Les conventions et les arrangements subsequents et leur violation de la part de l'intimée ne sont que des détails, des exemples du refus ou défaut de la part de l'intimée de remplir l'obligation générale imposée par la charte de fournir l'eau. Je ne puis conçevoir que l'on puisse rendre justice à la demanderesse sans lui permettre d'en faire la preuve. C'est tout ce qu'elle paraît avoir en vue. Elle ne demande pas la confiscation ou la destruction de l'aqueduc de la défenderesse; il restera toujours sa propriété. Ce qu'elle demande c'est la

(1) Art. 358, 360 C.C.

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déchéance de la franchise exclusive que lui confère non pas les dites conventions, mais le statut, 40 Vict. ch. 68, afin de lui permettre, ainsi qu'elle l'affirme dans sa déclaration, de construire elle-même un aqueduc municipal. Les parties les ont consenties simplement pour donner plus d'efficacité et de précision à ses dispositions. La demanderesse allègue que la défenderesse a abusé d'une manière grossière pendant un grand nombre d'années de tous les pouvoirs qu'elle lui a conférés et cela nonobstant plusieurs plaintes et protestations. Nous croyons qu'il est dans l'intérêt de la justice que l'enquête se fasse sur tous ces faits et conventions afin de mieux apprécier la conduite des parties.

L'appel doit en conséquence être accordé avec dépens devant cette cour et la cour d'appel, et la défense en droit partielle renvoyée avec dépens.

DAVIES J. (dissenting).—For the reasons given by Chief Justice Taschereau in the Court of King's Bench of Quebec, I am of opinion that the appeal should be dismissed.

IDINGTON J.—The determination of this appeal must depend on whether or not the relationship created between the appellant and respondent's corporate predecessor, created by virtue of chapter 65 of the Consolidated Statutes of Canada, 1859, was of a contractual character, and so within the resolutive provision of article 1065 of the Civil Code of Quebec.

The method of incorporation provided by the said Act is that at least five persons shall set forth the purpose for which they desire incorporation; that is for the purpose of furnishing a supply of gas or water or

both, for the village, town or city named, wherein it is proposed to operate, and upon the required declaration being filled up, with the details specified in the said Act, and acknowledged before the mayor or chief magistrate of the city, town or village named, he shall grant a certificate of these facts.

Thereupon the people so promoting petition the council of the said village, town or city to pass a by-law, granting authority to them as a company, to lay down pipes for the conveyance of gas or water or both, under the streets, squares and other public places of such city, town or village.

When all these formalities, of which the requisite details appear in the first three sections of the Act, have been complied with, and the by-law has been passed and registered as required, the petitioners and all others joining them, as stock-holders forming the company thereby established, shall be a body corporate with the style and title mentioned in such declaration.

The whole purpose of this statute is that any town or city may avail itself of the means thus furnished, of obtaining wholly or in part by means of private enterprise, a supply of gas or water or both for the corporate municipality and its inhabitants.

It becomes the business of the municipal council on the presentation of such a petition to make the best bargain it can on behalf of those it represents. Sometimes the bargain takes on an express form of contract beyond what appears in the by-law. In other cases as here the mere passing of the by-law and the documentary material prescribed by the statute and upon which the by-law was passed are combined with the legal implications arising there-

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from alone relied on to determine the respective rights of the parties concerned. The question is thus raised here of what is implied in this proceeding and this franchise-granting by-law.

It is quite clear that on the one side there is granted that which the municipal council had full power to grant or to withhold.

No power could interfere with the exercise of the council's will. It might have imposed such conditions as it saw fit.

It might have refused the prayer of the petitioners absolutely without its reason for so refusing being open to question by anybody but the constituent body electing the council.

What lies at the bottom of the proceeding if it is not that of a contractual character? The company undertakes that it will supply that which it is incorporated to supply, and that the duty which has by the grant and acceptance thereof been cast upon the company accepting such a grant shall be discharged. The obligation is only what the law implies, yet its nature is contractual for it is expressly founded upon the mutual consent of the parties and nothing else.

In effect the municipal council exchanges the uses of its streets and squares, and right to open the same, in return for the implied promise to give the needed supply of gas or water as the case may be.

Is there not in this transaction the very essence of reciprocal obligation of a contractual character?

On the part of the village, town or city there is an obligation that for the agreed period, up to fifty years or less, as may be agreed upon, the franchise given shall be enjoyed.

If that be not so then the council could repeal its

by-law at any moment it saw fit, as it is usually implied by law that the power to enact a by-law carries with it the right to repeal, unless in such case as this, that there is an implied obligation that once passed it shall stand unrepealed, so long as the conditions on which it was passed are observed.

On the other hand there are implied obligations that the corporations thus created and enfranchised shall observe and discharge the functions for which it was created.

I admit that there may be, by virtue of its creation, obligations resting upon a corporate creation without being of such a contractual character as seems necessary to bring them within the operation of article 1065.

It may also be that in English law, apart from special legislation, there is no effectual remedy either in such a case, or in such a case as this of a contractual nature, save by such means as will imply action or assent to action by the attorney-general.

But article 1065 of the Civil Code is a provision that seems to me to render the interference of the attorney-general unnecessary, if we find the relationship in question contractual.

It is with an eye to the application of this article 1065 C.C. that I have dwelt upon the nature of the legal relations arising out of such a petition and such a by-law thereupon and the acceptance of the concession thereby given the respondents' predecessor in title.

We must seek for the solution determining whether or not the relation in question is of a contractual character in the application of the general principles of law.

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There is no Quebec or Ontario decision on this statute as to the nature of the relationship created by the incorporation.

Probably the question of the legal quality of the relationship arising between an incorporating power and the corporation it creates and the corporators has never been so exhaustively examined elsewhere as in the case of the *Trustees of Dartmough College* v. *Woodward*(1), in the Supreme Court of the United States.

There it was found that there was a contract existing as the result of incorporation.

The college had been incorporated in the days when what became later the State of New Hampshire belonged to the British Crown and the attempted interference of that state occurred long after that state had become subject to the constitution of the United States and was thereby prohibited from enacting any "law impairing the obligation of contract."

Chief Justice Marshall in his judgment says, at page 643:

> This is plainly a contract to which the donors, the trustees and the Crown (to whose rights and obligations New Hampshire succeeds) were the original parties.

The decision is not a binding authority upon us, but the opinion thus expressed is that of one whose authority is of the highest and his opinion in this regard has stood the strain for nearly ninety years.

It has been accepted generally and acted upon in the cases cited to us of other American authorities as a correct exposition of the law on the subject.

If, even without going so far as that opinion goes,

(1) 4 Wheaton 518.

we look at the substance of what necessarily takes place under the consolidated statute, ch. 65, and already referred to, we find much less difficulty than arose in that case in holding that the relationship created between the appellant and the company in question was of a contractual character.

Then in 1874, during and pursuant to such relationship and statute, a bargain was made between the corporate company and the appellants for a service of supply of water.

This for reasons not quite clear and of no concern here was followed by 40 Vict. ch. 68, which substituted one Louis Molleur, the younger, as proprietor of all the property privileges and franchises of the company and charged him with all its obligations.

See section 1 of that Act which is as follows:

> 1. Louis Molleur the younger, of the Town of St. John's, in the District of Iberville and Province of Quebec, is and shall be the sole proprietor in his own name of the waterworks of St. John's, in place and stead of the Waterworks Company of St. John's, and he is substituted to the said company as proprietor of all the property, and charged with all the obligations and responsibilities of the said company.

The only addition Molleur got to this company's franchise was that it became exclusive instead of subject to competition.

Instead of being freed, as a result of this exclusive right, from the obligations of the company the more obvious I should say would be the legal implication of and for his continuing bound.

The obligation always existed to supply water.

That was the consideration for the franchise. When that supply ceased there arose the liability to have the contract I have found dissolved, and as a consequence the franchise declared forfeit.

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It was not every slip or accident that might give rise to such a result. It was as against the wilful and persistent disregard of the proper observation of its obligations to the power that created it that this right of rescission existed in law for the protection of the municipal corporation and those it represented during the existence of the company and the same remedy was the appropriate one that bound Molleur upon assuming the company's obligations.

An additional right was furnished by section 3, as against Molleur, who became substituted for the company, but apparently confined so far as that section operated, to a forfeiture only of the exclusive privilege created by this Act.

I think this was a wise precaution, though perhaps not necessary. Its existence in no way limited the original rights of those concerned when and if the charter became forfeited, to have it so judicially declared under article 1065 C.C.

It is not the contracts or breaches of contracts the respondent or his predecessor may have undertaken, but the breaches of such contracts as all or either may have entered into by virtue of this franchise and pursuant to duties arising thereunder, or refusal to make and observe reasonable contracts, that might work a forfeiture of the franchise transferred to respondent's predecessors always subject, however, to forfeiture.

Each and every one of such broken contracts are good ground of complaint under this original compact on which the respondents' rights rest. In violating any such contract the company or its successor or successors violated the obligations they were under and persistence therein caused it to fall within the

meaning and range of this original power of forfeiture.

Even if, as alleged, the appellant had given notice of an abandonment of any such special contract, if it should turn out that the abandonment arose from a persistent course of misconduct on Molleur's or respondents' part, setting the appellant and its legal rights and demands at defiance, such abandonment could not be set up as an excuse for such a course of conduct on his part or relieve him from the possible forfeiture this misconduct had wrought.

The appellant could not be expected to go on forever paying for nothing. The termination of payments and consequent rescission of that contract did not obliterate the rights to forfeit that had accrued by reason of such default.

The same is true in regard to the wilful violation of contracts it was his duty under the franchise to have entered into with any of the inhabitants whom the appellant represents.

The respondents question such right or duty of representation.

At a very early stage (1854) in the history of municipal institutions of such a type as is now common in Canada the right of a municipal corporation through its council to represent the people residing within the municipality in relation to public property and public rights and especially rights of the inhabitants acquired by and through the action of the corporation was challenged in the case of *Town of Guelph* v. *The Canada Co.*(1). It was there decided that the question of the dedication to the public of a public

(1) 4 Gr. 632.

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square having been accepted by the public could be raised by a suit of the corporation claiming so to represent the public within the municipality.

The learned Chancellor Blake, who so held, supported his judgment by a reference to American authority rested on an English case. There can be no doubt that wherever the municipal legislation empowers the establishment of waterworks by the municipal council and also empowers such a means of doing it as chapter 65 of the Consolidated Statutes of Canada, 1859, affords, that the public interests are properly represented by the municipal corporation having such a matter as water supply or other service confided to its charge, in all that may be necessary to be done for the protection of the property of the corporate body and generally speaking of the inhabitants concerned.

It does not follow that for purposes of recovering private damages it can do so.

Nor does it follow that the individual inhabitants can assert a right of action for damages suffered by reason of the failure of one contracting with the city to furnish hydrants, etc., to discharge his duty in that regard. See *Cunningham* v. *Furniss* (1).

I do not desire to say more as to that subject as these pleadings shew an action is now pending at the suit of an inhabitant and I have neither investigated the subject nor formed an opinion upon the law as it stands in Quebec.

I merely desire to point out some of the difficulties that may exist in recovering damages and thus render it more necessary to assert the right to rescission if it exist.

(1) 4 U.C.C.P. 514.

The result in *Johnston* v. *Consumers' Gas Co. of Toronto*(1), and consequent need of Ontario legislation, as in 63 Vict. ch. 35, would be impossible in Quebec if my view of the relationship between the two corporations being of a contractual nature be correct, for the case falls then within article 1065 of the Civil Code.

The need and purpose of the further contract was merely to define specifically the mode agreed upon for the company discharging its main duty towards the municipality or the inhabitants respectively; that is to supply water.

In default of such specification having been agreed upon the extent of the obligation inherent in the original contract would be measured by what under all the circumstances would be found reasonable.

The condition of things might be such that the extent to which that would reach might be very limited indeed.

For example, it could not be supposed that the original obligation would extend beyond what the authorized corporate capital of the company reasonably applied could produce.

If, however, the company formed such a contract as it did, in 1874, then the measure so adopted should define the binding limits unless and until conditions changed.

There is set forth quite enough in relation to that contract alone as well as many other material allegations all of which the demurrer admits to entitle the plaintiff to the judgment prayed for, and I see no good purpose to be served in face of such admission

(1) [1898] A.C. 447.

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by postponing for evidence to be taken. Doing so only adds to expense and unjustifiable delay.

I think, on the whole, that the appeal should be allowed with costs.

MACLENNAN and DUFF JJ. agreed with Girouard J.

Appeal allowed with costs.

Solicitors for the appellants: *Bisaillon, Chasse & Brossard.*

Solicitors for the respondents: *Roy, Roy & St. Cyr.*

JOHN GREEN AND ALEXANDER GREEN (DEFENDANTS) ..... } APPELLANTS;

AND

RUSSELL BLACKBURN (PLAINTIFF) RESPONDENT.

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*June 12.
*Oct 6.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Crown lands—Holders of location ticket—Prior right to mining rights—Privilege reserved—"Proprietor of the soil"—Construction of statute—R.S.Q. (1888), *ss.* 1269, 1440, 1441; 55 & 56 *V. c.* 20.

The expression "proprietor of the soil," in section 1441 of the Revised Statutes of Quebec, 1888, as amended by 55 & 56 Vict. ch. 20, read in connection with sec. 1269, Rev. Stat. Que., 1888, is not intended to designate the holder of a location ticket, and, consequently, persons holding Crown lands, merely as locatees, have no vested preferential rights to grants from the Crown of the mining rights therein, under secs. 1440 and 1441 of the Revised Statutes of Quebec, 1888, as amended by the "Act to amend and consolidate the Mining Law," 55 & 56 Vict. ch. 20 (Que.).

APPEAL from the judgment of the Superior Court, sitting in review, at the City of Montreal, which affirmed the judgment of Mr. Justice Rochon, in the Superior Court, District of Ottawa, maintaining the plaintiff's action with costs:

The action was for the revendication of the mining rights in lot No. 18, in the Gore of the Township of Templeton, County of Ottawa, certain minerals extracted therefrom by the defendants, and to recover damages. At the trial, in the Superior Court, District

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

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of Ottawa, the plaintiff's action was maintained and the defendants were ordered to deliver up possession of the mines on the said lot of land, a quantity of mica, which had been seized under attachment issued with the action, or to pay the value thereof to the plaintiff with costs. This decision was affirmed by the judgment appealed from.

The circumstances of the case and issues raised upon this appeal are stated in the judgments now reported.

Arthur McConnell for the appellants.

Aylen K.C. for the respondent.

GIROUARD and DAVIES JJ. agreed that the appeal should be dismissed with costs for the reasons stated by Duff J.

IDINGTON J.—One of the appellants received the following license:

Prospecting License No. 230.

John Green, Esq., of Ottawa, having paid a fee of five dollars, for sixty-nine acres of public and surveyed land, *is hereby authorized to prospect for mineral for three months from the twelfth day of the month of November*, 1900, on the south half of lot 18, in the Gore of the Township of Templeton, in the County of Ottawa, in the Province of Quebec.

Subject to the articles 1453 to 1456, inclusive, of the Quebec Mining Law (55 & 56 Vict. ch. 20), as well as all other regulations based on this law.

JULES COTÉ,
Secretary, Department of Colonization and Mines.

Quebec, 12th November, 1900.

Both appellants on the 2nd of January, 1901, obtained the following location ticket:

Crown Lands Agency.

Hull, 2nd January, 1901.

Received from A. and John Green the sum of $75, being the first instalment of one-fifth of the purchase money of 50 acres of land contained in wood lot No. 18 in the Gore range of the Township of Templeton, P.Q., the remainder payable in four equal annual instalments, with interest from this date.

This sale if not disallowed by the Commissioner of Crown Lands, is made subject to the following conditions, viz.: "The purchaser to take possession of the land within six months from the date hereof, and from that time continue to reside on and occupy the same, either by himself or through others, for at least two years, and within four years at farthest from this date, clear, and have under crop a quantity thereof in proportion of at least ten acres for every one hundred acres, and erect thereon a habitable house of the dimensions of at least sixteen by twenty feet. No timber to be cut before the issuing of the patent, except under license, or for clearing of the land, fuel, buildings and fences; all timber cut contrary to these conditions will be dealt with as timber cut without permission on public lands. No transfer of the purchaser's right will be recognized in cases where there is default in complying with any of the conditions of sale. In no case will the patent issue before the expiration of two years of occupation of the land, or the fulfilment of the whole of the conditions, even though the land be paid for in full. Subject also, to current licenses to cut timber on the land, and the purchaser to pay for any real improvements now existing thereon, belonging to any other party. This sale is, moreover, subject to the laws and regulations concerning the public lands, wood and forests, mines and fisheries in this Province.

F. A. GENDRON, *Agent.*

CAUTION.—If the Commissioner of Crown Lands is satisfied that any purchaser of public lands, or any assignee claiming under him has been guilty of any fraud or imposition, or has violated or neglected to comply with any of the conditions of sale or if any sale has been made in error or mistake, he may cancel such sale, and resume the land therein mentioned, and dispose of it as if no sale thereof has been made. Extract from 20th sec., Act 32 Vict. ch. 11.

On the 23rd May, 1903, a patent was issued to the appellants for the south part of lot No. 18 of the Gore of the Township of Templeton. In this patent there is a proviso that the grant is subject to the laws and

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regulations concerning public lands, mines and fisheries in the province.

On the 25th of May, 1905, the appellants received from the Crown Timber Agency at Hull the following:

Crown Timber Agency.

Hull, Que., 25th May, 1905.

No. 203.

Received from John and Alex. Green the sum of seventy-five dollars, being the amount of dues on the undermentioned wood goods cut during the season of 190 :

S. part lot 18, Gore Templeton, mining rights.

L. T. GENDRON, *Agent.*

This sum of $75.00 was duly remitted to the Minister of Lands, Mines and Fisheries, by the agent who in doing so stated that it was a balance due on the south half of lot 18 Gore of Templeton mining lot for John and Alex. Green.

I cannot find in the case any acknowledgment of this letter until the 15th of November, 1905, and then only incidentally in replying to a letter from the agent dated 11th November, 1905, requesting a patent for the mines to be issued to John Green and referring to the lot as being in dispute between Messrs. Russell Blackburn and the said Mr. Green.

In this letter of 15th November, 1905, the Deputy Minister promises that the $75.00 deposited by the Greens in the department will be reimbursed to them and the patent issued to the Messrs. Blackburn Bros. It is alleged in these letters that Messrs. Blackburn had bought and paid for the mining rights in the lot 18 a year before Greens had made any application. The agent at Hull thereupon on the 17th November, 1905, writes John Green that the Messrs. Blackburn Bros. had bought the mining rights on the south half

of lot 18 Gore of Templeton on the 16th July, 1904, and sends him a cheque for $75 being the amount given by Green for the same.

It appears in the case, by a letter from the agent to the department enclosing a cheque for $375, that the department were requested on the 16th July, 1904, to issue a patent to Blackburn.

It would appear from this letter that the cheque was for the south half of lot 18 Gore of Templeton and other lands in the same township, and as if the discovery had been made by one Edward Patry who had transferred to Russell Blackburn.

It would seem from the evidence that the transaction was not closed in 1904, and it was only closed on the 12th July, 1905. The evidence on this point is interesting:

Q.—You did not buy it from Patry—Patry's permit was for lot 17? A.—17 and 18.

Q.—What part of 18? A.—The north half.

Q.—So it was under Patry's permit that you actually intended to work? A.—When we first started?

Q.—Yes. A.—Yes.

Q.—And was it not under that same permit that you were buying Patry's rights for $375 from Mr. Gendron? A.—No; under Patry's license he had the whole of 17 and the north half of 18.

Q.—That was only a prospecting license Patry had? A.—Yes.

Q.—Didn't you pay this $375 to secure the mining rights under the license for permission to explore which you had got transfers from Party to you? A.—*To secure part of the lots he had under his license.*

Q.—*That was what the* $375 *was for?* A.—*Yes.*

Cross-examined by Mr. Aylen:

Q.—*I see a receipt here dated July,* 1905, *signed Jules Cote, did you pay that money then?* A.—*Yes.*

Q.—You got that from the secretary of the department—that receipt. A.—Yes.

Q.—Is that his signature? A.—Yes.

Q.—And what was that for? A.—That was for the payment of the balance of lot 18 in the Gore of Templeton.

Q.—And afterwards did you get from the Hon. Mr. Provost,

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Minister of Mines and Fisheries, Exhibit No. 2—mining concessions? A.—Yes.

Q.—Was the $490 mentioned there paid on the 24th of February, or was it paid part on the 12th of July, 1905, and partly before, do you remember? It says: "Balance of purchase of mining rights?" A.—Yes, we had paid for twenty-five acres and this $490 was for the balance, and that was for lot 17, I think. That is a receipt for the balance we paid and this is what we got afterwards, a receipt for the whole thing.

Q.—But the balance of the money for lot 18 was paid on the 12th of July, 1905? A.—Yes.

It would seem as if this Blackburn application remained ungranted at the time when the agent in Hull had as above stated transmitted on behalf of the appellants $75. It would seem moreover, as if neither of applicants had deposited enough of money to cover the price fixed by the department for the mining lands respectively sought after by each of these applicants; rightly or wrongly the appellants entertain a suspicion that they were not fairly dealt with and that in an irregular manner Blackburns were preferred over them. I cannot say for I have no right to pass upon the question at present whether the suspicion be well founded or not. It appears upon this evidence that if the Minister had desired he could notwithstanding anything that appears before us have upon receipt of the $75 pointed out to the Messrs. Green wherein their application failed or fell short by reason of the amount of money forwarded being less than could be received; and they might thereupon have made that good and he might also have discarded the Blackburn application founded upon a prospecting license that did not cover the south half of lot 18.

Notwithstanding all that I do not see how Messrs. Green can herein maintain that any prior right in law had been acquired by them by reason of the Minister preferring one irregular application over another. It

was entirely within his province in such a case to prefer one of two irregular applications over the other.

The case of the seleçtion of one party over the other as referred to above might if brought about by improper means have given rise to a case of a different character when the right of the party suffering could be asserted but only by means of an application or information to set aside the patent.

It is urged, however, that quite independently of the deposit of $75 the appellants had by virtue of the above location ticket or patent a prior right in law to acquire the mining rights and that such prior right could not be set aside without notice to the appellants.

It is said on the other hand, that in such a case if the Minister chose to disregard that preferential right the only remedy would be against the Crown by way of petition of right or possibly an application in some other way to have the patent issued to Blackburn rescinded as having been issued improvidently. It is urged that such would be the only remedy. I do not so understand the law.

If by statute there had been clearly created a mining right in the owner of the land it could be only set aside by an express enactment of the legislature, or by following the proceedings expressed in the law whereby forfeiture might be brought about of such preferential right, by notice to him, and the opportunity being given to avail himself of his privilege. No *ex parte* act of the Minister could invade the right created by statute and vested in another, and hence the appellants would if of the class given such a right have had a good defence.

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The appellants set up a claim of this kind as derived from and by virtue of the location ticket quoted above. The location ticket does not maintain such a pretension nor can I find that the statute by virtue of which the location ticket was issued justifies any such pretension existing in the holder of any location ticket.

Art. 1269 of the Revised Statutes of Quebec, 1888, is as follows:

> Upon the conditions and for the price regulated and established by the Lieutenant-Governor in Council, the Crown lands agent, if there is no contestation, is bound to grant a location ticket to any person who asks to purchase a lot of public lands for colonization purposes, if the lot asked for is for sale and not already granted.
>
> Such grant is, however, subject to the approval of the Commissioner, and *shall not prejudice the right of the latter to sell the lands under the Mining Act as well as firewood lots under existing regulations and sugary lands.*

By sec. 14, ch. 22 of 60 Vict. of the Province of Quebec, the above article was amended as follows:

> Art. 1269 of the Revised Statutes is amended by replacing of the words, after the words "right of the latter," in the second line of the second part by the words: "to sell the land as firewood lots under existing regulations and sugary lands, nor the right of the Commissioner of Colonization and Mines to sell the lots under the law respecting mines."

The article was further amended by ch. 14 of 63 Vict. by replacing the second clause thereof by the following:

> Sales made by Crown lands agents if not disapproved by the Commissioner within four months thereafter take effect from the date when they were made by such agents.
>
> Such grant, however, shall not prejudice the right of the Commissioner to sell, under the regulations, the lands as firewood lots and as sugary lands, nor the right of the Commissioner of Colonization and Mines to sell the lots under the laws respecting mines.

This came in force on the 23rd of March, 1900.

It is under this last amendment that the location ticket in question issued. I cannot understand how under that or any of the previous statutory provisions above recited, there could ever since 1888 have existed a right in a locatee to the minerals or to any preferential right of purchase thereto.

We were referred to certain interpretation clauses that would go, when read in conjunction with art. 1441 in connection with art. 1440, to support this right, but I cannot find anything that could by any possibility give effect thereto in the manner claimed. The sections referred to evidently were intended to apply to the case of absolute dominion over the land and not to such limited rights as the locatee such as in question could claim. The only legislation had in the way of further amending art. 1269 was after this location ticket had been issued and in no way adds to the force of the foregoing so far as any right the appellants may have had by virtue of their location ticket.

Then the question is raised as to how the appellant could have acquired any such rights in minerals as he sets up by virtue of his patent. The patent itself does not confer any such right and the only reference made to the subject at all in the patent is the last paragraph thereof which reads as follows:

> Provided, always, that this grant is subject to the laws and regulations concerning public lands, mines and fisheries in this province.

We have not been shewn any further enactment or regulation directly or expressly conferring any such right in a patentee. It is difficult to see how one having acquired a patent merely by virtue of complying with all the conditions of such a location ticket as the one here issued pursuant to any enactment such

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as art. 1269 in the Revised Statutes, 1888, or as it appeared in any of all its modifications down to the time when the appellants obtained the location ticket in question could claim any preferential mining right such as set up here. Such rights seem to have been expressly excluded from the operation of any location ticket under art. 1269.

Then the appellants fall back upon arts. 1440 and 1441. Art. 1440 of the Revised Statutes of Quebec is as follows:

> The mining rights belonging to the Crown which consist of the ownership of the property under the soil, under articles 1423 and 1424, may be acquired from the Commissioner by sale or lease or by license *or permit of occupation by the proprietor of the soil, who has a preferential right to the purchase of such mining rights.*
>
> Any miner may acquire mining rights *if the proprietor of the soil neglect or refuse to work the said mines, after having put the proprietor in default by notice given under articles* 1483 *and* 1484, *by paying, upon the award of arbitrators as hereinafter provided, all the damages and losses that he may cause the latter in mining or attempting to mine under such soil.*

Arts. 1423 and 1424 referred to in this art. 1440 read as follows:

> 1423. It shall not be necessary, in any letters-patent for lands granted for agricultural purposes, to mention the reserve of mining rights, *which reserve is always supposed to exist under the provisions of this section.*
>
> 1424. *As respects the Crown, such mining rights,* so tacitly reserved, shall be property separate from the soil covering such mines and minerals comprised in such rights, and shall constitute a property under the soil which shall also be public property, independent from that of the soil which is above it, *unless the proprietor of the soil has acquired it from the Crown as a mining location or otherwise, in which* case both the soil and the property under the soil form but one and the same private property.
>
> 2. However, whenever a person who has become owner of the soil and of the property under the soil, under any title, before the 10th of June, 1884, sells, hypothecates, leases or affects the mining rights in such property to another person, under article 2099 of the Civil Code of Lower Canada, such soil and the property under the soil again become two properties perfectly distinct and inde-

pendent from each other, for all lawful purposes, as they were when in the possession of the Crown, so that the sale, judicial or otherwise, of one of these properties, does not in any way affect the other.

3. It is, however, well understood that the rights acquired over such property, during the confusion in the ownership of the soil and of the property under the soil, are in no wise affected by the subsequent sale of mining rights and the division of the property in the soil and of that under the soil arising therefrom under this section; except only that the owner of the property under the soil shall be sued and made a party to the suit in the same manner as if he had purchased a part or portion of the soil.

In the Revised Statutes of Quebec, 1888, we find the following:

1425. Any person who previous to the 24th July, 1880, obtained by letters patent, for agricultural purposes but with reservation by the Government of the mining rights, any lot whatever, forming part of the public lands of the province, may, if he or his legal representative discover and wish to work a mine, purchase the mining rights so reserved by the Government, by paying in cash to the Commissioner, over and above the price already paid for said lot, a sufficient additional amount to make up the sum of two dollars per acre, if for gold or silver, and one dollar per acre, if for copper, iron, lead or other baser metal.

1426. Every proprietor of land, sold for agricultural purposes, by letters patent, but without any reservation by the Government of the mining rights, or the legal representative of such proprietor, who discovers upon such land a gold or silver mine, may work the same, without taking out a license for that purpose, by paying to the Commissioner, over and above the price already paid for such land, a sufficient additional amount to make up the sum of two dollars per acre.

It clearly appears from these two lastly mentioned articles that, in 1888, there probably were by virtue of prior law consolidated in these articles outstanding rights of persons who, previous to the 24th July, 1888, had obtained letters patent or, later and until the law was amended, might have obtained patents and yet had preferential rights, even where the reservation had been made by the Government of the mining rights in any lot patented for agricultural pur-

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poses. This option was given to such patentees by the payment of an amount additional to that they had paid to make up the sum of $2 per acre, if for gold or silver, or $1 per acre if for copper, iron, lead or other baser metal.

The other class, art. 1426, does not cover the appellants' case.

Then it is set up here by the appellant that by virtue of art. 1441 as it stood at the time of their purchase when read in connection with art. 1440 above set forth that the patentees had acquired a preferential right.

Art. 1441 as it stood at the time in question by virtue of its last of many amendments up to that time being 1 Edw. VII. ch. 13, sec. 2, was as follows :

> Art. 1441. The mining rights belonging to the Crown in the lands of private individuals may also be acquired in the manner indicated in the foregoing article.

We are asked to read these two articles (1440 and 1441) together and it is ingeniously suggested that the words in art. 1440, *"who has a preferential right to the purchase of such mining rights"* were intended to confer and did confer down to the date of the appellant's patent a preferential right such as is indicated existed in some proprietors of the soil.

I cannot read these words after considering the legislation I have set forth so fully as conferring any right upon the appellants. The words do not expressly confer any. They are an express recognition of the fact that some proprietors of the soil had acquired such preferential rights by virtue of some earlier legislation and that those who had acquired such rights by prior legislation had such control over the soil that the right could only be invaded by the ex-

press methods pointed out in the art. 1440 and also in later legislation.

Full effect is given to these words relied upon by attributing to them the cases of the operation of statutes conferring upon some of the earlier of the patentees the right to the minerals upon certain conditions. Such persons as then stood such owners and such of them as still own the property granted with that privilege are the persons who are referred to in art. 1441 by the words "who has a preferential right to the purchase of such mining rights." The appellants had not brought themselves within that class or of any of those classes who enjoyed, as appears above in regard to some of them, the statutory right above referred to. The appellants do not seem to me ever to have had any preferential right or other right to the minerals by virtue of being locatees or patentees of the land in question. If the appellant who had obtained a mining license had discovered at the proper time the mine in question and followed it up by the proper steps he might have secured the mine. He did not do so, possibly because erroneously supposing that, when he became with his brother a locatee or patentee of the land, he had no more to do than sit down and enjoy the mine by virtue of the mining license he had got before his patent. I do not find as well founded this suggestion in argument that the two joined together created any right in law to the minerals in question.

The appeal I think must be dismissed with costs.

MACLENNAN J. agreed in the opinion stated by Idington J.

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DUFF J.—This appeal raises the question of the title to the mining rights under the south half of lot 18, Templeton Gore. The appellants on the 2nd of January, 1901, acquired a location ticket in respect of this land and they received a patent of it on the 23rd May, 1903. Under the law as it stood on the first mentioned of these dates, 55 and 56 Vict. sec. 1441, the mining rights in question were the property of the Crown but subject to a preferential right vested in "the proprietor of the soil" to acquire them on compliance with certain prescribed statutory conditions. On the 23rd of May, 1905, the appellants made application through the Crown lands agent at Hull for the purchase of these mining rights paying (I will assume) at the same time the price prescribed by the statute. If when this application was made, the preferential right conferred upon "the proprietor of the soil" by the enactment mentioned was vested in the appellants it is clear, in my opinion, that this application and payment (on the assumption mentioned) constituted a valid exercise of their preferential right of purchase; and, thereupon, they acquired such an interest in the rights in question as would prevent the Crown from afterwards conveying a title to them except as subject to that interest. On the other hand, if the appellants had then no such preferential right, I am unable to discover anything in the transaction between appellants and the Crown officials which could affect the title of the Crown.

The holder of a location ticket had by statute conferred upon him a conditional right to acquire a title to the lands in respect of which it was issued, subject to certain reservations. Among other things there was reserved to the Crown the power of disposing of

the lands "under the mining law." Now it seems to me that, reading the provision in which this reservation is declared (R.S.Q. sec. 1269) along with sec. 1441, we must come to the conclusion that the legislature did not intend by the expression "proprietor of the soil," used in the last mentioned section, to designate the holder of a location ticket. This conclusion is fortified by the consideration that, on the appellants' construction, the holder of a mere conditional right to acquire a title to the surface had vested in him by virtue of that conditional right alone, a preferential right to acquire an indefeasible title to the minerals. Looking at the statute as a whole, I do not think that is what the legislature intended.

The appellants then, holding the land as locatees only at the time the enactment was passed, had at that moment no vested right in the mining rights in dispute—indeed no vested privilege to acquire those rights—but only a conditional right to acquire a title to the surface which, if the mining rights should not in the meantime be alienated, would confer upon them a preferential right to purchase the minerals; a mere expectation of this sort is not, I think, within the rule which requires statutes to be construed so as not to effect an existing status prejudicially in so far as they are reasonably capable of another construction. The decisions of the Judicial Committee in *Reynolds* v. *The Attorney-General for Nova Scotia*(1), and in *Main* v. *Stark*(2), illustrate the rule; and at the same time indicate the limits within which it will be applied. This case falls outside those limits. The minerals in dispute consequently came under the opera-

(1) [1896] A.C. 240. (2) 15 App. Cas. 384.

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tion of the Act of 1901, and the appellants never had any preferential right in respect of them.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *Arthur McConnell.*

Solicitors for the respondents: *Aylen & Duclos.*

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posed liability upon the Crown, in such a case, and gave jurisdiction to the Exchequer Court of Canada to entertain the claim for damages; and that the defence that deceased, having obtained satisfaction or indemnity within the meaning of article 1056 of the Civil Code, by reason of the annual contribution made by the Railway Department towards the Intercolonial Railway Employees' Relief and Insurance Association, of which deceased was a member, was not an answer to the action. *Miller* v. *The Grand Trunk Railway Co.* ([1906] A.C. 187) followed. THE KING *v.* ARMSTRONG **229**

[Leave to appeal to Privy Council was refused 18th July, 1908.]

2——*Collision—Stop at crossing—Statutory rule — Company's rule—Contributory negligence — R.S.C.* [1906] *c.* 37, *s.* 278.] A train of the Wabash Railroad Co. and one of the Canadian Pacific Railway Co. approached a highway crossing at obtuse angles. The former did not, as required by sec. 278 of the Railway Act, come to a full stop; the latter did so at a semaphore nearly 900 feet from the crossing and receiving the proper signal proceeded without stopping again at a "stop post" some 400 feet nearer where a rule of the company required trains to stop. The trains collided and the engineer of the Canadian Pacific Railway Co. was killed. In an action by his widow: *Held*, that the failure of the engineer to stop the second time was not contributory negligence which prevented the recovery of damages for the loss of plaintiff's husband caused by the admitted negligence of defendants. WABASH RD. CO. *v.* MCKAY. **251**

3——*Government railway — Operation over other lines—Agreement for running rights—Extensions and branches—"Public work"—Construction of statute — "Government Railways Act" — R.S.C.*, 1906, *c.* 36, *s.* 80—*"Exchequer Court Act" —R.S.C.*, 1906, *c.* 140, *s.* 20(*c*).] The agreement between the Government of Canada and the Grand Trunk Railway Company, made under the provisions of the Dominion statute, 43 Vict. ch. 8, giving the Government running rights and powers over a portion of the Grand

Trunk Railway, from Levis to Chaudière, between two sections of the Intercolonial Railway, constitutes that portion of the Grand Trunk Railway a part of the Intercolonial Railway, under the provisions of "The Government Railways Act," as amended by 54 & 55 Vict. ch. 50(D.), and, consequently, a public work within the meaning of the "Exchequer Court Act," 50 & 51 Vict. ch. 16, sec. 16(*c*), (D.); [R.S.C., 1906, ch. 140, sec. 20(*c*)]. THE KING *v.* LAFRANCOIS..**431**

[Leave to appeal was refused by the Privy Council 18th July, 1908.]

4——*Board of Railway Commissioners—Jurisdiction—Location of railway—Consent of municipality—Crossing—Leave of Board—Discretion.*] On 12th Aug., 1905, the Township of Sandwich West passed a by-law authorizing the W. E., etc., Ry. Co. to construct its line along a named highway in the municipality but the powers and privileges conferred were not to take effect unless a formal acceptance thereof should be filed within thirty days from the passing of the by-law. Such acceptance was filed on 12th Sept., 1905. This was too late and on 20th July, 1907, the council of Sandwich West and that of Sandwich East respectively passed by-laws containing the necessary authority. In April, 1906, the location of the line of the E. T. Ry. Co. was approved by the Board. In June, 1906, the Board made an order allowing the W. E., etc., Ry. Co. to cross the line of the C.P.R. In March, 1907, another order respecting said crossing was made and also an order approving the location of the W. E. Ry. Co., the municipal consent being obtained three months later. The E. T. Ry. Co. applied to the Board to have the orders of June, 1906, and March, 1907, rescinded and for an order requiring the W. E. Ry. Co. to remove its track from the highway at the point where the applicant proposed to cross it; to discontinue its construction at such point or, in the alternative, for an order allowing it to cross the line of the W. E. Ry. Co. on said highway. The applicants claimed to be the senior road and that the W. E. Ry. Co. had never obtained the requisite authority for locating its line. On a case stated to the Supreme Court by

charged her cargo and proceeded to reload, obtaining another supply of coal from the plaintiffs in the same manner as the first supply had been furnished. Within a few days, the price of these supplies of coal being still owing and unpaid, the hirers became insolvent, and the plaintiffs arrested the ship at Montreal, claiming special privilege upon her as *derniers équipeurs* in furnishing the first supply of coal on her last round voyage, the right of attachment before judgment in respect of both supplies, and seizing her under the provisions of articles 2391 of the Civil Code and 931 of the Code of Civil Procedure. *Held, per* Fitzpatrick C.J. and Davies, Maclennan and Duff JJ., that the voyage from Montreal to Rotterdam and return was not the ship's "last voyage" within the meaning of article 2383(5) of the Civil Code; that the voyage out from Montreal and that returning from Rotterdam did not constitute one round voyage but were separate and complete voyages, and that, consequently, there was no privilege upon the ship for the supply of coal furnished for her voyage from Montreal to Rotterdam. And also, that the provisions of article 2391 of the Civil Code did not render the ship liable to seizure for personal debts of the hirers, and, consequently, that she could not be attached therefor by *saisie-arrêt*. Judgment appealed from (Q.R. 16 K.B. 16) affirmed, Girouard J. dissenting.—*Per* Davies J.—The "last voyage" mentioned in art. 2383 C.C. refers only to a voyage ending in the Province of Quebec.—*Per* Idington J.—As the terms of the charter-party expressly excluded authority in the hirers to bind the ship for any expenses of supply and as nothing arose later that could by any implication of law confer any such authority on anyone and especially so in a port where the owners had their own agents any possible rights that might in a proper case arise under article 2383 of the Civil Code did not so arise here; and, therefore, though agreeing in the result express no opinion on the meaning of the term "last voyage" therein. *Lloyd* v. *Guibert* (L.R. 1 Q.B. 115) should govern this case. INVERNESS RY. AND COAL CO. *v.* JONES ET AL. **45**

2—— *Admiralty — Preliminary act — Amendment—Collision—Evidence.*] In an action in admiralty claiming damages for injury to plaintiffs' ship, the "Neepawah," through collision with the "Westmount" belonging to defendants the preliminary act and statement of claim alleged that the port quarter of the latter struck the stern of the "Neepawah." The local judge, in his judgment, held that the evidence shewed a collision between the two ships stern to stern and, against objection by defendants' counsel, of his own motion allowed the statement of claim to be amended to conform to such evidence stating that its admission had not been objected to and that defendants were not misled. *Held,* that such amendment should not have been made; that it set up a new case and one entirely different from that presented by the preliminary act and statement of claim and greatly prejudiced the defence; and that the local judge was wrong in stating that the evidence was admitted without objection as it was protested against at the trial.—*Held,* also, that errors in the preliminary act may be corrected by the pleadings but, if not, the parties will be held most strongly to what is contained in their acts.—*Held, per* Davies, Maclennan and Duff JJ., that the plaintiffs had not satisfactorily established that the collision, even that charged under the amendment, had actually occurred.—*Per* Fitzpatrick C.J., that the evidence proved that no collision between the vessels took place.— Idington J. concurred in the judgment allowing the appeal. MONTREAL TRANSPORTATION CO. *v.* NEW ONTARIO S.S. CO. **160**

3——*Admiralty law—Jurisdiction of the Exchequer Court of Canada—Claim under mortgage on ship—Action in rem—Pleading—Abatement of contract price—Defects in construction—Damages.*] In an action *in rem* by the builders of a ship to enforce a mortgage thereon, given to them on account of the contract price for its construction, the owners, for whom the ship was built, may plead as a defence *pro tanto* that the ship was not constructed according to specifications and claim an abatement of the price in consequence of such default and that the loss in value of the ship, at the time of delivery, attributable to such default, should be deducted from the claim under the mortgage. Bow