# REPORTS

OF THE

# SUPREME COURT

OF

# CANADA.

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REPORTER

C. H. MASTERS, K.C.

ASSISTANT REPORTER

L. W. COUTLÉE, K.C., (QUE.)

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PUBLISHED PURSUANT TO THE STATUTE BY

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

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VOL. 36.

CANADA LAW BOOK COMPANY,
32-34 Toronto St.,
TORONTO, CANADA.

1905.

# JUDGES

OF THE

# SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

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The Right Hon. Sir Henri Elzéar Taschereau, Knight, C.J.

The Hon. Robert Sedgewick J.

" Désiré Girouard J.

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

" Wallace Nesbitt J.

" John Idington J.

" James Maclennan J.

**ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:**

The Hon. Charles Fitzpatrick, K.C.

**SOLICITOR-GENERAL FOR THE DOMINION OF CANADA**

The Hon. Rodolphe Lemieux, K.C.

## ERRATA AND ADDENDA.

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

Page 141, after line 27, insert "SEDGEWICK J. concurred."

Page 159, line 14, for "Superior" read "Supreme."

Page 160, add foot-note as follows:—"(2) 24 Q.B.D. 103, at pp. 106-7."

Page 406, add reference to judgment appealed from and foot-note, "Q.R. 14 K.B. 1."

Page 463, line 27, for *"Hope"* read *"Heap."*

Page 542, line 25, for "Sir Elzéar Taschereau C.J." read "Sedgewick J."

Page 544, line 8, for "The Chief Justice" read "Sedgewick J."

Page 564, line 31, for "Commentaries" read "Comments."

## MEMORANDA.

On the fourth day of October, 1905, the Honourable Wallace Nesbitt, one of the Puisné Judges of the Supreme Court of Canada, resigned that office.

On the fifth day of October, 1905, the Honourable James Maclennan, of the City of Toronto, in the Province of Ontario, one of the Justices of the Court of Appeal for Ontario, was appointed a Puisné Judge of the Supreme Court of Canada, in the room and stead of the Honourable Wallace Nesbitt, resigned.

## APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOL. 35 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

*The King* v. *The "Kitty D."* (34 Can. S.C.R. 673). Appeal allowed with costs; judgment of the Supreme Court of Canada reversed and judgment of Mr. Justice Hodgins restored; 21st December, 1905.

*Montreal, City of,* v. *Montreal Street Railway Co.* (34 Can. S.C.R. 459). Appeal allowed with costs, judgment of Court of King's Bench, restored; 14th November, 1905.

*"Railway Act Amendment,* 1904," *In re* (34 Can. S.C.R. 136). Leave to appeal to Privy Council granted on the application of the Grand Trunk Railway Co.; 28th November, 1905.

*Syndicat Lyonnais du Klondyke* v. *Barrett* (36 Can. S.C.R. 279). Leave to appeal to the Privy Council granted; 14th December, 1905.

*Victoria-Montreal Fire Insurance Co.* v. *Home Insurance Co. of New York* (34 Can. S.C.R. 208). Leave to appeal to the Privy Council granted; 8th December, 1905.

*Water Commissioners of the City of London et al.* v. *Saunby* (34 Can. S.C.R. 650). Appeal allowed with costs; judgment of the Supreme Court of Canada reversed and judgment of the Court of Appeal for Ontario restored, with the variation that the damages be confined to the period beginning six months prior to the commencement of the action.

# SUPREME COURT RULES.

## General Order No. 88.

It is ordered that the following be added to the Rules of the Court:—

1. That Rule 15 as amended by Rule 80 be further amended by adding thereto, as sub-section 2, the following:

"Where the validity of a statute of the Parliament of Canada is brought in question in any appeal to the Supreme Court, notice of hearing, stating the matter of jurisdiction raised, shall be served on the Attorney-General of Canada."

2. The following rule shall be inserted after Rule 75:

"The time of the Long Vacation or the Christmas Vacation shall not be reckoned in the computation of the times appointed or allowed by these rules for the doing of any act."

3. Whenever a reference is made to the court by the Governor in Council or by the Board of Railway Commissioners for Canada, the case shall only be inscribed by the registrar upon the direction and order of the court or a judge thereof, and factums shall thereafter be filed by all parties to the reference in the manner and form and within the time required in appeals to the court.

4. Whenever an appeal is taken from any decision of the Board of Railway Commissioners for Canada pursuant to the provisions of the "Railway Act," the appeal shall be upon a case to be stated by the parties,

or, in the event of difference, to be settled by the said board or the chairman thereof, and the case shall set forth the decision objected to and so much of the affidavits, evidence and documents as are necessary to raise the question for the decision of the court.

All the rules of the Supreme Court from 1 to 44 both inclusive, shall be applicable to appeals from the said Board of Railway Commissioners for Canada, except in so far as the "Railway Act" otherwise provides.

(Signed) H. E. TASCHEREAU, C.J.
" ROBT. SEDGEWICK, J.
" D. GIROUARD, J.
" L. H. DAVIES, J.
" WALLACE NESBITT, J.
" JOHN IDINGTON, J.

June 14, 1905.

# A TABLE

OF THE

# NAMES OF THE CASES REPORTED

## IN THIS VOLUME.

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# CASES

DETERMINED BY THE

# SUPREME COURT OF CANADA

## 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.

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THE MONTREAL PARK AND ISLAND RAILWAY COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

CHARLES McDOUGALL, (PLAINTIFF)..RESPONDENT.

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*March 10,13.

*March 20.

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

*Negligence—Dangerous works—Ordinary precautions—Employer and employee—Knowledge of risk—Contributory negligence—Voluntary exposure to danger.*

An employer carrying on hazardous works is obliged to take all reasonable precautions, commensurate with the danger of the employment, for the protection of employees and, where this duty has been neglected, the employer is responsible in damages for injuries sustained by an employee as the direct result of such omission. *Lepitre* v. *The Citizens Light and Power Company* (29 Can. S. C. R. 1) referred to by Nesbitt J.

In such a case it is not sufficient defence to shew that the person injured had knowledge of the risks of his employment but there must be such knowledge shewn as, under the circumstances, leaves no doubt that the risk was voluntarily incurred and this must be found as a fact.

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* PRESENT :– Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

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MONTREAL PARK AND ISLAND RY. CO. v. MCDOUGALL.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, sitting in review, at the City of Montreal, whereby the judgment of the trial court, Robidoux J., was reversed and the plaintiff's action was maintained with costs.

The appellant company operates an electric tramway in the District of Montreal, in connection with which they have also a telephone system the wires of which are attached to poles which also serve to support electric feed-wires and the trolley by which the tramway is supplied with motive power. The plaintiff was a lineman employed by the company for the purpose of doing work on the telephone wires; he was shewn to have had considerable experience at this kind of work but it did not clearly appear whether or not he had ever worked at it in places where he might be exposed to the greater risks of coming in contact with wires highly charged with electric currents, such as would be necessary for the operation of a tramway. At the time of the accident by which plaintiff's injuries were caused, the company was replacing their old trolley wire by a new one which had not yet been put in place but was attached by tie-wires to the iron brackets on which the trolley in use was suspended in such a manner that it had become charged with high currents of electricity which passed from the new trolley into the brackets rendering them "hot", *i.e.* charging them, likewise, with the same high electric currents. The pole at which the accident occurred had a number of wires attached to it in addition to the feed wire and trolleys; it was crooked and difficult to climb and, in order to strengthen it, was supported by a back-stay or guy-wire wrapped round the pole and fastened to an iron holdfast driven into the ground. This guy-wire was not insulated but, while the pole

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was dry, was not in danger of becoming charged with electricity. The plaintiff, while working upon another pole, had been warned that the brackets were "hot" and told "not to stand on the bracket while he was handling the telephone wires." He was ordered by the foreman to climb the pole where the accident occurred, without further warning, and, in taking hold of the bracket to assist himself, in some way received two electric shocks which caused him to loosen his hold on the pole with one hand which came in contact with the uninsulated guy-wire. He was precipitated to the ground and injured and the theory was advanced that, in thus touching the uninsulated guy-wire, the electric circuit grounded through his body and threw him down. The company had not supplied him with non-conducting gloves, such as are usually supplied to linemen working among highly charged wires.

The plea was to the effect that it was not usual to supply such gloves to employees working on telephone wires with low currents of electricity, that plaintiff was an experienced man aware of the risks of his employment, that he had been warned about the "hot" brackets and that, by disregarding these repeated warnings, he imprudently and voluntarily incurred the danger and was alone responsible for the cause of his injuries.

In the Superior Court, the trial judge, Robidoux J., adopted the views propounded by the defence and dismissed the action, but this judgment was reversed by the Court of Review, on the ground that the company was at fault for neglecting to give the plaintiff the protection to which he was entitled in performing such dangerous work. The Court of Review, however, found that the plaintiff had contributed to the accident and, in accordance with the practice in the Province of Quebec, reduced the damages accordingly to $750.

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On an appeal by the company to the Court of King's Bench, that court affirmed the judgment of the Court of Review, and held that the company had been negligent—

"(1) In not insulating the wires of the back-stay; (2) in not informing the respondent of this fact and of the danger to which he was exposed in climbing a pole like the present one when it could not be ignored how difficult it must have been to avoid touching, at one and the same time, the brackets and the wires at the back-stay, specially when a slip of the spurs (worn for the purpose of climbing poles) or any false move might have rendered that result quite unavoidable."

The court below also said:—

"We must also add that the accident might have been avoided if the company had given respondent the rubber gloves ordinarily used for that kind of work or if the new trolley had been tied up to the bracket with a dry rope."

*Meredith K. C.* and *Holden* for the appellants.

*Brooke K. C.* and *Ewing* for the respondent.

SEDGEWICK and GIROUARD JJ. were of the opinion that the appeal should be dismissed with costs for the reasons stated by His Lordship Mr. Justice Davies.

DAVIES J.—I concur in the dismissal of this appeal. It is sufficient that it was clearly established, to my mind, that negligence on the part of the company or its officers was the direct cause of the plaintiff's injuries. They failed to take that reasonable care and provide themselves with those reasonable precautions which it was their duty to take and provide with reference to an employee engaged in the extremely dangerous work of stringing electric wires

along their poles. He was ordered by the foreman to go up one of the poles to attend to some wiring at a time when the ordinary insulation of the bracket connecting the pole with the over-head trolley wire had been destroyed and while the bracket was "hot." He was not supplied with gloves. A guy-wire attached to and supporting the pole was not insulated, and the foreman refused to disconnect the new trolley wire which was being strung from the bracket to which it was attached even for the few moments the plaintiff was working upon the post.

While there is some discrepancy between the witnesses as to the precise warning given to him, the man himself swears that he was only warned "not to stand on the bracket while he was handling the telephone wires." He did not disobey the warning but, apparently, when taking hold of the bracket to assist himself up, an act agreed upon by counsel for the company as not *per se* dangerous, he received a shock which caused him to loosen one of his arms which came in contact with the grounded and uninsulated guy-wire. This contact completed the circuit and he was thrown to the ground and injured. This is the theory of the cause of the accident adopted by the courts below and I accept it, under the evidence, as the true one.

The counsel for the appellant contended that the plaintiff had experience and knowledge of the risk he was running, but, even if he had, which I doubt, such knowledge would not, of itself, absolve the company from liability. It must be such a knowledge as, under the circumstances, leaves no inference open but the one that the workman had voluntarily incurred the risk and that must be found as a fact. The circumstances, in this case, are far from leaving any such inference open and the defence fails.

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Nesbitt J.

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

I desire to draw attention to the fact that the head-note of the case of *The Citizens Light and Power Company* v. *Lepitre* (1) is based merely upon an oral opinion of the Chief Justice in that case. That expression was not necessary to the decision of the case which simply proceeded upon the fact that the company had failed to provide ordinary appliances in such a dangerous work. I certainly would not concur, as at present advised, in the expression of opinion by the Chief Justice. I think the doctrine there laid down is only applicable as between a company carrying on such a dangerous employment and third parties.

I do not, myself, see any difference between an employee of an electric company and any other employee, other than that, owing to the extreme hazard of the work, precautions proportionately commensurate with the danger would have to be taken by the employer under the ordinary rule of law requiring reasonable care. The duty is the same in each case; the evidence of the performance of the duty must necessarily vary according to the circumstances.

In this case, the evidence is quite clear that reasonable precautions, such as were ordinarily adopted by other companies, were not taken, and, I think the view as to liability taken by the Court of King's Bench should be adopted.

IDINGTON J.—I agree with the reasons stated by my brother Davies.

*Appeal dismissed with costs.*

Solicitors for the appellants: *Campbell, Meredith, Macpherson & Hague.*

Solicitor for the respondent: *Cramp & Ewing.*

(1) 29 Can. S. C. R. 1.

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THE NORWICH UNION FIRE INSURANCE SOCIETY (PLAINTIFFS) } APPELLANTS;

*March 14.
*March 20.

AND

WALTER KAVANAGH (DEFENDANT)...RESPONDENT.

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

*Revendication —Statement of claim—Pleadings—Procedure—Arts. 110 and 339 C. P. Q.—Evidence—Judgment secundum allegata et probata—Ultra petita—Surprise.*

In an action for revendication of books, documents and records retained by a fire insurance agent after his dismissal and for damages in default of delivery thereof, several policy copy books, which could not be found at the time of the seizure, were delivered up in a mutilated condition by the defendant during the pendency of the action, the defendant being unaware of such mutilation. Some time afterwards the answers to defendant's pleas were filed and contained no reference to the mutilated and incomplete condition in which these books were returned. At the trial plaintiffs were allowed to give evidence as to the cost of replacing these books in proper condition, although defendant objected to the adduction of such proof, and the trial court judge assessed damages in this respect at $200, and at $2000 in respect of certain mutilated plans, at the same time declaring the revendication valid, etc. On appeal by the plaintiffs from the judgment of the Court of King's Bench, reversing the trial court judgment in regard to the pecuniary condemnation :—

*Held*, affirming the judgment appealed from, that, as the defendant had been surprised, in so far as the issues affecting the policy copy books were concerned, he was entitled to relief as to the item of $200 for damages in respect thereof. With regard to the item of $2000 damages, however, as the defendant could not have been taken by surprise, he himself having mutilated the plans, the Supreme Court of Canada reversed the judgment appealed from and restored the trial court judgment as to that item of the damages assessed.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing, in part, the judgment of

* PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

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the Superior Court, District of Montreal, by which the plaintiffs' action had been maintained with costs.

The circumstances of the case and the questions in issue on this appeal are stated in the judgment of the court delivered by His Lordship Mr. Justice Girouard.

*Martin K. C.* and *Beaudin K. C.* for the appellants.

*Kavanagh K. C.* for the respondent.

The judgment of the court was delivered by

GIROUARD J.—This appeal involves merely a question of local practice.

In 1900 the appellants caused to be issued a writ of revendication to seize and attach in the hands of the respondent all the books, documents and records of the company and, among others, copies or records of all policies issued by him and also all maps, whether issued by Goad or others, which they alleged to be illegally detained by the respondent, who for several years had been their chief agent in the Province of Quebec but had recently been dismissed from office.

By the conclusions of their demand, they pray first that the said seizure be declared good and valid, that they be declared proprietors of the said books, documents and records and that the respondent be ordered to give up the possession of the same to the appellants forthwith; and finally,

that in the event of the said defendant having secreted or made away with the said books, papers and documents or any part or portion thereof, which are the property of the said plaintiffs, and to the possession of which they are entitled, that he be adjudged and condemned to pay plaintiffs the value of the same, to wit, the sum of ten thousand dollars ($10,000), the said plaintiffs expressly reserving all their rights and recourse against the said defendant for any and all damages suffered and sustained or which may hereafter be suffered and sustained by them by reason of the failure and refusal of the said defendant to hand over to said plaintiffs the said books, papers and documents the whole with costs.

The trial judge maintained the *saisie revendication* and in this respect his judgment was confirmed by the Court of Appeal. The respondent not having appealed from this judgment it is *chose jugée* between the parties, and its soundness cannot be questioned before this court, as contended for by the respondent.

The difficulty before us turns upon a point of practice which arose at the trial when the witnesses were examined. The plaintiffs proved first that eighteen policy copy books—which could not be found when the seizure was made, but had been delivered up, pending the case, in January, 1901, and also the Goad plans which although seized were not delivered till November, 1901, under a judgment of the court—had been returned in a mutilated and incomplete condition, some 500 slips or wordings having been torn out of the policy copy books and numerous pencil memoranda and notes having been erased from the Goad plans, which slips and memoranda were proved to be very valuable and indispensable in the conduct of their insurance business Next, the plaintiffs endeavoured to establish and did establish that it would cost $2,000 to replace the Goad maps and $200 to replace the slips in the policy copy books.

The respondent objected to this evidence but the trial judge (Lavergne J.) allowed it and on the 19th January, 1903, he delivered the following judgment upon this branch of the case :—

Considering that even at the time of the attachment the defendant had secreted part of plaintiffs' property to wit, eighteen policy copy books, and had even destroyed, by erasing it, all information inscribed on Goad's plans ;

Considering that on the 14th of January, 1901, defendant was not in a position to and did not deliver up to plaintiffs all the property claimed and of which the plaintiffs were the lawful owners ;

Considering that even now the defendant has not and cannot deliver to plaintiffs their property in its entirety and integrity ;

Considering that whilst the Goad plans belonging to plaintiffs were in the defendant's possession, and when said defendant was threatened to

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Girouard J.

be sued, said defendant caused all the valuable information gathered since several years respecting insurance risks and which had been inscribed and annotated on said Goad's plans to be removed, erased and rubbed off;

Considering also that about 500 policy wordings were removed from the policy copy books by tearing off the leaves of said books, whilst they were in defendant's possession, which removal and destruction were not explained and justified in any way whatever;

Considering that the value of plaintiff's property so destroyed, to wit, the information on Goad's plans and the policy wording, is at least the sum of $2,200;

Considering that plaintiffs have established the essential allegations of their demand;

Doth declare the said plaintiffs to be the only true and lawful owners and proprietors of said books, papers and documents claimed and demanded from the defendant, and the said plaintiffs entitled to the possession thereof; condemns the defendant to pay plaintiffs the said sum of $2,200, the whole with interest from this date and costs against said defendant.

On the appeal of the respondent the money condemnation was rejected with costs, upon the ground that the mutilation and erasures were not in issue.

The respondent invokes article 110 of the Code of Civil Procedure:

Every fact which, if not alleged, is of a nature to take the opposite party by surprise or to raise an issue not arising from the pleadings, must be expressly pleaded. See also art. 339 C. P. Q.

The trial judge has considered that the mutilations and erasures had been sufficiently alleged in the plaintiffs' conclusions, which pray

that in the event of the said defendant having secreted or made away with the said books, papers and documents or any part or any portion thereof, (he be condemned to pay) the value of the same, to wit, the sum of $10,000.

The slips on the eighteen policy copy books and the memoranda and notes on the Goad plans had been either secreted or made away with, and it was for that reason that the sum of $2,200 were allowed as representing in part the value of the property revendicated, and not as damages to plaintiffs for the privation of the papers and documents in the conduct of their business, a fact which could not be fully ascer-

tained except in the distant future and induced them to reserve their remedy. We are not prepared to revise the ruling of the learned judge, except to the extent it may have caused injury. *Lambe* v. *Armstrong* (1); *Eastern Townships Bank* v. *Swan* (2); *Finnie* v. *City of Montreal* (3).

The defendant contends that he has been taken by surprise, at least as to the eighteen policy books, which had been delivered by him long before plaintiffs' answers to his pleas, without any allegation on their part that they were mutilated and incomplete, although fully aware of the fact. He swears that they were not made by him, nor by any one at his request or to his knowledge. We believe that he had reason to complain that, with regard to this item of $200, the evidence adduced was of a nature to take him by surprise and cause him injury and for that reason we are inclined to deduct that amount from the judgment of the Superior Court, although we admit that he could have prevented any possible injury, if, upon a proper affidavit, he had moved for an adjournment. The appellants have, however, assented to this deduction of $200, and it is not necessary to say any more about it.

With regard to the larger sum of $2,000, for necessary work to replace the Goad plans, which were discovered for the first time when they were delivered in November, 1901, under order of the court granted with the consent of the respondent, the judgment of the Superior Court is restored. The respondent cannot here allege surprise or any possible injustice, for he admits that the erasures were done by himself and a staff of clerks working day and night for two or three days preceding the seizure and to defeat the object of

(1) 27 Can. S. C. R. 309, at p. 312. (2) 29 Can. S. C. R. 193.
(3) 32 Can. S. C. R. 335 at p. 342.

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Girouard J

that seizure, he being dismissed at the time. The reason he advanced in his evidence for acting in this manner was that the pencil notes were made by himself and were his property. He sadly misunderstood his rights. All the courts are against him in this contention which is repeated in his factum, but was not pressed at the argument before us. Chief Justice Lacoste has dealt very lightly with this item, except that he finds the amount exaggerated. We are not willing to interfere in this respect with the judgment of the trial judge, unless there was no evidence to support his finding: but it is admitted that there is precise evidence given by a competent witness, one Laidlaw, and we are not going to inquire why the learned judge, who saw the witnesses, adopted his appreciation of the cost of restoring the property to its original value.

The appeal is, therefore, allowed and the judgment of the Superior Court is restored for $2,000 with costs in all the courts.

*Appeal allowed with costs.*

Solicitors for the appellants: *Foster, Martin, Archibald & Mann.*

Solicitors for the respondent: *Branchaud & Kavanagh.*

THE CANADIAN ASBESTOS COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

LÉOCADIE GIRARD (PLAINTIFF).....RESPONDENT.

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*Mar. 15, 16.
*March 20.

ON APPEAL FROM THE SUPERIOR COURT SITTING IN REVIEW AT THE CITY OF QUEBEC.

*Mines and mining—Dangerous ways, works, etc.—Inspection of pit—Employer and employee—Negligence—Evidence—Presumptions—Reversal of findings of fact.*

While at work in the pit of an asbestos mine the pit foreman was killed by loose rock falling upon him from the wall of the pit. Some time before the accident, after setting off a blast, the wall had been inspected by a competent person, under the personal direction of the pit foreman himself, and the particular spot from which the loose rock fell tested by sounding and prying with a crowbar and judged to be safe. In an action to recover damages the courts below inferred from the evidence that the wall of the pit had been allowed to remain in an unsafe condition, and held the defendants responsible on account of negligence in this respect. On appeal to the Supreme Court of Canada:

*Held*, reversing the judgment appealed from, Girouard J. dissenting, that, as an inspection had been duly made by competent persons, using their best judgment in the honest discharge of their duty, who reported the wall to be secure, there could be no negligence imputed to the company in that respect, although it afterwards appeared that there had been error in judgment or in the manner in which the inspection was performed.

*Held*, also, Girouard J. dissenting, that where there is evidence that makes it unnecessary to draw inferences or rely upon presumptions from facts proved the findings of two courts below, which have acted upon such inferences or presumptions, should be reversed.

APPEAL from the judgment of the Superior Court, siting in review at the City of Quebec, affirming the judgment of the Superior Court, District of Arthabaska, Choquette J., which maintained the plaintiff's action with costs.

PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

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CANADIAN ASBESTOS CO. v. GIRARD.

The action was brought by the widow of the late Thomas Tremblay, deceased, on her own behalf and as tutrix to her minor children, issue of her marriage with deceased, to recover damages on account of the death of her said husband, occasioned, as alleged, through the negligence of the company, defendants, in failing to provide a safe place for the workmen to carry on the work upon which they were employed by the company in their asbestos mines at Black Lake, in the District of Arthabaska. Deceased was the foreman in charge of the miners engaged in getting asbestos from a pit at the mines, which was about fifty feet in width and of about the same number of feet in depth. The asbestos was got by sinking levels of ten to fifteen feet, from time to time, in such a manner as to leave a bench or step from the walls of which the abestos and the rock in which it was found were blown off, by blasting, into the shaft and there trimmed by cutting away the rock. Shortly before the accident occurred blasts had been set off in one of the walls and, before taking the workmen down into the shaft again, this wall had been inspected by one Hébert, the steam driller, who was skilled in such work, under the directions of the deceased foreman, in order to ascertain that there were no loose pieces or rock hanging in the wall and liable to fall into the shaft and injure the men working there. The examination was made by letting Hébert down the side of the wall with ropes while he sounded the wall by striking it with a crow-bar to see that it was standing firmly. At one particular place, eight or ten feet above the bottom of the shaft, they observed a piece of rock which excited their suspicions as to its safety and Hébert tried to pry it out with the crow-bar but it remained, as he thought, firmly fixed in position by the rock wall surrounding it. He asked deceased to come down and make further

examination, but deceased replied that if Hébert thought it safe it must be so and, accordingly, ordered the men to go down into the shaft and continue their work, he himself going down with them and setting to work at a point immediately beneath the suspicious place in the wall. After he had been working there for some time, stated at from half an hour to an hour and a half, the rock in some manner became suddenly loosened, fell upon him and killed him. The accident was not seen by the other men working in the pit, but Hébert, who was sitting on the edge of the bench or step, saw the rock falling and gave evidence, on behalf of the plaintiff, as to how the accident had occurred.

The plaintiff alleged that the defendants were aware that this pit was in a dangerous condition, on account of cracks in the walls, that it had remained so for a long time in spite of complaints and that the defendants had taken no steps to remove the danger. The defence was that the mine was not dangerous, that the mining was carefully conducted, that deceased was an experienced man, that, in the usual discharge of one of his duties as foreman of the pit, he had, after the blasting, made an inspection of the wall and concluded that it was safe.

The trial court judge adopted the contentions of the plaintiff as being sustained by the evidence as to the general condition of the walls, from which it must, in his view, be inferred that the pit or shaft was not being worked with due regard to the safety of the men employed there. This judgment was affirmed, on appeal, by the Court of Review, Cimon J. dissenting.

*Stuart K.C.* and *Francis McLennan K.C.* for the appellants.

*Laflamme* and *J. E. Perrault* for the respondent.

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CANADIAN ASBESTOS CO v. GIRARD.

Idington J.

The judgment of the majority of the court was delivered by

IDINGTON J.—The respondent seeks to support this judgment on the simple ground that, though Hébert, the witness who saw the accident and knew more than all others as to the immediate causes and conditions leading thereto and was called by the plaintiff to testify, swore he exercised his best judgment and care in respect of the very stone that is in question, yet as it fell without apparent cause within half an hour or an hour and a half after his inspection there is such presumption of neglect on his part as to entitle us to discard his evidence and act upon the presumption. I cannot accede to this. The plaintiff in calling Hébert is supposed by law to put him forward as a credible witness. It is also shown he was a competent man. The factum of the respondent asserts this also. Tremblay, the deceased, had some opportunity to discern from the position of the stone and its general external appearance whether or not the general want of repair alleged to have existed in the mine would likely affect this particular stone and its next neighbours. He acted as if satisfied that there was not in the general condition of things that danger which is now alleged.

There cannot be imputed neglect if competent men exercise their best judgment and honestly discharge their duty even when that best judgment and duty done may turn out to have been mistaken. If there had been no inspection of this stone and Hébert had not given evidence and we were left to draw inferences from the facts given as to the generally dangerous character of the mine and general want of trimming of its walls, we might be driven to rely on presumption or feel inclined not to interfere with those presumptions others had acted upon. But we cannot

on this, which counsel admitted to be all he had to go upon, let that sort of presumption prevail against the direct evidence.

I think the appeal must be allowed with costs.

GIROUARD J. (dissenting)—I do not feel inclined to reverse the judgment of the two courts below upon a mere question of fact, as there is some evidence in support of their finding which is pointed out in their judgments.

*Appeal allowed with costs.*

Solicitors for the appellants: *McLennan & Howard.*

Solicitors for the respondents: *Perrault & Perrault*

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*March 16.

*March 20.

LA BANQUE D'HOCHELAGA (DEFENDANT)..... } APPELLANT ;

AND

LOUIS EUCLIDE BEAUCHAMP (PLAINTIFF)..... } RESPONDENT ;

AND

LA COMPAGNIE DE TÉLÉPHONE DES MARCHANDS DE MONTRÉAL..... } MISE EN CAUSE.

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

*Composition and discharge—Construction of deed—Novation—Reservation of collateral security—Delivering up evidences of debt.*

By deed of composition and discharge the bank agreed to accept composition notes in discharge of its claim against the plaintiff at a rate in the dollar, special reserve being made as to the securities it then held for the debt due by the plaintiff. The original debt was to revive in full on default in payment of any of the composition notes. Upon receiving the composition notes the bank surrendered the notes representing the full amount of its claim.

*Held*, reversing the judgment appealed from, that the effect of the agreement coupled with the reservation made was that the debtor was to be discharged merely from personal liability on payment of the composition notes but that the securities were to be still held by the bank for the purpose of reimbursing itself, if possible, to the extent of the balance of the original debt.

*Held*, also, that the surrender of the original notes by the bank did not extinguish the debt they represented and under the circumstances there was no novation.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, maintaining the plaintiff's consolidated actions with costs.

In March, 1900, the plaintiff obtained a deed from his creditors for sums of $100 and upwards in composition and discharge of the debts owing by him to them, as follows ;—

" We the undersigned creditors of L. E. Beauchamp, of the City of Montreal, hereby agree to accept from

*PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

him a composition of seventy-five cents in the dollar on the amount of our respective claims against him at this date; said composition payable by his notes at 3, 6, 9, 12, 15, and 18 months from 1st May next without interest, it being a condition to this agreement that Mrs. L. E. Beauchamp's claim will remain in abeyance till all the composition notes are fully paid. Said composition to be signed by all creditors for $100.00 and over. The real estate to be transferred to the Hochelaga Bank, Gault Bros. & Co. and J. G. Mackenzie & Co., till composition notes are fully paid.

" In case any of the instalments are not paid at maturity the balance of the original debt will revive in full.

" S. GREENSHIELDS, SON & CO.
" J. S. MACKENZIE & CO.
" THE GAULT BROTHERS CO. Limited.
" L. J. B. PICKEN, Attorney.
" BROPHY, CAINS & CO.
" THE W. R. BROCK COMPANY, (Limited).
" A. C. CUMMING, Attorney.
" LIDDELL, LESPERANCE, accept a 3 and 6 months note.
" CAVERHILL & KISSOCK,
" Except on goods dated 1st April, 1900.
" Special reserve being made as to the securities which we hold.
" BANQUE D'HOCHELAGA,
" per M. J. A. PRENDERGAST, Gen. Mgr,
" 3 months note THIBAUDEAU BROTHERS & CO.
" " DALY & MORIN
" DALY
" ISIDORE LECLAIRE
" J. GRENIER & CIE., 3 et 6 mois.

The security held by the bank was an assignment of a debt of $5,000 owing to plaintiff by the telephone company, *mise en cause*. The debt due by the plaintiff to the bank, at the time of the signing of the deed, amounted to $12,985.60, and on execution of the composition thereby effected the bank received six notes

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BANQUE D'HOCHELAGA v. BEAUCHAMP.

from the plaintiff amounting to $9,839.20 and, thereupon, surrendered to the plaintiff his original notes then held by the bank, representing their full claim of $12,985.60.

The first three composition notes were duly paid to the bank which, in the meantime, had continued collecting from the telephone company on their collateral security, so that upon the maturity of the fourth composition note it had collected $4,350 on this security. The plaintiff asked to have this sum applied towards payment of the three last composition notes, but the bank refused to do so, contending that the reserve made in the deed entitled it not only to receive the amount of the composition at the rate of seventy-five cents in the dollar upon the amount of their full claim against the plaintiff, but also to make the remaining twenty-five cents in the dollar by realizing, if possible, upon the collateral security so reserved.

The plaintiff then brought two actions against the bank, which were subsequently consolidated, and the plaintiff's *demandes* therein were, in effect, granted by the trial court judge (Robidoux J.) affirmed by the judgment appealed from, which condemned the bank to return all the composition notes to the plaintiff and retransfer to him the collateral security or the balance due thereon.

The material questions at issue on the present appeal are stated in the judgment of the court as delivered by His Lordship Mr. Justice Nesbitt.

*Brosseau K. C.* for the appellant.

*Angers K.C.* and *Beachamp K. C.* for the respondent.

The judgment of the court was delivered by :

NESBITT J.—The plaintiff being indebted to the bank in the sum of $12,800 for which the bank held as col-

lateral security certain debts due from the company *mise en cause* to the plaintiff to the amount of about $5,000 asked his creditors for a composition at seventy-five cents on the dollar, said composition to be payable by his notes at three, six, nine, twelve, fifteen and eighteen months from the 1st May, 1900. All creditors of $100 and over were to sign. Certain of the creditors signed with a condition following their signatures that notes at three and six months should be given instead of the notes provided for in the deed, and one firm signed excepting goods sold on a certain date. The bank signed by its general manager adding the words "special reserve being made as to the securities which we hold."

The bank had collected from the Telephone Company about $4,500 and the plaintiff has paid them in addition some $4,869, which two sums added together would pay the seventy-five cents on the dollar due under the composition deed. The plaintiff claims that the money collected from the Telephone Company should be applied on the seventy-five cents on the dollar and that he should be entitled to receive the return of the balance of the claim against the Telephone Company and a return of his notes. And the bank claim that they are entitled to receive from him seventy-five cents on the dollar and to obtain, if possible, the other twenty-five cents on the dollar from the realisation of the collateral security.

The trial judge found in favour of the plaintiff and that judgment has been confirmed by a majority of the judges of the Court of King's Bench. The majority of the court below take the view that the reserve of the securities in the composition deed was a reserve to guarantee the payment of the seventy-five cents on the dollar.

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BANQUE D'HOCHELAGA v. BEAUCHAMP.

Nesbitt J.

I think that the true construction of the bank's reservation when they signed the deed is that the bank say to the debtor, " we will accept seventy-five cents on the dollar from you in full discharge of your personal liabilitity to us, but the collateral securities we have we will hold for whatever they may be worth, and to the extent of twenty-five cents on the dollar we will collect on them if we can."

Of course any balance over the twenty-five cents would be accounted for. I think the view taken by Mr. Justice Hall in the court below was the correct one.

True the original notes were given up by the bank to the respondent, but not to extinguish the debt, but for the purpose of being handed to the other creditors. These notes were, moreover, mere evidence of the debt and if it can be established that the latter was not extinguished or novated then it is in full force. The deed of composition declares in express terms that in case any of the instalments were not paid at maturity the balance of the original debt would revive in full.

Some interesting questions presented themselves at the hearing arising out of the manner and expressed conditions under which the deed of composition was signed by the several creditors by virtue of which the necessary equality which the deed called for amongst the assenting creditors was destroyed. No question was raised before us on the point and in the view we take of the case it is not necessary to do more than refer to it to shew that we have not by our silence given an apparent sanction to such a proceeding.

The actions of the respondent should be dismissed with costs.

*Appeal allowed with costs.*

Solicitors for the appellant: *Brosseau, Lajoie, Lacoste & Quigley.*

Solicitor for the respondent: *J. E. Beauchamp.*

MICHEL SIMÉON DELISLE (PLAINTIFF) ..... APPELLANT; 1905

*March 16.
*March 20.

AND

CLOVIS ARCAND (DEFENDANT) ..... RESPONDENT.

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

*Appeal—Jurisdiction—Possessory action.*

Possessory actions always invoke title to land in a secondary manner and consequently are appealable to the Supreme Court of Canada. *Pinsonneault* v. *Hébert* (13 Can. S.C.R. 450); *Gauthier* v. *Masson* (27 Can. S.C.R. 575); *Commune de Berthier* v. *Denis* (27 Can. S.C.R. 147); *Riou* v. *Riou* (28 Can. S.C.R. 52); *Couture* v. *Couture* (34 Can. S.C.R. 716) referred to. *Cully* v. *Ferdais* (30 Can. S.C.R. 330); *The Emerald Phosphate Co.* v. *The Anglo-Continental Guano Works* (21 Can. S.C.R. 422), and *Davis* v. *Roy* (33 Can. S.C.R. 345) distinguished.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Quebec, and dismissing the plaintiff's action with costs.

The action was brought *au possessoire* to eject the defendant from the possession of a portion of a lot of land of which the plaintiff alleged that he was owner *à titre de propriétaire,* for a decretal order that the defendant should deliver up the same in the condition it was before the trespass, for the demolition of a wall constructed thereon by the defendant and for $500 damages. The defence was that the works done by the defendant was done merely to prevent the piece of land in question caving into a drain which the defendant had constructed upon an adjoining lot and that there had been no trespass. By the judgment of

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt, and Idington JJ.

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the Superior Court the plaintiff's action was maintained, but this decision was reversed on appeal to the Court of King's Bench by the judgment now appealed from.

*Belcourt K.C.* for the motion. The action is really one for trespass and claiming $500 damages. It does not even ask for *bornage;* at the most it can be regarded simply as a possessory action and there is no question as to the title to land involved. This case is in all respects similar to *The Emerald Phosphate Co.* v. *The Anglo-Continental Guano Works*(1). We also refer to *Cully* v. *Ferdais*(2), and *Davis* v. *Roy*(3).

*Stuart K.C.* contra. The action depends upon our possession *à titre de propriétaire* and involves the question whether or not the defendant has any right to enter upon the land in question and construct works thereon. It also effects future rights as between the parties. We rely upon the decisions of this court in *Blatchford* v. *McBain*(4); *McGoey* v. *Leamy*(5); *Gauthier* v. *Masson*(6); *Delorme* v. *Cusson*(7); and *Parent* v. *The Quebec North Shore Turnpike Road Trustees*(8).

The judgment of the court was delivered by:

GIROUARD J.—This is a motion to quash an appeal from a judgment rendered in a possessory action. Our uniform jurisprudence has been to entertain such an appeal in numerous cases and seldom, if ever, has our jurisdiction been questioned. The reason is that possessory actions always involve in a secondary manner the title to lands, for the plaintiff must possess *animo domini, à titre de propriétaire,* and the defendant

(1) 21 Can. S.C.R. 422.
(2) 30 Can. S.C.R. 330.
(3) 33 Can. S.C.R. 345.
(4) 19 Can. S.C.R. 42.
(5) 27 Can. S.C.R. 193.
(6) 27 Can. S.C.R. 575.
(7) 28 Can. S.C.R. 66.
(8) 31 Can. S.C.R. 556.

may plead, as the respondent did in this instance, that he is not such a proprietor. See *Pinsonnault* v. *Hébert* (1); *Gauthier* v. *Masson* (2); *Commune de Berthier* v. *Denis* (3); *Riou* v. *Riou* (4); *Couture* v. *Couture* (5).

In *Cully* v. *Ferdais* (6), Taschereau J. lays down the rule that an action *confessoire*, like actions *négatoires*, is appealable; the appeal was quashed because the action was not one of those actions.

Mr. Belcourt has referred us to *The Emerald Phosphate Co.* v. *The Anglo-Continental Guano Works* (7). But I fail to see how he can find any comfort in tnat decision. First, it was not a case of possessory action, but one of injunction which is always purely personal. The last remarks of Taschereau J. are conclusive upon the point before us:

> Now, under the laws of the province the rights to the title of this lot, or the possession thereof, could not be determined on such a proceeding taken *ab initio*. No judgment *au possessoire* or *au pétitoire* could be given thereon.

The case of *Davis* v. *Roy* (8) does not apply, for there the question at issue before this court was not the possessory action, but the personal condemnation for $200 for rent.

The motion is rejected with costs.

*Motion dismissed with costs.*

Solicitors for the appellant: *Bédard & Chalout.*

Solicitors for the respondent: *Drouin, Pelletier & Baillargeon.*

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(1) 13 Can. S.C.R. 450.
(2) 27 Can. S.C.R. 575.
(3) 27 Can. S.C.R. 147.
(4) 28 Can. S.C.R. 53.
(5) 34 Can. S.C.R. 716.
(6) 30 Can. S.C.R. 330.
(7) 21 Can. S.C.R. 422.
(8) 33 Can. S.C.R. 345.

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*March 16.

*March 20.

SAMUEL ROULEAU (PLAINTIFF).....APPELLANT;

AND

TREFFLÉ POULIOT AND OTHERS (DEFENDANTS).....RESPONDENTS.

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

*Appeal—Jurisdiction—Future rights—Toll bridge—Exclusive limits—Infringement of privilege—Matter in controversy.*

The plaintiff's action was for $1,000 for damages for infringement of his toll bridge privileges, in virtue of the Act, 58 Geo. III. ch. 20 (L.C.), by the construction of another bridge within the limit reserved, and for the demolition of the bridge, etc. The judgment appealed from dismissed the action. On a motion to quash the appeal;

*Held*, that the matter in controversy affected future rights and, consequently, an appeal would lie to the Supreme Court of Canada. *Galarneau* v. *Guilbault* (16 Can. S.C.R. 579) and *Chamberland* v. *Fortier* (23 Can. S.C.R. 371) followed.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Quebec, which dismissed the plaintiff's action with costs.

The plaintiff alleged that he was owner of a toll-bridge over the River Etchemin, to which there was a privilege attached, under the Act, 58 Geo. III. ch. 20, (L.C.), forbidding the erection of any other bridge across that river within certain limits; that the defendants had infringed his rights and caused him damages by erecting a bridge across the river within the privileged limits, and he claimed $1,000 for damages, demolition of the newly constructed bridge, and other appropriate relief. The judgments of the courts below held that the new bridge had not been erected within the reserved limits and dismissed the action.

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

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ROULEAU v. POULIOT.

The plaintiff asserts the present appeal to the Supreme Court of Canada.

*Belcourt K.C.* for the motion.

*Stuart K.C.* contra.

The judgment of the court was delivered by:

GIROUARD J.—The decisions of this court in *Chamberland* v. *Fortier* (1) and especially in *Galarneau* v. *Guilbault* (2) dispose of this motion to quash. Future rights are clearly at stake.

The motion to quash is rejected with costs.

*Motion dismissed with costs.*

Solicitors for the appellants: *Belleau, Belleau & Belleau.*

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

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THE CORPORATION OF THE COUNTY OF ELGIN (DEFENDANTS) ..... } APPELLANTS;

AND

ANTOINE ROBERT (PLAINTIFF).....RESPONDENT.

1905

*April 11.

ON APPEAL FROM THE CHANCELLOR OF ONTARIO.

*Appeal per saltum—Time limit—Pronouncing or entry of judgment.*

To determine whether the sixty days, within which an appeal to the Supreme Court must be taken, runs from the pronouncing or entry of the judgment from which the appeal is taken no distinction should be made between common law and equity cases.

The time runs from the pronouncing of judgment in all cases except those in which there is an appeal from the Registrar's settlement of the minutes or such settlement is delayed because a substantial question affecting the rights of the parties has not been clearly disposed of by such judgment.

(1) 23 Can. S. C. R. 371 at p. 374. (2) 16 Can. S. C. R. 579.

*The Registrar in Chambers.

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COUNTY OF ELGIN v. ROBERT.

MOTION before the Registrar in Chambers for leave to appeal direct from the judgment of the Chancellor of Ontario without any appeal being first had to a Divisional Court or the Court of Appeal for Ontario.

The material facts are set out in the judgment of the Registrar.

*Geo. F. Henderson* for the motion.

*A. F. May*, contra.

THE REGISTRAR.—This is an application for leave to appeal *per saltum* from the judgment of the Honourable the Chancellor of Ontario, without any intermediate appeal being had to the Divisional Court or to the Court of Appeal for Ontario. The facts of the case are, shortly, as follows:

The London and Port Stanley gravel road is a toll road vested in the corporation of the County of Elgin. In 1857 the defendants leased the said road to the predecessors in title of the plaintiff, and the lease contained a provision whereby the defendants covenanted that whenever the corporation could legally sell or convey the road to the plaintiff's predecessors in title, his heirs, executors, administrators or assigns, or to any company to be formed by him for that purpose, that the municipal council should thereupon convey their right, title and interest in the road upon payment of the first nineteen years' rent reserved by the lease and upon receiving satisfactory security for the balance of the rent.

The plaintiff then alleged that he had paid the nineteen years rent and was entitled to receive a conveyance of the toll road, but that the defendants had refused to convey the same to him. The defendants pleaded amongst other things that the lease was *ultra vires* of the municipal council, and by way of counter-

claim prayed that the lease be declared null and void.

This action was tried before the Chancellor of Ontario, in St. Thomas, on the 19th December, 1904, who gave judgment indorsed on the copy of the pleadings as follows:—

Judgment for plaintiff with costs declaring plaintiff entitled to conveyance of property to be settled by the master if parties do not agree. Stay of execution of judgment for four months; leave to apply. G. A. Boyd.

Judgment on counterclaim, that it be dismissed with costs.

The shorthand notes contained the following discussion between the chancellor and counsel when judgment was being pronounced:

His Lordship: The case of *Caughell*, (*Payne* v. *Caughell* (1), binds me as to the law.

Mr. Glenn: (for the defendant). I ask for a longer stay than ordinary stay.

His Lordship: Oh, yes.

Mr. Glenn: I intend to apply for leave from the Supreme Court to go direct there.

His Lordship: Oh, yes; I think that is reasonable. You should have all the time necessary to have an effectual pleading. There is no use going to the Court of Appeal if I understand the decision aright. The judges have committed themselves to this view of the case, so you would probably be justified in going down to the Supreme Court. Mr. Hodgins I think spoke of that before you came in about that being the forum of appeal. I think you should be facilitated in that.

Mr. Glenn: Of course it is a case in which very little can be said to Your Lordship if that opinion binds you.

His Lordship: I feel that that case binds me; if not the precise decision, the opinions of the judges.

Mr. Glenn: Of course I think the law of your own court is the law. *Payne* v. *Caughell.* (2)

His Lordship: I thought so too, at the time, but I cannot say that now. We get wiser as we go on. I think I will have to give judgment for plaintiff with costs.

The minutes of judgment were not settled and entered until the 11th day of February, 1905. The present application was launched on the 30th day of March, more than three months after the date of the pronouncing of the judgment, but within sixty days from the date of the entry of the judgment.

(1) 24 Ont. App. R. 556. (2) 28 O. R. 157.

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COUNTY OF ELGIN v. ROBERT.

The Registrar.

It is not alleged nor established before me that there was any difficulty in settling the minutes of judgment in this case. Apparently the successful party at his leisure drafted the minutes, and these were settled by the local master at St. Thomas according to the draft. It was not necessary to speak to the minutes, nor can I find that there would have been any difficulty whatever in settling the minutes promptly after the judgment was pronounced. Probably the delay was owing to the fact that the unsuccessful party thought that, with a stay for four months, there was no urgency in having the minutes settled. Upon the argument I raised the question as to my jurisdiction to make the order asked, in view of the decisions of this court in *Barrett* v. *Syndicat Lyonnais du Klondike* (1), and *Lee* v. *Canada Mutual Loan and Investment Co.* (2), and a full consideration of the decisions of the court bearing on the application have confirmed my first impression.

Mr. Henderson in his very able argument contended that the date of the pronouncing of the judgment applied to common law cases, and the date of the entry of the judgment applied to equity cases, and that where law and equity are fused as in the Province of Ontario, a case which under the old practice would have resulted in a decree in equity, the time would begin to run from the date of the entry of the judgment, and in support of his contention cited the words used by Chief Justice Ritchie in *Vaughan* v. *Richardson* (3). The learned Chief Justice is there dealing with the effect of section 41 of the Act which required that a notice of appeal should be given within twenty days from the time the judgment was pronounced, and he makes use of the following words:—

It (the notice) must be given in a case such as this within twenty days from the time that judgment is pronounced, for we have held that in

(1) 33 Can. S. C. R. 667. (2) 34 Can. S. C. R. 224.
(3) 17 Can. S. C. R. 703.

common law cases the time runs from the pronouncing of the judgment. A different rule prevails in equity cases where the minutes have to be settled before judgment can be entered.

Assuming that, in the view of the Chief Justice, the distinction between common law and equity judgments was the feature which determined the date from which time should run, it does not appear that a judgment on this point was necessary to a decision in the case. He there held that no appeal lay to the Supreme Court because the notice required to be given by section 41 never had been given either within the twenty days or after, and this is the reason also given by Mr. Justice Strong and Mr. Justice Taschereau for quashing the appeal.

The later cases, in my opinion, are not consistent with the view of Chief Justice Ritchie on this point. In *Martin* v. *Sampson* (1), an action was brought by an assignee for the benefit of creditors to set aside a chattel mortgage which was alleged to be void on the ground that the affidavit of *bona fides* was insufficient under the statute. The trial judge held the chattel mortgage void. The Court of Appeal set aside the judgment below and dismissed the action with costs. This latter judgment was rendered on the 7th November, 1895. Immediately after the rendering of judgment, the solicitors for the mortgagee served the usual notice for settlement of the minutes of judgment and, the draft minutes as served included a direction that costs should be paid both to the appellant and the mortgagor, he having been joined in the action, and named with the mortgagee as a defendant, but the plaintiff contended that the mortgagor was never actually a party and was not represented by counsel nor heard upon the appeal. The Registrar of the Court of Appeal, in settling the minutes, held that the

(1) 26 Can. S. C. R. 707.

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COUNTY OF ELGIN v. ROBERT.

The Registrar.

mortgagor was not entitled to costs. He also in other respects altered the draft minutes of judgment by making a provision that the mortgagee was entitled to moneys deposited in the Bank of Hamilton to abide the final judgment in the action. No objection was taken by either side to the alterations in the draft minutes made by the Registrar, and the minutes were not spoken to before either a judge or the court. It was held both by Mr. Justice Osler in the court below, before whom the first application to allow the security was made, and by the Registrar of the Supreme Court, affirmed by Mr. Justice Gwynne, before whom a second application was made to allow the security, that, under the decisions of the Supreme Court, the time should run from the pronouncing and not from the entry of the judgment.

It will be seen, therefore, that this was a case which, under the old practice, whould have required a bill filed in equity to obtain the relief asked by the plaintiff, and if the view of Chief Justice Ritchie in *Vaughan* v. *Richardson* (1) was adopted, it was a case in which the court should have held that the time ran from the date of the entry of the judgment.

In *O'Sullivan* v. *Harty* (2), and *Martley* v. *Carson* (3) where the court held that the time ran from the date of the entry of the judgment, we find that questions arose upon settlement of the minutes by the Registrar which were brought before the court appealed from for determination, and this, it seems to me, was the factor which, in the view of the Supreme Court, determined in these cases the date from which the time should begin to run.

In my opinion, according to the jurisprudence of the Supreme Court, the date from which time begins to

(1) 17 Can. S. C. R. 703. (2) 13 Can. S. C. R. 431.
(3) 13 Can. S. C. R. 439.

run in appeals under sec. 40 of the Act is always the date of the pronouncing of the judgment, unless an application is made to the court appealed from to review some decision made by the Registrar on the settlement of the minutes, or some substantial question affecting the rights of the parties has not been clearly disposed of by the judgment as pronounced, and the determination of this has delayed the settlement of the minutes.

*Application dismissed with costs.*

NOTE.—This application, with the decision thereon, having been referred by the Registrar to His Lordship, the Chief Justice, under General Order No. 83, the judgment of the registrar and his reasons therefor were approved.

1905

*Mar. 14,15.
*March 20.

SAMUEL MEISNER (DEFENDANT).....APPELLANT;

AND

JACOB MEISNER (PLAINTIFF). .....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Statute of Frauds—Part performance—Evidence.*

M. leased land to his two sons, S. and W., of which fifty acres was to be in the sole tenancy of W. In an action by M. against S. for waste by cutting wood on said fifty acres the defence set up was that by parol agreement in consideration of S. conveying one hundred acres of his land to W. he was to have a deed of the fifty acres, and having so conveyed to W. he had an equitable title to the latter. M. admitted the agreement but denied that the land to be conveyed to S. was the said fifty acres.

*Held, per* Nesbitt and Idington JJ. that the conveyance to W. was a part performance of the parol agreement and the statute of frauds was no answer to this defence.

The majority of the court held that as the possession of the fifty acres was referable to the lease as well as to the parol agreement, part performance was not proved, and affirmed the judgment appealed from in favour of the plaintiff (37 N. S. Rep. 23) on this and other grounds.

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

The material facts are stated in the above head-note and in the judgments given on this appeal.

*Borden K.C.* for the appellant.

*Newcombe K.C.* for the respondent.

SEDGEWICK and GIROUARD JJ. were of opinion that the appeal should be dismissed for the reasons given by Mr. Justice Davies.

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

(1) 37 N. S. Rep. 23.

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MEISNER v. MEISNER.

Davies J.

DAVIES J.—I am of opinion that this appeal should be dismissed. The questions involved are largely those of fact. The trial judge has found them in plaintiff's favour, and the Court of Appeal in Nova Scotia has confirmed his judgment. The evidence is very confused and in the important points almost directly conflicting. As the trial judge says:

> The whole difficulty between father and son has so obviously grown out of family feuds and constant litigation that little credit can be given to anything they say, and in the absence of written evidence no legal effect in my view could be given to the defence set up.

On such a finding by the trial judge as to the credibility of the parties and their evidence it would require a very strong case indeed to justify this court in reversing his conclusion, confirmed as it is by the Provincial Court of Appeal. Mr. Borden felt this difficulty but contended that the trial judge had misapprehended the evidence as to the defendant's possession of the seventy acre lot in dispute, and that his judgment was formed on that misapprehension. For my part I am quite unable to see that there was any such misapprehension. His conclusions were reached by rejecting the evidence of the defendant and accepting that of the plaintiff and his witnesses, and I incline to the opinion that he was right.

The facts, so far as I have been able to extract them, are that the father was at one time the owner of a considerable block of land and entered into a family agreement in writing with his two sons, Samuel, the defendant, and William, under which the lands were apportioned between them as tenants from year to year of their father, conditional on their providing for the maintenance and support of the old man and his wife.

Under this family arrangement the seventy acre lot became William's, as tenant.

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The defendant admitted cutting the trees complained of but contended that he had become the equitable owner of this seventy acre lot by virtue of a parol agreement made between himself and the plaintiff, his father, whereby, in consideration of his conveying 100 acres of land previously conveyed to him by the father to his brother William, the plaintiff agreed that he should have the use of the lot in question in all respects as owner, and that he would give him the title by will at his death. He contended that he had conveyed the 100 acres to William, had entered into possession of the seventy acres under the parol agreement with the father, and that there having been part performance of the agreement his equitable title was a good defence to the action.

The father on his part utterly denied the existence of any such agreement, but admitted that he was to give Samuel fifty acres of land somewhere if he would convey one half of his 300 acre lot to William which he denied was done. William, the brother, on the other hand says that Samuel, the defendant, went into possession of the seventy acre lot under an agreement of exchange with him whereby it was provided that Samuel was to convey to William "one half of the land he owned between the two rivers" estimated to contain about 300 acres, and William was to assign to Samuel his interest in the seventy acres. William says,

> he, Samuel, was to have the use of it the same as I had. He was to rent the same as I did. It was not the understanding that he was to have the use of it in father's lifetime and have it willed to him. He was to have the use of it. The time was up every year.

In order to successfully maintain his defence and defeat the operation of the Statute of Frauds it was essential that defendant should have proved part performance of the alleged verbal agreement by which

he was to become the owner of the seventy acres. Has he done so? The trial judge held he had not because his possession was as clearly referable to the lease of that seventy acres from the father to William, and of which leasehold interest Samuel had become the assignee (if William's version was accepted) as it was to the alleged verbal agreement between the father and Samuel.

The defendant could only succeed, and that was fully recognized by his counsel, by showing that the acts relied upon by him as part performance were unequivocally and in their own nature referable to some such agreement as that alleged by him. *Maddison* v. *Alderson* (1). In my opinion he has signally failed to do so. His possession of the seventy acre lot, to put it at the highest for him, is as clearly referable to the exchange of lands testified to by William and under which Samuel became the tenant of his father of this lot as it was to the alleged verbal agreement of which Samuel testified. I must say that I concur with the trial judge in thinking the former theory to be the correct one.

That being so there was no part performance of the alleged agreement even if one could accept the vague and unsatisfactory evidence of Samuel as to its existence.

The appeal should be dismissed with costs.

NESBITT J.—The plaintiff, Jacob Meisner, the father of William, Samuel and Stephen Meisner, was apparently the owner of a considerable tract of land.

In November, 1886, he conveyed a parcel of land to the defendant Samuel Meisner which I gather was then assumed to contain about 150 acres. In November, 1888, a lease was executed between the father and

(1) 8 App. Cas. 467.

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Samuel and William of the homestead together with stock and implements. This lease expressly excepted 50 acres of the homestead from the portion to be rented to Samuel, and expressly leased said 50 acres to William. In the view I take of the document I think this 50 acres about which the dispute has arisen is, for the purposes of this suit, to be treated as if it had been leased by a separate document to William. In October, 1893, Samuel conveyed to William 100 acres, part of the parcel conveyed in 1886 by the father to Samuel. The father now sues Samuel for cutting wood on the fifty acres or seventy acres which was exclusively leased to William in 1888. Samuel sets up as a defence that he is entitled to cut this timber on the ground that by a bargain between himself and his father he, at the request of the father, conveyed the 100 acres in 1893 to his brother William; that William *then* gave up possession of the fifty acres and Samuel went into possession of it and has cut wood from time to time; and that the father agreed that if he would give a deed to his brother of the 100 acres, he, the father, would give the defendant the exclusive use and enjoyment of the seventy acres as his own during the father's life time and give him a title of the seventy acres by his will.

The trial judge found against the claim of the son and such finding has been affirmed by the Supreme Court of Nova Scotia, and we are pressed with the argument that this court should not disturb a mere finding of fact in which both the courts below have concurred.

So long as an appeal lies to this court on questions of fact I think we cannot decline the duty of forming and expressing our own judgment, bearing in mind, however, the considerations so fully referred to by Lord Davey in *Montgomerie & Co. Limited*, v. *Wallace-*

*James* (1), at pages 82 and 83. I have the less hesitation in this case because it is apparent that the trial judge was influenced in his decision by the view which he held that he was not entitled to draw any inference from the fact of finding the defendant in possession of the seventy acres, because, he said,

his acts of possession, in the absence of corroborative evidence as to the agreement, must be referred to the lease under which he had the right to enter on this lot for ordinary purposes but not to cut timber on it.

This same error runs still more strongly through the judgment of the Court of Appeal which makes a full collection of cases to shew that no evidence to contradict or vary the terms of the lease could be given by the defendant, cases having no bearing unless the court assumed the defendant was entitled to possession by virtue of the lease. I have already pointed out that the lease expressly excludes this fifty acres from its provisions and expressly gives the exclusive possession to William Meisner. It is quite clear that if the evidence convinces us that the possession of Samuel Meisner at the date of the litigation is to be referred to a subsequent arrangement such as Samuel alleged, that then the father cannot succeed in this action of waste and the statute of frauds is no answer to the defendant. Samuel swears expressly to the bargain—I give a short extract of his evidence:

My father said if I would give Willie a deed of 100 acres between the two rivers that he would give me the seventy acre lot and at his death I was to have a title of it. It was to use it as my own. That was before I gave the deed. I gave the deed to Willie. There was no objection to it from my father or from Willie from that time until this trouble arose. Since I gave the deed to Willie I have cut logs on the seventy acre lot. I have cut pine, spruce, hemlock and hardwood. That is before this last time. My father knew I cut. The seventy acre lot was surveyed twice. It was surveyed just before I gave Willie the deed. Father and William got it surveyed. I did not get the deed from my father at once after I gave the deed because he said he would not put it out of his hands;

(1) [1904] A. C. 73.

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he would give me the land and after his death I would get the title of his will.

The father admits that he requested the defendant to give William a deed and admits that he was to give *a deed* of *some* land but denied that it was *the fifty acres*, and says that he has not yet made up his mind what land it will be; he says:

I cannot tell when the deed was given by Samuel to Willie, I did not read it, it was read to me.

The brother William says:

Samuel gave me a deed. I put it on record. I did not pay Samuel anything for it.

The brother, however, says that the defendant was to simply take his place as tenant in the fifty acres and he could be turned out at any time, his time was up every year. He also says, referring to the seventy acre lot,

yes, he was to have the use of it if he gave me one-half of what he had between the rivers, *I had the use of the seventy acre lot before that.*

This seems to make it plain that Samuel's possession is to be referred to the *bargain*, not to the *lease*. This is the fact on which both courts erred.

Stephen Meisner, another brother, called as a witness, swears:

Father complained to me that Samuel was stripping that land. I said, well, did not Samuel get that land from you? Does he not own it? Did he not give William the 100 acres of land between the two rivers for a place over on the side of the river? And he told me, yes, but Samuel did not give the 100 acres, only part of the 100 acres. * * * * He said when Samuel gave William the 100 acres he was giving him the seventy acre lot. He said Samuel gave William a deed of part of the 100 acres but not the whole.

Samuel Robar, a neighbour, states that the father told him substantially the same. Thomas Acker, another neighbour, states that three years before the trial he asked the father for liberty to cut hemlock trees upon the lot and in reply he said he could not as it belonged to Samuel.

It is true the father denies that he made these statements, but the story of the father that the defendant was to give the deed of 100 acres to his brother, and that he was to give a deed of some fifty acres not mentioned seems incredible, more particularly as the defendant, apparently immediately after the conveyance by him to William of the 100 acres, *for the first time* went into the exclusive possession of the fifty acres and apparently exercised the usual rights of ownership from time to time from 1893 down to 1902, without objection by the father. Nobody other than William Meisner made any suggestion of an execution of the deed of 100 acres for a mere yearly tenancy which William enjoyed of the fifty acres, which bargain, if made, would of course account for the possession of Samuel. Apart from the possession of the seventy acres I think the execution by Samuel of the conveyance to William of the 100 acres, which was executed on the faith of the father's promise, was an act of part performance taking the case out of the Statute of Frauds. *In the matter of Estate of Earl of Longford*; *In re Cook's Trustee's Estate* (1). See *Lincoln* v. *Wright* (2) as to the defence of Statute of Frauds. I do not intend to prejudice the position of any of the parties in any action of specific performance. Different considerations may arise there, as for instance the father's statement that Samuel had not conveyed all he agreed to which if found to be the fact might influence a court in its decree in such an action. I would allow this appeal with costs in all the courts.

IDINGTON J. concurred.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Wade & Paton.*

Solicitors for the respondent: *McLean & Freeman.*

(1) L. R. Ir. 5 Eq. 99.

(2) 4 DeG. & J. 16.

IN THE MATTER OF "AN ACT RESPECTING THE CANADIAN PACIFIC RAILWAY," 44 VICT. CH. 1, AND THE CONSTRUCTION OF THE SUDBURY BRANCH OF THE SAID RAILWAY.

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*Mar. 17, 20, 21.

*April 6.

THE CANADIAN PACIFIC RAILWAY COMPANY..... } APPLICANTS.

AND

THE JAMES BAY RAILWAY COMPANY..... } CONTESTANTS.

ON A REFERENCE FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

*Railways—Branch lines—Canadian Pacific Rway. Co's. charter—44 V. c. 1, (D), and schedules—Construction of contract—Limitation of time—Interpretation of terms—"Lay out", "Construct", "Acquire"—"Territory of Dominion"—Hansard debates—Construction of statute—"The Railway Act, 1903."*

The charter of the Canadian Pacific Railway Company, [44 Vict. ch. 1, (D.)] and schedules thereto appended imposes limitations neither as to time nor point of departure in respect of the construction of branch lines;—they may be constructed from any point of the main line of the Canadian Pacific Railway between Callender Station and the Pacific Seaboard, subject merely to the existing regulations as to approval of location, plans, etc., and without the necessity of any further legislation.

On a reference concerning an application to the Board of Railway Commissioners for Canada for the approval of deviations from plans of a proposed branch line, under section 43 of "The Railway Act, 1903", it is competent for objections as to the expiration of limitation of time to be taken by the said Board, of its own motion, or by any interested party.

SPECIAL CASE submitted by the Board of Railway Commissioners for Canada for hearing and consideration, under the provisions of the forty-third section of The Railway Act, 1903.

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

The statement of the case was as follows :—

" 1. The Canadian Pacific Railway Company was incorporated in 1881 by Letters Patent issued by the Governor General under the Great Seal of Canada pursuant to section 2 of the Act 44 Victoria, chapter 1.

" 2. The said Letters Patent are in the form set forth as schedule A to the said Act and the contract between Her late Majesty and the syndicate whose rights were subsequently acquired by the Canadian Pacific Railway Company, is also set forth as a schedule to the said Act, which will be found in the statutes of Canada for the year 1881 on pages 3 to 30 both inclusive.

" 3. On 14th November, 1902, the said company deposited in the Department of Railways and Canals at Ottawa a map and plan of a proposed branch line of railway from a point near Sudbury, on the company's main line of railway, to a point near Kleinburg, on the Ontario and Quebec Railway, all in the Province of Ontario, together with profile and book of reference.

" 4. On the 18th day of November, 1902, the said map and plan, profile and book of reference were duly sanctioned by the Minister of Railways as appears by his certificate indorsed thereon.

" 5. Subsequently an application to the Board of Railway Commissioners for Canada was made by the Canadian Pacific Railway Company for the approval of certain deviations from the said proposed route.

" The James Bay Railway Company was incorporated by statute 58 & 59 Victoria (Canada), chapter 50 and thereby authorized to construct a railway from Parry Sound in the Province of Ontario to French River, thence northerly to the easterly side of Lake Wahnapitae and thence to James Bay, and by statute 60 & 61 Victoria (Canada), chapter 47 the James Bay Railway

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Company was authorized to extend its line from Parry Sound to the City of Toronto or to a point adjacent thereto.

"7. Upon the said application to the Board of Railway Commissioners, the James Bay Railway Company filed a protest with the said Board, and being notified of the hearing of the application by the said Board appeared and objected to the approval of the said deviations upon the ground that the Canadian Pacific Railway Company had no power to construct the branch in question for two reasons:—

"(*a*) That the period within which branch lines of railway could be constructed by the Canadian Pacific Railway Company under its statutory and charter authority had expired; and—

"(*b*) That no such authority empowered the construction, at any time, of branch lines in the Province of Ontario.

"The following questions, being in the opinion of the said Board of Railway Commissioners questions of law, are submitted by the said board for the opinion of the Supreme Court of Canada:

"I. Has the Canadian Pacific Railway Company, under the legislation, schedules and charter aforesaid, now power to construct the branch line referred to, or has the time expired within which such branch line might be constructed?

"II. Do such legislation, schedules and charter authorize construction by the said company of the proposed branch line, it being altogether situated in the Province of Ontario?

"III. Is it open to the James Bay Railway Company or to the Board of Railway Commissioners to take the objection that the time within which the said company may build branch lines under its charter has expired?

"8. All statutes and orders-in-council, also the said maps, plans, profiles and books of reference may be referred to on the argument of the case subject to all objections as to their admissibility in evidence.

"9. All the statements in the schedule hereto for the purpose of this reference are admitted by the parties to be correct and may be used on the argument subject to all objections as to their admissibility in evidence.

"SCHEDULE."

"REFERRED TO IN THE FOREGOING STATEMENT OF CASE."

"(1) At the date of the Canadian Pacific Railway Charter (1881) the territory through which its main line was to be constructed was, with the exceptions to be mentioned, almost completely uninhabited and only by its general characteristics had become known to the people of Canada. The exceptions to this statement are:—

"(*a*) A small settlement existed at Port Arthur and Fort William:

"(*b*) Southern portions of the Province of Manitoba and as far west at the present western boundary of the Province had been surveyed and were sparsely settled, particularly in the neighborhood of Rat Portage and the Red River District where the Winnipeg settlement was:

"(*c*) Some portions of the country between such western boundary and British Columbia had been surveyed into blocks of sixteen townships each:

"(*d*) A small settlement on the British Columbia coast.

"(2) From year to year after the date of the contract the Government of the Dominion of Canada caused portions of Manitoba and the Northwest Territories to be surveyed and set off into townships and sec-

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tions but it was not until the year 1901 that the last of the townships in the North-West Territories and western part of Manitoba through which the railway runs was surveyed and set off into sections. Some of the territory in the eastern part of Manitoba and the western part of Ontario, and in British Columbia, together with large tracts in Manitoba and the North-West Territories through which branch lines of the Canadian Pacific Railway may at some time run (if the contentions of the Canadian Pacific Railway in in question herein are sustained) have not yet been surveyed even into townships by the Government.

" (3) At the date of the Canadian Pacific Railway charter the main line of the railway north of Lake Superior had been projected to run some distance north of the Lake and join the line between the Lake and Selkirk. The accompanying sketch marked Plan No. 1, (partial copy of a map attached to the report of the then Engineer-in-Chief of the Department of Railways—Mr.Sandford Fleming—dated 26th April 1878), shows the projected junction of the eastern and Lake Superior sections of the railway and the line to Fort William as then contemplated. After that date the route of the main line was changed. The part of it lying north of Lake Superior was brought more to the south so as to skirt the Lake and the western end of the eastern section was made to join the eastern end of Lake Superior section at or near Fort William as shown in the accompanying sketch marked Plan No. 2 which is a partial copy of a map.

" (4) Prior to 1st May, 1891, the Canadian Pacific Railway Company, without any other legislative authority than that contained in the legislation of the Parliament of Canada appearing in the said statute 44 Vict., ch. 1, and the schedules thereto and the charter issued in pursuance thereof, constructed and

equipped the branch lines of railway or extensions of branches in List A, in paragraph 5, hereof. Subsequent to said first May, 1891, the Canadian Pacific Railway Company have constructed, without any such other authority, the branches or extensions of branches set out in List B in paragraph 5 hereof. In respect of the branches or extensions of branches set out in the said lists, those which are accompanied by the word "(Inspected)" were inspected by a Government Engineer and permission granted to the Company to open such branches respectively for the public conveyance of passengers.

(5) For the information of the court the following lists have been prepared:—

"LIST A"

BRANCHES OF THE COMPANY'S MAIN LINE CONSTRUCTED PRIOR TO MAY 1ST, 1891."

"1. Ontario: The Algoma Branch from Sudbury to Sault Ste. Marie, 182·1 miles. Constructed 1883-6 (Inspected).

"2. Ontario: The Stobie Branch from Sudbury to Copper Mines, 5·6 miles. Constructed 1887.

"3. British Columbia: The New Westminster Branch from New Westminster Junction to New Westminster, 13·7 miles. Constructed 1887. (Inspected).

"4. British Columbia: The Port Moody Branch from Port Moody to Vancouver, 13 miles. Constructed 1887.

"5. Manitoba: The Pembina Mountain Branch from Winnipeg to Manitou, 110·1 miles. Constructed 1882. (Inspected).

"6. Manitoba: The Gretna Branch from Rosenfeld to Gretna, 13·7 miles. Constructed, 1882.

"7. Manitoba: The Selkirk Branch from Winnipeg to West Selkirk, 24 miles. Constructed 1883. (Inspected).

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"LIST 'B.'"

"BRANCHES CONSTRUCTED SUBSEQUENT TO MAY 1ST, 1891."

"8. Ontario: The Dyment Branch from Dyment to Ottamine, 7 miles. Constructed 1900. (Inspected.)

"9. British Columbia: The Mission Branch from Mission Junction to Mission, 10 miles. Constructed 1895.

"10. British Columbia: The Arrow Lake Branch from Revelstoke to Arrowhead, 27.7 miles. Constructed 1897.

"11. British Columbia: The Coal Harbour Branch from Vancouver to Coal Harbor, 1.2 miles. Constructed 1903.

"12. Manitoba: An extension of the Stonewall Branch, from Stonewall to Teulon, 19 miles. Constructed 1898. (Inspected.)

"13. Manitoba: The Lac du Bonnet Branch from Molson to Lac du Bonnet, 27 miles. Constructed 1900. As to this branch the Dominion Statute 63 & 64 Vict., ch. 55, sec. 3, gives such authority as is contained in that section. (Inspected.)

"14. Manitoba: The McGregor Branch from McGregor to Brookdale, 36 miles. Constructed 1900-02. As to this branch the Dominion Statute 63 & 64 Vict., ch 55, sec. 3, gives such authority as is contained in that section. (Inspected.)

"15. Manitoba: Extension of Souris Branch from Souris to Glenboro, 45.7 miles. Constructed 1891-2. (Inspected.)

"16. Manitoba: Extension of Souris Branch from Napinka to Deloraine, 18.6 miles. Constructed 1892.

"17. Manitoba and North-West Territories: The Pheasant Hills Branch from Kirkella in Manitoba to

Haywood in the North-West Territories, 146 miles. Constructed 1903-4. (Inspected.)

"18. Manitoba and North-West Territories: The Souris Branch from Kemnay to Estevan, 156.2 miles. Constructed 1891-2. (Inspected from Kemnay to Melita.)

"19. North West-Territories: The Portal Branch from North Portal to Pasqua, 160.3 miles. Constructed 1893."

The statement then referred to Dominion legislation and action respecting subsidies for branch lines or extensions thereof constructed by the Canadian Pacific Railway Company under its charter; and certain Parliamentary references thereto, that is to say;

As to the Algoma Branch, in Ontario:—47 Vict., ch. 1 (sanctioning a Government loan), sec. 5. (At this time the Algoma Branch Line had been constructed to Algoma on the Georgian Bay.)—48 & 49 Vict., ch. 57, secs. 1, 3 and 10; 49 Vict., ch. 9, secs. 2 and 3; 50 & 51 Vict., ch. 56, sec. 4. The Company enacted by-laws in connection with the issue of the branch bonds, and, on 19th May, 1887, an order-in-council was passed approving of such by-laws.

As to the Dyment Branch, in Ontario, 63 & 64 Vict., ch. 8, authorized a cash subsidy. "The subsidy has been paid by the Dominion Government to the Canadian Pacific Railway Company. The subsidy agreement between the Crown and the company, dated 28th August, 1902, and signed on behalf of Her Majesty by the Acting Minister of Railways, contains the following recital:—'Whereas the company was incorporated and authorized to build the railway hereinafter mentioned by the Act or Acts following, namely, Canada 1881, chapter 1, section 14.' This section is the clause in the company's original charter authorizing the construction of branch lines."

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As to the Arrow Lake Branch, in British Columbia. 55 & 56 Vict., ch. 5, sec. 3, authorized a cash subsidy. "The subsidy has been paid by the Dominion Government to the company."

As to the Pheasant Hills Branch, in Manitoba and North-West Territories, by 3 Edw. VII., ch. 57, a cash subsidy was authorized. "Nearly all of this subsidy has been paid by the Dominion Government to the Canadian Pacific Railway Company. The subsidy agreement is dated 14th January, 1904, and the recital contains a reference to the company's original charter similar to that in the Dyment Branch."

As to the Souris Branch, in Manitoba and North-West Territories, by 53 Vict., ch. 4, sec. 1, "the Governor-in-Council may grant subsidies in land hereinafter mentioned to the railway companies and towards the construction of the railways also hereinafter mentioned, that is to say:—To the Canadian Pacific Railway Company, Dominion lands to an extent not exceeding six thousand four hundred acres per mile for a branch line to be constructed from Glenboro' westerly a distance of about sixty miles, to a point on the proposed branch railway of the said company running from Brandon, south-westerly.—To the Canadian Pacific Railway Company, Dominion lands to an extent not exceeding six thousand four hundred acres per mile for a branch line of railway from a point at or near Brandon, on the main line of the Canadian Pacific Railway, south-westerly to or near township three, range twenty-seven, west of the first principal meridian, and thence westerly a total distance of one hundred miles; and also a similar grant, at the same rate per mile, for the said company's proposed branch railway from a point on the line just described at or near township three, range twenty-seven, west of the first principal meridian, easterly to Deloraine, a

distance of about twenty-five miles,—making the total length of railway to which this grant is applicable one hundred and twenty-five miles."

"The order-in-council of 18th of May, 1899, providing for this grant of land states that: 'It is the intention of the company to build these extensions under the powers conferred upon it in relation to the building of branch lines.' The order-in-council of 7th February, 1891, sets apart the reservation of land required to meet the above grant. Orders-in-council were made in 1890 and in 1891 (after 1st May) extending the time for completing this branch. The order-in-council of 24th August, 1894, provides for a land grant of 6,400 acres per mile, for the extension of the Souris Branch from a point in the vicinity of Souris in a westerly direction, a distance of about 32 miles. The order-in-council of 22nd August, reports that the company has earned 1,408,704 acres of land by the construction of the Souris Branch and provides for grants thereof; 54 & 55 Vict., ch. 10 authorizes the Governor in Council to grant the land subsidies for another branch in Manitoba; 54 and 55 Vict., ch. 71, "authorizes the issue of Consolidated Debenture Stock to use in acquiring or satisfying bonds issued in respect of the Souris Branch and contains the following words in sub-section (*a*) of section 1; 'The company being at the time of the passing of this Act empowered by its charter to construct the same.' All this stock has been issued and sold by the company and is now outstanding."

The statement continues :—

"The only reference in the statutes to the Sudbury Line is contained in 51 Vict. ch. 51 (1888), which is the Act increasing the company's bonding powers on branch lines from $20,000 to $30,000 a mile. The preamble to this Act is as follows :—"Whereas the Cana-

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dian Pacific Railway Company has, by its petition, represented that the branch line, to be known as the Toronto Branch of the Canadian Pacific Railway, which it proposes to construct under its charter from a point at or near Sudbury to a point at or near Claremont, will be unusually expensive; that an issue of twenty thousand dollars of bonds per mile thereon would not constitute a sufficient aid towards the construction thereof; and that a similar state of things will probably occur in respect of other branches to be hereafter built by the said company, and it has prayed that the maximum amount of bonds to be issued on any such branch, be fixed at thirty thousand dollars per mile, and it be authorized to issue debenture stock in the place and stead of such bonds; and it is expedient to grant the prayer of the said petition.

" 8. The route map of the James Bay Railway Company was duly filed and approved by the Minister of Railways and Canals pursuant to section 122 of the 'Railway Act 1903' on the 2nd day of April 1904. Plans, profiles and books of reference showing the James Bay Railway Company's location through the districts of Nipissing, Parry Sound and Muskoka and the County of York were duly submitted to and sanctioned by the Minister of Railways and Canals prior to the coming in force of the said Act and thereafter by the Board of Railway Commissioners at various dates between January 26th, 1904, and December 14th 1904, and all requirements of the several Railway Acts applicable thereto preliminary to the commencement of construction have been duly complied with.

" 9. The locations of the two railways in the District of Nipissing for some distance occupy identical areas and at other places throughout the locations they overlap and cross each other. By the deviations of the Canadian Pacific Railway in question herein that com-

pany is seeking to occupy a line which will cross the line of the James Bay Railway Company.

" 10. At the dates of the passing of the Act 44 Vict. ch. 1, the entering into the agreement and the granting of the charter referred to in the said Act, the North-West Territories were governed by the Parliament of Canada by virtue of The Imperial Act 34 & 35 Vict. ch. 28, sec. 4."

" 11. On or about the 13th day of November, 1897, at the request of the then Minister of the Interior, Sir Oliver Mowat, then Minister of Justice, after hearing counsel for those interested including the Canadian Pacific Railway Company, gave a written opinion which deals with the power of the Canadian Pacific Railway Company to build branches under the statute 44 Vict. ch. 1. The following is the whole of such opinion in so far as it relates to the power of the Canadian Pacific Railway Company to build branches."

" I think, though the point is not free from difficulty, that the time for building branch lines was limited to the time mentioned in clause 4 of the contract. That clause stipulates for the completion, on or before the 1st May, 1891, of the works therein described as the east section and centre sections of the road and the 15th section of the Act provides for the company's constructing " the main line," and an existing branch described in the Act, and also other branches to be located by the company from time to time as provided by the said contract * * * 'the said main line of railways and the said branch lines of railway shall be commenced and completed as provided by the said contract.' This language is so clear and explicit that it is out of the question to suppose it not to have been intended that there should be a limit of time as regards the branches. Not only does the Act expressly state the contrary, but to give an unlimited time for com-

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mencing or completing a railway authorized by any Act would have been contrary to the whole course of railway legislation. It would be contrary also to the policy of the General Railway Act of 1879 s. (6) which Act is referred to in the 22nd clause of the contract as applying to the Canadian Pacific Railway so far as applicable thereto and as not inconsistent with the Act relating to that company.

"Now it is true that the 4th section of the contract does not expressly mention branch lines. But it being quite clear from the 15th section of the Act that it was intended there should be a limit of time both for commencing and for completing these, that Parliament interpreted some provision in the contract as containing a limit or as showing a limit when read with the 15th section of the Act, and that the only provision on the subject of such a limit is the 4th clause of the contract, that clause is to be construed accordingly. The words 'the said main line of railway and the said branch lines of railway shall be commenced and completed as provided by the said contract' may be read as including in the eastern and centre sections named the branch lines which the company should build therefrom under the authority of the Act; or the 15th section may be read as if it said "provided for by the contract in respect of the works therein specified. It was evidently intended by Parliament to put the main line and the branch lines on the same footing in this respect.

"It has been suggested that the 15th section may be read as limiting time for those branch lines only which the company had contracted to build, but these are no more provided for by the words than other branch lines are; and if the 4th clause may in the light of the 15th section be read so as to embrace the branch lines contracted for, these may be read in like manner as

embracing the branch lines located by the company from time to time."

The date fixed by the contracts referred to in section six of the agreement in the schedule to 44 Vict. ch. 1 for the completion of the construction of the Lake Superior section, were all prior in time to the first of May, 1891.

The statement then refers, with extracts to the following statutes namely,—33 & 34 Vict. ch. 3 (D), (preamble and sec. 1); 34 & 35 Vict. ch. 28 Insp. (preamble, enacting clause and secs. 1, 3 and 4); 46 Vict. ch. 34 (D), sec. 6; and 47 Vict. ch. 1 (D.) preamble; 44 Vict. ch. 1 (D), with schedules, and "The Consolidated Railway Act, 1879" ch. 9, sec. 28, subsec. 6.

The principal questions referred to upon the arguments at the hearing of the case are discussed in the judgments now reported.

*Ewart K.C.*, *Aylesworth K.C.* and *Creelman K.C.*, for the Canadian Pacific Railway Company. As to the meaning of the word "territory" generally:—"From the fundamental doctrine of territorial sovereignty * * flows the corrollary that *territory* and *jurisdiction* are co-extensive;" Hannis Taylor, International Law, 206:—"The whole space over which a nation extends its government becomes the seat of its jurisdiction and is called its *territory*;" Vattel, Droit des Gens, I, c. 18, sec. 205; Hannis Taylor, International Law, 206:—"A dependency is a *territory* placed under a subordinate government;" Cornewall Lewis, Government of Dependencies, 9:—"The entire *territory* subject to a supreme government possessing several dependencies (that is to say, a *territory* formed of a dominant country together with its dependencies) is sometimes styled an Empire;" Cornewall Lewis, Government of Dependencies, 73; "The *territorial*

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property of a state consists of all the land and water within its geographical boundaries, including all rivers, lakes, bays, gulfs and straits lying wholly within them * * The *non-territorial* property of a state consists of such possessions as it may hold in its public capacity beyond its own limits;" Hannis Taylor, International Law, 263: "*Territory* of the state acquired by prescription;" Ib., 275: "One sovereign power is bound to respect the subjects and rights of all other sovereign powers outside of its own *territory*;" *The Queen* v. *Jameson* (1): "Every state possesses the power of regulating the conditions on which property within its *territory* may be held or transmitted;" Fœlix, Droit Int. Privé, sec. 9; Hannis Taylor, International Law, 206.: "The jurisdiction of the nation within its own *territory* is necessarily exclusive and absolute;" *per* Marshall, C. J. in *The Schooner Exchange* v. *McFaddon*, (1812). (2): "It is a principle * * universally recognized that the power of legislation in constituting offences * * is *primâ facie* local, limited to the *territory* over which the legislature has jurisdiction;" *Re Criminal Code Bigamy sections* (1897), (3) at pages 469, 470, 471, 472, 476, 477, 484, 488, 489: "If the legislature of a particular country should think fit by express enactment to render foreigners subject to its laws with reference to offences committed beyond the limits of its *territory*;" *Reg.* v. *Keyn*, (4): 'Straits only, or less than, six miles wide are wholly within the *territory* of the state or states to which their shores belong;" Hannis Taylor. International Law, 279: "The jurisdiction of colonies is confined within their own *territories*, and the maxim * * * *extra territorium jus dicenti impune non paretur* would be applicable to such a case;" *Macleod*

(1) [1896] 2 Q. B. 425.
(2) 7 Cranch 116 at p. 136.
(3) 27 Can. S. C. R., 461.
(4) 2 Ex. D. 63 at p. 160

v. *Attorney-General for New South Wales* (1): "The laws of a colony cannot extend beyond its *territorial* limits;" *Low* v. *Rutledge* (2); *Reg.* v. *Mount* (3); *Reg.* v. *Brierly* (4): "But since states are not accustomed to permit another state to enter their *territory* for the sake of exacting punishment;" Grotius, Bk. II, c. 21, secs. 3, 4; Clarke, Extradition, 2: "Assassins, incendiaries and robbers are seized everywhere at the desire of the sovereign in whose *territories* the crime was committed;" Vattel, Bk. II, sec. 76; Clarke, Extradition, 3: "He ought to be delivered up to those against whom the crime is committed, that they may punish him within their own *territories*;" Rutherford, Bk. II, c. 9, sec. 12; Clarke, Extradition, 8: "There ought to be laws on both sides giving power * * * to each government to secure persons who have committed offences in the *territory* of one and taken refuge in the *territory* of the other;" Lord Brougham in the House of Lords, 14th Feb. 1842; Clarke, Extradition, 10: "The law of nations embraces no provision for the surrender of persons who are fugitives from the offended laws of one country to the *territory* of another;" *United States* v. *Rauscher* (5); Hannis Taylor, International Law, 255: "Statutes relating to the removal of persons from the *territory* of the law maker;" Lefroy, Legislative Power in Canada, pp. 322-338: "*Territorial* waters of Her Majesty's *Dominions*" does not mean North-West Territory waters, in the Dominion of Canada; see 41 & 42 Vict. (Imp.), ch. 73, sec. 7; Hannis Taylor, International Law, 277: "Charles the Second made a grant to Lord Clarendon and others of the *territory* lying on the Atlantic ocean;" Story on the Constitution, (ed. 1891,) 93: "A project was formed for the settlement of a colony

(1) 1891) A. C. 455.
(2) 1 Ch. App. 42.
(3) L. R. 6 P. C. 283 at p. 301.
(4) 14 O. R. 525, 534.
(5) 119 U. S. R. 407.

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upon the unoccupied *territory* between the rivers;" *Ibid*, 101: "At the time of the first grants of the colonial charters, there was not any possession or occupation of the *territory* by any British emigrants; *Ibid*, 107.

The treaty between Great Britain and the United States of 9th August, 1842, is styled "A treaty to settle and define the boundaries between the *territories* of the United States and the posessions of Her Britannic Majesty in North America * * * and for the giving up of criminals," etc. But the word "territories" here does not apply to Oregon, but to the State of Maine principally. In the recital of the treaty are the words: "The prevention of crime within the *territories* of the two parties." Section 4 provides for the case of "grants of land heretofore made by either party within the limits of the *territory* which," etc. And section 5 provides for the "Disputed *Territory* Fund." So also, in the Treaty of 1846 establishing the boundary west of the Rocky Mountains, the desire is recited for "An amicable compromise of the rights mutually asserted by the two parties over the said *territory*. And see articles 1 and 3 of the treaty.

As to whether or not the James Bay Railway Company can raise objection as to time of construction see *Roy* v. *La Compagnie du Chemin de Fer Quebec, Montmorency & Charlevoix* (1), *per* Cassault J.; Morawetz on Corporations, secs. 1006, 1015; *Re New York Elevated Railway* (2); Thompson on Corporations, secs. 6598, 6602; *Chesapeake & Ohio Canal Co.* v. *Baltimore & Ohio Railroad Co.* (3), *per* Buchanan C. J. at page 121; *Becher* v. *Woods* (4); *McDiarmid* v. *Hughes* (5); *Doe d. Hayne* v. *Redfern* (6); *Doe d. Evans* v. *Evans* (7).

(1) 11 Legal News, 359.
(2) 70 N. Y. 337.
(3) 4 Gill & J. (Md.) 1.
(4) 16 U. C. C. P. 29.
(5) 16 O. R. 570.
(6) 12 East 96.
(7) 5 B. & C. 584.

The following cases and authorities were also cited: —Am. & Eng. Encycl. vol. XCIII, p. 677; *Chicago and Western Indiana Railroad Co.* v. *Dunbar* (1); *Rochester H. & L. Railroad Co.* v. *New York Lake Erie & Western Railroad Co.* (2); *Trester* v. *Missouri etc. Railroad Co.* (3); *New York & Erie Railroad Co.* v. *Young* (4); *Williamsport & N. B. Railroad Co.* v. *Philadelphia & Erie Railroad Co.* (5); *Major* v. *The Canadian Pacific Railway Co.* (6), *per* Ritchie C. J. at pages 237-240 and *The North Eastern Railway Co.* v. *Lord Hastings* (7) at page 268.

*S. H. Blake K. C., Walter Cassels K. C. and W. A. H. Kerr* for the James Bay Railway Co. In order to arrive at the rights of the Canadian Pacific Railway Co. in view of the legislation which has been enacted, it becomes essential to consider what rights were granted to the contractors by section 14 of Vict., ch. 1. The company stand in the place of the contractors, they *are* the contractors, and their right to construct branch lines is a right given them "from time to time." It must be limited to the time within which their contract had to be performed. No right could exist after they had received the consideration for the fulfilment of their contract, within the time limited, after the expiration of their contract and after the time had expired.

No such right can be inferred from the provisions of section 15 of the charter. The opinion of Sir Oliver Mowat, on this question, (8) is obviously correct and we refer to it as part of our argument. It is obvious that if the general powers to build branches, as claimed, existed there could be no necessity for the

(1) 100 Ill., 110.
(2) 44 Hun., 210.
(3) 33 Neb., 171.
(4) 33 Penn., 175.
(5) 141 Penn., 408 at 415.
(6) 13 Can. S. C. R., 233.
(7) [1900] A. C., 260.
(8) Page 53 *ante*.

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specific powers given as to building branches mentioned in clause 15 of the charter.

It was never contemplated or intended that the Dominion should infringe the rights of the provinces to incorporate railways having their terminal points within the provincial boundaries, in virtue of the British North America Acts, 1867 and 1871. At the time of the contract the powers subsequently taken by the Dominion, by 46 Vict, ch. 24, sec. 6, as to legislation in regard to railways intersecting or crossing railways chartered by the Dominion, did not exist nor was any such right then claimed by the Dominion. The "territory" within which the rights were granted respecting branch lines was, obviously, only that territory over which the Dominion had sole jurisdiction under the British North America Act, 1871. It is impossible to place any construction upon clause 14 of the contract which might extend its meaning so as to include other parts of Canada.

The only other clause which can be relied upon by the company as giving them the powers claimed as to the construction of branch lines is clause 15 of the charter, and this still leaves them subject to the condition that any branches or branch lines, including those specifically named, must be completed within the time limited for the construction of the main line according to the contract. If there was such power conferred as is now claimed by the company as to the construction of branch lines, then there would have been no necessity of giving specific powers as to the branches particularly mentioned. These particular branches were named and power given to construct them for the reason that they would not be covered by section 14 of the contract, their terminal point not being within the territory of the Dominion.

It is obvious that, when the contract was entered into, the contractors were to have the right to lay out and equip, etc., branch lines to any point or points within the territory of the Dominion, what was meant by the word "territory" was what was known by the British North America Act of 1871, as the territory of the Dominion. It would seem an absurd contention that these words should be construed as meaning any point or points within the Dominion of Canada.

The contractors were constructing two sections; *quâ* contractors they would have the right to build branch lines. The Government were constructing the other sections of the railway, and the words "to any point or points within the territory of the Dominion" cannot be held to mean more than they say, and have reference only to as the territory over which the Dominion had exclusive legislative jurisdiction, and in which the Dominion owned the Crown lands. This is manifest from the provision of the clause 14, providing that the Government shall grant to the company the lands required for the road-bed of such branches, for the stations, etc., in so far as such lands are vested in the Government. How can it reasonably be contended, having regard to this language, that a general power to construct east from Winnipeg to the Atlantic Ocean, or west from Winnipeg to the Pacific Ocean, could be conferred upon these contractors?

We also submit that if, in point of fact, any particular branches have been sanctioned by the Parliament of Canada, although we do not admit that any have been so sanctioned, such a thing as estoppel could only be set up in regard to the particular branches so sanctioned. There is no ambiguity whatever as to the meaning of the statute, 44 Vict., ch. 1. There is no power in the Government to vary or alter the

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terms of the contract and such a thing as an estoppel against the Crown and the public of Canada, by an acceptance of certain lines constructed even if beyond the powers of the company, could have no possible effect in enlarging the powers conferred by the statute and contract hereinbefore set out.

As to our rights of contestation, we do not require to bring in the Attorney General for Ontario; we can sustain our position alone as our lands and rights are imperilled. *Grahame* v. *Swan* (1), at page 559. As to the interpretation of the words "time to time" see 26 Am. & Eng. Encycl. (2 ed.), and at page 167 as to *stare decisis* being a wider term than *res judicata*. This is not a case for *scire facias*, there is no question of a forfeiture of any kind.

*Newcombe K.C*, Deputy of the Minister of Justice, and *A. S. White K.C.* held a watching brief on behalf of the Attorney General for Canada.

Formal answers were rendered by the Supreme Court of Canada, as follows:—

"In the matter of application No. 590 of the Canadian Pacific Railway Company for approval of certain deviations from the original plan of the route of the Sudbury Branch of their railway, referred by the Board of Railway Commissioners for Canada for the opinion of the Supreme Court of Canada, under the statute of Edward VII., chapter 58, section 45, being 'The Railway Act, 1903,' the following questions were submitted to the court for hearing and consideration:

"I. Has the Canadian Pacific Railway Company, under the legislation, schedule and charter aforesaid, now power to construct the branch line referred to, or has the time expired within which such branch line might be constructed?

(1) 7 App. Cas. 547.

"II. Do such legislation, schedule and charter authorize construction by the said company of the proposed branch line, it being altogether situated in the Province of Ontario?

"III. Is it open to the James Bay Railway Company or to the Board of Railway Commissioners to take the objection that the time within which the said company may build branch lines under its charter has expired?

"The court, having heard counsel on behalf of the Canadian Pacific Railway Company, as well as on behalf of the James Bay Railway Company (the Attorney General for Canada also represented by counsel who stated that he was taking no part in the argument), and having considered the questions submitted as aforesaid, certifies to the said Board of Railway Commissioners for Canada that, for the reasons contained in the documents hereunto annexed, the following are the answers of the said court:

"To the first question;—Yes, the Canadian Pacific Railway Company has now power to construct the said Sudbury branch of its railway, Idington J dissenting.

"To the second question;—Yes, Idington J. dissenting, on ground of time having expired.

"To the third question;—Yes, as to both the James Bay Railway Company and the Board of Railway Commissioners; Girouard and Davies JJ. taking no part in this answer, because the answers to the first and second questions render any answer to the third question unnecessary."

(Signed) "ROBT. SEDGEWICK J."
"D. GIROUARD J."
"L. H. DAVIES J.
"WALLACE NESBITT J."
"JOHN IDINGTON J."

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Reasons for foregoing answers were delivered by Their Lordships, annexed to the formal opinion, as follows:—

SEDGEWICK J.—This is a reference to this court from the Board of Railway Commissioners for Canada by virtue of the Dominion Railway Act, 1903. Some years ago the Canadian Pacific Railway Co. had located a branch line from Sudbury in the Province of Ontario to Toronto, and had obtained, before the passing of the Railway Act of 1893, the approval of the Minister of Railways to the location and plans thereof. Subsequently, after the passing of that Act, the Canadian Pacific Railway Co. applied to the Board for approval of certain deviations from the proposed route of this Sudbury branch. The James Bay Railway Co. opposed the application on the ground that the Canadian Pacific Railway Co. had no authority to construct the branch either under its original charter or by any subsequent legislation. These are the questions:

1. Has the Canadian Pacific Railway Company, under the legislation, schedules and charter aforesaid now power to construct the branch line referred to; or has the time expired within which such branch line might be constructed?

2. Do such legislation, schedules and charter authorize construction by the said Company of the proposed branch line, it being altogether situated in the Province of Ontario?

3. Is it open to the James Bay Railway Company, or to the Board of Railway Commissioners, to take the objection that the time within which the said Company may build branch lines under its charter has expired?

Section 15 of the Canadian Pacific Railway Co's charter is as follows:

15. The Company may lay out, construct, acquire, equip, maintain and work a continuous line of railway, of the gauge of four feet eight and one-half inches, which railway shall extend from the terminus of the Canada Central Railway near Lake Nipissing, known as Callander Station, to Port Moody in the Province of British Columbia; and also, a branch line of railway from some point on the main line of railway to Fort William

on Thunder Bay ; and also the existing branch line of railway from Selkirk, in the Province of Manitoba, to Pembina in the said Province ; and also other branches to be located by the Company from time to time as provided by the said contract,—the said branches to be of the gauge aforesaid ; and the said main line of railway, and the said branch lines of railway, shall be commenced and completed as provided by the said contract ; and together with such other branch lines as shall be hereafter constructed by the said company, and any extension of the said main line of railway that shall hereafter be constructed or acquired by the company, shall constitute the line of railway hereinafter called The Canadian Pacific Railway.

This section contemplates two classes of branch lines, namely, branches such as that from Selkirk to Pembina, and another from a point on the main line of railway to Fort William. These two branches may be called the Government branches to distinguish them from the other branches to be located by the company from time to time, which may be called the company branches.

I take the meaning of this clause to be that the company might "acquire" (it certainly was not intended that they should "lay out" or "construct") the two sections of the main line which the Government were to build and those Government branches which were either in process or in contemplation of being built ; and that they might "construct" the other two sections of the main line and other branches "to be located by the company from time to time."

The first question then is : Has the time expired for the construction of branch lines ? The controlling word is in clause 15 above set out, wherein it is provided that the company may construct other branches to be located by the company from time to time, and that the whole, namely, the said main line of railway and the said branch lines of railway (Government branch lines and company branch lines) shall be commenced and completed as provided by the said contract. There is a time specified when the main line is to be

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commenced and also when it is to be completed, but there is no provision in the contract which can with any certainty lead to the conclusion that any time was ever fixed for the commencement or completion of the company's branch lines. The contestants, the James Bay Railway Co., seek to eliminate the words " shall be commenced and completed as provided by the said contract," and to insert in lieu thereof words which may have, and which I think have as a matter of fact, a different meaning: They propose to read the provision that branch lines must be commenced and completed as provided by the said contract, as if it said that branch lines " shall be commenced and completed within the same time as is provided by the contract for the commencement and completion of the two sections of the main line by the company." I have not sufficient boldness to venture upon such judicial legislation as this. Judicial legislation may be necessary where we have to delve into the common law to obtain some precedent for a state of affairs involving legal rights the like of which is new in the experience of mankind, but I have never yet been able to see any necessity for a resort to that method when we are endeavouring to interpret a written instrument, whether it be a statute, a contract, or any other document. No matter what the intention may have been, unless that intention can be unequivocally drawn from the language which the parties have used in the instrument under consideration, it is all the same as if there had been no intention at all.

The contestants contend that the contract must be construed so as to make the commencement of the branch lines co-incident with those of the two sections of the main line, but one section of the main line is to be commenced by the "first July next" and the other not later than the " first May

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next." Which of these dates applies to branch lines?

Several considerations in addition to those arising from a study of the mere words themselves will, I think, lead to the conclusion that it could not have been the intention of Parliament to provide a definite period beyond which the company would lose their power of building branch lines.

Consider the condition of the North West Territories at the time this contract was made. A vast, practically unknown country, the fertile belt of which was in round numbers nearly 1000 miles in length, and nearly 500 miles in width. It was practically unsurveyed. The road was intended to be not only a great international highway extending from the Atlantic to the Pacific, but a great colonization railway as well, its main object being to open up to the world that magnificent area of wheat growing country, the wealth and potentialities of which we have even yet hardly begun to appreciate.

The Government had entered into an obligation with British Columbia pursuant to the "Carnarvon Terms" to complete the road at the earliest possible moment, and the whole power of Parliament, practically the whole revenues of the country, and every energy the Canadian people possessed, were cheerfully given to attain the end in view, the national honour of Canada being to a certain extent involved. The first great aim of the government, of Parliament and of the company must therefore have been to finish the main line first; branch lines to be built by the company might well afford to wait. They could not be built anyway for any practical purpose, particularly through the fertile belt so called, without previous survey and considerable settlement. What concession would it have been to give the company the right to build branch lines only during the ten years

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during which the main line was being built? They could not touch branch lines. It would be an illusory gift at the best. It has been suggested to us that the power contended for by the Canadian Pacific Railway Co. that they have the right in perpetui y to build branch lines from their main line was such a tremendous power, a power so fraught with danger to the state and the exercise of which might prevent the building of other railways by competing companies, that any construction other than that must be resorted to. I have yet to see anything very extraordinary in the grant of this power, especially when we consider the other grants which Parliament in its wisdom was induced to make for the purpose of completing the railway and of thus cementing together the theretofore scattered fragments, the *disjecta membra* of the Dominion Parliament had contributed $25,000,000 in cash and 25 million acres of land. It had given gratuitously to the company the two main sections ready to be operated, at a cost I suppose as great as that of the sections built by the company. It had made them a perpetual corporation, and eliminated from the general Act section after section which might be supposed to interfere more or less with the carrying on of the enterprise, and with the borrowing of money for that purpose. It had also, (and this may be deemed to be an extraordinary concession, necessary doubtless in the interests of the enterprise, but still extraordinary,) enacted that the Canadian Pacific Railway, and all stations, station grounds, work shops, buildings, yards and other property, rolling stock and appurtenances required and used for the construction and working thereof, and the capital stock of the company, should be forever free from taxation by the Dominion or by any province thereof to be established or by any municipal corporation therein, and it had as well

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exempted the company's lands from taxation for twenty years after the grant thereof from the Crown. Thus Parliament had given the company chartered powers to last forever. It had given them the right to operate forever a line of railway from the Atlantic to the Pacific, assuming the company took advantage as it has since done of this special provision in the charter for the acquirement of railways east of Sudbury. It had exempted the company's property, so far as it was within the North-West Territories and was used for railway purposes, from taxation forever. Why should it be thought a strange thing, an abnormal thing, a thing so unthinkable that the words of the contract must be twisted out of shape to obviate the difficulty—why should it be thought a strange thing that Parliament should give to the company along with these other perpetual rights, the perpetual right of building branch lines from any part of its main line to any other point within Canadian territory? The whole state of affairs at the time of the charter must have indicated that for many years, perhaps for generations, the Canadian Pacific Railway could be successfully operated only by the opening up of the North-West for settlement and by the building of branch lines by this parent road for the purpose of making the most of the country and developing its innumerable magnificent resources. One can easily imagine that it would have brought a smile to the cheek of those illustrious gentlemen whose daring and patriotism, and whose pluck and fortitude (along with that of others,) accomplished the work, had some law officer of the Crown in treaty with them suggested "Oh, but if you want to build any branch lines you must begin and complete them at the same time as you begin and complete the main line." Short work,

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one can readily conceive, would be made of such a proposition as that.

I take the liberty of adding here an epitome of the Canadian Pacific Railway Company's argument on this branch of the case, as set out in their factum:

1. The contract does not fix any date for completion of branch lines.

2. The dates fixed for the commencement and completion of the main line cannot apply to the company's branches;

(*a.*) Because there are several such dates, and there is no reason for selecting one rather than the other.

(*b.*) Because the short periods for the commencement of the main line would be absurdly inadequate for the location of the necessary branches.

(*c.*) And still more inadequate for the comencement of construction.

(*d.*) Because the speedy construction of the main line was the paramount object of the contract.

(*e.*) Because the main line itself (from which branches were to be built) was not itself fixed by the contract and was not definitely settled until the year 1882 or afterwards.

(*f.*) Because the clause itself speaks of "other branch lines" to be "hereafter constructed by the said company."

I am now come to the second question: Has the Canadian Pacific Railway Company power to build branches in Ontario? The contestants say—"No. That they cannot build branches except to a point within what is known as the North-West Territories," basing their argument upon section 14 of the contract which provides that:

The company shall have the right from time to time to lay out, construct, equip and maintain and work branch lines of railway from any point or points along their main line of railway, to any point or points within the territory of the Dominion.

They argued that the word "territory" there must mean immovable property owned by the Dominion. This argument appears to me to be so, shall I venture to say, far-fetched, that the very statement of it is its own contradiction.

They also argue that "territory of the Dominion" means "The North-West Territories."

A third argument is that the Canadian Pacific Railway Company is empowered to build branches from the eastern and central sections only. To my mind nothing can be more unlikely or inconceivable than this. Even admitting the contention, nothing can be derived from it, for the branch which is under consideration is admitted to commence at a point upon the eastern section.

I simply propose to assert that the territory of the Dominion has no connection whatever with the phrase "The North-West Territories of Canada," except in so far as the North-West Territories are part of that territory. The territory of the Dominion, I take it, is all those lands and lands covered with water which form part of or are under the Parliamentary control of the Dominion. The phrase has no reference whatever to the *dominium* or ownership of the Crown, but to those British Dominions beyond the seas, known under the constitutional Act by the name of Canada. The point, however, seems to me so insignificant that the elaborate argument given by counsel for the Canadian Pacific Railway Company is all that need be referred to.

As to the third question I concur in the judgment of my brother Nesbitt.

GIROUARD J.—This reference—the first from the Board of Railway Commissioners for Canada—involves very important questions of construction of the powers of the Canadian Pacific Railway Co., to construct branch lines. It has been said that franchises of this character are to be construed most strictly against the corporation and in favour of the public; but it is now well settled both in England and the United States that the powers may be implied as well as expressed, and that their construction must be reasonable, that is,

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consistent with and following a reasonable view of the general scope and purpose of the legislative grant, viewed in the light of surrounding circumstances. *Attorney General* v. *Great Eastern Railway Co.* (1); *The Government of Newfoundland* v. *Newfoundland Railway Co.* (2); *Jacksonville Railway Company* v. *Hooper* (3). It will not, therefore, be out of place at the outset to give a short history of the Canadian Pacific Railway and inquire into the circumstances which gave rise to the construction and operation of this transcontinental line.

The Canadian Pacific Railway does not owe its existence to the ambition of individual adventurers, but to the national policy of Canada, as expressed in several Acts of its Parliament. The very preamble of the Act we are now requested to consider, 44 Vict. ch. 1, declares that by the terms and conditions of the admission of British Columbia into the Dominion of Canada

> the Government of Canada has assumed the obligation of causing a railway to be constructed, connecting the seaboard of British Columbia with the Railway system of Canada.

The immense western country known as Rupert's Land, which had recently been acquired from the Hudson Bay Company, had not been surveyed; it was very little known and, as stated in the printed case, "was almost completely uninhabited.". The Canadian Government, however, was so satisfied that the obligation assumed in favour of British Columbia would easily be accomplished, that it agreed to do so within ten years from the date of the union, that is in 1881.

The stated case, settled by the Board of Railway Commissioners and agreed to by the parties, refers us to many statutes and other public documents. I think

(1) 5 App. Cas. 473.
(2) 13 App. Cas. 199, 206.
(3) 160 U. S. Z. 514; 7 A. & E. Ency. 712.

that in a case of public interest, I may say of Government or parliamentary contract or agreement like the present one, we ought to carefully consider not only the parts of the documents quoted, but also the whole, and in fact all the public documentary records which may affect the case, and which, under the Evidence Act of 1893, courts of justice can take official notice of without causing any surprise or injury to any party. In many past cases of this description this court and the Privy Council have even referred to opinions expressed in Parliament as reported in Hansard.

In 1872 the Parliament of Canada passed the first Canadian Pacific Railway Act and granted a subsidy of 50 million acres of land, and 30 million in cash; 35 Vict. ch. 71. Although two companies were incorporated to carry out the scheme, and one of them was accepted and obtained the contract, nothing came out of this first effort. In 1874 another offer was made, which will be found in 37 Vict. ch. 14. Briefly stated, it provided for a subsidy of 20,000 acres of land, and $10,000 cash per mile, and a Government guarantee of 4 per cent for twenty-five years upon such sum as might be necessary to secure the construction of the road. There was no provision for any branch line except the Georgian Bay and the Pembina branches, which were also generously subsidized. The second scheme also failed, and to keep faith with British Columbia an extension of time had to be demanded and the Government set to work by commencing to build two of the heaviest sections of the entire line, extending over about 644 miles of a mountainous country, namely, the Lake Superior section, from the head of Lake Superior near Fort William to Selkirk, and the western section from Kamloops to Port Moody. While these extensive works were in progress under Government contracts a new project was proposed, and

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approved of by Parliament, the meaning of which we are called upon to determine, as to branches to be constructed. This statute is 44 Vict. ch. 1, and was passed in 1881, although the contract which led to it was signed in October, 1880. The Government undertook to finish and deliver to the company the two sections commenced, and the company promised to build the eastern section from Callander Station to the Lake Superior section, and also the central section from Selkirk to Kamloops, on or before the first day of May, 1891, the company receiving a cash subsidy of 25 millions of dollars and a land subsidy of 25 millions of acres, valued at that time at about $1.50 per acre. This statute is composed of three parts. 1st. "An Act respecting the Canadian Pacific Railway;" 2nd. The said contract; and, 3rd. the charter or Act of incorporation. I presume the three documents must be read together, but if there is any discrepancy between them the contract must give way. I believe there is none, at least as to the point before us.

As it may easily be understood from the past experience most extensive and, in fact, unprecedented powers were demanded and obtained. To do so the whole policy of the country, as expressed in the Railway Act of 1879, had to be set aside and a new and exceptional one adopted. More liberal subsidies and concessions had to be granted. The two Government sections, which were estimated to cost about $28,000,000, but did actually cost a little over $31,000,000, were to be delivered free of charge. The lands required for the road bed, for stations, station grounds, workshops, dock ground and water frontage at the termini on navigable waters, buildings, yards, if vested in the Government, were granted to the company. It was also agreed that all this property and the railway, its rolling stock and the capital stock of the company were

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to be forever free from taxation by the Dominion or the Territories, or any province or any municipal corporation to be established therein, and that the land grants were also to be free from taxation for 20 years from the date of the Crown patent, unless sooner sold or occupied. The selection of these lands was entirely left with the company instead of the Government. The importation of the rails and all railway and telegraph material to be used in the original construction was declared to be free from customs duty. The company might at any time, whether within ten years or after, operate lines of steamers over seas, lakes and rivers, which it might reach or connect with, although in doing so it might damage or even destroy similar lines already existing. Finally, to come to the matter which is the subject of this reference, unlimited powers to build branch lines were given to the railway company by merely depositing the plan of location, without the sanction of the Governor in Council.

Notwithstanding these extraordinary concessions and privileges, the company soon almost came to grief, and in 1884 had to come to Parliament for relief. It was granted in the form of a temporary loan for nearly $30,000,000, which was satisfied and settled a few years afterwards, and before maturity, partly in cash or its equivalent, and partly by selling to the Government 6,793,014 acres of its land grants at $1.50 an acre. (47 Vict. ch. 1., 49 Vict. ch. 9.) Ever since the company's success has been constant and on the increase, so much so that it has added 4,785 miles of extensions and branches to its original main line, and has finally become one of the greatest railway corporations in the world, with a paid-up capital of $407,000,000, and nearly $133,000,000 of bonded debt, according to the blue books published by the Government, from which and the Acts of Parliament all the above figures have been collected.

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Now railway charter holders who are always to be found in every progressive and prosperous country, are quarrelling with it over the power, which it has at all times exercised, of building branch lines anywhere within the Dominion under their charter and without a special Act of Parliament.

At the argument I was very much impressed with the magnitude of the powers claimed by the Canadian Pacific Railway Co., as it would strike the mind under existing circumstances, but viewed in the light of the above circumstances it is not extraordinary. Parliament and the country, it seems to me — for its action was sanctioned by the people the following year — were prepared to grant almost anything to meet its obligation to British Columbia. But let us go now to the pure legal aspect of the case.

The charter, clause 15, enacts:

> The company may lay out, construct, acquire, equip, maintain and work a continuous line of railway, of the gauge of four feet eight and one-half inches, which railway shall extend from the terminus of the Canada Central Railway, near Lake Nipissing, known as Callander Station, to Port Moody, in the Province of British Columbia; and also a branch line of railway from some point on the main line of railway to Fort William, on Thunder Bay; and also the existing branch line of railway from Selkirk, in the Province of Manitoba, to Pembina, in the said province; *and also other branches to be located by the company from time to time, as provided by the said contract* —the said branches to be of the gauge aforesaid; *and the said main line of railway, and the said branch lines, shall be commenced and completed as provided by the said contract;* and, together with such other branch lines as shall be hereafter constructed by the said company, and any extension of the said main line of railway that shall hereafter be constructed or acquired by the company, shall constitute the line of railway hereinafter called the Canadian Pacific Railway.

Clause 18 of the charter, para. (*d*), enacts that

> the map or plan or book of reference of any part of the main line of the Canadian Pacific Railway made and deposited in accordance with this section, after approval by the Governor in Council, *and of any branch of such railway hereafter to be located by the said company, in respect of which the approval of the Governor shall not be necessary, shall avail, etc.*

Clause 31 of the charter also provides for the issue of bonds in place of land grant bonds

on the main line of the Canadian Pacific Railway and the branches thereof hereinbefore described, but exclusive of such other branches thereof, etc.

Clause 14 of the contract reads as follows :—

14. The company shall have the right, *from time to time*, to lay out, construct, equip, maintain and work branch lines of railway from any point or points along their main line of railway to any point or points *within the tevritory of the Dominion.* Provided always, that before commencing any branch, they shall first deposit a map and plan of such branch in the Department of Railways. And the Government shall grant to the company the lands required for the road bed of such branches, and for the stations, station grounds, buildings, workshops, yards and other appurtenances requisite for the efficient construction and working of such branches, *in so far as such lands are vested in the Government.*

I was first inclined to think that the power to build the branch lines was limited to the North-West Territories, which were the property of the Dominion. After carefully examining all the clauses of the contract I soon became convinced that the word "territory" (without a capital T) in section 14 must be taken in its ordinary sense, that is, jurisdiction. Whenever Parliament intends to use it as indicating the country known as the "Territories," it generally uses that expression, or sometimes that of "Territory," as in section 9 of the charter and the preamble of the Act, or more often that of "North-West Territories," as in sections, 11, 14, 15 and 16 of the contract. Such is, moreover, the name which Parliament had previously given to that country. 32 & 33 Vict. ch. 3, s. 1.

Likewise, as to time, I fail to find any limitation. It is contended that branch lines, like the main line, must "be commenced and completed as provided by the said contract." But the contract does not impose any limitation as to the commencement or completion of their location or construction; it has a limitation in clause 4 as to the main line only and also "the said

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branch lines of railway" contracted for, namely, the Fort William branch—which was never built in consequence of a deviation of the main line — and the Pembina branch, which, although finished, had to be maintained and worked. As to the other branches to be located, which the company may or may not immediately construct, the charter, section 15, and the contract, clause 14, both provide that they may be constructed *from time to time*, that is, at any time the company deems it expedient. This is the only reasonable construction which can be placed upon these enactments. It is, in fact, necessary to the working out of the land grant arrangement.

It is stipulated in the contract, section 11, that these land grants are to extend back 24 miles deep on each side of the main railway from Winnipeg to Jasper House; but if they are not fit for settlement the deficiency is to be made up in the fertile belt or elsewhere "at the option of the company * * * extending back 24 miles deep on each side of any branch line or lines of railway to be located by the company." It would take years, certainly more than ten years, before the company might be called upon to make this option and select its land grants; in fact the parties have admitted in the stated case that it was not till 1901 that the last townships through which the main line of the railway runs were surveyed and set off into sections. They also admit that large tracts of land through which branch lines of the company may run under the charter have not yet been surveyed into townships by the Government. There is no limitation of time as to the option or selection; it could not be commenced before some years, and certainly could not be completed before the necessary surveys were made; parties agree that it cannot be completed even at the present time. How can it be contended that the company could possibly

locate or build branch lines necessary to the development of these lands before they are selected and probably patented by the Crown?

Clause 6 of the contract provides for the completion and delivery of the Government sections partly by the 30th of June, 1885, and the whole at the latest by the 1st of May, 1891. I cannot understand how the company could possibly complete all its branch lines from these sections before the latter date, for, as I understand clause 7 of the contract and clause 15 of the charter, these sections form part of the Canadian Pacific Railway from which the company can construct branch lines as well as from the sections constructed by the company. As a matter of fact only seven branches were built prior to the 1st of May, 1891, in order to give railway facilities to distant settlements or to industrial establishments in close proximity, whereas nineteen have been built since that date. In all cases of railway development, especially in an immense and wild country like that traversed by the Canadian Pacific Railway, almost entirely uninhabited on its entire length of about 2,644 miles west of Callander Station, near Sudbury of to-day, the necessity of branch lines is not generally felt till the main line is built and operated, and for many years afterwards.

If any doubt be possible upon the point, which I do not, however, entertain, courts of justice should hesitate before denying a power which has often been recognized by the highest authorities. We have no expression of judicial opinion exactly in point except as to location, but we find, in the case of the *Canadian Pacific Railway Co.* v. *Major*, (1) decided by this court in 1886, and reported in 13 Can. S. C. R., at page 237, dicta and propositions as to time, which seem to sustain the contention of the company in the present instance.

(1) 13 Can. S. C. R. 233.

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Chief Justice Ritchie, referring to a certain limitation enacted by the Railway Act of 1879, and to section 14 of the contract, said, speaking for the court:—

From which (section 14) it is abundantly clear that the right conferred on the railway company from time to time to lay out, construct, equip, maintain and work branch lines of railway from any point or points along their main line of railway to any point or points within the territory of the Dominion is entirely inconsistent with any such limitation; and therefore I think the company had a right to construct a branch from any point or points on the railway to English Bay as well, as to any other point or points within the territory of the Dominion.

And further on the learned judge adds (at page 240):—

No court has a right to reject, or refuse to give effect to, the words of the legislature if a reasonable construction can be placed on the language used, and, therefore, I am constrained so to construe this statute as to give effect, if possible, to this, to my mind, very plain language of the legislature, and I can give no effect to it if it was not the intention of the legislature to authorize such branches and such extensions of the main line as might be found expedient to complete and make available this great national undertaking, the construction of a railway connecting the sea-board of British Columbia with the railway system of Canada, a construction not only reasonable but one which, in my opinion, harmonizes with the subject of the enactment and the object which the legislature had in view.

When the contract was under discussion in the House of Commons Mr. Blake, the leader of the Opposition, demanded its rejection upon the ground, among others, that

by the contract, power is given to the company *forever* to build branch lines in various parts of the Dominion. (See Votes and Proceedings, (1881) p. 159).

From the time of its approval by Parliament to the 1st of May, 1891, no less than seven branch lines were constructed within the limits of the old provinces, and after that date to the year 1903 eighteen more were built and operated within the old provinces, two of them extending through the Territories and only one being entirely in the latter country, the

whole without any objection being raised by any one, and in almost every case, after due Dominion inspection and authorization.

In 1884 Parliament expressly recognized the Algoma branch, then in course of construction from Sudbury to Sault Ste. Marie, in the province of Ontario, under the general powers of the charter and authorized a large issue of bonds (47 Vict. ch. 1). Parliament has also granted cash and land subsidies to branch lines of the company constructed before and since 1891. A full list of all these branch lines is given in the stated case, and it is not necessary to repeat it here. I will, however, reproduce the preamble of a Canadian statute passed in 1888, 51 Vict. ch. 51, which is the Act increasing the company's bonding power on branch lines generally, and one of the Sudbury branches in particular, from $20,000 to $30,000 per mile, as expressing the views of Parliament both upon the location and time of their construction :

Whereas, the Canadian Pacific Railway Company has, by its petition, represented that the branch line, to be known as the Toronto branch of the Canadian Pacific Railway, which it proposes to construct under its charter from a point at or near Sudbury to a point at or near Claremont, will be unusually expensive ; that an issue of twenty thousand dollars of bonds per mile thereon would not constitute a sufficient aid towards the construction thereof ; and that a similar state of things will probably occur *in respect of other branches to be hereafter built by the said company*, and it has prayed that the maximum amount of bonds to be issued on any such branch be fixed at thirty thousand dollars per mile, and that it be authorized to issue debenture stock in the place and stead of such bonds ; and it is expedient to grant the prayer of the said petition, etc.

It may be said that implied recognition of power by the legislature is not sufficient to confer that power, although very high American authorities can be quoted to the contrary, which will be found collected in American and English Encyclopœdia, (2 ed.) vol. 7, p. 708 ; I refer especially to the case of *Society vs Pawlet*, (1)

(1) 4 Peters 501.

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decided by the United States Supreme Court. But it cannot, I submit, be seriously contended that the subsequent action of Parliament is not sufficient to remove any possible doubt in the matter. And finally, when we consider the disastrous consequences which a decision adverse to the Canadian Pacific Railway Company would bring upon its millions of bonds and debenture stock distributed all over the world, which would not be binding upon the so-called branch lines, I think we should come to the conclusion that it has at least that effect, unless forced to do otherwise by clear terms of the statute. For the reasons already advanced I think the statute supports this conclusion. Without wishing to add anything to the judgment of the House of Lords in *Attorney-General vs. Great Eastern Railway Co.* (1) which I believe fully covers the case, I would be inclined, under the special circumstances of the case, to treat the charter of the Canadian Pacific Railway Company in a liberal manner, like any other statute, in accordance with the principle laid down in the Interpretation Act, namely, that every Act of Parliament must receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act, and of every provision or enactment thereof according to its true intent, meaning, and spirit; 31 Vict. ch. 1, s. 7, par. 39; R. S. C., ch. 1, s. 7, par. 56.

With these explanations, I shall now proceed to answer the questions submitted:

To the first question I answer:—Yes, the Canadian Pacific Railway Company has now power to construct the branch line referred to, as under section 14 of the contract and section 15 of the charter it may construct any branch line at any time.

To the second question, answer;—Yes.

(1) 5 App. Cas. 473.

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To the third question :—In consequence of the above answers the answer to this question is unnecessary.

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DAVIES J —After the fullest consideration and repeated conferences with my colleagues, I have reached the conclusion that the first two questions should be answered in the affirmative These answers render it unnecessary to give any answer to the third question, and I express no opinion with regard to it.

I have read with great care the opinion prepared by Mr. Justice Nesbitt and, as I find myself in full accord alike with his reasoning and his conclusions with respect to these two main questions, I will content myself with concurring with his judgment so far as it relates to these two questions and their answers.

NESBITT J.—This is a case submitted by the Board of Railway Commissioners for Canada under the 43rd section of the Railway Act, 1903. The following are the questions submitted :

1. Has the Canadian Pacific Railway Company, under the legislation, schedule and charter aforesaid, now power to construct the branch line referred to, or has the time expired within which such branch line might be constructed ?

2. Do such legislation, schedule and charter authorize construction by the said company of the proposed branch line, it being altogether situated in the Province of Ontario ?

3. Is it open to the James Bay Railway Company or to the Board of Railway Commissioners to take the objection that the time within which the said company may build branch lines under its charter has expired ?

In the year 1874 an Act was passed, chapter 14 of 37 Victoria, intituled: "An Act to provide for the construction of the Canadian Pacific Railway." This Act recites the admission of British Columbia into the union with the Dominion of Canada. It recites the fact that by the terms of the admission the Government of the Dominion were to construct a railway

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from the Pacific to connect the seaboard of British Columbia with the railway system of Canada. It then provided that a railway to be called the Canadian Pacific Railway should be made from some point near to and south of Lake Nipissing to some point in British Columbia on the Pacific Ocean. It provided for the division of the said railway into four sections. It also provided for certain branches of the railway to be constructed, such branches to form part of the Canadian Pacific Railway. Section 8 of the said statute provided for the construction of the said railway in subsections by contractors, and, after providing for the construction and the consideration to be paid therefor, subsection 10 of the said section 8 provided that in applying the said Railway Act to the Canadian Pacific Railway or any portion thereof the expression "the railway" shall be construed as meaning any section or subsection of the said railway the construction of which has been undertaken by any contractors, and the expression "the company" shall mean the contractors for the same. The said statute sets out further provisions for the construction of the railway.

Subsequent to this statute the Act in question (and upon which mainly this case turns) being chapter 1 of 44 Victoria, assented to on the 15th of February, 1881, was enacted. It recites that by the terms and conditions of the admission of British Columbia into union with the Dominion of Canada the Government of the Dominion has assumed the obligation of causing a railway to be constructed connecting the seaboard of British Columbia with the railway system of Canada. It also recites:

> That whereas certain sections of the said railway have been constructed by the Government and others are in course of construction, but the greater portion of the main line thereof has not yet been commenced or placed under contract, and it is necessary for the development of the North-West Territory and for the preservation of the good faith of the

Government in the performance of its obligations, that immediate steps should be taken to complete and operate the whole of the said railway.

It then recites:

And whereas in conformity with the express desire of Parliament a contract has been entered into for the construction of the said portion of the main line of the said railway and for the permanent working of the whole line thereof, which contract with the schedule annexed has been laid before Parliament for its approval, and a copy thereof is appended hereto, and it is expedient to approve and ratify the said contract and to make provision for the carrying out of the same.

The statute then enacts under section 1 as follows:

The said contract, a copy of which with schedule annexed is appended hereto, is hereby approved and ratified, and the Government is hereby authorized to perform and carry out the conditions thereof, according to their purport.

The second section of the said statute provides that for the purpose of incorporating the persons mentioned in the said contract and those who shall be associated with them in the undertaking, and of granting to them the powers necessary to enable them to carry out the said contract according to the terms thereof, the Government may grant to them, in conformity with the said contract, under the corporate name of the Canadian Pacific Railway Company, a charter conferring upon them the franchises, privileges and powers embodied in the schedule to the said contract and to this Act appended, and such charter being published in the *Canada Gazette* with an Order in Council relating to it shall have force and effect as if it were an Act of the Parliament of Canada.

The contract by its first clause *inter alia* provided:

The individual parties hereto are hereinafter described as the company.

I read this clause as a conveyancing description applicable to the contractors until after the necessary steps were taken by them to complete the incorporation authorized by the charter when the rights, franchises and privileges conferred by the contract on the incorporators became vested in the "corporate entity" to be known as the Canadian Pacific Railway Company. This was complete as I understand after the 9th April, 1881. See Gazette of that date.

The 13th clause provided that the company should have the right to lay out and locate the line of railway

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contracted for preserving the terminal points from Callander Station to the point of junction with the Lake Superior section and from Kamloops and from Selkirk to the junction with the western section. The work was divided into four sections and two branches, and the company were to build the central and Eastern sections which were to be commenced respectively by the 1st May and the 1st July, 1881, and to be completed by the 1st May, 1891. See fourth clause of contract. The Government, by the sixth clause of contract, were to complete the Western and Lake Superior sections by the latest by May, 1891. There were also two branch lines, one from Selkirk to Pembina and one from some point on main line to Fort William. These the Government were to construct the Fort William branch as part of the Lake Superior section, as a reference to the first clause of the contract and the map on page 16 of case will shew.

By the 14th clause of the contract it was provided:

The company shall have the right, from time to time, to lay out, construct, equip, maintain and work branch lines of railway from any point or points along their main line of railway, to any point or points within the territory of the Dominion. Provided always, that before commencing any branch they shall first deposit a map and plan of such branch in the Department of Railways. And the Government shall grant to the company the lands required for the road bed of such branches and for the stations, station grounds, buildings, workshops, yards and other appurtenances requisite for the efficient construction and working of such branches, in so far as such lands are vested in the Government.

And by the 15th clause of the charter it was provided:

The company may lay out, construct, acquire, equip, maintain and work a continuous line of railway, of the gauge of four feet eight and one half inches; which railway shall extend from the terminus of the Canada Central Railway near lake Nipissing, known as Callander Station, to Port Moody in the Province of British Columbia; and also a branch line of railway from some point on the main line of the railway to Fort William on Thunder Bay; and also the existing branch line of railway from Selkirk, in the Province of Manitoba, to Pembina in the said province; and

also other branches to be located by the company from time to time as provided by the said contract,—the said branches to be of the gauge aforesaid, and the said main line of railway, and the said branch lines of railway, shall be commenced and completed as provided by the said contract; and together with such other branch lines as shall be hereafter constructed by the said company, and any extension of the main line of railway that shall hereafter be constructed or acquired by the company, shall constitute the line of railway hereinafter called The Canadian Pacific Railway.

It is upon the construction of these two clauses that the contest mainly turns. Mr. Blake and Mr. Cassels for the James Bay Railway Company argued that the contract was one between the Government and the incorporators described as "The Company" and was only for the Eastern and Central sections and that the incorporators must complete building within ten years, and had only the right contemporaneously with their building of such sections to carry out and locate branches; that the "corporate entity" only became assignee of the privileges and franchises granted to the incorporators and could enjoy no higher rights than granted to the incorporators under the contract, and such rights were only, so far as we are here concerned, to locate branches up to May, 1891, and only from some point on the eastern and central sections to some point on land *owned* by the Dominion. I think this is a fair statement of the position taken by the counsel for the James Bay Railway Company. The Canadian Pacific Railway Company's counsel, Mr. Ewart and Mr. Aylesworth, contended that the "corporate entity," the Canadian Pacific Railway Company, had the right for all time to lay out and locate branches from time to time from any point on the main line between Callander and the Pacific sea-board subject, at the present time, to the filing of plans and approval required by the Railway Act, 1903; that from Callander eastward the rights of the company were governed by section 25 of the charter with which we are not now concerned. A great deal was said in argu-

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ment as to the previous railway policy of the Parliament of Canada and the policy since in respect to other railways, and as to the public danger involved if a construction such as contended for by the Canadian Pacific Railway Company was adopted. We are not in one sense concerned with that construction. The purpose is expressed by the terms of the statute which are absolutely controlling as to the legislative intent, and while a construction which will produce a consequence so directly opposite to the whole spirit of our legislation ought to be avoided, if it can be avoided without a total disregard of those rules by which courts of justice must be governed, yet if Parliament has explained its own meaning too unequivocally to be mistaken the courts must adopt that meaning. We have only to declare what the law is, not what it ought to be, and I feel relieved from any doubt in this case which I might entertain (though I entertain none whatever) by the fact to which I attach considerable importance that successive Acts of Parliament have been passed by which Parliament itself has assumed as the correct one the construction I adopt. (I shall refer to these later.) The courts too have expressly in one case and by implication in another adopted one phase, viz., the right to build anywhere from the main line from Callander to the Pacific. I will also refer later to these more at length. On the question of the construction contended for by the James Bay Railway Company being likely to place the territory tributory to the main line from Callander to the Pacific in the grasp of a monopoly I would only say that in practice no such result has followed. Numerous railway charters have been obtained and railways actually built in many places where, if my construction of the charter and contract is correct, the fear of the right of the Canadian Pacific Railway

Company to parallel, &c, would have deterred the application for the charter or the construction of the railway if capital was likely to be deterred by such fear It is to be borne in mind also that in the United States, in most if not all of the states, the location of the line of its road is entrusted by law to the company alone, and that where a corporation has been organized in compliance with the conditions of the statute and has made a map and profile of the route intended to be adopted by the company, it has acquired a vested and exclusive right to build, construct and operate a road on the line which it has adopted subject to the right of other road companies to cross its route and lands in the way and manner provided by law. It would scarcely be urged that this policy, the very opposite to the one adopted here, has deterred railway building in the United States. It is to be further borne in mind that in this country all branches built by the Canadian Pacific Railway Co. to develop territory or to acquire traffic as the needs of the country arise, have to be approved as to the general route by the Minister of Railways and as to deviations, etc., by the Railway Committee and the public rights thus fully conserved. This of course has no bearing on the construction of the charter but is, I think, an answer to the argument of future monopoly which has been advanced as a reason for a different construction being the proper one to arrive at.

The general rule which is applicable to the construction of all other documents is equally applicable to statutes and the interpreter should so far put himself in the position of those whose words he is interpreting as to be able to see what those words related to. He may call to his aid all those external or historical facts which are necessary for this purpose and which led to the enactment and for those he may consult contempo-

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rary or other authentic works and writings. This, however, does not justify a departure from the plain reasonable meaning of the language of the Act. The best and surest mode of expounding an instrument is by construing its language with reference to the time when and circumstances under which it was made, and next to such method of exposition is the rule that if an Act be fairly susceptible of the construction put upon it *by usage*, the courts will not disturb that construction. The authorities for these statements are too well known to render lengthy citation necessary. I refer, however, to *Read* v. *The Bishop of Lincoln* (1); *Herbert* v. *Purchas* (2); Maxwell on Statutes, (3 ed.) pp. 32-39, inclusively, pp. 423 and following; Broom's Legal Maxims (7 ed.) pp. 516-579. As to reference to House of Commons records for purposes of historical exposition, see *The Attorney General of British Columbia* v. *The Attorney General of Canada* (3); *The Fisheries Case* (4); pages 456-465 *et seq.*; *In re Representation in the House of Commons* (5), pages 497, 581-593. To apply, then, contemporaneous historical reference and legislative and judicial exposition, the recital in the Act under consideration establishes that the Government of Canada was under obligation to construct a railway connecting the sea-board of British Columbia with the railway system of Canada. The stated case contains the following admissions :—

(1) At the date of the Canadian Pacific Railway charter (1881) the territory through which its main line was to be constructed was, with the exceptions to be mentioned, almost completely uninhabited, and only by its general characteristics had become known to the people of Canada. The exceptions to this statement are :

(*a*) A small settlement existed at Port Arthur and Fort William ;

(1) (1892) A. C. 644.
(2) L. R. 3 P. C. 605 at p. 648.
(3) 14 Can. S. C. R. 345, pages 361-369 ; 14 App. Cas. 295, page 305.
(4) 26 Can. S. C. R. 444.
(5) 33 Can. S. C. R. 475.

(*b*) Southern portions of the Province of Manitoba and as far west as the present western boundary of the province had been surveyed and were sparsely settled, particularly in the neighbourhood of Rat Portage and the Red River district, where the Winnipeg settlement was;

(*c*) Some portions of the country between such western boundary and British Columbia had been surveyed into blocks of sixteen townships each;

(*d*) A small settlement on the British Columbia coast.

(2) From year to year after the date of the contract the Government of the Dominion of Canada caused portions of Manitoba and the North-west Territories to be surveyed and set off into townships and sections, but it was not until the year 1901 that the last of the townships in the North-West Territories and western part of Manitoba through which the railway runs was surveyed and set off into sections. Some of the territory in the eastern part of Manitoba and the western part of Ontario and in British Columbia, together with large tracts in Manitoba and the North-West Territories through which branch lines of the Canadian Pacific Railway may at some time run if the contentions of the Canadian Pacific Railway Company in question herein are sustained, have not yet been surveyed, even into townships, by the Government.

(3) At the date of the Canadian Pacific Railway charter the main line of the railway north of Lake Superior had been projected to run some distance north of the lake and join the line between the lake and Selkirk. The accompanying sketch marked plan No. 1 (partial copy of a map attached to the report of the then Engineer-in-chief of the Department of Railways—Mr. Sandford Fleming—dated 26th April, 1878) shows the projected junction of the eastern and Lake Superior sections of the railway and the line to Fort William as then contemplated. After that date the route of the main line was changed. The part of it lying north of Lake Superior was brought more to the south so as to skirt the lake, and the western end of the eastern section was made to join the eastern end of Lake Superior section at or near Fort William, as shown in the accompanying sketch marked plan No. 2, which is a partial copy of a map.

(4) Prior to the 1st May, 1891, the Canadian Pacific Railway Company, without any other legislative authority than that contained in the legistion of the Parliament of Canada appearing in the said statute 44 Vict. ch. 1, and the schedules thereto and the charter issued in pursuance thereof, constructed and equipped the branch lines of railway or extensions of branches in list A in paragraph 5 hereof. Subsequent to said 1st May, 1891, the Canadian Pacific Railway Company have constructed without any such other authority the branches or extensions of branches set out in list B in paragraph 5 hereof. In respect of the branches or extensions of branches set out in the said lists, those which are accompanied by the word "inspected" were inspected by a Government engineer and permission granted to the company to open such branches respectively for the public conveyance of passengers.

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LIST "A."

BRANCHES OF THE COMPANY'S MAIN LINE CONSTRUCTED PRIOR TO MAY 1ST, 1891.

1. Ontario: The Algoma Branch from Sudbury to Sault Ste. Marie, 182·1 miles. Constructed 1883 and 6. (Inspected.)

2. Ontario: The Stobie Branch from Sudbury to Copper Mines, 5·6 miles. Constructed 1887.

3. British Columbia: The New Westminster Branch from New Westminster Junction to New Westminster, 13·7 miles. Constructed 1887. (Inspected.)

4. British Columbia: The Port Moody Branch from Port Moody to Vancouver, 13 miles. Constructed 1887.

5. Manitoba: The Pembina Mountain Branch from Winnipeg to Manitou, 110·1 miles. Constructed 1882. (Inspected.)

6. Manitoba: The Gretna Branch from Rosenfeld to Gretna, 13·7 miles. Constructed 1888.

7. Manitoba: The Selkirk Branch from Winnipeg to West Selkirk, 24 miles. Constructed 1883. (Inspected.)

LIST "B."

BRANCHES CONSTRUCTED SUBSEQUENT TO FIRST MAY, 1891.

8. Ontario: The Dyment Branch from Dyment to Ottamine, 7 miles. Constructed 1900. (Inspected.)

9. British Columbia: The Mission Branch from Mission Junction to Mission, 10 miles. Constructed 1895.

10. British Columbia: The Arrow Lake Branch from Revelstoke to Arrowhead, 27·7 miles. Constructed 1897.

11. British Columbia: The Coal Harbour Branch from Vancouver to Coal Harbour, 1·2 miles. Constructed, 1903.

12. Manitoba: An extension of the Stonewall Branch from Stonewall to Teulon, 19 miles. Constructed 1898. (Inspected.)

13. Manitoba: The Lac du Bonnet Branch from Molson to Lac du Bonnet, 27 miles. Constructed 1900. As to this branch the Dominion statute 63 & 64 Vict. c. 55, sec. 3, gives such authority as is contained in that section. (Inspected.)

14. Manitoba: The McGregor Branch from McGregor to Brookdale, 36 miles. Constructed 1900-02. As to this branch the Dominion statute 63 & 64 Vict. c. 55, sec. 3, gives such authority as is contained in that section. (Inspected.)

15. Manitoba: Extension of Souris Branch from Souris to Glenboro, 45·7 miles. Constructed 1891-2. (Inspected.)

16. Manitoba: Extension of Souris Branch from Napinka to Deloraine, 18·6 miles. Constructed 1892.

17. Manitoba and North-West Territories: The Pheasant Hills Branch from Kirkella in Manitoba to Haywood in the North-West Territories, 146 miles. Constructed 1903-4. (Inspected.)

18. Manitoba and North-West Territories: The Souris Branch from Kemnay to Estevan, 156. 2 miles. Constructed 1891-2. (Inspected from Kemnay to Melita.)

19. North-West Territories: The Portal Branch from North Portal to Pasqua, 160·3 miles. Constructed 1893.

The undertaking was of a very exceptional speculative character and in turning to the Act, contract and charter we find unprecedented clauses. The Government bound itself to complete two sections, the Fort William Branch and the Selkirk and Pembina Branch, and hand same over to the contractors, to pay a cash subsidy of twenty-five million dollars and to give a land grant of twenty-five million acres *to be fit for settlement* and to be in alternate sections; the land grant to be free from taxation for twenty years from the grant from the Crown; the capital stock of the company and its stations, station grounds, workshops, buildings, yards, rolling stock, etc., to be exempt from taxation forever. There are other marked benefits conferred, a masterly summation of which may be found in Hansard, 1881, vol. 5, p. 517. I refer to this latter only to show that the undertaking was thought to be so hazardous that exceptional privileges were deemed necessary to induce the contractors to enter upon the undertaking and to give point to the consideration that it was extremely unlikely any person contemplated that branches would be required prior to May 1891; that the road was a colonization road and branches would be built as the country developed and the future revealed along what lines trade developed making the location and construction of branch lines feasible and practicable. This being the situation of the parties the contract was made with the incorporators and a charter was granted creating the corporate entity which, after the incorporators had performed the initial requirements, came into existence on the 9th April, 1881. As I have before indicated, in my view after that date

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it was such corporate entity which is described by the word company when that word is used in the contract and charter. This is apparent when section after section is examined.

Section 7. The railway constructed under the terms hereof shall be the *property* of the company.

(This must mean the corporate entity not the incorporators who are also as I have said referred to as the company). The same section provides "and the company shall thereafter and *forever* efficiently maintain, work and *run* the Canadian Pacific Railway."

Section 9 The Government agree to grant to the company a subsidy in money of twenty-five million dollars and in land of twenty-five million acres.

Section 10 grants the road-bed to the "company." Section 11 grants the land to the company, and further on the grant of land is to be

on each side of any branch line or lines of railway *to be located by the company.*

Section 16 exempts forever from taxation the *capital stock* of the company and the lands of the company for twenty years from the Crown grant. As I have stated, according to Mr. Blake's argument, the word "company" meant incorporators, and the incorporators' obligations ceased in May, 1891, and the rights acquired by the contract by them were by the Act and charter at that date and then only vested in the corporate entity. In sections 17, 18 and 20 the word "company" is also used in a sense wholly inappropriate to the incorporators described as such as it would scarcely be argued that when the company may issue land grant bonds, etc., the incorporators as contractors were meant and not the corporate entity. If then the corporate entity is intended to be described when the word "company" is used in the contract when section 14 says

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. The company shall have the right from *time to time* to lay out, construct, equip, maintain and work branch lines of railway from any point or points along their main line of railway to any point or points within the territory of the Dominion

a sensible construction can be placed on the language. If the argument is acceded to that the contractors (the incorporators) are thus described the result follows that as the gentlemen named were only to build and own the eastern and central sections "their" line of railway is only the eastern and central part of the railway, and branch lines can only be built from such sections. Mr. Blake and Mr. Cassels urged this most strenuously pointing to section 13 which says:

The Company shall have the right * * * to lay out and locate the line of railway hereby contracted for

and as the only line contracted for was that part comprised in the eastern and central section, the language used in section 14 must be construed as I have indicated, and further that the words "within the territory of the Dominion" meant within land owned by the Dominion and not the area over which the Dominion Parliament exercised legislative jurisdiction. I may describe this as the argument of "place" as opposed to that of "time" with which I will deal later. To deal with "place" first. In my view the contract means that the company, the corporate entity at any rate up to May, 1891, could built branches anywhere from the main line of railway between Callander and the Pacific sea-board, and in using the words "territory of the Dominion" Parliament meant within the area over which the jurisdiction of the Parliament of Canada extended as to the whole main line of railway from Callander to the Pacific. If the construction argued for is to be placed on these sections it would lead to such obviously absurd results that some other construction must be sought for. In pointing to these results I cannot do

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better than adopt some of the arguments of the counsel for the Canadian Pacific Railway Company upon this point:—

(1) A branch may commence at "any point or points along their main line of railway"—anywhere in any province—but it must *end* in the North-West Territory.

(2) For example, a branch may (indisputably) commence at Portage la Prairie in Manitoba and run south-west; but it cannot stop until it gets beyond the boundary of the province. It must finish in the Territories.

(3) Conversely a branch may (indisputably) commence at Regina in the North-West Territories and run north-east; but it must stop before crossing the Manitoba line. It must finish in the Territories.

(4) What more absurd provision than that a branch line may start anywhere along a 2,500 mile line of railway, but must always run towards its centre, and must finish there within a fixed limit of a few hundred miles.

Objection: Points "within the territory of the Dominion" means points upon land owned by the Dominion.

Pursuing the line or reasoning just submitted, it would appear that the effect given by the present objection to the clause under consideration is that although a branch may begin anywhere on the main line it must always finish upon Government property. It must not stop a mile short on Jones's land, or go a mile beyond to Smith's land. Some Government property must always be picked out for one of the termini.

So that if the Government did not happen to own a lot or two in a certain town, no branch could have its terminus there. And if in the town the Government did own a lot, the railway would have to lay the last

rail upon it however inaccessible it might be—or stay away altogether.

And what if the Government sold the lot before the railway reached it ?

I would also add, I find in the contract the draftsman there describing the North-West Territories says :

> The company may, with the consent of the Government, select in the North-West Territories any tract or tracts of land. (Contract, sec. 11).
>
> In the establishment of any new province in the North-West Territories. (Contract, sec. 15).
>
> The lands of the company in the North-West Territories * * * shall be free from taxation. (Contract, sec. 16).

Mr. Cassels also argued that if the company already possessed the power to construct branches in Ontario, why was it necessary to get special provision inserted in clause 15 of the charter in reference to the branch line from Fort William to the main line ? This branch was to be built by the Government and acquired by the company, so that argument fails.

These considerations would be sufficient in my view to determine that the argument as to the places from which branch lines would be built could not be limited as to point of commencement to the eastern and central sections and, as to terminals, to land owned by the Dominion. But, when one sees how the court and Parliament have dealt with the subject, it makes the conclusion to be now arrived at irresistible.

This court has already held in *The Canadian Pacific Railway Co.* v. *Major* (1) that the company had power to build a branch from Port Moody to Vancouver, and this branch was on the western section and in the area of the Province of British Columbia, but within the legislative jurisdiction for the purposes of railway authorization of the Dominion Parliament. It is true the present argument was not advanced to the court but it must be assumed that the

(1) 13 Can. S. C. R. 233.

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court would not overlook so obvious a want of legislative authority as is contended for here. In the case of *Ontario etc. Railway Co.* v. *Canadian Pacific Railway Co.* (1) the point urged as to the meaning of "within the territory of the Dominion" was, if correct, so complete an answer that one can scarcely understand if it was tenable if the court could say, at page 443,

> no question was raised as to the authority of the defendants (the Canadian Pacific Railway Co.) to construct a line of railway to the Sault Ste-Marie,

and it is to be observed that the counsel now raising the question were engaged for the plaintiff in that case. For the action of Parliament, I refer also on this point to the list "A" before referred to, and to the list "B," 8 to 16 inclusive, as to the points from or to which branches could be built, all of which acts are opposed to the construction contended for.

I have therefore come to the conclusion I have above indicated that as to section 14, the line of railway referred to is the line from Callander to the Pacific seaboard, and that the words "territory of the Dominion" mean the area along such line or railway over which the Dominion Parliament had legislative jurisdiction.

I come now to deal with the time within which the right to build branches so authorized must be exercised. The clause pointed to under which it is claimed no branch could be built after May, 1891, is 15 of the charter before set out. The clause used the words "lay out, construct and acquire" and these have to be divided and made applicable to the subject matter. The company was not to "lay out or construct" either of the branches nor two sections of the main line, but was to "acquire" these. That is the Government were under obligation to build two sections of the railway or two branches for the company and, as to these, the words "lay out" or "construct" are inapplicable to

(1) 14 O. R. 432.

the company. There were other branches to be located from time to time by the company as *provided by the contract.* (Clause 14). When the draftsman says in clause 15 of the Act (schedule A),

> the said main line of railway and the said branch lines of railway shall be commenced and completed as provided by the said contract

I take it he is referring to the various sections and described branches for the completion of which an obligation existed both on the part of the Government and the company under the contract, and when he refers to *other branches to be located* from time to time he refers to the branches under clause 14 which the company have the *privilege* of building but as to which no contractual or other obligation existed. No time was fixed by the contract either for the commencement or completion of such branches and it is a misdescription to refer to them as having a time limit under the contract. The express right to lay out, locate and build from time to time given by the contract cannot be cut down by mere surmise that a power to build from time to time could not be contemplated because it would be out of harmony with existing railway policy. The contract was very keenly debated; the effect of this provision was drawn in the most marked manner to the public attention and denounced as mischievous. See Hansard vol. 5, p. 503. I refer to this not as throwing any light upon the meaning of the clause but as shewing the attention of Parliament was drawn to the existence of such a clause and that it was open to the construction claimed for it. The clause was passed and the list I have referred to shews the branches built since 1891 and the action of Parliament thereon from that date until the present time.

In a case decided by the Supreme Court of the United States in 183 ', in a court in which both those great jurists Chief Justice Marshall and Justice Story

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sat, and the opinion of the court was delivered by Mr. Justice Story, it was held that the naming of a society in a royal charter was a plain recognition by the Crown of the *existence of a corporation and of its capacity to take the land in controversy* and further that such a recognition would confer the power to take the land even if it had not previously existed. See 4 Peters, 480, at p 502, where the argument of Mr. Daniel Webster is given effect to by the court. I cite this case not as an authority but as entitled to great weight on account of the eminence of the counsel and Bench concerned in it. It seems to me to be on the same principle as the cases referred to by me before collected in Maxwell on Statutes, (3 ed.) pp. 428-429, and as Parliament has over and over again recognized the right to build branches after 1891, that great importance is to be attached to such Parliamentary interpretation or recognition. It is to be borne in mind also that on the faith of the contract being ample authority to build at any time branches within the limits described, large sums of money it was stated had been borrowed solely on the security of such branch lines and Parliament must have known that such would have been the inevitable result. It is said that Sir Oliver Mowat, in 1897, when Minister of Justice, advised that no such power existed, but, it seems to me, that the fact of Parliament subsequently disregarding and ignoring his advice and again recognizing the right to build both as to time and place, strengthens the position of the Canadian Pacific Railway Company in appealing to the doctrine of recognition embodied in the case in 4 Peters before referred to. It appears to me, therefore, that the time limit in clause 15 is only as to branches *contracted* for and has no application whatever to such branches as the company was *privileged* to build at its option.

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The third question it is perhaps unnecessary to answer in view of the opinion I have formed of the proper answers to the first two.

Assuming that ten years was the limit within which branch lines were to be built, I am of opinion nevertheless that as there are no words in the Act, charter or contract expressly providing that at the end of the ten years all power to built shall cease such as were used in *Montreal Park and Island Railway Co.* v. *The Chateauguay and Northern Railway Co.* (1), that the power still exists until a forfeiture of such power is declared in properly constituted judicial proceedings. This is the rule in the United States. See Morawetz on Corporations. ss. 1006-1015; Thompson on Corporations, Vol. 5, ss. 6598-6602. In England I find no direct authority but if I am correct that the power still exists it would seem to follow that only in a suit to which the Attorney General is a party plaintiff (or if he refuses he may be made a party defendant) can the question be successfully raised. I do not decide this, however, as it is very doubtful where, as in this case, the James Bay Railway Company will be crossed and otherwise interfered with by the building of the branch and it has, therefore, a special and peculiar interest, whether it cannot raise the question. *Hinckley* v. *Gildersleeve* (2); *Town of Guelph* v. *Canada Co.* (3); *Stockport District Waterworks Co.* v. *Mayor of Manchester* (4); *Pudsey Coal Gas Co.* v. *Corporation of Bradford* (5), would seem to indicate that in such case the James Bay Railway Company *would* be entitled to be heard in a suit brought by it to restrain the Canadian Pacific Railway Company entering upon its lands. In this proceeding, however, ss. 3 and 5 of the gen-

(1) 35 Can. S.C.R. 48 at p. 60.
(2) 19 Gr., 212.
(3) 4 Gr., 632.
(4) 9 Jur. N.S., 266.
(5) L. R. 15 Eq,, 167.

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eral Railway Act, 1903, should be read in with clause 14 of the contract and as additional to it, and as the Canadian Pacific Railway Company have to file plans and obtain approval of them, the James Bay Railway Company would have a right to appear and appeal to the discretion of the Minister of Board on such application. It is doubtful if the court could compel the Minister or the Board to act if in his or its *bonâ fide* discretion approval of plans was declined *Attorney General* v. *Toronto Junction Recreation Club* (1); *In re Massey Manufacturing Co.* (2) shew when the court can interfere and compel executive action.

I think the Minister or Board has more than ministerial powers and represent the Crown, and it seems to me that this distinguishes the case from a mere action by a private party when, even with his special interest, he might be precluded from raising the question as to which I do not think we are called upon to decide. I think, in this application to the special tribunal created by the Act, the James Bay Railway Co. may be heard.

I would therefore answer to the first question:

The Canadian Pacific Railway has power to construct the branch referred to and the time within which such branch ought to be constructed has not expired.

To the second question; Yes.

To the third question; Yes

IDINGTON J.—Under the Railway Act of 1903 the Board of Railway Commissioners submit for the opinion of this court the following questions:

1. Has the Canadian Pacific Railway Company, under the legislation, schedules and charter aforesaid, now power to construct the branch line referred to, or has the time expired within which such branch line might be constructed?

(1) 7 Ont. L. R. 248. (2) 11 O. R. 444; 13 Ont. A.R. 446.

2. Do such legislation, schedules and charter authorise construction by the said company of the proposed branch line, it being altogether situated in the Province of Ontario?

3. Is it open to the James Bay Railway Company or to the Board of Railway Commissioners to take the objection that the time within which the said company may build branch lines under its charter has expired.

The legislation, schedules and charter aforesaid consist of 44 Vict. ch. 1, and the schedules annexed thereto, of which latter the first is a copy of the contract between Her Majesty and certain gentlemen who undertook thereby to build parts of the Canadian Pacific Railway, and the second is a copy of the legislation that became the authority for the issue of the letters patent creating the Canadian Pacific Railway Company.

It is the extent of the corporate powers of this company as to building branch lines that is now called in question. The questions asked must be answered by the meaning given to sec. 14 of the contract schedule just referred to.

To interpret it properly regard must be had not only to the rest of the contract and the enactment that gives it vitality, but also to the history leading up to it and the conditions immediately surrounding it.

Whilst all must be looked at and the whole considered together, we must bear in mind that the one schedule contains a temporary contract and the other the foundation for a chartered corporation that was to have a perpetual existence.

The contract was with certain parties who could not, save by the creation of the corporation, transfer their rights to any one else.

The corporation was to consist not only of such parties, but also of such others as they might associate with them as shareholders. The contract was only to be binding in the event of the *Act of Incorporation* being granted to the company in the form of schedule "A."

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Section 21 of said contract that shews this, is as follows :—

21. The company to be incorporated, with sufficient powers to enable them to carry out the foregoing contract, and this contract shall only be binding in the event of *an Act of incorporation being granted* to the company in the form hereto appended as schedule "A."

This legislation having been passed providing the Act of incorporation, the contract became thereupon immediately binding and the contractors then might or not as they saw fit seek for the immediate issue of the letters patent creating the corporation. They were not bound to do so. No part of this contract expressly rendered it necessary to do so.

Whatever may have been the design of this cumbrous method and the hiatus that was to exist between the legislation providing for, and the incorporation of, the company, it is important to mark the existence of this hiatus for it enables one more clearly to observe by the actual segregation of the contract from the incorporation and incorporating enactments that there may, and perhaps must, be attached to each of the provisions of the contract a meaning quite independent of anything else in schedule A which might never have been called into active existence.

I have no doubt that the parties who provided this condition of things had some real purpose in view and that it did not come about as mere accident.

Its resultant effect on the meaning we must give to the provisions of the contract is not to be waived off by saying that the promoters, though contractors, never intended or were intended to construct the railway. Their legal position by virtue of this contract was that they must, and that there was no other means of escape from its obligations than by and through the creation of a corporate body which the contract did not render by its express terms at all obligatory on them to bring into being.

Let us, therefore, interpret this contract as we can, and as far as we can, by itself as an independent document, but of course to be interpreted in light of what had gone before and the then surrounding conditions.

The first clause thereof interprets "The Canadian Pacific Railway" to mean the entire railway as described in 37 Vict. ch. 14, and the individual parties thereto as described by the words "The Company."

The words "The Company" being a term that might appropriately be applied to the corporation to be formed, when formed may have been used in anticipation thereof and designed to bear a reference as occasion called for it to the syndicate body or the corporate body, but this possible double use or meaning in no way ought to be permitted to confuse us.

The primary meaning of the term "The Company" in this contract, and particularly in every place where present contractual obligation or present privilege or franchise is designed to be expressed, must mean the individuals as contractors.

When those privileges and franchises have been transferred to and those obligations imposed on the corporate body by the occurrence of certain events, and the operation of the enactments that anticipated such events, and the Parliamentary assignment resultant therefrom has taken effect, the term "The Company" may be read then and thereafter in the same clauses or some of them as descriptive of or meaning the corporation.

Meanwhile the term "The Company" designates contractors who have undertaken certain work. It means no one else.

The Canadian Pacific Railway which is in question in this contract and interpreted therein as I have pointed out by reference to 37 Vict. ch. 14, is by sec. 1 thereof defined as follows:

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1. A railway, to be called "The Canadian Pacific Railway," shall be made from some point near and south of Lake Nipissing to some point in British Columbia, on the Pacific Ocean, both the said points to be determined and the course and line of the said railway to be approved of by the Governor in Council.

3. Branches of the said railway shall also be constructed as follows, that is to say:

First. A branch from the point indicated as the proposed eastern terminus of the said railway to some point on the Georgian Bay, both the points to be determined by the Governor in Council.

Secondly. A branch from the main line near Fort Garry, in the Province of Manitoba, to some point near Pembina, on the southern boundary thereof.

And by sec. 4 thereof it is enacted that

the branch railways above mentioned shall, for all intents and purposes, be considered as forming part of the Canadian Pacific Railway.

This railway was in process of construction by the Government when this contract was entered into.

The road to be built has been divided into four sections, of which the terminal points were in this contract more accurately defined than in 37 Vict. ch. 14. Two of these sections had been partially constructed and were by this contract allotted to the Government to complete, and the other two, called respectively the eastern and central sections, were by the contract assigned to the company for construction.

The Selkirk branch, from Selkirk to Pembina, was then completed. Sections 13 and 14 of the contract are as follows:

13. The company shall have the right, subject to the approval of the Governor in Council, to lay out and locate the line of the railway hereby contracted for, as they may see fit, preserving the following terminal points, namely: from Callander station to the point of junction with the Lake Superior section; and from Selkirk to the junction with the western section at Kamloops by way of the Yellow Head Pass.

14. The company shall have the right, from time to time, to lay out, construct, equip, maintain and work branch lines of railway from any point or points along *their main line* of railway to any point or points within the territory of the Dominion. Provided always, that before commencing any branch they shall first deposit a map and plan of such branch in the Department of Railways. And the Government shall grant to the

company the lands required for the road bed of such branches, and for the stations, station grounds, buildings, workshops, yards and other appurtenances requisite for the efficient construction and working of such branches, in so far as such lands are vested in the Government.

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It is this right from time to time to lay out, etc., branch lines of railway, etc., that is now said by the Canadian Pacific Railway Company here to continue for all time as theirs.

The question has been approached and argued as if the company had always existed, and as if it had been owner or in some way master of the main line from end to end of the original project, and as if the words "their main line" in sec. 14 meant the whole main line.

Had that been the case, and the corporate company had an existence when this contract was entered into, one could understand the reason for asserting that the term "*their main line*" means what is now claimed by that company.

Not only, as I have pointed out, is this not the case, but it was certain contractors only who were given the rights there and now in question. These contractors had by said sec. 13 only the right, subject to the approval of the Governor in Council, to lay out and locate two sections of the main line, and the subsidies of $25,000,000 and 25,000,000 acres of land that they were to get by sec. 9 of the contract were mainly given for that work, and were to be paid and granted as the work of construction proceeded. The subsidies were by subsec. (*a*) of sec. 9 appropriated in relation to said central and eastern sections on the respective bases as to land and money as therein appears.

What concerns us here is to observe that those subsidies were to be paid or granted as the work of construction of those two sections progressed and became in twenty mile sections completed, so as to admit of the running of regular trains thereon. These subsi-

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dies would by this process be exhausted by the time of the completion of these two sections, which time was fixed at 1st May, 1891.

If we remember the limited authority given the company by sec. 13 and that their contract for construction had nothing to do with what was beyond their two sections, and that, though by sec 7 they became entitled to running rights over the other sections being constructed and to be constructed by the Government as same were completed, they were not to have any right of property therein until the eastern and central sections had been completed by them, and then only as Government had completed its parts, which need not be until 1st May, 1891, we will be able to understand the very peculiar words "*their main line*" in this sec. 14. We see thus why what at first blush seems a strangely inapt expression is used. "*Their main line*" were the central and eastern sections built by them.

Its true meaning being thus seized, it is plain that their rights to build branch lines were limited to that part of which they were in a limited sense masters. This also furnishes obvious common sense reasons for giving powers to build branches from their main line, when one reflects on the probable needs of construction and the anticipated colonization of the country that the contractors were becoming so deeply interested in.

Without giving to these words "*their main line*" a meaning that they will not bear in light of what I have adverted to or attributing to the man who drafted this contract a poverty of language or ignorance of its precise meaning that he nowhere else indicates as one of his failings, I think these words must be held to refer only to the two sections that were then, as they

were constructed, to become the property of the company of contractors

We find on turning to sec. 11 provision for selecting lands along and for 24 miles deep "on each side of any branch line or lines of railway to be located by the company and to be shown on a map or plan to be deposited with the Minister of Railways."

This indicates nothing beyond a plain intimation that at least some branch lines of the nature indicated were expected to be built during and within the time when the company had to have their contract finished and be in a position to select their lands.

It is said, however, that all this does not, and that the contract does not, in express terms put a limit of time or place upon the expected construction of branch lines. I have indicated why I think the part or place was limited. If I am right in that limitation, I am unable to comprehend why it should exist in that limited way only unless we are to construe the grant of this power as one to be exercised only as incident to and during and not beyond the period fixed for the construction of those two sections in relation to which the parties were speaking and contracting, to be known as the eastern and central sections. Within such limits one could understand such a grant being made. Time and the existing condition of things would keep i s exercise within reasonable bounds. If it were intended as a general power for all time I can see many more reasons for its creation or existence in relation to the other sections after construction than I can in relation to those to which my interpretation confines it.

And why, if intended in the sense now contended for, should the extension of the then existing Selkirk and Pembina branch and branches from such an important branch have been omitted?

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We thus find the probable limitation of time, without imputing absurdity either in language, intention or construction.

Without formulating any rule or pushing any canon of construction too far for this complex matter of a grant, a contract and a Parliamentary concession rolled into one to bear, I think I am safe in saying that we need to seek for a reasonable meaning or intention and to avoid, if possible, that which would be repugnant to the then mode of thought and strangely inconsistent with the remainder of the contract.

That which I now suggest would not be unreasonable.

We find it by considering the contract as a whole, and the legislation before and with it, including Schedule A as a whole. We are forbidden by considering the Consolidated Railway Act of 1879, which was the deliverance of this same Parliament as to the general policy, of that time, in regard to railways and especially as to their branch lines, and the time within which main lines should be constructed, and in the application of that Act to the undertaking in question, to give this paragraph the meaning now contended for by the Canadian Pacific Rly. Co.

The lines upon which this contract was framed had been laid down by 37 Vict. ch. 14, in every essential feature.

Except in regard to the extent of the subsidies and the financial arrangements based thereon, speaking in a comprehensive and general sense, there was no material departure from those lines unless we are to interpret this contract as conferring upon the contractors the right (as now asserted) forever to build branch lines.

Why should we suppose such a radical change of purpose or of policy? Why when decided upon, if

ever decided upon, should we find it conferred by a grant of a personal and non-assignable franchise and not expressly given to the perpetual corporation as such?

I think we should be slow to attribute to Parliament an assignment forever of all right of control over the power of a railway company, building a line of such magnitude as this one, to build when, where and how it saw fit such branch lines as the company should decide to build. The aspect of national importance, from both the political and commercial points of view, seems also to forbid such a purpose, and especially such a sudden change of purpose.

Of course, even if the purpose, so repugnant to all this, and the thought of that time, were yet plainly expressed we must give effect to it. It has not been so expressed unless we impute to the words "from time to time" as used here the meaning of "forever." The contrary to my mind was intended, if not expressed in words, and the power of building branches was limited to those sections that the contractors undertook personally to build, and to the time of limitation for that building, and incidental thereto, as part of the whole, that whole being the completion and delivery over of the parts and branches so built to the future controlling power that from the 1st May, 1891, if not earlier, was to use the whole road.

It would seem from all this not only that the intention of the parties to the contract is discovered by reading it with regard to these limitations of time and space for the operation of the powers given by sec. 14 but also that full effect is given to the words "from time to time" when read to mean so long as the constructive period that these contractors might possibly have something to say in regard to the subject matter, and not to mean from time to time forever.

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A remarkable feature of this matter is that in so far as affecting the then present and soon or immediately to become operative contractual obligations, privileges or franchises this contract and the Parliamentary transfer thereof are implicitly relied upon to execute the purpose of the parties, but when it comes to the exercise of a right that would come into or might only come into being, or rather that the parties intended should have a right to exist and become at a later period a perpetual right, vested in the corporate company, the parties to this contract do not rely upon this contract, ample as are its powers, but in regard to its accruing future rights of paramount and permanent importance they are careful to repeat the provisions therefor in the legislation.

See for example the *repetition* in sec. 3 of the Act, of the contract conditions in regard to the perpetual and efficient operation of the railway and the money and land grants, and in sec. 5 of the Act of the future running rights over the road and ownership of same as completed, and of the whole when completed.

The deposit, the standard of construction, the times for completion, the grants of land for road bed &c, the extinction of Indian title, the restriction of competitive lines, some of the bonding provisions, and the right to build branch lines, are all treated alike as of a temporary character and permitted to rest upon the contract, also temporary, and are not repeated elsewhere. That which is not necessarily legislative in its character but merely contractual is governed by the contract. That which is to abide for all time is as one would expect treated as needing direct legislation.

I recognize that this line of distinction is not adhered to in every respect and literally, but when we look at the contract and the legislation I think there exists a clear line of demarcation such as I have indicated

between what was temporary in character and that which was to be permanent, and we find such an important matter as the construction of branch lines omitted entirely from the permanent side of the line of demarcation. Why should it from its importance and permanency not find its place there?

All the Syndicate had acquired by this contract was transferred by the operation of secs. 3 and 4 of schedule "A," as soon as the letters patent were issued and the provisions of that schedule became operative, but that transfer did not enlarge the power to build branches beyond what had been possessed by the contractors. It transferred a right which at best could not have extended beyond the lives or surviving life of those to whom it was granted as a personal right, license, or franchise. I have to repeat that it could never extend by this contract to their assigns, for they were not named in the instrument framing the personal grant.

This being the only alternative limitation of the grant indicates again in another way the intention of the contracting parties that the right to build such branch lines should exist only in relation to and during the process of construction of what they had respectively undertaken should be done by each.

Now, coming to the consideration of sec. 15 of schedule "A," which is as it were a summing up of the whole matter, and seems conclusive upon close analysis thereof as binding us to adopt a temporary and not a perpetual time for the existence of the right to build those branch lines, sec. 15 is as follows:—

15. The company may lay out, construct, acquire, equip, maintain and work a continuous line of railway, of the gauge of four feet eight and one-half inches; which railway shall extend from the terminus of the Canada Central Railway near lake Nipissing, known as Callander Station, to Port Moody in the Province of British Columbia; and also a branch line of railway from some point on the main line of railway to Fort William on

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Thunder Bay ; and also the existing branch line of railway from Selkirk, in the Province of Manitoba, to Pembina in the said province ; and also other branches to be located by the company from time to time as provided by the said contract,—the said branches to be of the gauge aforesaid ; and the said main line of railway and the said branch lines of railway, shall be commenced and completed as provided by the said contract ; and together with such other branch lines as shall be hereafter constructed by the said company, and any extension of the said main line of railway that shall hereafter be constructed or acquired by the company, shall constitute the line of railway hereinafter called The Canadian Pacific Railway.

This, analysed, provides as follows :

(1.) " A continuous line of railway " &c.

(2.) " A branch line of railway from some point on the main line of railway to Fort William on Thunder Bay."

(3.) The existing branch line of railway from Selkirk in the Province of Manitoba to Pembina in the said province.

(4) And also " other *branches to be located* by the Company *from time to time as provided by the contract.*"

4a. " The said branches to be of the gauge aforesaid."

(5) " And the said main line of railway and *the said branch lines of railway* shall be commenced and *completed as provided by the said contract.*

(6) " And together with such other branch lines as shall be hereafter constructed by the said Company, and any extensions, &c..... shall constitute the line of railway hereinafter called the Canadian Pacific."

Observe that there are only two specific branches named, of which one is already existing and not needing " to be located " or built.

When we ask the meaning of the 5th paragraph of this analysis we find the plural—" branch lines of railway "—used. It cannot, therefore, only refer to the specified branches preceding it, as there is only one " to be commenced and completed." It must, therefore, of necessity include another or others.

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What other or others? Those that "*shall be commenced and completed as provided by the said contract*, is the only possible reply, to begin with. And they can, in the next place, only be those (in the 4th paragraph of analysis) "*other branches to be located by the Company from time to time as provided by the contract.*"

Whether I have made my meaning clear or not, this seems to me as simple as the simplest mathematical problem. It is said, however, that though this be taken as the correct rendering of the language used, the words "commenced and completed as provided by the said contract", do not refer to branches, or at all events to those "to be located" branches. It cannot refer to any branches unless it be those branches to be located, for the contract does not name or refer by name to the branch here specified to Fort William at all.

Moreover, the Fort William branch was not off or from the eastern or central section at all, and if what is now contended for by the Canadian Pacific Railway Company ever was supposed to have a foundation in fact, there was no necessity for referring in this incidental way to the Fort William branch. If the company had a right by the terms of the contract to build any branches they saw fit, there was no necessity for specially describing or apparently thus enabling them to build the Fort William branch.

No other branch is, or I submit can be, in question if those here referred to as "to be located" do not answer the description.

Are we then, not being able to find something to which to apply those words (in paragraph 5 of this analysis) to read the paragraph as if the words "and the said branch lines of railway" had no existence or meaning?

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Is it to escape, as the only way of escape, from the imperative words "*shall be commenced and completed as provided by the said contract*" that we are to resort to that alternative?

I think that they should be read in light of what I have adverted to as applicable to what may or shall have been done within sec. 14 of the contract, and that only. We thus, and only thus, can give effect in a reasonable and natural way to every word in this sec. 15.

And when we have done so, we look back to the contract to find what is meant by these words "completed as provided by the said contract," which plainly imply a period of completion.

I think the 6th paragraph of this analysis relates to the branch lines which the Railway Act gives power to construct, and such other lines as might lawfully be constructed by or acquired by the corporate company.

Such anticipatory words are in such legislation useful and were appropriately used here.

I am in this view not troubled about the Algoma branch legislation, the Sudbury branch legislation, or any other legislation relating to those branches built or partly built within the time limit I have suggested, nor am I in this result troubled about small branches within the powers given by the Railway Act of 1879.

What is relied upon as happening since May, 1891, as confirmatory of the pretentions now put forward by the company, is for the most part thus disposed of, and what remains is of an administrative character that ought not to influence any court in the interpretation of an Act of Parliament. I am unable to understand why some of these incidents have been allowed to trouble us at all. The branches running off the

branch lines, as, for example, the Souris Branch, surely cannot help us to interpret the powers of the company in regard to branch lines running from a point on their main line.

What was done in relation to these subsidiary branches illustrates when closely examined a variety of cases such as a parliamentary beginning within the time, a carelessness or audacity as to whether powers had or had not existed after the time expired, and finally a statute expressly granting the power by 63 & 64 Vict., ch. 55, to build just the same sort of branch lines if not the same as are here expressly put before us as exemplifying alleged parliamentary recognition, or extensions thereof.

The company petitioned Parliament for this grant of new powers, and in this same Act there is provided, expressly as it seems to me, that two lines off and from the main line shall be built by virtue of the powers therein given.

It looks very much as if in 1900 the company had abandoned, if indeed it ever seriously had before then put forward, the contention here in question.

The Arrow Lake branch is apparently part of the Kootenay railway scheme, for which there was independent legislation, and by 54 & 55 Vict. ch. 71, s. 2, as well as a preceding section, this company is empowered and protected

The Pheasant Hills Branch grant was to be commenced within two years from 1st August, 1903, completed before the end of four years from that date, or as fixed by the Governor in Council, and to be constructed according to the description, conditions, and specifications approved by the Governor in Council on report of the Minister of Railways and Canals, and specified in a contract with the Minister, who is empowered, with approval of the Governor in Council, to make it,

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and the location of the line is to be subject to the approval of the Governor in Council, and by sec. 6, the Governor in Council may at all times secure to other companies running powers and reasonable facilities for enjoying same equally, etc. And the Governor in Council is to have control over all tolls, etc.

Indeed much time spent on this branch of the case following up the data given, so far as given, leads me to the conclusion that all the grants relied upon as some recognition of the existence of the powers now claimed were conditional upon terms to be imposed by the Governor in Council. And where the branch line involved a bonding power, as in the case of the Kootenay and other companies, no reliance was placed upon the powers now claimed and existing, but parliamentary sanction or confirmation was sought and got for what was to be done.

I am quite aware that much of the reasoning I have adopted in reaching the conclusions I have is not in accord with that by which some of the former members of this Court arrived at their conclusions in the case of *Canadian Pacific Railway Co.* v. *Major* (1), which might have been supported on other grounds, and also does not necessarily govern us in this case.

With great respect and regard for those who decided that case, I take the liberty of thinking here that in some respects the arguments presented to us now were not presented then. It was admitted by counsel that if the time had elapsed within which the power to build branches was given, the question of the extent of that power need not be answered.

I therefore confine myself on this point, without concealing my opinion, to saying in reply to question No. 1, that the time has expired within which such branch line might have been constructed.

(1) 13 Can. S. C. R. 233.

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And as to the third question, I think in view of the great length of time that has elapsed, in my judgment, since any such power existed in the company and nothing as to the work in question here done under it, or asserting it, save filing of plans in question here, that it became the duty of the Board of Railway Commissioners to consider and determine the question of right, or extent of right, existing in the company when they applied to that Board and within their exercise of powers to determine, and that the Board could hear any one interested as the James Bay Railway Co. seemed to be here; and that Company as well as the Board had the right to take the objection taken.

This is a case of the limitation of the company's powers by time and space that were as I find defined.

It raises none of the questions that might have arisen in regard to work that had been only partly done when the time expired.

Solicitor for the Canadian Pacific Railway Co.:

*A. R. Creelman.*

Solicitors for the James Bay Railway Co.:

*Blake, Lash & Cassels.*

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*April 7.
*May 2.

HOWARD BENALLACK AND EDWARD LAFRANCE (PLAINTIFFS) ..... } APPELLANTS;

AND

THE BANK OF BRITISH NORTH AMERICA, EDWARD O. FINLAISON AND CHARLES BOSSUYT (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE TERRITORIAL COURT OF THE YUKON TERRITORY.

*Preferential assignment—Debtor and creditor—Pressure—Knowledge of insolvency—Yukon Con. Ord.* 1902, *ch.* 38, *ss.* 1 *and* 2.

The effect of the second section of the Yukon ordinance, chapter 38, Consolidated Ordinances, 1902, is to remove the doctrine of pressure in respect to preferential assignments and, consequently, all assignments made by persons in insolvent circumstances come within the terms of the ordinance.

In order to render such an assignment void there must be knowledge of the insolvency on the part of both parties and concurrence of intention to obtain an unlawful preference over the other creditors. *Molsons Bank* v. *Halter* (18 Can. S. C. R. 88); *Stephens* v. *McArthur* (19 Can. S. C. R. 446); and *Gibbons* v. *McDonald* (20 Can. S. C. R. 587) referred to.

APPEAL from the judgment of the Territorial Court of the Yukon Territory, *in banco*, affirming the judgment of Dugas J., at the trial dismissing the plaintiffs' action with costs.

The case is stated as follows, by Mr. Justice Craig, in delivering the judgment appealed from:

"This is an action brought by the plaintiffs to set aside several instruments as being void against creditors under chapter 38 of the Yukon Consolidated Ordinances, and also asking that the defendant bank be declared a trustee for Bossuyt of the property covered by the mortgage and assignments mentioned;

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

that Finlaison be declared a trustee of certain property conveyed to him; that the bank be ordered to account for all the goods mortgaged or transferred and the moneys or proceeds realized by said bank under those various assignments; and a general account.

"The case has two main branches, one in which the plaintiffs attack the chattel mortgage, assignment of book accounts and notes, the other attacking the rate of interest charged by the bank and asking for an account of that interest and an allowance of the same, taken over seven per cent, for the benefit of the creditors.

"The pleadings set out that the plaintiffs were execution creditors on the 28th June, 1902, and simple contract creditors for a long period before that date; that the defendant Bossuyt was insolvent in October, 1901; that on the 1st of November, 1901, Bossuyt made a chattel mortgage to the bank to secure a past due debt of $41,550; that the bank took immediate possession of that property and disposed of it, this property consisting mainly of butchers meats; that land transferred to Finlaison, who was acting manager of the bank, was transferred to him as trustee to secure the same debt; that Bossuyt assigned debts in April and May, 1902, in all amounting to $20,000; that he indorsed and transferred promissory notes amounting in all to about $12,000 to secure the same debt; that no consideration was given but security for prior debts; that since October, 1898, Bossuyt borrowed from the bank moneys at 24 per cent per annum and afterwards at 18 per cent per annum, and that the bank wrongfully collected interest over and above the rate allowed by the Banking Act of 7 per cent; that during this time Bossuyt was insolvent to the knowledge of the bank and that assignments were made voluntarily and with intent to defeat the plaintiffs and other creditors and were taken by the bank with such intent and to give

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a preference and had the effect of giving a preference to the bank over other creditors; that the assignments were made fraudulently for the purpose of defeating creditors and had that effect and are void; that if the assignments were good an account should be taken of the interest, and only 7 per cent allowed.

"The defendants deny these allegations generally, alleging that the book debts of Bossuyt, chattel mortgages, etc., and other assignments were taken as extra precaution and additional security; that the notes and book debts were transferred as collateral in the ordinary course of business; that the interest paid was settled and the account closed and the interest over and above the legal rate was voluntarily paid by Bossuyt long before action; and they allege that the execution creditors have no status to ask for an account, there being no privity between them and the bank in the matter of the interest; that the plaintiffs are not creditors within the meaning of the Act respecting preferential assignments.

"The evidence, I think, shews the following facts: That Bossuyt, the judgment debtor, in 1898 and 1899, was owing the plaintiffs a balance of $28,200; that the balance remains unpaid to date; that Bossuyt also owed Davies $9,000, secured by warehouse receipts before the assignment was made, and that he also owed one VanRass $500; and, further, that he owed Lafrance $17,000 in the fall of 1901; that from 1899 down he continued to borrow large sums of money from the bank amounting in all on the 1st of November, 1901, to about $41,000, there being a current note then matured of about $5,000 which was unpaid, not included in the then security; that on the 1st of November he gave a chattel mortgage to the bank covering stock of meat and fowl situate in Dawson; that between that time and April and May,

1902, the bank made other advances to him, and that additional security was taken by assignment of book debts and promissory notes. After the taking of the chattel mortgage in November Bossuyt was allowed to sell the meat. For about a month he took it away without the leave of the bank. The bank manager observing this required the book-keeper, one Peck, who was acting in the service of Bossuyt, to keep check of the meats and pay over the proceeds to the bank, which was done. Bossuyt had a great deal of other meats in his warehouse; the meat of one Burns, about $8,000 worth or more, for which the bank advanced the money on the purchase; also the meat which was covered by a warehouse receipt to Davies, all of which was sold and turned into the general account of Bossuyt without any distinction or earmarking. Bossuyt, clearly in fraud of Davies, disposed of the entire stock of meat which Davies held as security for his advance and deprived him entirely of his money, without any knowledge on the part of the bank, however, and this money was paid over along with the other money realized from the sale of the meat which was purchased from Burns with the $8,000 advanced by the bank. During this time I take it that Lafrance was well aware (at least I draw that inference from the evidence) that Bossuyt was dealing with the bank; he never mentioned to the bank the Bossuyt indebtedness to him even on the occasion when he indorsed a $9,000 note for Bossuyt in the fall of that year, which the bank discounted and paid over to him, although at that time it is quite clear from the evidence that the manager of the bank informed the plaintiff, Lafrance, that he had advanced up to the limit of Bossuyt's credit and assets, yet Lafrance never mentioned to the bank anything of his debt. It is also absolutely clear from the evidence

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that Bossuyt never in any way informed the bank of his other liabilities and the bank had no knowledge whatever in any way of the liabilities of Bossuyt beyond that to themselves. The manager of the bank in March, 1902, became aware of the Davies note of $9,000. It is quite clear that the bank charged 24 per cent interest on all the advances made up to December, 1901, and then the rate was reduced to 18 per cent. It is also in evidence that Bossuyt did not tell Lafrance of his large debt to the bank and Lafrance, it appears, never inquired although he knew that Bossuyt had dealings with the bank and that the bank required his indorsement before advancing $9,000.

"That the bank was ignorant of the financial condition of Bossuyt is quite apparent from this, that the manager swears that if he had been requested he would have loaned Bossuyt the further $9,000 to pay off the Davies note upon the security of the assets which he believed Bossuyt had. Bossuyt's evidence is not at all satisfactory, but this can be clearly drawn from it that he never informed the bank of his position and that the bank was ignorant of his real position; that he anticipated being able to pull through at the time of giving the chattel mortage; that he went into a statement of his effects with the bank at that time, with the manager, and together they estimated he had about the sum of $95,000, and in view of what the bank knew of his position from that statement and otherwise, and being aware only of their own debt, Bossuyt was clearly not insolvent to the knowledge of the bank. Bossuyt carried on his business until June 28th, selling his meat. as I have already recited, mixing all the moneys from the various sources of supply in the one general account. The bank certainly at that time became anxious about the large advances they were making and felt they should have

security. The stock as valued by Bossuyt and the bank was taken at wholesale prices. Bossuyt to-day cannot give any very clear estimate of what he had, but he does not deny going over his stock with the manager of the bank and that the estimate that the bank manager now gives must be taken to be what was arrived at at that time. Bossuyt admits that Lafrance knew he was borrowing from the bank in the fall of 1901 to pay for meat, and in that fall Bossuyt bought a very large consignment of meat from Lafrance, about $27,000 worth, on which he paid Lafrance $17,000 in cash borrowed from the bank, the balance being paid by a note discounted by Bossuyt and indorsed by Lafrance which is the note I previously referred to. Some considerable losses, which are not very clearly sworn to, but certainly losses which seriously affected Bossuyt, occurred in the winter of 1901 and 1902. Bossuyt says that so far as the bank knew he was solvent in 1901. Bossuyt admits signing the cheque monthly for the interest, as called upon, or otherwise. He says generally the cheques were written in the bank by the manager and he signed them. These cheques, as appears by the exhibits, ran from June 29th, 1901, on to February 8th, 1902, the first cheque being for $6,054, and being ear-marked "Interest on notes to 30 June", and so on at various dates monthly from that time on cheques were given to the bank on themselves and paid out of the general account which Bossuyt had whenever money was on hand. Some of the book debts assigned certainly were proceeds of the meat mortgaged and some of the notes the same, as well as other book debts contracted during the carrying on of Bossuyt's business.

Lafrance was called and his evidence was just about as I have given it summarized. He did not learn of Bossuyt's mortgage to the bank until February, 1902.

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He knew of several shipments all paid through the bank; he admits telling Finlaison that Bossuyt was all right, and that he never mentioned to the bank manager any claim of his against Bossuyt.

"The action was based upon the law contained in chapter 38 of our Ordinance which I had better give in full. Section 1 says:—'Every gift, conveyance, assignment or transfer, delivery over of payment of goods, chattels or effects or of bonds, bills, notes, securities or of shares, dividends, premiums, or bonuses in any bank, company or corporation made by any person at any time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the verge of insolvency, with intent to defeat or delay or prejudice his creditors, or to give to one or more of them a preference over his other creditors or over any or more of them, or which has such effect, shall, as against them be utterly void.' Section 2: 'Every such gift, conveyance, assignment, transfer, delivery over or payment, whether made owing to pressure or partly owing to pressure or not, which has the effect of defeating, delaying or prejudicing creditors or giving one or more of them a preference, shall, as against the other creditors of such debtor, be utterly void.' The title of the Bill is an 'Ordinance respecting Preferential Assignments', and the marginal note to section 1 is: 'Fraudulent and Preferential Assignments' and the marginal note to section 2 is the word 'Pressure' at the foot. That section 2 was passed after the decision of *Molson's Bank* v *Halter* (1)."

*Ewart K. C.* for the appellants.

*Shepley K. C.* and *Christie* for the respondents.

The judgment of the court was delivered by

(1) 18 Can. S. C. R. 88.

IDINGTON J.—It is urged by the appellants that the amendment by sec. 2 of ch. 38 of the Yukon Ordinances consolidated (1902) is such as to distinguish this case from the cases of *Molsons Bank* v. *Halter* (1), followed by *Gibbons* v. *McDonald* (2), that interpreted the R S. O. 1887, ch. 124, and *Stephens* v. *McArthur* (3), that interpreted the Manitoba Act 49 Vict. ch. 45, sec. 3, where the words used are identical with those of the Ontario Act.

The Yukon Ordinance before its amendment in question was almost identical with those of the Ontario and Manitoba statutes upon which these cases were respectively decided. The amendment now in question consists in adding to the 1st section the following as sec. 2:

2. Every *such* gift, conveyance, assignment, delivery over or payment whether made *owing to pressure* or *partly owing to pressure or not*, which has the effect of *defeating, delaying*, or *prejudicing creditors* or *giving one or more of them a preference* shall *as against the other creditors of such debtor be utterly void.*

This was passed after the decision in *Molsons Bank* v. *Halter* (1).

Does it do more than remove the question of pressure out of consideration in arriving at a proper conclusion in a case falling within the first section which was practically passed upon by the decisions referred to? I think not. "Every *such* gift, &c." evidently means that class or those classes designated by the preceding section.

Take the doctrine of pressure out of the question by force of this amendment as it was taken by the facts in the case of *Gibbons* v. *McDonald* (2) and we have nothing left to distinguish this case from that. There the whole of the debtor's assets had been assigned as it is alleged by the appellants is the case here.

(1) 18 Can. S. C. R. 88. (2) 20 Can. S. C. R. 587.
(3) 19 Can. S. C. R. 446.

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Idington J.

I cannot read this amending section 2 of the Yukon Ordinance as doing more than striking at the doctrine of pressure. If the words "whether made owing to pressure or partly owing to pressure" had been inserted in the first section just after the word "intent" the same legal effect would have been produced.

The only other thing in this amending section is a repetition of the words "which has such effect." That repetition adds nothing to the force of the words in the first section if we are to be governed, as I think we must, by the interpretation given by the cases I have referred to and the reasoning which lead to their decision. I need not refer at length to that reasoning. It is clearly set forth in the judgments of Mr. Justice Strong, especially at pp. 452 & 453 of *Stephens* v. *McArthur* (1). It would seem as if there the removal of the doctrine of pressure, as an element of the reasoning leading to the conclusion reached, had been anticipated. It was, therefore, not necessary when the case of *Gibbons* v. *McDonald* (2) arose, without any fact in it upon which the doctrine of pressure could rest, to repeat this reasoning, and the same learned Justice simply contented himself with referring to his former judgment and the majority of the court concurred therein. It was there shown that the preference prohibited was a voluntary preference and hence a fraudulent preference.

And if a fraudulent preference to whom is the having such a purpose to be attributed?

Is it enough to shew that the assignor may have had such an intent?

Must not the assignee as well as the assignor be a party to the fraudulent intent?

(1) 19 Can. S. C. R. 446. (2) 20 Can. S. C. R. 587.

Such would seem to be the result of a long line of decisions upon which the commercial world has had a right to act for a long time past. And though there may not have been any express decision of the point upon this legislation in this court the late Chief Justice, Sir William Ritchie, in *Gibbons* v. *McDonald* (1), at page 589 indicates that in his view there must be

> a concurrence of intent on the one side to give and on the other to accept a preference over other creditors.

Counsel for the appellants properly conceded that the evidence here did not show knowledge on the part of the bank such as would enable us to find this concurrence of purpose.

Until the legislature obliterates the element of intent in such legislation and clearly declares that, quite independently of intent, the preferential result or effect of the transaction impeached is to govern, it will be exceedingly difficult to arrive at any other conclusion in cases of this kind. The results that might flow from such legislation ought not to be brought about without such purpose being most clearly expressed by the legislature.

The appellants as execution creditors only, (not suing for all creditors), assert some rights of a novel character which, in the view I take, it is unnecessary to dispose of or pass upon.

I think the appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellants: *R. L. Ashbaugh.*

Solicitors for the respondents: *Pattullo & Ridley.*

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(1) 20 Can. S. C. R 587.

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*April 5,6.

*May 2.

CHANDLER AND MASSEY, LIMITED (DEFENDANTS)..... } APPELLANTS.

AND

THE KNY-SCHEERER COMPANY (PLAINTIFFS)..... } RESPONDENTS

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Contract—Sale of goods—Lowest wholesale prices—Special discount.*

By contract in writing whereby The C. & M. Co. agreed, for three years from the date thereof, to purchase for their business surgical instruments manufactured by The K.-S. Co. only, the latter contracted to supply their products at "lowest wholesale prices" and for all goods furnished from New York to allow a special discount of 5 per cent from the prices marked in a catalogue handed over with the contract.

*Held*, that under this agreement The K.-S. Co. could allow to purchasers of their goods in large quantities a greater discount from the wholesale prices than 5 per cent without being obliged to give the same reduction to the C. & M. Co.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the plaintiff

The material facts are stated in the above head-note and in the written opinions of the judges on this appeal.

*R. F. Smith K.C.* and *Blackstock K. C.* (*Riddell K. C.* with them) for the appellants, referred to *Lindley* v. *Lacey* (1); *Wilson v. Windsor Foundry Co* (2); *Dunsmuir* v. *Lowenberg, Harris & Co.* (3); *Bank of England* v. *Vagliano* (4).

*PRESENT.—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

(1) 17 C. B. N. S. 578.
(2) 31 Can. S. C. R. 381.
(3) 34 Can. S. C. R. 228.
(4) [1891] A. C. 207.

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*Shepley K.C.* and *Middleton* for the respondents cited Ewart on Estoppel pp. 68-70; *Jorden* v. *Money* (1); *Chadwick* v. *Manning* (2).

SEDGEWICK J.—I am of opinion that the appeal should be dismissed.

GIROUARD J.—I concur with hesitation.

DAVIES J.—After a careful study of the evidence given by the respective parties and their witnesses and the judgments of the courts below I am of opinion that this appeal should be dismissed with the usual results.

I agree with the several findings of the trial judge as to the effect of the verbal conversations between the parties which preceded the preparation and entering into of the agreement of January and of the subsequent correspondence of February.

The written agreement entered into by the parties after prolonged interviews and consultations and from notes or memoranda prepared by the plaintiffs themselves contained no stipulation as to the establishment by the plaintiffs in Canada of a Canadian wholesale stock, and the conversations between the parties coupled with the written correspondence afterwards entirely failed in my opinion to establish any such collateral agreement. There were, no doubt, repeated statements on the part of the plaintiffs that it was their intention, part of their business policy, to establish such a branch, but there was no contract on their part binding them to do so. The plaintiffs, I think it is established, fully intended to do so as part of their business policy and the defendants assumed that they would and acted on the assumption. But it

(1) 5 H. L. Cas. 185 at p. 210. (2) [1896] A. C. 231.

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Davies J.

was quite open to the plaintiffs on the agreements made between the parties to change their minds and their policy as regards the establishment of this Canadian stock as subsequent changes of circumstances seemed to make it desirable for them to do so, without being liable to the defendants for any damages.

I do not think it necessary to go into the facts in detail as they are recited at length by the Chief Justice who tried the case and fully summarized in the judgment of the Court of Appeal. With these judgments on this branch of the case I fully concur. See the cases of *Jorden* v. *Money* (1); *Rhodes* v. *Forwood* (2); *The Queen* v. *Demers* (3); *Chadwick* v. *Manning* (4); Ewart on Estoppel, pp. 689.

This conclusion practically disposes of the appeal, but there were some minor questions relating to the delivery of the catalogues and to the correctness of the prices at which the goods were charged defendants which were argued at some length.

On the question of the delivery of the catalogues I never entertained any doubt as to the conclusion of the Court of Appeal being the proper one.

On the other question respecting the wholesale prices charged defendants I have had considerable doubt. The contract provided for the sale by the plaintiffs to the defendants of their products "at lowest wholesale prices." The clause reads as follows:

> The Kny-Scheerer Company will supply Chandler & Massey, Limited, their products at lowest wholesale prices.
>
> For all goods to be furnished from New York a special discount of five per cent will be allowed as a special inducement from the prices marked in the confidential wholesale catalogue which is handed to them with this contract. For all goods to be furnished from Montreal, either from Canadian stock or upon direct shipment from European factory, new

(1) 5 H. L. Cas. 185.
(2) 1 App. Cas. 256.
(3) [1900] A. C. 103.
(4) [1896] A. C. 231.

prices will be made as soon as possible on the entire line and be subjected to the same discount.

It is not contended by the defendants that they were charged higher prices than those mentioned in the catalogue for the goods purchased in New York, or that the new prices charged for the goods obtained by defendants from the Canadian stock of plaintiffs were higher than the lowest wholesale prices charged other customers of plaintiffs. The discount to be allowed off the prices mentioned in the catalogue as also off those "new prices to be made" on Canadian stock was fixed at five per cent and the defendants' contention, as I understand it, is that inasmuch as the evidence shewed the plaintiffs had allowed to a few of their customers who purchased their goods in very large quantities a greater discount than five per cent off the wholesale prices they, the defendants, were entitled to the increased or greater discount under the terms of their agreement.

The plaintiffs on the other hand submitted, and the trial judge and Court of Appeal upheld the submission, that while the true construction of the agreement entitled the defendants to the goods purchased by them at the lowest wholesale prices it did not entitle them to any higher discount than the five per cent expressly stipulated for and that nothing in the agreement prohibited the plaintiffs from allowing to other purchasers of their goods, not of the same class as defendants but buyers of very much larger quantities of goods, a greater discount than the stipulated discount provided for defendants without allowing them to share in such increased discount. In other words, so long as it was not a mere cloak or device for covering up a sale of goods at lower wholesale prices than those charged defendants, but was a *bonâ fide* discount allowed in consideration of the quantity of goods pur-

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chased, the plaintiffs could allow the additional discount beyond the five per cent without being compelled to concede same to defendants.

I fully agree with the courts below that the prices and discounts charged and allowed by plaintiffs in their dealings with their branch firms cannot be considered in determining the meaning of the clause.

The Court of Appeal seem to have considered that the parties themselves had by their actions and conduct put a construction on the agreement adverse to that now contended for by defendants and that in view of the dealings between the parties extending over a period of twenty months, and the numerous disputes and adjustments of the charges in the invoices rendered during that time from plaintiffs to defendants, it was now too late for the latter to attempt to open up these prices thus adjusted, fixed and settled by the parties.

While entertaining doubts as to the proper construction of the clause I do not feel that I would be justified under the facts in reversing the conclusions of the courts below, which I cannot say are clearly erroneous.

The appeal should be dismissed.

NESBITT J.—Had it not been that no useful purpose is attained by dissenting, I should have held that, in my view, the contract was based upon the agreement that an export stock should be established and maintained in Montreal and afterwards in Toronto. I do not think it was intention; I think it was bargain and I view the case as just one more instance of a party suffering for the general good by the enforcement of the salutary rule that business men should be careful to have their understandings in writing. *Jorden* v. *Money* (1) is relied upon by the respondent as shewing that no matter how strongly one represents he intends

(1) 5 H. L. Cas. 185.

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to do so or so and induces another to act to his prejudice, he can, in breach of all principles governing men of common honesty, abandon his intentions. Such is the law, apparently, but I would unhesitatingly say, here, it was not intention but bargain. However, as the majority are for affirming I concur, as I assume I must be in error in my view.

Idington J. concurred in the dismissal of the appeal.

*Appeal dismissed with costs.*

Solicitors for the appellants: *Beatty, Blackstock, Fasken, Riddell & Mabee.*

Solicitors for the respondents: *Macdonald, Shepley, Middleton & Donald.*

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*May 2.
*May 15.

IN RE

# RAILWAY ACT AMENDMENT, 1904.

## IN THE MATTER OF THE JURISDICTION OF PARLIAMENT TO PASS SECTION 1 OF 4 EDW. VII., CH. 31.

REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL.

*Constitutional law—Railway company—Negligence—Agreements for exemption from liability—Power of Parliament to prohibit.*

An Act of the Parliament of Canada providing that no railway company within its jurisdiction shall be relieved from liability for damages for personal injury to any employee by reason of any notice, condition or declaration issued by the company, or by any insurance or provident association of railway employees; or of rules or by-laws of the company or association; or of privity of interest or relation between the company and association or contribution by the company to funds of the association; or of any benefit, compensation or indemnity to which the employee or his personal representatives may become entitled to or obtain from such association; or of any express or implied acknowledgement, acquittance or release obtained from the association prior to such injury purporting to relieve the company from liability, is *intra vires* of said Parliament. Nesbitt J. dissenting.

SPECIAL CASE referred by the Governor-General-in-Council to the Supreme Court of Canada for hearing and consideration.

The following is the case submitted:—

*Extract from a Report of the Committee of the Honourable the Privy Council approved by His Excellency the Governor-General on 28th December*, 1904.

On a memorandum dated 14th December, 1904, from the Minister of Justice recommending, pursuant to the authority of and as directed by the Act passed in the fourth year of His Majesty's reign, Chapter 31,

*PRESENT:—Sir Elzéar Taschereau C. J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

intituled "An Act to amend the Railway Act, 1903," that the question of the competency of the Dominion Parliament to enact the provisions set forth in the first section of said Act be submitted to the Supreme Court of Canada for its determination.

The Committee submit the same for approval.

(Sgd.) JOHN J. McGEE,
*Clerk of the Privy Council.*

*Extract from a Report of the Committee of the Honourable the Privy Council, approved by His Excellency the Governor-General, 13th January, 1905.*

On a report dated 9th January, 1905, from the Minister of Justice, submitting that by an order-in-council dated 28th December, 1904, the question of the competency of the Dominion Parliament to enact the provisions set forth in the first section of the Act passed in the fourth year of His Majesty's reign, Chapter 31, intituled "An Act to amend the Railway Act, 1903," was ordered pursuant to the authority and as directed by the said Act to be submitted to the Supreme Court of Canada for its determination.

The Minister states that inasmuch as it is provided by the second section of the said Act that the said Act shall come into force on a day to be named by a proclamation, which event has not yet happened, doubts may arise as to the validity of the said reference and the powers of the Supreme Court of Canada to determine the questions thereby referred.

The Minister accordingly recommends that the question of the competency of the Dominion Parliament to enact the provisions set forth in the first section of the said Act passed in the fourth year of His Majesty's reign, Chapter 31, intituled "An Act to amend the Railway Act, 1903," be referred to the Supreme Court of Canada for hearing and considera-

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tion pursuant to the provisions of the Revised Statutes of Canada, Chapter 135, "An Act respecting the Supreme and Exchequer Courts," as amended by 54 and 55 Victoria, Chapter 25, intituled "An Act to amend Chapter 135, of the Revised Statutes of Canada, intituled "An Act respecting the Supreme and Exchequer Courts."

The Committee submit the same for approval.

(Sgd.) JOHN J. McGEE,
*Clerk of the Privy Council.*

The Minister of Justice.

The provisions set forth in the first section of the Act referred to in the said Reference, being Chapter VI. of 4 Edward VII., are as follows :—

No agreement with employees to relieve company from liability for personal injury.

I. Notwithstanding anything in the Act heretofore passed by Parliament, no railway company within the jurisdiction or legislative power or control of Parliament shall be relieved from liability for damages for personal injury to any workman, employee or servant of such company, nor shall any action or suit by such workman, employee or servant, or, in the event of his death, by his personal representatives, against the company, be barred or defeated by reason of any notice, condition or declaration made or issued by the company, or made or issued by any insurance or provident society or association of railway employees formed, or purporting to be formed, under such Act; or by reason of any rules or by-laws of the company, or rules or by-laws of the society or association ; or by reason of the privity of interest or relation established between the company and the society or

association, or the contribution or payment of moneys of the company to the funds of the society or association; or by reason of any benefit, compensation or indemnity which the workman, employee or servant, or his personal representatives, may become entitled to or obtain from such society or association or by membership therein; or by reason of any express or implied acknowledgment, acquittance or release obtained by the company or the society or association prior to the happening of the wrong or injury complained of, or the damage accruing, to the purport or effect of relieving or releasing the company from liability for damages for personal injuries as aforesaid.

The following counsel appeared on the hearing.

*Newcombe K. C.*, Deputy Minister of Justice for the Dominion of Canada.

*C. H. Ritchie K. C.* and *Haughton Lennox* for the Railway Employees.

*Walter Cassels K. C.* for the Grand Trunk Railway Company.

*Newcombe K. C.* is heard. This legislation only applies to railway companies within the jurisdiction or legislative control of Parliament and is authorized by sec. 91, subsec. 29 of The B. N. A. Act, 1867 and sec 92 subsec. 10.

Railway companies of the class mentioned can only be incorporated by Parliament which can also take away the powers so conferred. *Vogel* v. *Grand Trunk Railway Co* (1).

*Ritchie K. C.* and *Lennox* are heard for the Railway Employees. The validity of legislation similar to this

(1) 10 Ont. App. R. 162 at p. 179.

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has been upheld by the courts in *Ferguson* v. *Grand Trunk Railway Co.* (1) ; *Grand Trunk Railway Co.* v. *Miller* (2) ; *The Queen* v. *Grenier* (3).

Parliament has the exclusive power to prescribe regulations for the construction, repair and alteration of the railway and for its management, and to dictate the powers and constitution of the company. Per Lord Watson in *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours* (4).

*Cassells K. C.* is heard for the Grand Trunk Railway Co. This legislation is void as an infringement on property and civil rights in the Province. *Citizens Ins. Co.* v. *Parsons* (5); *Russell* v. *The Queen* (6); *Attorney General of Manitoba* v. *Manitoba License Holders Association* (7).

The Ontario Courts have held The Workmens' Compensation Act applies to Dominion railways, consequently this legislation is within the competence of the local legislature. See *Washington* v. *Grand Trunk Railway Co.* (8) ; *Canada Southern Railway Co.* v. *Jackson* (9).

THE CHIEF JUSTICE.--I am of opinion, as at present advised, that the Act in question is *intra vires* of the Dominion Parliament. I view it as one of public order for the good government of the whole of the Dominion in relation to corporations and undertakings under the control of the federal authority. The case of *Citizens Ins. Co.* v. *Parsons* (5), relied upon by the railway companies does not, as I read it, help their opposition to the validity of the Act.

(1) Q. R. 20 S. C. 54.
(2) 34 Can. S. C. R. 45.
(3) 30 Can. S. C. R. 42.
(4) [1899] A. C. 367 at p. 372.
(5) 7App. Cas. 96.
(6) 7 App. Cas. 829.
(7) [1902] A. C. 73.
(8) 24 Ont. App. R. 183.
(9) 17 Can. S. C. R. 316.

I see nothing in it to justify their contention that if the Dominion Parliament had imposed statutory conditions for the whole Dominion upon the federal insurance companies, such statutory conditions would have been *ultra vires*. The exclusive jurisdiction of Parliament over federal railways must include the power to enlarge or restrict their rights and duties in the *administration* of their various roads so as to make them uniform all through the Dominion. It is certainly expedient, not to say more, that upon such railways the relations between the corporation and its employees should be governed by the same rules all over the Dominion, and that the right of an employee of such a company, or of his personal representative in the event of his death, to recover compensation if he is injured or killed in the performance of his duties be not different whether the accident happens in British Columbia for instance, or in Nova Scotia or Quebec, or made dependent upon the locality where he has joined the service of the company. And the federal Parliament alone can pass such a law for the Dominion. These federal corporations are created and these railways are operated in the public interest of the Dominion at large, and whatever the federal Parliament thinks it expedient to decree in relation to their management and administration in that same public interest it must have the power to do.

GIROUARD J.—If I were unfettered by authority I would feel inclined to declare that the statute before us was *ultra vires* of the Parliament of Canada. But in face of the decisions of the Privy Council I consider that doubt is not even possible, and that we have only one thing to do, that is, to uphold that statute as being incidental to the power which clauses 91 and 92 of the B. N. A. Act give to the Parliament of Canada, to

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Girouard J.

make laws for the creation, regulation and maintenance of interprovincial or international, or even federal railways, within the meaning of the said Act.

DAVIES J.—I confess to having had many doubts upon the proper answer to be given to the question asked as to the validity of this legislation. It is very near the line, and while, from one point of view, it seems to be *intra vires* of the Dominion Parliament I admit the weight of the arguments to the contrary. On the whole, I have reached the conclusion that the legislation is *intra vires* and valid, and my answer to the question is in the affirmative. If *intra vires* in part it seems to me be so in all.

I have reached this conclusion because I think the Act is within the enumerated powers specially conferred upon the Dominion Parliament by the 91st section of the British North America Act.

Sub-section 29 of that section extends the exclusive legislative authority of the Parliament of Canada to

> such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces.

The subject matter here in question comes within the express exception of sub-section 10 of section 92, and therefore comes within the 29th enumeration of section 91 of the British North America Act, 1867, and is excluded from provincial powers by the tenth enumeration of section ninety-two.

Exclusive legislative authority on railways, such as are here enumerated, being vested in the Dominion Parliament, that Parliament has, as a consequence, full and paramount power so to legislate upon such matter as fully, properly and effectively to carry out the construction, management and operation of these railways. In so legislating it matters not that they infringe upon the

powers of legislation with regard to property and civil rights assigned to the provincial legislatures. Such invasion is admittedly necessary to enable the parliament properly and effectively to legislate. The main and controlling question is, therefore, whether the legislation in question can be said to be fairly and reasonably within the plenary and exclusive powers of the Dominion Parliament enabling it effectively to control the construction, management and operation of the classes of railways excepted from sub-section ten of section ninety-two and embraced within sub-section twenty-nine of section ninety-one. I think it may fairly be so held.

The Act substantially prohibits any railway under the jurisdiction of Parliament from making any contract directly or indirectly with its employees so as to limit or relieve the company from liability for personal injuries to these employees in the course of their employment. The provisions necessarily infringe upon subject matters ordinarily within the jurisdiction of the legislatures. But that does not matter provided the legislation can be upheld as being reasonably within the exclusive powers conceded to the Dominion Parliament to provide for the effective and proper operation and management of the roads. I do not think the courts should be astute to discover reasons to annul the legislation of parliament on a subject matter within its exclusive jurisdiction even if, in the exercise of its powers, it does trench upon the subjects generally within the provincial jurisdiction, or if plausible arguments can be urged that, from that one aspect, such legislation is not necessary to control effectively the subject matter of such legislation.

The Grand Trunk Railway Company in its factum upon this appeal contending against the validity of the Act, says :

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The statute in question is far reaching. It would operate to destroy the effect of any notice, condition or declaration made or issued by the company. Such a statute might prove very injurious to the proper maintenance and operation of the railway. It would tend to negligence on the part of employees; and other results of an injurious character to the public service and the safety of the travelling public would necessarily result from such a far-reaching statute.

Now, these arguments rather tend to confirm my opinion of the validity of the legislation. Whether it

would prove injurious or not to the proper maintenance and operation of the railway

is for Parliament and not the court to decide. By passing the Act Parliament has decided. That the Act may affect "the proper maintenance and operation of the road" seems, by the argument, to be admitted, and once that conclusion of fact is reached, the legal result follows, of parliamentary jurisdiction. Any Dominion legislation that, it may reasonably be assumed, will substantially affect the proper maintenance and operation of the railway must, in my opinion, be valid. The fact that it may, from a railway standpoint, be deemed prejudicial and injurious to railway interests and may not promote effective operation and management, by no means settles the question. In deciding such a point parliament must within all proper reasonable limits be supreme.

Human agencies are as essential for the proper management and operation of railways as are mechanical agencies, and, so far they relate to these objects, are necessarily subject to the control of Dominion legislation. The former are, of course, from their complex nature, necessarily more difficuly to control and the line, up to which and within which the powers of the Dominion Parliament extend, is difficult to determine and almost impossible to define by any arbitrary rule. But it does seem to me that the hours during which employees may or may not work, the sex, ages

and wages of those who may be employed, the right of employees to combine and form labour unions, the degree and extent to which these unions may be permitted to interfere with the hours, wages and work of the men, the negligence which will give employees a right of action caused by it, the limitations which ought to be put upon that right, alike as to the power of the employee to surrender or contract himself out of the right or the power of the railway company, by notice or rule or otherwise, to limit or entirely abolish it, are all subjects well within the Dominion legislative powers, although they may infringe upon the general powers of the local legislatures. These special matters I have mentioned are a few of the many analogous and cognate subjects arising out of the employment by these great railway corporations of many thousands of men whose duties are to control and manage railways forming a perfect net-work across the Dominion, which subjects must either wholly or partially come within the ambit of the Parliament alone capable of calling these corporations into being and of effectively regulating their operation.

We cannot ignore, in determining what are and what are not fairly within the ambit, the actual existing condition in Canada.

Here are at least three great railway corporations, either already transcontinental or rapidly becoming so. Their operations are of a national character and importance. Their employees number many thousands. The unions of these employees amongst themselves for the better support and protection of their interests and the amalgamation, in some cases, of these unions with the labour unions of the neighbouring republic, add additional strength to the argument for giving a broad and liberal construction to the plenary powers

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of legislation vested in the Dominion Parliament so as to ensure some degree of uniformity in its exercise.

If legislation affecting the contracts entered into by the railways with their employees and the limitations which may be placed upon the companies' liability for damages to their workmen when injured or killed in the course of their employment, are matters for the several provincial legislatures and not for the Dominion Parliament, then, of course, such legislation may be as various and conflicting as there are legislatures to legislate, and it may well result that such various and conflicting legislation would materially affect the management and operation of the roads.

I am, after much reflection, of the opinion that all such legislation must necessarily be within the jurisdiction of the Parliament of Canada which creates the corporations and has plenary and exclusive powers to legislate upon everything relating to their effective management and control.

In the late case of *Madden* v. *Nelson and Fort Sheppard Railway Co.* (1), the Judicial Committee of the Privy Council held that the provision in The British Columbia Cattle Protection Act, 1891, as amended in 1895, to the effect that a Dominion railway company, unless they erect proper fences on their railway, should be responsible for cattle injured or killed thereon, was *ultra vires* of the provincial legislature. The Lord Chancellor, in delivering the judgment said :

> It would have been impossible to maintain the authority of the Dominion Parliament, if the provincial legislature were to be permitted to enter into such a field of legislation which is wholly withdrawn from them and is, therefore, manifestly *ultra vires ;*

and he goes on to explain the meaning of the Privy Council's judgment in the case of *The Canadian Pacific Railway Co.* v. *The Parish of Notre Dame de Bonsecours* (2) by saying that, in that case, it was

(1) [1899] A. C. 626. (2) [1899] A. C. 367.

decided that, although any direction of the provincial legislature to create new works on the railway and make a new drain and to alter its construction, would be beyond the jurisdiction of the provincial legislatures, the railway company were not exempted from the municipal state of the law as it then existed—that all landowners, including the railway company—should clean out their ditches so as to prevent a nuisance.

These decisions throw much light upon the view which the Judicial Committee of the Privy Council take as to the necessity of excluding the provinces from interfering by legislation in a matter wholly withdrawn from them and, inferentially, show how broad should be the construction placed upon the powers of the Dominion in a matter exclusively relegated to it to legislate upon.

For these reasons, I answer the questions as to the validity of the Act in question in the affirmative.

NESBITT J.—That the Dominion Parliament has the exclusive jurisdiction to legislate in respect to the incorporation, organization, operation and management of certain railways is not open to dispute, and the sole question presented for our consideration here is whether the Act in question is not an infringement of the provincial jurisdiction as being legislation upon civil rights and not purporting to be upon a subject incident to or ancillary to "railway legislation." It is to be observed that the Act is one claimed to be promoted by a section of the employees of the railway and aimed at the redress of a contract grievance or supposed destruction of civil remedy and as such it is frankly supported by the factum filed on behalf of the promoter acting for such employees.

It is also to be observed that although it is headed "An Act to amend the Railway Act of 1903," it stands quite apart from the "Act to amend the Railway Act, 1903," to be found in the very next chapter of the same statutes, and which latter Act deals with what might

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well be described as "railway legislation." I merely draw attention to this as lending some colour to the argument that the Act in question was only passed to interfere with contract rights and has no real relation to the operation or management of "railways." The Act itself, we were told on argument, was passed because the Dominion Parliament had incorporated an insurance company and compelled the Grand Trunk Railway Company to contribute a certain sum yearly to the funds of the company which company had been empowered to make by-laws and that one of the by-laws, No. 15, made provision that any member of the society or his representatives became disqualified from maintaining an action against the railway company for injuries arising from accident. This has been held to be a contract authorized by the employee who took advantage of the benefits of the company's contribution, etc., and to preclude recovery for negligence. The Act in question apparently goes much further than legislation upon such a subject as was said to be aimed at and, as I read it, provides that no railway company shall be relieved from liability for damages for personal injury to any workman, employee or servant of such company, by reason of any notice, condition or declaration made or issued by the company, or by reason of any rule or by-laws of the company, or by any express or implied acknowledgment, acquittance or release obtained by the company * * * prior to the happening of the wrong or injury complained of, or the damage accruing to the purport or effect of relieving or releasing the company from liability for damages for personal injuries as aforesaid.

Such legislation would, it seems to me, enable an employee to recover notwithstanding his express breach of duties prescribed although the provincial

law regulating the rights of the parties was to the contrary and I am unable to conceive that such legislation can be said to be in any way incidental to the operation or management of railways or to be in any sense "railway legislation." Since railways were operated no such provisions so far as I know can be found in any country under the guise of legislation regulating the operation or management of railways, and I cannot believe would be granted by any Parliament as part of a legislative railway policy.

Necessarily at almost every step in railway legislation property and civil rights must be involved, such as expropriating lands, contracts for carriage of goods, regulating the tolls to be charged and the terms of carriage. Duties must be prescribed, but the remedies for breach of such duties it seems to me are within the jurisdiction of the provincial legislatures. No doubt if parliament saw fit to enact as part of the operating policy of the railway that workman should only work certain hours; that men of certain age only should be employed; that no women or young boys or girls should be so employed; that workmen should not go on strike; it could do so as an incident of railway operation but this legislation does not appear to me to fall within the doctrine of operation or management but rather within legislation as to contracts as, for instance, if Parliament prescribed that if a passenger was injured on the railway he should give notice within twelve hours or no action would lie, which would be, in my opinion, outside its jurisdiction. I think Parliament can say the railway shall do so and so and, upon failure, any person injured by such failure shall have an action, but there, it seems to me, its jurisdiction ends, and the doctrine of civil rights leaves the railway subject to the jurisdiction of the Provincial Legislatures as to the remedies and defences respectively.

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Mr. Lennox, the promoter, argued that the legislation was necessary because the insurance society was incorporated by the Parliament of Canada, but it seems to me that a foreign corporation of which the employees became members or policy holders under similar recited conditions would have been the same The remedy given otherwise by law the employee was held to have contracted himself out of, not because it was a Dominion corporation, but for the reasons I have indicated, and the legislation in question, therefore, is admittedly to get rid of the effect of what has been held to be a contract, and is not to prescribe certain rules to govern in the employment of operatives in the management of the railway viewed in which aspect it might well be "railway legislation," and *intra vires*. In Ontario the 10th sect. of R.S.O., 1897, ch. 160, would seem to regulate the defence. In Quebec in case of death, art. 1056 of the Civil Code would indicate that the workman could receive compensation for the injury prior to his death and so allow him to contract for a release for any injury from which death might result, which would bar action by his representative. This statute if *intra vires* would appear to override any provincial law. I am not deciding that rule 15 of the Grand Trunk Provident Association is a binding contract, but this legislation, as I read it, embraces any acquittance obtained by the company prior to the accident and, therefore, seems to me a matter purely affecting civil rights and not legislation falling within the subject of "railways" as relating to the incorporation, organization, operation or management of them. I have been constrained to this view by what I conceive to be the real purport of *The Queen Insurance Co.* v. *Parsons* (1); *Hodge* v. *The Queen* (2); *Russell* v. *The*

(1) 7 App. Cas. 96.

(2) 9 App. Cas. 117 at p. 130.

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*Queen* (1); *McArthur* v. *Northern & Pacific Junction Railway Co.* (2); *Clegg* v. *Grand Trunk Railway Co.* (3); *Canada Southern Railway Co.* v. *Jackson* (4); *The Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours* (5); *Union Colliery Co.* v. *Bryden* (6); *Cunningham* v. *Tomey Homma* (7); *City of Toronto* v. *Bell Telephone* (8). Also, the recent ten hour labour case from New York, decided by the Supreme Court of the United States, where the majority held that the law was really a labour law and unconstitutional and not a health law and constitutional as a police provision.

The statute under consideration seems plainly one seeking to disguise purely civil rights' legislation under the false garb of railway policy and deprives one party to a contract of its rights under the form of legislating on the subject of "railways" when such contract rights are neither incidental nor ancillary to such subject, unless the mere fact of one of the contracting parties being a railway necessarily creates jurisdiction.

I would adopt the well known rule in the United States where the courts have been so often called upon to decide between the nicely shaded lines of state and federal authority and where the character of legislation is none the less manifest because of the general terms in which it is expressed.

I would answer that the Act in question was not one the Parliament of Canada was competent to pass.

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(1) 7 App. Cas. 829.
(2) 17 Ont. App. R. 86.
(3) 10 O. R. 708 at page 714.
(4) 17 Can. S. C. R. 316.
(5) [1899] A. C. 367.
(6) [1899] A. C. 580 at p. 587.
(7) [1903] A. C. 151.
(8) [1905] A. C. 52.

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*Mar. 27, 28, 29.

*May 2.

THOMAS W. KIRKPATRICK AND JAMES MUNROE (PLAINTIFFS) ... APPELLANTS;

AND

JAMES McNAMEE, PERSONALLY AND AS EXECUTOR OF MARY McNAMEE, DECEASED, (DEFENDANT) .. .. ..... RESPONDENT.

ON APPEAL FROM THE TERRITORIAL COURT OF THE YUKON TERRITORY.

*New trial—Contradictory evidence—Wilful trespass—Rule in assessing damages—Practice—Adding party—Reversal on appeal.*

In an action for damages for entry upon a placer mining claim and removing valuable gold bearing gravel and dirt, the trial judge found the defendants guilty of gross carelessness in their work, held that they should be accounted wilful trespassers, and referred the cause to the clerk of the court to assess the damages.

The referee adopted the severer rule applicable in cases of fraud in assessing the damages. The Territorial Court *en banc* reversed the trial judge in his findings of fact upon the evidence.

*Held*, reversing the judgment appealed from, that the trial judge's findings should be sustained with a slight variation, but that the referee had erred in adopting the severer rule against the defendants in assessing the damages, and that his report should be amended in view of such error.

*Semble*, that the record and pleadings should be amended by adding the plaintiff's partner as co-plaintiff.

*Held*, per Taschereau C.J. dissenting, that although not convinced that there was error in the judgment of the trial judge which the court *en banc* reversed, while at the same time it did not appear that there was error in the judgment *en banc*, yet the latter judgment should stand, as the court *en banc* should not be reversed unless the Supreme Court, on the appeal, be clearly satisfied that it was wrong.

APPEAL from the judgment of the Territorial Court of Yukon Territory reversing the judgment of Mr. Justice Craig, at the trial, and dismissing the plaintiffs' action with costs.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Idington JJ.

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The plaintiffs sued to recover damages sustained through trespasses committed by the defendants on fractional creek placer mining claim No. 20A, below discovery, on Hunker creek in the Yukon Territory, of which the plaintiffs were grantees from the Crown at the time the action was brought. The trespasses complained of consisted of the removal of the pay-dirt and gold-bearing gravel from a portion of the claim, covering an area of 964 square feet, and the washing up by the defendants and converting to their own use of the gold therein. The action was tried in June, 1903, before Mr. Justice Craig, who found that the defendants committed the trespasses complained of, and that they did so wilfully and deliberately, or at all events, that such gross carelessness was shown by them in the operations from which these trespasses resulted that they must be accounted wilful trespassers. At the trial it was agreed between counsel, with the approval of the court, that the issue being tried should not bear upon the quantum of damages, but that that should be referred to a referee later. Pursuant to this arrangement the judgment directed a reference to the clerk of the Territorial Court to take an account of the plaintiffs' damages in accordance with the declarations as to the rights and liabilities of the parties set out therein. The referee made his report fixing the plaintiffs' damages at $14,993, for which amount and costs judgment was entered. From this judgment and report the defendants appealed, and the Territorial Court *in banco*, Craig J. dissenting, reversed the judgment at the trial and dismissed the action. The plaintiffs now appeal.

*Aylesworth K.C.* and *Walsh K.C.* for the appellants.

*Auguste Noël* for the respondent.

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The Chief Justice.

THE CHIEF JUSTICE (dissenting).—I would dismiss this appeal. Not that I am convinced that there was error in the judgment of the trial judge, which the court *in banco* reversed, but because I am not convinced that there is error in the judgment *in banco* appealed from.

The appellant, I am free to confess, has succeeded in creating considerable doubt in my mind as to its correctness, but I cannot reverse upon a doubt. That judgment must stand if the appellant has not convinced us that it is wrong, and that, as far as I am concerned, he has failed to do. It may be that, had I formed part of the court *in banco*, I would have affirmed the judgment of the trial judge, because, though doubting, I would not have been clearly satisfied that he was wrong, but it is the judgment of the court *in banco* that the appellant asks us to reverse, and we cannot reverse it, though doubting, if not clearly satisfied that it is wrong.

In *Hale* v. *Kennedy* (1), it was held in that sense, that:

> The rule generally followed by the courts is not to review the finding of the judge of first instance where his decision depends upon a balance of testimony; still, if the court *in banco* has reversed that finding, this court must be satisfied upon appeal that the court *in banco* was wrong, before it will interfere with that judgment.
>
> We are concerned directly, (said Lord O'Hagan, in *Symmington* v. *Symmington* (2) an analogous case,) not with the judgment of the Lord Ordinary, (the trial judge,) but with that which overruled it; and the latter, we ought to affirm unless we are satisfied of its error,—

followed in this court in *Demers* v. *The Montreal Steam Laundry Company* (3).

GIROUARD J.—I would allow this appeal and restore the judgment of the trial judge *in toto*, but, as the majority of the court has come to the conclusion to

(1) 8 Ont. App. R. 157. (2) L. R. 2 Sc. App. 424.
(3) 27 Can. S. C. R. 537.

send the case back to re-assess the damages, I will not dissent.

DAVIES J. concurred with Idington J.

NESBITT J. concurred with Idington J.

IDINGTON J.—This appeal should be allowed and the judgment of Mr. Justice Craig restored upon amendment to be allowed.

A careful consideration of the judgments of Mr. Justice Dugas and of Mr. Justice Macaulay and the evidence they respectively lay stress upon, and the rest of the evidence supporting defendants' view of the case, leaves no doubt in my mind but that the learned trial judge is right in finding that the defendants had trespassed.

Much of the confusion that exists, arises from attaching too much importance to some answers of the witness Hovland, which if taken as literally and mathematically correct, may furnish an apparently good foundation for what the majority of the court below have built thereon. Such an interpretation of the witness's evidence is not warranted by it as a whole. He did not, though placing his finger at point "E" in Exhibit H, intend to convey the meaning that there was at that point, as distinct from shaft No 3 on same plan, another shaft with timber in it, and lagging leading from it towards or across the line dividing 21 from fraction 20*a*. If he had been for a moment so understood by court and counsel, we would have had much more relating to this point E than we have been favoured with. The witness, quite honestly, put himself, by his speaking of the centre of the cut and distances he gave from that point, at another place than he would be, consistently

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with holding him as referring to shaft No. 3 in much of his evidence. It is to my mind just one of those obvious errors that occur daily at the trial of cases where a witness, however much he tries, may not be able to be absolutely correct in regard to either time or space, and especially when dealing with maps or plans which many intelligent men often cannot comprehend.

The witnesses have been so numerous and the holes they refer to have been in their stories multiplied so many times beyond what appear on the plans before us, as to render the case somewhat troublesome. The learned trial judge, and counsel, I have no doubt, understood what each witness referred to, and when the witness happens to speak of "this" and "that," "here" and "there," without specifically identifying on the plan the point referred to, he was not confusing anybody at the trial. This furnishes to my mind (in addition to the usual reasons for so doing) abundant reason for here accepting the judgment of the learned trial judge rather than that in appeal. I think it is not at all a case where there is any need for assuming wholesale perjury to have existed in any view one might take of the case.

But there is needed in the trial judge of a case like this that keen discrimination that weighs the evidence by tests that separate, as the trial proceeds, the results of the accurate from the inaccurate witness, the candid, truthful one from the one less so. I am, therefore, slow to suggest that the learned trial judge may have erred in his finding wilful carelessness.

It is, however, by assuming that in the main the witnesses tried to give us the truth that we are here enabled so to reconcile nearly all the evidence, with the result arrived at. In doing so we have to assume defendant and his witnesses, with one or two excep-

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tions, honest, and if honest there cannot be that wilful carelessness imputed to the defendants that the law requires before assessing damages on the scale which has been adopted. I think the milder rule suggested in *Trotter* v. *Maclean* (1) should be adopted and the defendant should be allowed in any event the full cost of getting out the gold in addition to the mere cost of washing after the earth was dug out. I think, too, the referee has been influenced by the severer rule having been adopted, into treating this piece of ground as exceptionally rich as compared with all the surrounding ground, apparently thinking the defendant should be punished with a very high average.

I offer no opinion as to the proper result other than to say I am of opinion the result arrived at is unreasonable and excessive, and is not supported by the evidence.

It is not clear that in law the respondents who raised by their statement of defence the issue of title are precluded by their failure to press it at the trial from now taking the objection they have done as to Bonner not being a party. At all events the defendants are entitled to have the doubt removed and Bonner, in whose name (with that of his partner) as one of the partners the license stood when some of the trespasses were committed, bound by the recovery herein. I think, therefore, he should be added as a party plaintiff. He seems to have assigned his rights to his partner Kirkpatrick. That assignment may not so have transferred his right of action as to vest it in Kirkpatrick. But evidently he intended to sell all his interests to the remaining partner, and that sale carried with it the right to use his name.

(1) 13 Ch. D. 574.

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Idington J.

The case has been tried as if the defendants were liable therein for any of the trespasses that the licensees or any of them might have a right to complain of, and to give effect to this result let the suggested amendment be made; to carry out this let the court below amend the record and the referee then re-assess the damages on basis indicated.

The appeal then should be allowed with costs.

See *Harper* v. *Godsell* (1) at p. 428; *Dawson v. Great Northern and City Railway Co.* (2); *May* v *Lane* (3); *Colonial Bank* v. *Whinney* (4); *Job* v. *Potton* (5); *Caldwell* v. *Stadacona Fire & Life Insurance Co.* (6).

*Appeal allowed with costs.*

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

Solicitors for the respondent: *Noël & Noël.*

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(1) L. R. 5 Q. B. 422.
(2) [1904] 1 K. B. 277.
(3) 64 L. J. Q. B. 236.
(4) 11 App. Cas. 426.
(5) L. R. 20 Eq. 84.
(6) 11 Can. S. C. R. 212.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS) } APPELLANTS ;

AND

THOMAS JOSEPH BLAIN (PLAINTIFF) ..... } RESPONDENT.

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*March 30.
*May 2.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*New trial—Decree of appellate court—Reasons for judgment.*

B., a passenger on a railway train, was thrice assaulted by a fellow passenger during the passage. The conductor was informed of the first assault immediately after it occurred and also of the second but took no steps to protect B. In an action against the railway company B. recovered damages assessed generally for the injuries complained of. The verdict was maintained by the Court of Appeal but the Superior Court of Canada ordered a new trial unless B. would consent to his damages being reduced (34 Can. S. C. R. 74). In the reasons given for the last-mentioned judgment written by Mr. Justice Sedgewick for the court, it was held that damages could be recovered for the third assault only but the judgment as entered by the registrar stated that the court ordered the reversal of the judgment appealed from and a new trial unless the plaintiff accepted the reduced amount of damages. Such amount having been refused a new trial was had on which B. again obtained a verdict the damages being apportioned between the second and third assaults. On appeal to the Supreme Court of Canada from the judgment of the Court of Appeal maintaining this verdict :

*Held*, Taschereau C.J. and Davies J. dissenting, that as the decree was in accordance with the judgment pronounced by the court when its decision was given, and as it left the whole case open on the second trial the jury were free to give damages for the second assault and their verdict should not be disturbed.

*Held*, per Taschereau C.J. that the decree of the court should have been framed with reference to the opinion giving the reasons for the judgment and, if necessary, could be amended so as to be read as the court intended.

APPEAL from a decision of a Court of Appeal for Ontario maintaining a verdict at the trial in favour of the plaintiff.

*PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Idington JJ.

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The facts material to this appeal are fully stated in the above head-note.

*Johnson K.C.* and *Denison* for the appellant.

*Riddell K.C.* and *D O. Cameron* for the respondent.

THE CHIEF JUSTICE.—I am not quite convinced that, under the state of facts brought out at the trial, this respondent has any right of action whatever against the appellants upon any of the allegations of his statement of claim. That is why, though I did not enter a dissent, I had, upon the first appeal (1) to ask my brother Sedgewick to write down the reasons for our judgment, not feeling satisfied that I could myself find any good ones in support of the conclusion of the court that the appellants were liable for the third assault complained of by the respondent, though not for the two others. However, that judgment is, of course, binding upon me. It is the settled law of the case.

As to the $2,500 for the second assault, the only point now before us, I would allow the appeal. The respondent was not entitled to a second trial as to this assault. The order or rule for a new trial drawn up in the office must be construed with reference to the opinion of the court upon which it is based, and, consequently, has to be read with the words

as to the third assault complained of by the respondent in his statement of claim,

after the words "parties." This judicial opinion was the only effective authority for the drawing up of that rule or order. See per Esher M. R., in *Holtby* v. *Hodgson* (2). It does not, strictly speaking, form part of the record, but it cannot, as the respondent would contend, be entirely disregarded in the construction of the formal order. On the contrary, as laid down by

(1) 34 Can. S. C. R. 74.

the annotator to the word "Mandate," vol. 13, Ency. of Pl. & Pr. 847:

The lower court, in giving effect to the mandate of the appellate court, should construe such mandate with reference to the opinion accompanying it.

Where a cause is remanded to the trial court for further procedings, they must be had in accordance with the opinion or the direction of the appellate court.

Id. vol. 2, 378. See *Davidson* v. *Dallas* (1).

In *Pitts* v. *La Fontaine* (2), in the Privy Council, their Lordships, upon the construction of a previous order-in-council, referred to a passage in their judgment to demonstrate what had been their intention in making that order.

The opinion, delivered by this court at the time of rendering its decree,

said Mr. Justice Gray, for the court, *In re Sanford Fork and Tool Co.* (3)

may be consulted to ascertain what was intended by its mandate and * * * upon a new appeal it is for this court to construe its own mandate and to act accordingly.

See also *West* v. *Brashear* (4); *Supervisors* v. *Kennicott* (5); *Graff* v. *Boesch* (6); and *Smith* v. *Day* (7).

In *Thompson* v. *Maxwell Land Grant and Rway. Co.* (8), Mr. Justice Brewer, delivering the opinion of the court, said, in the same sense:

We take judicial notice of our own opinions, and although the judgment and the mandate express the decision of the court, yet we may properly examine the opinion in order to determine what matters were considered, upon what grounds the judgment was entered, *and what ha become settled for further disposition of the case.* We therefore turn to the former opinion and the mandate to see what was presented and decided.

The reasons for the judgment do not constitute the judgment, but the formal judgment is void if inconsistent with the opinion of the court and in direct opposition to it. And upon that ground would the

(1) 15 Cal. 75.
(2) 6 App. Cas. 482-487.
(3) 160 U. S. R. 247.
(4) 14 Peters, 51.
(5) 94 U. S. R. 498.
(6) 50 Fed. Rep. 660.
(7) 117 Fed. Rep. 956.
(8) 168 U. S. R. 451–456.

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The Chief Justice.

court have said to this respondent upon appellant's motion for a new trial,

you cannot recover upon the evidence for the first and second assaults, but we will give you another chance to prove that part of your case.

The order of this court now in question limits to $1,000 the amount that the respondent, in our opinion, was entitled to, not because we held that he was entitled to that amount for the three assaults complained of in his statement of claim, but because he was not, in our opinion, entitled to recover for the two first assaults; and as the jury had rendered a general verdict in his favour for a lump sum of $3,500, for which judgment had been entered against the appellants, and as we were of opinion that this sum upon the evidence was grossly in excess of the damages resulting to him from the third assault, the only one for which the appellants were liable, their appeal was allowed and a new trial ordered unless he, the respondent, agreed to take $1,000 for the damages he had suffered from that third assault. Had we been of opinion that the appellants were liable for the three assaults, their appeal would have been dismissed. And had we been of opinion that they were not liable at all for any of the three assaults, it is clearly not a new trial that we would have ordered; judgment would then have been entered in their favour and the respondent's action dismissed. And had the respondent accepted the $1,000, the judgment entered for that amount would clearly not have been a judgment for the damages resulting to him from the two first assaults (1).

If necessary, in view of the circumstances of this case, the order should be amended *nunc pro tunc*, in furtherance of justice, so as to read as the court intended it to be.

(1) 34 Can. S. C. R. 74-80.

Every court has an inherent jurisdiction to put its records in correct form, on application, or *ex mero motû*, in default of application. No court will allow an order to stand which does not speak the truth. *Re Swire* (1), approved of in House of Lords, in *Hatton* v. *Harris* (2). And for ascertaining what it was that the court really ordered or determined, can there be a safer and more reliable guide than the written opinion of the court filed as its judgment ? And the parties are not at liberty either by consent express or implied, nor by waiver or acquiescence to bind a court to accept as its judgment anything else but that which the court intended to be its judgment.

North J. in *Shipwright* v. *Clements* (3), allowed an amendment of a decree 20 years old so as to make it confortable to the written opinion of the judge who had pronounced it. In *Hatton* v. *Harris* (2), in the House of Lords, a decree forty years old was amended, Lord Penzance, in *Lawrie* v. *Lees* (4) said.

> I cannot doubt that under the original powers of the Court, quite independent of any order that is made under the Judicature Act, every court has the power to vary its own orders which are drawn up mechanically in the registry or the office of the court,—to vary them in such a way as to carry out its own meaning, and where language has been used which is doubtful to make it plain.

See *Smith* v. *Goldie* (5) and *Rattray* v. *Young* (5), in this court.

In *Rajunder Narain Rae* v. *Bijai Govind Sing* (6) their Lordships of the Privy Council held that

> By the common law this court possesses the same powers as the courts of record and statute have, of rectifying mistakes which have crept in by misprision or otherwise, in embodying its judgments.

In *Insurance Company* v. *Boon* (7) in the United States Supreme Court, it was said by Strong J. : —

(1) 33 W. R. 785 ; 30 Ch. D. 239.
(2) [1892] A. C. 547.
(3) 38 W. R. 746.
(4) 7 App. Cas. 19 at p. 35.
(5) Cout. Dig. 1123.
(6) 2 Moo. Ind. App. 181 at pp. 207-216.
(7) 95 U. S. R. 117.

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Every court of record has power to amend its records so as to make them comform to and exhibit the truth. Ordinarily, there must be something to amend by, but that may be the judge's minutes or notes, not themselves records, or anything that satisfactorily shows what the truth was ;

and the learned judge goes on to say that though the opinion of the judge is no part of the record, yet it is a guide for amending the formal judgment.

However, in this case, I would not think an amendment necessary. The order should be construed as if it, in express terms, restricted the new trial to the third assault. If the trial judge had so construed it and, reading it by the light of the opinion delivered by this court, had charged the jury accordingly, the respondent would not have asked us, I am sure, to hold that the judge had erred in acting in conformity to the unanimous opinion of this court and to send the case back for a new trial because he had not directed a verdict for all the assaults.

SEDGEWICK—I am of opinion that the appeal should be dismissed.

GIROUARD J.—The whole difficulty arises out of what appears to have been an oversight in the judgment of this court delivered in this very case. The court did not seem to have anticipated that the respondent might refuse the $1,000 allowed him in full satisfaction of his claim and take the chances of a new trial.

The respondent, while travelling as a passenger on a train of the appellants, was thrice seriously assaulted by a drunken fellow passenger, first, at the Toronto Union Station, before the departure of the train, and twice after, and claimed damages, in consequence, from the railway company. The case was tried by a judge and jury who rendered a general verdict for $3,500.

This verdict being sustained by the trial judge and the Court of Appeal, an appeal was taken to this court, which, on the 30th November, 1903, pronounced the following judgment, as per written memorandum read in open court, and then and there handed down to the Registrar, which was recorded in the minute book of the court, as follows :

Appeal allowed, no costs in this court nor in the Court of Appeal. New trial ordered unless respondent accepts a reduction of damages to $1,000, interest and costs of court of first instance, the latter costs to be costs in cause to abide the event if respondent takes a new trial.

About a couple of weeks afterward, namely, on the 17th day of December, 1903, the reasons for the said judgment were handed down to the said Registrar, who is empowered by statute to publish the reports of the "decisions" of the Supreme Court (sec. 112 of the Supreme Court Act). In the course of time, frequently several months after their delivery, in this instance on the 30th of March, 1904, they were published in the Supreme Court Reports (1).

It appears from the report of the case that, as the court had come to the conclusion, on the evidence adduced at the trial, that the company was liable only for injury caused by the third assault, a new trial was ordered

unless the plaintiff agrees to accept $1,000, together with costs, in full of his claim against the company. There will be no costs in the court below nor in this court.

It must be noted that the reasons for judgment, like the judgment, do not provide for the case of refusal by the plaintiff of this reduced amount of damages, by limiting the new trial to the third assault or by dismissing the action for any injury caused by the second assault. A new trial was ordered generally.

Later on, on the 5th of January, 1904, the respondent, having declined the option, applied to the Regis-

(1) 34 Can. S. C. R. 74.

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trar for a settlement of the minutes of the judgment, and, after hearing him and due service of said application having been accepted by the solicitor of the company who was also present, and no objections being made, the said Registrar settled and entered the minutes of judgment as follows:

1. This court did order and adjudge that the said appeal should be and the same was allowed, and that the said judgments of the Court of Appeal for Ontario and of the Chief Justice of the King's Bench should be and the same were reversed and set aside, and a new trial had between the parties, unless the respondent should accept a reduction of damages to $1,000, interest and costs of court of first instance, which option the respondent did, on the 31st day of December, 1903, refuse.

2. And this court did further order and adjudge that the costs in the High Court of Justice for Ontario, in the event of such refusal, should be costs to the successful party in the cause.

3. And this court did not see fit to make any order as to the costs in this court.

I cannot conceive that this formal judgment, transmitted to the court below, is at variance with the written memorandum read in open court as the judgment of the court. I cannot even say that it contradicts the very terms of the reasons But suppose it is inconsistent with their tenor and meaning, which document is to govern and constitute the judgment of this court? Is it the judgment pronounced in court, which alone should be transmitted and certified to the court appealed from, or the reasons for judgment which were not read in court nor transmitted to the court below? Can it be said that the reasons for judgment contain the "judgment or order" of the court within the meaning of the Supreme Court Act? As I understand that Act, R. S. C. ch. 135, especially sec. 2 (*d*), and sections 19 and 67, the pronouncement in court, oral or written, of the decision of the court in any case constitutes the judgment of the court The reasons of judgment are mere opinions which may be considered as part of the judgment in so far as they

disclose the grounds upon which it is rendered, but they cannot vary the text or *dispositif* of the formal judgment.

The judges of the lower courts are not bound by any expressions used by the appellate court beyond and contrary to the decree. Such is also the well established jurisprudence not only in England but in the United States, and I submit, with due respect, that no other rule can reasonably and safely be adopted. I hardly believe that it is necessary to quote authorities upon this point; I will merely refer to the following where all the cases are collected; Encyl. of Pleading and Practice, vol. xi., pp. 825-826; Seton on Decrees, (6 ed.) 187; Daniels Chan. Prac. vol. i., p. 636. The new trial had to take place as ordered by this court. It was held, accordingly, and the jury found negligence as to both second and third assaults—a finding not shewn at the first trial, the verdict being a general one—and returned a verdict for $1,500 by reason of the third assault, and $2,500 for the second one, which has been sustained by the trial judge Anglin J., and the Divisional Court, Chancellor Boyd, Teetzel and Magee JJ. We are now asked to set it aside as to the second assault, the appellant relying upon our reasons for judgment on the first appeal. I cannot examine the evidence in the latter case, the same not being before us, and applying the principles of law laid down in our said reasons of judgment and reading the evidence as I do in the present case, I have come to the conclusion not to disturb the verdict.

It is contended that the evidence is the same at the two trials. I do not know that, and I have no means of knowing. I see no admission of the parties to that effect. I notice also an order of the master permitting the use of any deposition of any witness given at the

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first trial only in the event of the plaintiff being unable to obtain the evidence of such witness. I find in the present printed case only one deposition taken at the first trial, that of Dr. McCallum. True, the evidence given at the former trial is on file among the archives of our court; but, as I understand my duty, I am *functus officio* and incompetent to take it into consideration I must decide this appeal like any other one, just as the Privy Council would do if ever called to review our decision, upon the record before us.

The appellants have only themselves to blame if they are deprived of the benefit of the former judgment of this court. They raised no objection to the judgment as pronounced, nor to the settlement of the minutes, although they were duly notified and appeared before the Registrar. They did not move to have them corrected or completed by this court or a judge thereof, either before they were transmitted to the court below or after, in the manner and form indicated in several cases collected in the digest of the reports of this court (1) in *The Chambly Manufacturing Co.* v. *Willett* (2) and *Letourneau* v. *Carbonneau* (3), both decided in this court in 1904, and also in Annual Practice (4).

On the first of February, 1904, the appellants moved in the court of first instance for a stay of proceedings upon the ground that they had applied for leave to appeal from the decision of this court to the Privy Council, which leave was later on refused (5). They must be presumed to have known then the tenor of the judgment, and yet they did nothing to have the former properly rectified. They seemed to have

(1) Cout. Dig. 1121-1124.
(2) 34 Can. S. C. R. 502.
(3) 35 Can. S. C. R. 701.
(4) [1905] p. 361.
(5) [1904] A. C. 453.

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relied entirely upon the principle of law involved in the case.

And, when the second trial was held, no objection to the charge of the judge as to the second assault was raised; probably, in face of our judgment, none could be made; not even a suggestion was thrown out that this branch of the case had been disposed of by the judgment of this court. The appellants evidently understood that the whole case was re-opened and relied upon a fresh verdict as to both assaults, it being conceded by the plaintiff that the company was not liable for the first one. It is now too late to allow them to take a different view of the situation.

The appeal should be dismissed with costs.

DAVIES J.—This is the second time that this case has been before us on appeal. On the first appeal (1) this court laid down the rule as to a carrier's liability, as follows:

> Whenever a carrier through its agents or servants knows or has the opportunity to know of the threatened injury, or might reasonably have anticipated the happening of an injury, and fails or neglects to take the proper precautions or to use the proper means to prevent or mitigate such injury, the carrier is liable.

Applying that rule to the facts as proved we held that the carrier company was liable for damages for the third assault (so called), and was not liable for what was called the second assault. We, therefore, ordered a new trial, and, in such trial, the judge very properly directed the jury to find separately the damages for each of the assaults, which was done. No question was raised here as to damages for the last assault, the appellant finding itself precluded on the question of liability as to that by our previous decision, and not raising any question as to their amount.

(1) 34 Can. S. C. R. 74.

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The question, and the only question raised, is as to the defendant's liability for what has been called the second assault, but which, as the trial judge justly remarked, might more properly, as against the defendants, be called the first assault.

I have very carefully read all the evidence given at this second trial, but am quite unable to see any difference on the only point now before us between that evidence and the facts we had before us on the first appeal. We then held that the facts were not such as would justify a conclusion that the conductor ought reasonably to have anticipated this assault and taken measures to prevent it. So far as the facts are concerned the evidence as to what occurred at the Union Station and the Parkdale Station were admittedly the same at both trials. Mr. Riddell contends that on this trial the evidence of the conductor was not given and that Mr. Blain's evidence is fuller and more complete as to the facts at the moment the second assault took place. I am not able to see that these two contentions in any way should alter the result. So far as the assault which was made on the plaintiff at the Union Station, and before the train started, is concerned, it is common ground that the defendants are not liable. The conductor had no knowledge whatever of this assault except what he heard from Blain himself just as the train was leaving. In fact the train had actually started, but was stopped by some one to enable Blain, who, after the assault, had left the train, as, he says, to get a constable, to get aboard again. Then, for the first time, both men standing on the platform, the conductor hears from Blain that he had been assaulted by some one, but whether Anthony's name was mentioned or not Blain could not say. He told the conductor he would not go on the train unless the man was put off, and says the conductor replied there

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was no time then, but that he would get a constable at Parkdale, a station a couple of miles away. Just after this promise was given, the plaintiff Blain swears, that Mr. Thornton, the ticket agent at Brampton, from whom he had purchased his return ticket, came along the platform where he and the conductor were standing and called out, "its all right, Mr. Blain, get on, and, I still hesitated, he added, he (meaning Anthony) is quiet now, and, I thought he was quiet now till we got to Parkdale."

The only information the conductor had was that there had been an assault but that the man who committed it was all right and then quiet. Before hearing this he had given the promise about the constable.

At Parkdale, Mr. Blain spoke to the conductor on the platform about the constable and was told there was none there and to get on. But he does not say a single word intimating that the man had not remained quiet or that anything had occured since assurances had been given to Blain and the conductor that Anthony was quiet to make the conductor fear or anticipate any renewal of trouble.

In all the evidence before us I have not been able to find a single word or fact indicating that from the moment on the Toronto platform, when the assurances were given about it being all right to get on, that the man was quiet, up to the moment when the second assault took place, the man Anthony had not remained perfectly quiet or that the conductor could or ought to have had any knowledge to the contrary. In the absence of any such evidence, how can it be held that the conductor could or should have anticipated a renewal of the troubles? He knew nothing of the previous relations between the parties. He was in charge of an excursion train filled with passengers, and learns, at the moment of starting, that there had been

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an assault committed, whereupon, he tells the complaining party to get on the train and he would have a constable at the next station. This is followed by assurances from friends of the parties that the man had become quiet and that it was all right. No subsequent information was given to the conductor of any change in the man's attitude, nor did any facts occur from which he could or ought to have inferred any such change till after the second assault took place. No evidence whatever was given that any change did as a fact take place till the actual commission of the second assault. The conductor, therefore, had been lulled into a false security and could not reasonably have anticipated this assault. Mr. Blain, himself, did not anticipate it. The assault was sudden, so much so that the friends of Mr. Blain, who were sitting around him at the time, could not interfere in time to prevent it.

Under these facts I feel that unless we reverse our previous decision we are obliged to set aside the finding of damages for the so-called second assault and to reduce the verdict to the sum of $1,500, the damages awarded for the third assault

The appeal should be allowed accordingly.

IDINGTON J.—Plaintiff having entered as a passenger one of the defendants' passenger cars forming a train which was to leave Union Station, Toronto, for Brampton 11 p.m. on 10th October, 1901, was in passing along the aisle assaulted, knocked down between two seats and pounded there by one Anthony, till fellow passengers took him off.

Anthony was wild, boisterous, in a very noisy condition and quarrelsome. He was drunk. He had immediately previous to this assault upon plaintiff seized another passenger on the same train, shoved him back on a seat threatening that he would choke

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him to death. He was a big, strong, powerful man, weighing about two hundred and fifty pounds.

The train was a large one. The plaintiff with his wife, got off the car, and he went for a constable, whilst she stood on the platform. Meantime Anthony was scuffling with others on the car striking at them. People were standing up and quite a row and noise were going on in the car.

This was five minutes before the train was due to leave. No conductor or brakesman was about. After traversing the tracks going upstairs and inquiring in vain for a constable, plaintiff returned to the train which was starting.

Plaintiff says:

And some one called out, here is Mr. Blain; he is coming; and the car stopped, and the conductor then for the first time came to me, and he says: What did you stop the train for?

Q. Is that the tone he said it in?

A. A good deal more surly than that I said, I did not stop the train. He said why don't you get on. I said I have been assaulted by a man in there—I think I mentioned the name Anthony, but I am not sure—he has assaulted two or three other parties, and he threatens to do it again, and I am not going on the train unless he is removed or arrested. He says, well, the man has a ticket, and he has a right to go. Well, I said, he has no right to go on and commit a breach of the peace, and I won't go on. He said, you get on; and I positively refused. I had abandoned the idea of going. Well, he said, there is no constable here, and if you get on we will have a constable at Parkdale. I hesitated; and just at that moment Mr. Thorburn, the ticket agent at Brampton, who had sold me the ticket, called out, he is all right, Mr. Blain, you get on.

Q. You told him you had been assaulted by some person, and that you had been told he had assaulted two or three others, had you?

A. Yes.

Q. What others?

A. I saw him striking at Beattie, and I saw him striking at Jim Noble before he made the assault on me.

Q. And then you also said he threatened to do it again?

A. Yes. As I was coming down the stairs somebody said, you get a constable, Mr. Blain; he is threatening to go after you again.

Q. You do not know of your own knowledge about a threat?

A. No.

Q. But did you tell the conductor that?

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A. Yes.

Q. Then did you get on when he said he would get a constable at Parkdale?

A. Yes.

Q. Would you have got on without that promise?

A. I certainly would not. I had abandoned the idea. I had no hat; my hat had been knocked off, and I was running through the station without a hat.

Q. Did not you see any of the officers at all around the Union Station when you were running around that way without your hat looking for assistance?

A. I did not; I tried earnestly to get a constable.

Q. Then did you get on?

A. I got on.

Q. Did you see Anthony at all between Toronto Union Station and Parkdale?

A. I did not.

Q. Then at Parkdale what did you do?

A. I got off at Parkdale, and did not see the conductor or Anthony. The car that I got off was not quite up to the station. I walked up the platform past a car, and in the next car, one next to the one I passed, was Anthony standing with a crowd around him, and I could hear him; he was talking in a loud voice.

Q. Was he in the car?

A. He was in the car; and, of course, I was surprised he was there. I looked around for the conductor, and I went into the station house and the conductor was there; he was getting his orders. Mr. Burnett from Brampton was there. After he got his orders I said to him, have not you got a constable? Are you not going to remove this man? He said, there is no constable here. Well, I said, it is only a matter of a few minutes to get a constable, and that man will cause trouble all the way to Brampton, and he has been threatening me again. *He said: There is no one making a row but yourself.* Well, I said, I had a right to make a row. I continued addressing him as I was walking on towards the train. He would hardly listen or stop, and when he got to the train he waved his lantern and says, you get on or you will be left. So I had not time to get back to the car I got off; I got on the car ahead of the one I got off.

Q. Where was your wife?

A. She was in the car behind the one I got on. I hesitated a moment, but my wife was in the car, and I could not possibly communicate with her, and I got on.

Q. Then there was no way by which you could have communicated with her if you had stayed off at Parkdale?

A. No.

Q. Where was your hat at that time?

A. I had no hat.

Q. Then you got on at Parkdale?

A. I got on at Parkdale.

* * *

Q. Then did you see the conductor before the next assault?

A. No. The conductor got on the car in front of the one I got on.

Q. Then from Union Station up to Parkdale, did the conductor pass through the train?

A. No.

Q. Parkdale, that is the first station after you leave the Union Station?

A. Yes.

Q, Did he pass through your car, at all events, from the time that you left the Union Station until such time as you were assaulted for the second time?

A. No.

Within three miles from this point where plaintiff so imploringly made an appeal for protection, he was again assaulted by this drunken man in such a violent manner that for the damages arising therefrom the jury has awarded $2,500 damages, and the defendants say nothing as to the amount of the damages.

The conductor came along just after this second assault, and plaintiff relates thus what passed and was said, p. 21:

Now this man has attacked me again. Well, he said, I did not see it. Well, I said, surely I am not to be killed before you believe me. There are plenty of people who saw him and know what is going on, and you ought to have him removed. Well, he said, he has a ticket, and he has a right to go on; and he did not give any satisfaction in any way.

Q. Would he interfere to prevent him striking another assault or is that all he said?

A. That is all he said.

Before reaching next station two miles further on, that is less than five miles from where the protection was asked and refused, a third assault took place, and plaintiff finally quit the train.

From Union Station the man Anthony is described to have been "mad drunk" all the time and the condition of things in the car is described thus, p. 32:

The ladies could hear what was going on in the smoking compartment—a fearful noise, and everybody was crowding around to see the man. He was perfectly wild, and people came. He was mad drunk all the time.

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Q. Were the people in the car quiet all the way going up from Toronto, too ?

A. They were in a great state of excitement ; the car in which the first assault took place the women folks all left that car and went into another car.

Q. And what about the other cars : were they quiet ?

A. They were in an uproar all the way along.

Q. Then at any time was that uproar put an end to ? Was it quieted down at any time from the time you were assaulted at the Union Station until you got off ?

A. Never.

Burnett, another passenger, who was also assaulted complained to the conductor and told him also of the assault on the plaintiff, and is asked :

Q. Then what did he say to that ?

A. Well, he did not see the row or anything to that effect at all. He did not seem to be around to see this row.

Q. No, I do not want the words ; I want the substance of it ?

A. He said there was no one around here to arrest him ; there was no policeman around.

Again, others desired arrest.

Q. What did he say when they wanted him arrested ?

A. Well, he said he did not see any row at all.

Q. Well, then, when Mr. Blain spoke to the conductor about having been assaulted upon the train what did the conductor say to him then ?

A. The conductor said there did not seem to be any police around or any one around here to arrest this Anthony.

Witness repeats variations of this view conductor took of the incident.

The condition of Anthony, the excitement in the car and the expectation that Anthony would be arrested at Parkdale, and the attitude of the conductor as testified to by each and all are corroborated by Beattie, and as to the excitement in the car and Anthony's condition, by Gilkinson and Broddie, Mr. Clendenning and Mrs. Clendenning, and Graham.

The last named also adds, p. 69 :

The conductor said he had a ticket and he had as good a right to ride as Mr. Blain. Mr. Blain said he would not get on. Then the conductor said he would have a constable at Parkdale and have him arrest him there. Then we got on and the train went.

Q. What else did Mr. Blain tell the conductor in addition to the ssault?

A. He told him that he thought he had threatened to attack him again.

And Mrs. Blain, corroborating the general story adds, p. 74:

Q. Was anything said as to what the conductor would do at Parkdale?
A. He said he would have him arrested.

A number of the passengers testify that the conductor and brakesman could have managed Anthony if they had tried to arrest him and each of the gentlemen says that, if asked by the conductor, they would have assisted to arrest the drunken man.

In regard to those passages from the evidence cited above, that relating to what transpired after the second assault I refer to as throwing light upon the attitude of the conductor. It seems to rebut all that was adduced in argument, as to the conductor having relied upon something that had gone before, lulling him into apathy. It indicates an entirely different frame of mind on the part of the conductor. He clearly did not, at the time, take the position that counsel now takes here, that by reason of what had transpired, after his promise at the Union Station to have the man arrested, he had been induced to change his mind by his observance of the man's condition or any other facts that would lead a reasonable man to believe the danger had passed away.

He seems, on the contrary, to have taken the stand even after the second assault, boldly upon the ground that he had no right or power or duty to interfere, unless the matter had come directly under his own eye.

No such position is open to a conductor under such circumstances. I take it he was in duty bound, upon finding the disturbance that existed in his train, and hearing the complaint that was made, to have taken

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due care to prevent a recurrence of such incidents as had been already explained to him.

I think this evidence furnishes, within the principles laid down in *The Canadian Pacific Railway Co. v. Blain* (1), which govern cases like this, sufficient to entitle the plaintiff to have the questions submitted to the jury which were submitted, and to support the findings of fact the jury have by their answers found, in relation to the circumstances in question.

There is no objection taken to the charge of the learned trial judge who seems to have left the case fairly to the jury, nor is there anything else in the trial of the case to indicate that it was not fairly tried. The results arrived at are wholly within the province of the jury, and I submit cannot be interfered with by this court.

The order granting a new trial left the whole case open as if nothing had transpired before the trial now in question. The case must therefore be considered, I think, solely in the light of the evidence given at that trial. It sometimes may be instructive to look at the facts of a previous decision to ascertain what the exact point, if not sufficiently illustrated in the opinion judgment, really was, that the court intended to decide. The doing so however, must always be liable to produce error, for when the facts are not set forth in the opinion judgment, it may well happen that some particular fact may have been overlooked, or may not have been presented in the same light that it may bear upon later and better argument. I have therefore not considered, beyond listening to the arguments of counsel upon the point, the facts that may have been reported as the result of the first trial. Counsel claims that the evidence did differ in this, and

(1) 34 Can. S. C. R. 74.

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that is not denied though the materiality of the difference is questioned.

I think, therefore, the judgment of the Divisional Court should be upheld, and the appeal dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellants: *Angus McMurchy.*

Solicitor for the respondent: *D. O. Cameron.*

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*April 3,4,5.
*May 2.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS)..... APPELLANTS;

AND

MARY HAINER (PLAINTIFF) .....RESPONDENT.

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THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

AND

GEORGE HUGHES (PLAINTIFF)..... RESPONDENT.

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THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS)..... APPELLANTS;

AND

JOSEPH RICHARD BREADY (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Negligence—Railway company—Excessive speed—Fencing—Railway Act*, 1888, *ss.* 194, 197—55 *&* 56 *V. c.* 27, *s.* 6 (*D*)—*Evidence—Reasonable inferences.*

The provisions of 55 & 56 Vict. ch. 27, sec. 6 amending sec. 197 of The Railway Act, 1888, and requiring, at every public road crossing at road level of the railway the fences on both sides of the crossing and of the track to be turned into the cattle guards applies to all public road crossings and not to those in townships only as is the case of the fencing prescribed by sec. 194 of The Railway Act, 1888. *Grand Trunk Railway Co.* v. *McKay* (34 Can. S. C. R. 81) followed.

Three persons were near a public road crossing when a freight train passed after which they attempted to pass over the track and were struck by a passenger train coming from the direction opposite to that

*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

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of the freight train and killed. The passenger train was running at the rate of forty-five miles an hour, and it was snowing slightly at the time. On the trial of actions under Lord Campbell's Act against the Railway Company the jury found that the death of the parties was due to negligence "in violating the statute by running at an excessive rate of speed" and that deceased were not guilty of contributory negligence. A verdict for the plaintiff in each case was maintained by the Court of Appeal.

*Held*, that the Railway Company was liable; that the deceased had a right to cross the track and there was no evidence of want of care on their part and the same could not be presumed; and though there may not have been precise proof that the negligence of the company was the direct cause of the accident the jury could reasonably infer it from the facts proved and their finding was justified. *McArthur* v. *Dominion Cartridge Co.* ([1905] A. C. 72) followed; *Wakelin* v. *London & South Western Railway Co.* (12 App. Cas. 41) distinguished

*Held* also, that the fact of deceased starting to cross the track two seconds before being struck by the engine was not proof of want of care; that owing to the snowstorm and the escaping steam and noise of the freight train they might well have failed to see the head-light or hear the approach of the passenger train if they had looked and listened.

APPEAL from decisions of the Court of Appeal for Ontario maintaining the verdict at the trial in favour of the plaintiff in each of the three cases.

The facts of the case will be found in the above head-note and in the judgment of Mr. Justice Nesbitt on this appeal.

The cases were not consolidated in the Ontario courts but were tried together and argued together in the Court of Appeal whose decision was given on all three on the same day.

*Riddell K.C* and *Rose* for the appellants. The speed of the train at over six miles an hour was not negligence. The limitation does not attach if the track is properly fenced and under The Railway Act, 1888, secs. 194 *et seq.*, fencing is only required in townships.

If there was negligence plaintiffs have not proved that it was the direct cause of the accident and therefore cannot recover. *Wakelin* v. *London & South*

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*Western Railway Co.* (1); *Montreal Rolling Mills Co.* v. *Corcoran* (2); *Canadian Coloured Cotton Mills Co.* v. *Kervin* (3).

*Staunton K.C.* and *Lancaster* for the respondents, cited *Grand Trunk Railway Co.* v. *Birkett* (4); *Harris* v. *The King* (5).

SEDGEWICK and GIROUARD JJ. concurred in the judgment of Mr. Justice Davies.

DAVIES J.—These actions were brought under Lord Campbell's Act to recover damages for the negligence of the defendant railway company causing the death of the three deceased persons who were killed in the village of Grimsby at a point where the appellants' railway crosses Depot Street.

The jury found that the accident was due to the negligence of the railway company "in violating the statute by running (their train) at an excessive rate of speed," and that the deceased persons "could not by the exercise of reasonable care have avoided the accident."

The trial judge directed judgment to be entered in each case for the amount of the verdict rendered and the Court of Appeal refused to disturb the judgment so entered.

The main contentions of the railway company on this appeal were: 1st, that the statutory provisions limiting the rate of speed at which railway engines may pass through any thickly peopled portion of any city, town or village, to six miles an hour, unless the track was fenced in the manner prescribed by law had no application to crossings at villages because the

(1) 12 App. Cas. 41.
(2) 26 Can. S. C. R. 595.
(3) 29 Can. S. C. R. 478.
(4) 35 Can. S. C. R. 296.
(5) 9 Ex. C. R. 206.

duty to fence was only imposed by the statute in townships, and if the statute required no fence, and under the circumstances there was no necessity for cattle guards, section 197 did not apply; 2ndly, that there was no evidence to connect the alleged negligence with the accident; and thirdly, that the trial judge erred in refusing to charge the jury as to the duty of persons about to cross a railway track to look both ways for an approaching train.

As to the application of the statutory provisions regulating the rate of speed at which trains may run through thickly peopled portions of cities, towns or villages, we had occasion to consider the point very fully in *Grand Trunk Railway Co.* v. *McKay* (1), and I see no reason whatever to doubt the conclusions which we there reached. The controlling sections of the Act are the 197th and 259th. The latter expressly prescribes the limitation on the speed at which the trains are to cross the highways unless the track is fenced in manner prescribed by the Act, and the 197th section is imperative as to the fencing required. Where the prescribed fencing exists the limitation in speed does not apply, where the fencing is absent it does. There was no fencing at the railway crossing in the village of Grimsby where the accident occurred and the express train was admittedly running at the rate of forty-five miles an hour which, in my judgment, was in direct violation of the statute.

Mr. Riddell contended that there was no evidence connecting the statutory negligence with the accident and he relied upon *Wakelin* v. *London and South Western Railway Co.* (2), together with cases decided by this court as authority for the proposition that there must be either direct evidence shewing such connec-

(1) 34 Can. S. C. R. 81. (2) 12 App. Cas. 41.

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tion or presumptions weighty, precise and consistent to that effect.

There can, I take it, be no doubt as to the correctness of this general proposition. In the absence of any direct evidence or of facts from which an inference may reasonably be drawn that the accident was directly occasioned by the alleged negligence the defendants cannot be held liable. The late case of *McArthur* v. *Dominion Cartridge Company* (1), is instructive upon the point that in certain cases it is not necessary to give exact proof of the fault which certainly caused the injury but that it is sufficient if the facts are such as to justify a reasonable inference that such was the case and exclude any other inference.

But the facts proved in this case do not appear to me to admit of any inference but one. The deceased parties were killed by the express train as they were going over the railway crossing, and the train was at the time running, in violation of the statute, at the rate of forty-five miles an hour. No evidence of recklessness or want of care on the part of the deceased was offered. So far as the evidence did go they appeared to have acted as prudent persons should. There is here no reasonable room for conjecture. The parties themselves were all killed and no eye witness actually saw them killed. But the jury, on evidence which fully justified them in so finding, found as an irresistible inference from the facts that they were killed by the express train running at a rate of speed prohibited by statute. Under these circumstances I cannot see how the case of *Wakelin* v. *South Western Railway Co.* (2) at all applies. The circumstances there established were held to be equally as consistent with the allegations of the plaintiff which he was bound to prove as with the denial of the defendants. The conclusion to be drawn

(1) [1905] A. C. 72.

(2) 12 App. Cas. 41.

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was essentially a matter of mere conjecture and that is not sufficient. In that case there was negligence proved but no proof that it was the immediate or proximate cause of the accident. The finding of the jury there was as the Lord Chancellor said "without a fragment of evidence to justify it." In the absence of direct evidence there must of course be such facts proved that an inference may be reasonably drawn from them connecting the accident with the negligence and shewing the latter to have been the direct proximate cause of the accident In this case I cannot see how any other inference could be reasonably drawn from the facts than that which the jury drew. It may well be that in negligence cases there is not and there ought not to be any necessary presumption either way as to facts requiring proof. The unfortunate persons who were killed on the occasion in question were proved to have been standing alongside of the track awaiting the passing of a freight train in front of them. They were proved to have been properly looking at the advancing freight train. The express train rushing along at forty-five miles an hour in an opposite direction to the freight train passed the latter after it had gone over the street crossing a very short distance. The time of night, the conditions of the weather, and the noise, dust and smoke caused by the freight train, all combined, might well have prevented them seeing the express approaching even if they did look. Only a few seconds elapsed, probably two, between the passing of the last car of the freight train one way over the crossing and the engine of the express train the other way. It was not necessary, in my opinion, to presume one way or the other as to their having looked to see if another train was approaching from the opposite direction to which the freight train was going. If they did look the existing circumstances as

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found might easily have prevented them seeing, and if the defendants have, in order to escape liability, to rely upon contributory negligence of the deceased parties the onus of proving it affirmatively, in the first instance at any rate, rests upon them and they have failed to discharge it. See judgments Lords Blackburn and Watson in *Wakelin* v. *London and South Western Railway Co.* (1), at page 43.

The general rule as to the necessity of persons crossing a railway track or street car track looking both ways to see whether they can safely cross is a most salutary and proper one. But that it is not an absolute and arbitrary one admitting of no exceptions under any circumstances seems to be apparent from the late case of *Barry Railway Co.* v. *White* (2).

It seems to me, however, clear that in the absence of any direct evidence on the point the finding of the jury of the absence of contributory negligence cannot under the circumstances of this case be open to any question. Neither party could or did give any direct or positive testimony, and the plaintiffs certainly were not bound to prove a negative in order to entitle them to verdicts in their favour.

It seemed to me at the argument and reflection has only further convinced me that when Mr. Riddell failed to sustain his contention as to the speed of the train not being in violation of the statute his other point vanished. If the train was being rushed through this thickly populated village at a rate of speed nearly eight times as great as that permitted by law that was of course an act of great negligence. If in crossing the highway at such speed the train killed the unfortunate people who while lawfully going along the highway were at the moment on the railway crossing it did seem a most unreasonable propo-

(1) 12 App. Cas. 41.

(2) 17 Times L. R. 644.

sition in the absence of any negligence on their part to say—the train was rushing along at a prohibited speed, it is true, but as the persons it struck are all killed and no one else saw the accident the company must not be held liable unless there is actual evidence that the deceased looked both ways for trains before going across the track. If such was the law the result would be that in most cases where the parties were killed outright such evidence would necessarily be wanting and the company would have complete immunity. The more reasonable doctrine is that to be found in *McArthur* v. *Dominion Cartridge Co.* (1), before referred to, that the absence of exact proof of the fault which caused the injury is not necessarily fatal to the plaintiffs' case provided such fault can from the proved facts be reasonably inferred and is not mere conjecture. That is the principle on which I would base my judgment and applying it to the facts of the case as proved I think it fully justifies the verdicts found.

Then with respect to the judge's charge, as to which exception has been taken, I have read it most carefully and I am bound to say that taking it as a whole, as we are bound to do, I do not think it open to serious objection.

NESBITT J.—These are three actions brought under Lord Campbell's Act to recover damages for the death of two young women and a young man, who were killed on the defendants' line of railway (at Grimsby station), as alleged, by their negligence.

The question for us is whether the learned judge at that trial ought to have withdrawn the case from the jury and directed a verdict for the defendants. I was of opinion at the conclusion of the very able argument which was addressed to us at great length by counsel

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for both parties that the judgment in favour of the plaintiffs was wrong and that the defendants were either entitled to a new trial or to have had a non-suit entered for them at the close of the case. A careful perusal and consideration of the evidence has, however, convinced me that the judgment in favour of the plaintiffs should be affirmed and the appeal dismissed with costs. While the learned judge's charge to the jury may be open in two particulars to criticism I think it it is substantially correct and that he was right in not withdrawing the case from the jury. As, however, there was a great deal of discussion upon the various points involved I propose stating what I conceive to be the result of the authorities in each of the questions involved.

The evidence is that the defendants operate at this point two main lines of railway, Grimsby being situated midway between Niagara Falls and Hamilton. There are also at the point in question several sidings. On the night of Sunday, the 7th December, 1902, at about 8.30, the young women and the young man having been at church were returning to their homes and in so returning were obliged to cross several of the sidings, and as they came up to the south main track a freight train consisting of about forty cars and drawn by an engine was passing to the east. The three persons who were killed were last seen standing about eight feet south of the south track of the defendants' railway apparently waiting for the freight train to pass. The last cars of the freight train having gone completely past the crossing met the engine of the express going west at a distance of three or four car lengths from the crossing just east of the station, so that at the moment the engine of the express passed the rear cars at a distance of from one to two hundred feet from the crossing the three per-

sons must have attempted to cross the track and proceeded about eight or ten feet when they were struck and killed. The express was going at the rate of about forty-five miles an hour which would make it travel about sixty-six feet per second, so that from when it passed the rear cars of the freight train to the time it would go over the level crossing would be between two and three seconds, and if the deceased moved forward at say three miles per hour they would cover about nine feet in two seconds. The evidence seemed clear that standing where deceased were eight or ten feet from the track the head light of the approaching engine could under ordinary conditions be seen for a considerable distance down the track. There was evidence that there was a little wind from the west with light flurries of snow and that a freight train passing, as the one in question did, necessarily raised a considerable quantity of dust and smoke which would probably obscure the head-light and the noise made by the freight train would almost certainly drown the noise of the approaching express.

The negligence charged was the running of the express at this point at an excessive rate of speed under the provisions of section 259 of the Railway Act as amended by 55 & 56 Vict., ch. 27, sec. 8, which is in the following language :

> No locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town or village, at a speed greater than six miles an hour unless the track is fenced in the manner prescribed by this Act.

As I have said the evidence was clear that the train was running at not less than forty-five miles an hour. The plaintiffs also charged negligence in not giving the statutory signals of bell or whistle. This I may dispose of at once by saying that the evidence seems clearly to negative this charge of negligence, and the jury must

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also be taken to have negatived this charge as they only found the negligence to consist of excessive speed. It was also charged that the company was negligent in not having provided a gate or watchman at the crossing. This is disposed of by this court in *Grand Trunk Railway Co.* v. *McKay* (1), which had not then been decided in this court. The only negligence upon which plaintiffs relied at the argument before this court was excessive speed under this section of the Railway Act I have quoted. Mr. Riddell argued that this section was not applicable as the crossing was in an incorporated village and that the only fencing prescribed by the Act was under section 194 of the general Railway Act, and sec. 6 of 55 & 56 Vict. ch. 27, which latter is in the words following:

> At every public road crossing at road level of the railroad the fences on both sides of the crossing and on both sides of the track shall be turned into the cattle guards so as to allow the safe passage of trains.

Mr. Riddell argued that as section 194 only prescribes the building of a fence on each side of the railway through the organized townships, that there was no liability to fence in cities, towns or villages, and section 259 did not apply; that as the object of the Act in maintaining cattle guards and return fences so as to prevent horses, cattle, sheep or swine, etc., from getting on the track was to provide for the safety of passengers the statute having created a duty with the object of preventing a mischief of a particular kind persons who by reason of a neglect of the statutory duty suffered a loss of a different kind were not entitled to maintain an action in respect of such loss. This doctrine is of course well recognized in such cases as *Gorris* v. *Scott* (2); *Buxton* v. *North Eastern Railway Co.* (3); *Vanderkar* v. *The Rensselaer and Saratoga Railroad Co.* (4). In the last named case

(1) 34 Can. S. C. R. 81.
(2) L. R. 9 Ex. 125.
(3) L. R. 3 Q. B. 549.
(4) 13 Barb. 390.

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it was held that the provision in the statute of 1848 requiring railroad companies to construct and maintain cattle guards at all road crossings sufficient and suitable to prevent cattle and other animals from getting on the railroad, does not apply to cities and villages because the statute made an obvious distinction between streets or villages and townships; also *Parker* v. *Rensselaer and Saratoga Railroad Co.* (1), where the same doctrine was affirmed. See also Pollock on Torts (7 ed.), p. 26; Hardcastle on Statutes (2 ed.), 255; Beven on Negligence (2 ed.), 764; *Cleveland Railway Co.* v. *Wynant* (2). I do not think the principle in these cases can be made to apply to the case at bar. Section 6, which I have quoted above, seems to make cattle-guards and return-fences imperative at every public road crossing at road level, and this being a public road crossing within the limits of an incorporated village is not fenced in the manner prescribed by the Act, and I do not think that this fencing is prescribed for the same reasons as the fencing required by section 194 in townships.

It was argued that the trial judge should have nonsuited on the authority of the case of *Wakelin* v. *London & South Western Railway Co.* (3), at page 45, and that that case was not distinguishable from the present case, inasmuch as assuming negligence on the part of the defendants the evidence fell short of proving that the immediate and proximate cause of the calamity was the negligence of the defendants. The court stated it was left to mere conjecture as to whether it was the *causa causans*, and that the plaintiffs undertook to establish negligence as a fact and that such negligence was the cause of the death of the deceased. If in this case it had been shewn that the defendants were approaching the track or standing within a few

(1) 16 Barbour 315. (2) 114 Ind. 525.

(3) 12 App. Cas. 41.

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feet of it when last seen, and that the train was approaching in clear view or its approach could be distinctly heard by any one paying due attention, and that if the deceased had looked or listened they must have seen or heard the approaching train, I think it would have been the bounden duty of the trial judge to non-suit. But that is not this case. The jury have a right to infer that the deceased attempted to cross the track and *while there is no presumption that they behaved with care* (as to which I will speak later), there is no presumption that they behaved recklessly, and as the evidence fails in the important link for the defendants that it does not establish that if the deceased had looked they could have either heard the train or seen it but owing to the noise of the freight and the obscurity created by the smoke and dust the contrary is to be inferred, I think the case must go to the jury to establish contributory negligence in the deceased, and as the jury have negatived that the defendants must fail. In the *Wakelin Case* (1) there was nothing to shew how the accident occurred. Here there is only one conclusion to be drawn, viz., *that the deceased started to cross* two seconds before the passenger engine arrived at the crossing, and the difficulty for the defendants is that it is a question of fact whether by using due care the deceased could have seen or heard the train with the dust, smoke and noise, and so the case must go to the jury. The line is an extremely narrow one but I desire to repeat that had it appeared by the evidence in this case for the plaintiffs that the defendants were guilty of negligence, yet, had the deceased exercised that care both of sight and hearing that they were bound to exercise they must have seen or heard the approaching train then there would have been nothing for the jury because there would have

(1) 12 App. Cas. 41.

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been a failure on the part of the plaintiffs to prove that the negligence established was the immediate and proximate cause of the calamity and the court would have been left to mere conjecture as to whether the accident occurred owing to the defendants' negligence or to the negligence of the deceased in not looking. But where, as in this case, the evidence establishes that even if the deceased exercised due care the accident might occur, then, I think, the case must be submitted to the jury. It was urged most strenuously that the court had a right to assume that the deceased were aware that the law required the company to run at this point at a rate not exceeding six miles an hour because of the failure to fence, and therefore had a right to assume that they had plenty of time to cross. I entirely disagree with this suggestion. In the first place I think the reasonable assumption is that people living in the immediate neighbourhood of the station would be likely to be aware that the express train which was due at this hour was accustomed to pass at the rate of forty-five miles an hour and upwards, and I think it is somewhat a violent assumption that the deceased would be aware that the court would subsequently to the accident declare that the express train was violating the law in running at this point at this high rate of speed, or that the construction I have put upon the statute in the present case was the proper construction. I do not think that the court can assume in the face of our common knowledge that trains do run at this high rate of speed and that people are accustomed to see them run at this high rate of speed in violation of section 259 that any such consideration entered into the calculations of the deceased before attempting to cross the track. I think such presumptions in the face of our common knowledge of their falsity come well within

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the description of "monstrous propositions" referred to by Lord Esher in *Ex parte Mercer*; *In re Wise* (1), when he was asked to draw a presumption in a very different type of case but a presumption which he felt was entirely inconsistent with the facts and which he refused to draw, notwithstanding the proposition had the support of *dicta* of great and eminent judges. I think that if a man looks and sees a coming train and crosses with full knowledge of its approach he does so at his own risk. I think also that if he is ignorant when under the circumstances as between him and the company he ought to have known that the train was approaching, his legal position does not differ from that which it would have been if he had actually known what by using due care he would have known. To hold otherwise would be to enable a person to take advantage of his own wrong. And here, were it not for the fact that the evidence discloses that even if the deceased were careful the accident could still have happened because the noise of the freight train would probably prevent the sound of the express train being heard, and the dust and smoke of the freight and the flurries of snow would probably prevent the train being seen, I would unhesitatingly hold the plaintiffs could not recover. It was argued that the cases in this court of *Montreal Rolling Mills Co.* v. *Corcoran* (2); *Canadian Coloured Cotton Mills* v. *Kervin* (3); and also *Young* v. *Owen Sound Dredge Co.* (4), and *Brown* v. *Waterous Engine Works Co.* (5), were qualified by the recent decision of the Privy Council in *McArthur* v. *Dominion Cartridge Co.* (6). I am unable to accede to this contention. I do not think that the *McArthur Case* (6) has made

(1) 17 Q. B. D. 290 at p. 298.
(2) 26 Can. S. C. R. 595.
(3) 29 Can. S. C. R. 478.
(4) 27. Ont App. R. 649.
(5) 8 Ont. L. R. 37.
(6) [1905] A. C. 72.

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any change in the law. It was admitted in that case that there was no proof of contributory negligence. It was not pretended that the accident could be accounted for as coming under the head of inevitable accident, nor was it contended that there could be any reasonable explanation of the mishap other than that insisted on by the plaintiff, viz., that the evidence disclosed that cartridges were occasionally presented in a wrong posture and that the final blow or punch which was necessary to complete the operation of manufacture because of this wrong posture sometimes fell on the side of the cartridge and sometimes on the metal end in which the percussion cap had been inserted, and that such presenting of the cartridges in a wrong posture was due to the defective working of the automatic fingers which the company's superintendent had designed. There was also apparently a defect in the outside powder box in this that the explosion which should have spent itself in the open air took effect inwards. The Privy Council said the jury very properly inferred, and could only infer, that the accident happened through the negligence of the defendants. The Privy Council also held that in that particular case of an explosion *where the accident was the work of a moment and its origin and cause incapable of being detected the necessity for proof* existing in other classes of cases was dispensed with. I cannot see that the *McArthur Case* (1), which is *sui generis*, has in any way interfered with the doctrine laid down in the other cases I have referred to or with the doctrine in *Wakelin's Case* (2). I entirely dissent from the view expressed by Armour, Chief Justice of Ontario, in *Young* v *Owen Sound Dredge Co.* (3) that the cases in this court had gone far beyond the *Wakelin Case* (2). I agree

(1) [1905] A. C. 72.
(2) 12 App. Cas. 42.
(3) 27 Ont. App. R. 649.

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with the result of his judgment and think that the ground upon which the judgment should have been based was that stated both by Mr. Justice Osler and Mr. Justice Lister in the same case

that the evidence failed to show how the unfortunate man fell off the boat.

In this case the deceased had a right, using due care, to cross the track, and there is no evidence that with the exercise of that due care the accident would not have happened. On the contrary the evidence would seem to indicate that under the peculiar circumstances of this case the deceased, using every care both in looking and listening, would probably have met their death. It is to be observed that the time when they could first see the train until the accident happened was a period of about two seconds, and that looking and listening two seconds before they stepped upon the track the evidence is that probably they would not have seen or heard the train. There is no doubt that the accident happened by their being struck by the swiftly approaching train.

On the question of new trial, I have said there were certain portions of the charge open to criticism. The learned trial judge, in one part of his charge, stated to the jury that

they must assume that the deceased were not guilty, unless there was evidence to show that they were guilty, of contributory negligence.

Had this stood alone I should have thought a new trial should have been directed but I think it was corrected by his direction in other parts of the case. I think that there is no presumption one way or the other. The true rule is laid down in the recent case of *Pomfret* v. *Lancashire and Yorkshire Railway Co.* (1), where Collins M. R. says:

In the present case the county court judge has based his judgment upon his right to assume that everything has been properly done; he has relied

(1) [1903] 2 K. B. 718.

upon the proposition "*omnia præsumuntur rite esse acta*;" but I do not think that that is the correct view to take, or that there is any such presumption in such a case as that before us, for in *Wakelin* v. *London and South Western Railway Co.* (1), the House of Lords declined to act upon the presumption that the deceased man had behaved with care.

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It was urged that in *Texas & Pacific Railway Co.* v. *Gentry* (2), the Supreme Court of the United States had drawn an opposite presumption, and so the head-note appears, but an examination of that case where the doctrine is dealt with at page 367 does not seem to me to justify the head-note but, on the contrary, seems to me to be in accord with the English doctrine. The court says:

> Those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, incentive to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care. This principle was approved in *Baltimore and Ohio Railroad Co.* v. *Griffith* (3). Manifestly it was not the duty of the court when there was no evidence as to the deceased having or not having looked and listened for approaching trains before crossing the railroad track, to do more touching the question of contributory negligence than it did, namely, instruct the jury generally that the railroad company was not liable if the deceased, by his own neglect, contributed to his death, and that they could not find for the plaintiffs unless the death of the deceased was directly caused by unsafe switching appliances used by the defendant, and without fault or negligence on his part.

This seems to be nothing more than saying there is no presumption one way or the other. The learned trial judge in this case also declined to charge that it was the duty of a man "under all circumstances" on approaching a railway track to look both ways to see whether a train was coming from either direction. I think as an abstract statement of law this is not correct and the learned judge was right in refusing to so charge. I also think that the judge did charge that, so far as the circumstances of the case were con-

(1) 12 App. Cas. 41.
(2) 163 U. S. R. 353.
(3) 159 U. S. 603, 609.

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cerned, the deceased were *bound to recognize that the trains were running both ways* and that the degree of care that they did exercise he proposed to *leave to the jury.* As, however, the question was strenuously argued in this court as a ground of misdirection and the question as to whether it is the duty of a person approaching a railway track to look in both directions and listen for a train before crossing has been much discussed I propose to state shortly the authorities both in England, the United States and this country upon the subject I think the best discussion of the English authorities is to be found in the case of *Coyle* v. *The Great Northern Railway Co.* (1), in the judgment of Chief Baron Palles. It is to be remembered that the judgment of Lord Cairns in the *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*, (2) which is always relied upon for the doctrine that a person is not bound to look under all circumstances, was a judgment affirming a refusal by Chief Baron Palles to non-suit in that case, and therefore Chief Baron Palles' analysis of that with other authorities is particularly valuable, and the result of his analysis is that all the cases establish that the plaintiff's conduct in crossing the line without looking, which is *primâ facie* negligence, may lose its character of negligence by reason of its being induced by the conduct of the company in stating in effect "there is no necessity to look, for the train is not coming", or in other words, an act which would be negligent *per se* may cease to be negligent by reason of the invitation of the company to do the act which otherwise would have been negligence. There may be evidence of acts or omissions on the part of the company by which he might have been put off his guard and allowed to suppose that the might safely act as he did, namely, cross without looking, and in

(1) 20 L. R. Ir. 409. (2) 3 App. Cas. 1155.

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every case where a person who has not looked has succeeded against a negligent defendant there *was* such a departure from the ordinary usage or such other act on the part of the defendant as might reasonably have been held to be an inducement to cross, a statement by the company that a person was safe in crossing. Apart from this I think the cases clearly establish that if a man actually looks and sees a coming train and crosses with full knowledge of its approach he does so at his own risk ; that, except as I have indicated, he is bound to look and to listen under the doctrine of using due care. A man does not use due care who does not look and listen unless he has been thrown off his guard by the company in the way I have indicated, and if it appears that had he used due care, (that is, looked and listened), he must have seen or heard the approaching train, he is guilty of such negligence as disentitles him from recovering. As I have pointed out, in *Jamieson* v. *Harris* (1), recently decided, the question of speed is not as a rule very important. The accident could not have happened unless the person was at that particular moment on that portion of the line. Had the train been faster he would not have been there ; had the train been slower he would not have been there ; had he been faster or slower he would not have been there. But the point is that his negligence in not using due care in looking or listening has brought him at that point at that particular moment and his negligence is therefore the *causa sine qua non* of his injury or death and is a contributory cause of his injury or death and so he cannot recover. This conclusion is justified by a long series of decisions. In this country I would refer to *Nicholls* v. *The Great Western Railway Co.* (2) ; *Johnson* v. *Northern Railroad Co.* (3) ;

(1) 35 Can. S. C. R. 625.

(2) 27 U. C. Q. B. 382.

(3) 34 U. C. Q. B. 432.

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*Winckler* v. *Great Western Railway Co.* (1). In the *Nichols Case* (2) the Chief Justice says, in referring to parties crossing a track without looking :—

If parties so acting can recover it must be solely on the ground that the defendants are a railway company and to hold them entitled to damage notwithstanding the total disregard of their own safety is to encourage carelessness and endanger human life.

In the *Winckler Case* (1) it is said, at page 264 :

Then as to the necessity of the driver maintaining a look out, it is quite manifest that this was his duty ; he cannot go on at all hazards because the other party is in fault. If this were so it would have been right of the plaintiff to have killed the donkey in *Davies* v. *Mann* (3).

And at page 269 Wilson J. says :

The defendants have a right to run their trains and they can neither go to the right nor left, nor can they stop them at once. Knowing all this, the legislature gave the defendants the right to run their trains and, I think, cast the duty upon those who cross their track not to rush in the way of their trains when in motion, which they cannot control.

In the *Johnson Case* (4) the court said :

It is the duty of the traveller approaching a railway crossing to look along the line of railway track and see if any train is coming, and if he fails to take such precaution, and an accident happens, it is more than evidence of negligence in the traveller ; it is little short of recklessnesss for any one to drive on to the track of a railway without first looking and listening to ascertain whether a moving locomotive is near. * * * * In general terms a neglect of duty on the part of a railway company will not excuse a person approaching a crossing from using the sense of sight and hearing, where those senses may be available ; and when the use of either of these faculties would give sufficient warning to enable the party to avoid the danger contributory negligence is shown.

In England, Chief Baron Pollock, in *Stubley* v. *The London & North Western Railway Co.* (5), says that a railway

is in itself a warning of danger to those about to go upon it, and cautions them to see whether a train is coming.

And Channell B. in the same case says :

But passengers crossing the rails are bound to exercise ordinary and reasonable care for their own safety, and to look this way and that to see if danger is to be apprehended.

(1) 18 U. C. C. P. 250 at p. 257.
(2) 27 U C. Q. B. 382.
(3) 10 M. & W. 546.
(4) 34 U. C. Q. B. 432.
(5) L. R. 1 Ex. 13.

And in *Skelton* v. *London and North Western Railway Co.* (1), Bovill C. J, in answer to the argument that the gate being open the deceased had a right to assume that the line was clear, says:

> The deceased could not have supposed that the position of the ring showed that the line was clear, because the coal train was standing before the gate, and, if the crossing was rendered dangerous by obstruction to the view *it only made it more incumbent upon him to take due care.* There is no evidence, however, that the deceased took any care or caution whatever. When he reached the first line of rails he could have seen three hundred yards, but it appears from the evidence that he did not look either to the right or left, but walked heedlessly on, and it was owing to this want of caution on his part that the accident occurred.

See also *Cliff* v. *The Midland Railway Co.* (2); *Ellis* v. *The Great Western Railway Co.* (3); *Davey* v. *The London & South Western Railway Co.* (4); *Curtin* v. *Great Southern & Western Railway Co. of Ireland* (5). In *Allen* v. *North Metropolitan Tramways Co.* (6), the court was composed of Lord Esher M. R. and Lindley and Bowen L. JJ. It was a case where the accident happened upon a bridge upon which two tramway lines coalesced and the plaintiff when endeavouring to cross the road looked only in one direction and not in the direction from which the car was coming. There was some evidence that the car was going fast, and there was evidence that the plaintiff did not hear the car coming owing perhaps to the ground being covered with snow. The court, overruling the Divisional Court, held that it was clear from these facts that the plaintiff had only himself to blame for the accident. He walked into the tram car when *if he had looked he must have seen it.* In *Lake Erie & Detroit River Railway Co.* v. *Marsh* (7), upon an application for leave this court assumed that the law was as I have stated.

(1) L. R. 2 C. P. 631.
(2) L. R. 5 Q. B. 258.
(3) L. R. 9 C. P. 551.
(4) 12 Q. B. D. 70.
(5) 22 L. R. Ir. 219.
(6) 4 Times L. R. 561.
(7) 35 Can. S. C. R. 197.

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The American authorities are very explicit. Mr. Justice Field, of the Supreme Court of the United States, in *Chicago, Rock Island and Pacific Railroad Co.* v. *Houston* (1), says, at page 701:

If the positions most advantageous to the plaintiff be assumed as correct, that the train was moving at an unusual rate of speed, its bell was not rung, and its whistle not sounded, it is still difficult to see on what ground the accident can be attributed to the "negligence, unskilfulness or criminal intent" of the defendant's engineer. * * * She, the deceased, was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into places of possible danger. Had she used her senses she could not have failed to both hear and see that the train was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, *she saw the train coming, and yet undertook to cross the track instead of waiting for the train to pass and was injured, the consequence of her mistake and temerity cannot be cast upon the defendant.*

This case was reaffirmed in *Texas and Pacific Railroad Co.* v. *Gentry* (2), which I have already referred to.

In the State Courts it has been held in the case of *Gorton* v. *The Erie Railway Company* (3), at page 664:—

But these obstacles, if they existed, and hid from view the railroad and approaching trains to the extent claimed, did not relieve the plaintiff from the duty of looking for an east-bound train at the first opportunity, but rather rendered a cautious approach to the crossing the more necessary. Upon the undisputed evidence that, if the plaintiff had looked to the west, as he approached and reached the north track of the railroad, he could have seen the approaching train and that he did not look, he should have been non-suited.

And again, in *McGrath* v. *The New York Central and Hudson River Railroad Co.* (4), the Court of Appeal says:—

In respect to a person travelling on a highway which is crossed by a railroad it has been settled, by a series of adjudications in this state, that he is bound on approaching the crossing to look and listen if by doing so he can discover the proximity of a moving train, and that the omission to

(1) 95 U. S. R. 697.
(2) 163 U. S. R. 353.
(3) 45 N. Y. 660.
(4) 59 N. Y. 468.

do so is an omission of ordinary care which will prevent his recovering for an injury which might have been avoided if he had used his faculties of sight and hearing.

And again in *Salter* v. *The Utica and Black River Railroad Co.* (1)

The principle which requires that a man should use his ears and eyes in crossing a railroad track, so far as he has opportunity to do so, equally demands that he shall employ his faculties in managing his teams, and thus keep out of danger, and the fact that the view was obstructed for a certain distance imposed the greater obligation of holding his team in check.

And in *Butterfield* v. *The Western Railroad Corporation* (2), the plaintiff was struck while crossing the railroad on a highway. The night was dark and stormy and he did not look, although he listened for a train, relying upon a signal to apprise him of its approach. The Supreme Court held, assuming that the duty of sounding the bell or whistle was violated and that the plaintiff had a right to expect those signals to be given, that this did not relieve him from the use of both eyes and ears as he approached the crossing, and that a failure to do so was negligence and the plaintiff could not recover.

See also *Central Railroad Co. of New Jersey* v. *Feller* (3).

In *Gardner* v. *Detroit, Lansing and Northern Railroad Co.* (4), the court says, at page 244 :

We think the court below should have entered judgment for defendant upon the plaintiff's own testimony and the findings of the jury. It was found that when the plaintiff was within five feet of the north rail he could, if he had looked, have seen eastward on the track a distance of two hundred and fifty feet. There was nothing to obstruct his view if he had looked * * * It is apparent, from the plaintiff's own testimony, that he was not exercising due care in going over these tracks. A railway track is, in itself, notice and warning of danger, and we have repeatedly held that it is the duty of a person to look and listen before venturing upon it.

In New Jersey, in the case of *Delaware, Lackawana & Western Railroad Co.* v. *Hofferan* (5), the court says :

(1) 75 N. Y. 273.
(2) 10 Allen (Mass.) 532.
(3) 84 Pa. St. 226.
(4) 97 Mich. 240, at page 244.
(5) 57 N. J. L. 149, at page 153.

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A railroad track is a place of danger and any one who incautiously places himself upon it, and sustains damage in consequence of such carelessness, is entirely remediless. The law requires of all persons approaching such a point of peril the exercise of a reasonable caution, and if this duty is neglected, and an accident thereby occurs, it says to those who are thus in default that they must bear the ill which is the product in whole or in part of there own folly," *Pennsylvania Railroad Co.* v. *Matthews* (1). * The deceased was not relieved of the duty of exercising the highest practicable degree of care in avoiding the danger to himself, and of looking each way for an approaching train, before crossing, because of the neglect of the defendant in failing to give proper statutory signals by ringing the bell or blowing the whistle on the locomotive.

See also *Barnum* v. *Grand Trunk Western Railway Co.* (2); *Garlich* v. *Northern Pacific Railway Co.* (3).

I have cited these cases to demonstrate that the law, except where there are special circumstances such as I have indicated in discussing the *Coyle Case* (4), implies negligence if a person fails to take due care in approaching or crossing a railway crossing, and that due care means looking and listening.

It would scarcely be urged that if a man attempted to cross Broadway, in New York, where cable cars are seldom more than fifty or sixty feet apart, that he could recover if it was shown that he attempted to cross without looking in both directions. He would expect in that situation cars at any moment, and therefore he would be guilty of a want of due care in not looking. I conceive that if he is aware that he is crossing a railway track that he must in the same way expect a train at any moment and that unless he is misled into security by some act or omission of the company he is the author of his own injury if he meets with injury in crossing without looking.

The case of *Barry Railway Co.* v. *White* (5), was urged as assuming a doctrine different from what I have indicated. I do not so read the case. That was a case of lines of railway running alongside a dock,

(1) 7 Vroom 531.
(2) 100 N.-W. Rep. 1022.
(3) 131 Fed. Rep. 837.
(4) 20 L. R. Ir. 409.
(5) 17 Times L. R. 644.

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and the man injured was crossing these lines to get to the boat on which he was an engineer, the boat then lying in the dock; and his case was that he had no reason to expect a train and was not therefore negligent in not looking before crossing the track in question. It is quite true the defendants urged that the place where the accident occurred was in the nature of a shunting yard for goods traffic, and that the man injured should look behind him as well as in front of him before stepping on to the line. The report is not very clear and I do not find that the case is elsewhere reported, and it would seem to me not an ordinary case of railway crossing but to be a case where it must be a question for the jury whether the person crossing had a right to expect a train to approach without signals, the railway tracks being apparently in the dock yard. Nothing can be gathered from the judgment of the Lord Chancellor in directing a new trial, and I do not think the case throws any light upon the discussion. In my view there is no real clash in the cases upon the subject, although I admit that where the law of negligence is concerned the quotation by Baron Dowse from the Poet Laureate's lines are most apt when he speaks of:

> The lawless science of our law—
> That codeless myriad of precedents;
> That wilderness of single instances.

IDINGTON J.—I think that there was evidence in this case that had to be submitted to the jury and that the learned trial judge could not properly have withdrawn it from their consideration.

I see nothing in the learned judge's charge that can properly be complained of as misdirection.

I am, therefore, of opinion that this appeal ought to be dismissed with costs

*Appeals dismissed with costs.*

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

Solicitors for the respondents: *Lancaster & Campbell.*

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*May 2, 3.

*May 15.

# IN RE INTERNATIONAL AND INTERPROVINCIAL FERRIES.

## IN THE MATTER OF THE VALIDITY OF CHAPTER 97 OF REVISED STATUTES OF CANADA AND AMENDMENTS THERETO.

REFERENCE BY THE GOVERNOR GENERAL IN COUNCIL.

*Constitutional law—Interprovincial and international ferries—Establishment or creation—License—Franchise—Exclusive right—Powers of Parliament—R. S. C. c. 97 - 51 V., c. 23 (d).*

Ch. 97 R. S. C. "An Act respecting ferries," as amended by 51 Vic., ch. 23 is *intra vires* of the Parliament of Canada.

The Parliament of Canada has authority to, or to authorize the Governor General in Council to, establish or create ferries between a province and any British or foreign country or between two provinces.

The Governor General in Council, if authorized by Parliament, may confer, by license or otherwise, an exclusive right to any such ferry.

SPECIAL CASE referred by the Governor general in Council to the Supreme Court of Canada for hearing and consideration.

The following is the case so submitted :

*Extract from a report of the honourable the Privy Council, approved by the Governor General on the 28th December*, 1904.

On a memorandum dated 16th December, 1904, from the Minister of Justice recommending that pursuant to the Supreme and Exchequer Courts Act, as amended by the Act passed in the 54th and 55th years of the reign of Her late Majesty, Queen Victoria, Chaptered 25, intituled "An Act to amend Chapter 135 of the Revised Statutes, intituled 'An Act respecting the Supreme and Exchequer Courts'", the following ques-

*PRESENT:—Sir Elzéar Taschereau C. J. and Sedgewick, Girouard, Davies, and Nesbitt JJ.

tions be referred to the Supreme Court of Canada for hearing and consideration, viz: —

1. (*a*) Is Chapter 97 of the Revised Statutes of Canada intituted "An Act respecting Ferries," as amended by the Act passed in the 51st year of the reign of Her late Majesty Queen Victoria, Chapter 23, intituled "An Act to amend the Revised Statutes of Canada, chapter 97, respecting Ferries," *intra vires* of the Parliament of Canada?

(*b*) If the said Act, as so amended, is *intra vires* in part only, which sections or provisions thereof are *ultra vires* or to what extent is the said Act *ultra vires*?

2. (*a*) Has the Parliament of Canada authority to establish or create or authorize the Governor General in Council to establish or create ferries between a province and any British or foreign country, or between two provinces? and

(*b*) Is it competent to the Governor General in Council, if thereunto authorized by the Parliament of Canada, to grant or confer by way of license or otherwise an exclusive right to any such ferry?

The Committee submit the same for approval.

(Sgd) JOHN J. McGEE,
*Clerk of the Privy Council.*

*Newcombe K.C.* Deputy Minister of Justice, appeared for the Dominion of Canada.

*Blackstock K.C.* for the Province of Ontario.

A factum was filed on behalf of the Province of Quebec but no counsel was present to represent that province.

*Blackstock K.C.* is heard. The right to grant a franchise—an incorporeal hereditament, is one of the prerogatives of the Crown, one of the *jura regalia.*

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*Newton* v. *Cubitt* (1); *Anderson* v. *Jellet* (2); *Perry* v. *Clergue* (3).

As one of the *jura regalia* the right in question passed to the provinces under sec. 109 B. N. A. Act, 1867. *Attorney General for Ontario* v. *Mercer* (4).

*Newcombe K.C.* is heard for the Dominion. Parliament is given exclusive legislative jurisdiction over ferries between a province and any British or foreign country, or between two provinces. These are the ferries dealt with in the legislation in question.

A provincial legislature could not control a ferry outside of the province. The right must necessarily be with parliament.

Section 109 of the British North America Act only refers to royalties connected with "lands, mines and minerals," and not to the prerogative rights in question here.

THE CHIEF JUSTICE.—These questions should, in my opinion, be answered in the affirmative. The policy of the British North America Act is to leave all international or interprovincial undertakings within the federal power. And that, it is evident, must necessarily be so as to ferries. Taking for instance a ferry on the Ottawa River between Ontario and Quebec, neither Ontario nor Quebec has the right to effectually grant a license for a ferry abutting on the opposite shore over which it has no jurisdiction. And if the provinces have not that right the federal parliament must have it. Such a ferry was not situate, and the right to it did not arise, either in Ontario or in Quebec at the time of the Union, and consequently sec. 109 of British North America Act has no appli-

(1) 12 C. B. N. S. 32; 13 C. B. N. S. 864.
(2) 9 Can. S. C. R. 1, at p. 11.
(3) 5 Ont. L. R. 357.
(4) 8 App. Cas. 767 at p. 778.

cation. And if sec. 109 does not apply, sec. 102 does, and the revenues from these licenses belong to the federal authority, under whose legislative control they have been specially put by the British North America Act, for greater certainty. The *Fisheries Case* (1) is clearly distinguishable. There were no proprietary rights at the union in ferries between the two provinces vested in either one or the other of these two provinces.

No provincial legislature could incorporate a company to run a ferry between the two provinces, and no provincial government could itself be granted by its legislature the power to run an exclusive ferry between two provinces. The Dominion Parliament alone could do it, and fix the price of the license to the company upon such additional terms and conditions as it saw fit to enact.

SEDGEWICK and GIROUARD JJ. concurred in the opinion of Mr. Justice Nesbitt.

NESBITT J.—The question referred to this court is as follows :

1. (*a*) Is Chapter 97 of the Revised Statutes of Canada intituled "An Act respecting Ferries", as amended by the Act passed in the 51st year of the reign of Her late Majesty Queen Victoria, Chapter 23. intituled "An Act to amend the Revised Statutes of Canada, chapter 97, respecting Ferries", *intra vires* of the Parliament of Canada?

(*b*) If the said Act, as so amended, is *intra vires* in part only, which sections or provisions thereof are *ultra vires* or to what extent is the said Act *ultra vires*?

2. (*a*) Has the Parliament of Canada authority to establish or create or authorise the Governor General in Council to establish or create ferries between a province and any British or foreign country, or between two provinces and

(1) 26 Can. S. C. R. 444.

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(*b*) Is it competent to the Governor General in Council, if thereunto authorised by the Parliament of Canada, to grant or convey by way of license or otherwise an exclusive right to any such ferry?

The doubt has arisen owing to a decision of Mr. Justice Street in a case of *Perry* v. *Clergue* (1), in which that learned judge held that a ferry was an incorporeal hereditament the title to which remained in the Province under section 109 of the British North America Act and that the power conferred by section 91, s.s. 13, was merely a power of regulation of the ferry when created by the Provincial authority similar to the power which the Dominion has relative to fisheries.

On the 3rd July, 1797, the statute 37 George III, chapter 10 (in the Revised Statutes of Upper Canada) was passed intituled "An Act for the Regulation of Ferries". This statute authorised the justices of the peace in quarter sessions to make such rules and regulations for the governance of ferries and also for the regulation of tolls as might be thought proper and penalties were imposed for any overcharge and so forth.

In 1853 a statute was passed by the Parliament of Canada, 16 Victoria, chapter 212, intituled "An Act to regulate Ferries beyond the local limits of the Municipalities in Lower Canada."

This statute repealed previous statutes and provided that

> from and after the time when the Act shall come into force no person shal act as a ferryman, etc. or shall convey or cause to be conveyed by any one in his service any person across any river, stream, lake or water within Lower Canada and not wholly within the local limits of any municipality thereof without having received a license under the hand of the Governor of the Province", etc.

1) 5 Ont. L. R. 357.

Powers were conferred upon the Governor in Council to make and from time to time to repeal or alter regulations for establishing the extent and limit of all such ferries; for defining the manner in which the conditions including any duty or sum to be paid for the license under which and the period for which licenses shall be granted in respect of all such ferries; for fixing tolls and so forth. Section 7 of this statute provided that all moneys arising out of such ferry licenses and out of penalties incurred in regard to the same or otherwise under this Act should form part of consolidated revenue fund.

In 1855 the Province of Canada passed a statute, 18 Victoria, chapter 100, intituled "Lower Canada Municipal and Road Act, 1855". This statute by section 42 dealt with the ferries. It provided that ferries, in cases where both sides of the river or water to be crossed lie within the same local municipality, should be under the control of the municipal council.

It provided by subsection 3 that the moneys arising from any licenses for a ferry should if the ferry be under the control of a local municipality, belong to such municipality and if it be under the control of the county council they should belong one moiety to each of the local municipalities between which the ferry lies and such moneys should be applied to road purposes.

Sub-sec. (4) provided that ferries in cases where both sides of the river or water to be crossed did not lie within the same county should continue to be regulated and governed as they then were.

In 1857 a statute was passed by the Parliament of Canada, 20 Victoria, chapter 7, intituled "An Act to amend the laws regulating ferries so as to encourage

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the employment of steamboats and ferryboats in Upper Canada."

The preamble recites that "whereas it is necessary and expedient to afford greater inducements than now by law exist for the purpose of establishing steam ferries in Upper Canada, and it is necessary to amend the law regulating ferries."

It then provides that a license to have a steam ferry between two municipalities may be granted to municipalities in Upper Canada by the Governor—a condition being imposed that the craft to be used for the purpose of such ferry shall be propelled by steam.

A provision was made permitting the municipalities to sublet the ferries for such price and upon such terms and at such conditions as to rates of ferriage, etc., as the municipalities might see fit, but providing that in so subletting the said municipality or municipalities should not in any way contravene the terms of the license from the Crown.

Section 5 of this statute deals with ferries on the provincial frontier, and it provides:

> And as in order to encourage the establishment of good ferries for the accommodation of commerce on the line of the provincial frontier, it is essential to place the control and management of the same in the municipalities immediately interested, no license in future shall be granted to any person or body corporate beyond the limits of the province, but such license in all cases shall be granted to the municipalities within the limits of which such ferry exists.

These statutes related only to Upper Canada. At the time of confederation the Consolidated Statutes of Upper Canada of 1859 were in force. The first section of chapter 46 of these statutes related to ferries on the frontier line of Upper Canada and was a consolidation of the two statutes, 20 Victoria hereinbefore referred to, and 22 Victoria, ch. 41.

The provisions of this statute other than the first and second sections clearly apply to ferries other than

ferries on the frontier line of Upper Canada. The Confederation Act was then passed which by section 91 conferred upon the Parliament of Canada authority to legislate in regard to ferries between a province and any British or foreign country or between two provinces.

Sec. 91, subsec. 10, as to navigation and shipping.

Sec. 91, subsec. 13, ferries between a province and any British or foreign country or between two provinces.

Sec. 92, subsec. 10, as to lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other or others of the provinces or extending beyond the limits of the province, lines of steamships between the provinces and any British or foreign country.

At this time the right to issue a license for a ferry was in no sense the same as the title to land.

Upon the grant of a license for a ferry, or if a ferry were obtained by prescription in the hands of the licensees, the interest therein might be treated as in the nature of an incorporeal hereditament, but the right to grant (while vested in the Crown) was controlled by the legislature. It was a grant or license under the Great Seal.

It would appear that the Crown had abandoned certain prerogative rights leaving them to the control of the legislature, such as granting of charters, and that the exercise of such a power by the Crown, certainly in the colonies, might be treated as obsolete, and therefore when the subject of fines was mentioned it covered the power or authority to create the ferry which only when created became a species of property. It seems singular that apparently the provinces could not create a company to operate a ferry between provinces or a province and a foreign territory and yet

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could create the ferry itself, and it seems to me reasonably clear that the creation of such a company with such powers is not within the enumerated provincial powers.

I think it is obvious, having regard to the whole scheme of confederation, that the intention of the British North America Act was to place within the sole control of the Dominion Parliament all rights affecting navigation between the Dominion and any foreign country and as well the right to legislate as to grants of a ferry between the Dominion and a foreign country.

The Legislature of Ontario have so dealt with the subject.

The earliest consolidation of the statutes of Ontario is by the Revised Statutes of Ontario passed in 1877. In the appendix A to these statutes there is a list of the Acts contained in the Consolidated Statutes for Canada and Upper Canada published in 1859 "shewing to what extent those which are of a public general nature and within the legislative authority of the Legislature of Ontario remain in force and how they have been dealt with in the revision of the statutes."

On page 2301 of this volume, chapter 46 of the Consolidated Statutes of Upper Canada, 1859, is referred to and this statute is consolidated except section 1. This sec. 1 deals with frontier ferries, and the same appendix, on the same page, shews that the subject matter of frontier ferries has been dealt with by the Dominion by 33 Victoria, chapter 35.

In 1892 the Municipal Act was passed by the Parliament of Ontario, 55 Victoria, chapter 42; section 287 of this statute enacts that "a council may grant exclusive privileges in any ferry which may be vested in a corporation represented by such council other than a ferry between a province of the Dominion of

Canada and any British or foreign country or between two Provinces of the Dominion," and further provisions were enacted by the same statute by section 495 subsec. (4).

On the doctrine of Parliamentary interpretation, which I have dealt with fully in the *Canadian Pacific Railway Branch Line Case* (1) just decided by this court, this legislation coupled with the Dominion legislation would go far towards answering the question in favour of the Dominion jurisdiction.

Is it however correct to say that the powers under section 91 are limited in scope to mere regulation?

The distribution of legislative power in Canada is substantially provided for by ss. 91 and 92 of the British North America Act. Section 92 deals with the exclusive powers of Provincial Legislatures.

Section 91 provides

that it shall be lawful for the Queen by and with the advice and consent of the Senate and House of Commons to make laws for the peace, order and good government of Canada in relation to all matters not coming within the class of subjects by this Act assigned exclusively to the legislatures of the provinces, and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that notwithstanding anything in this Act the exclusive legislative authority of Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated ;—

and at the end of the section it is provided:

And 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.

This expression, peace, order and good government, seems to be drawn from the proclamation of the 7th

(1) 36 Can. S. C. R. 42.

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October, 1763, following the Treaty of Paris. That recited:

> We have thought fit to publish and declare by this our Proclamation that we have in the Letters Patent by which such Governments are constituted given our Governors, etc., power to summon and call General Assemblies.

The proclamation then proceeds to confer power on the governors, with the consent of the council and the representatives of the people so to be summoned as aforesaid, to make, constitute and ordain laws, statutes and ordinances for the public peace, welfare and good government of our said colonies and of the people and inhabitants thereof as near as may be agreeable to the laws of England.

When the Provinces of Upper and Lower Canada were re-united the imperial statute, 3 & 4 Victoria, chapter 35, (1840,) was enacted providing for the re-union of these two provinces and also for the government of Canada and power was conferred on the Legislative Council and Assembly of Canada to make laws for the peace, welfare and good government of Canada.

Prior to confederation, in the old provinces of Quebec and in the provinces of Upper and Lower Canada, and subsequently, after the re-union, in the Province of Canada, under the powers conferred, hereinbefore referred to, laws were passed relating to railways and other works and it was taken for granted that the powers conferred in the language quoted above conferred the right to legislate in favour of railways and other corporations conferring upon them the power of expropriation in furtherance of the objects of the corporations.

Under section 91 of the British North America Act railways connecting the province with any other of the provinces are dealt with and the same statutory powers in regard to expropriation and otherwise have been conferred by the Dominion Parliament without question. In fact it would be impossible to deal with

the provisions of section 91 unless it were held that the Dominion Parliament has, incident to the creation of corporations within their jurisdiction, a jurisdiction to pass provisions for expropriation of property, etc., in order to enable them to carry out their corporate objects. This seems to be recognized by the Privy Council in various cases, such as *Tennant* v. *Union Bank* (1); *Colonial Building Society* v. *Attorney General of Quebec* (2); *Cushing* v. *Dupuy* (3); *Dobie* v. *The Temporalities Board* (4); and other cases.

It was argued that the *Fisheries Case* (5); the *Mercer Case* (6) and the *British Columbia Mines Case* (7) compelled the view to be taken that ferries were *jura regalia* and provincial property.

In the *Fisheries Case* (5), the question arose as to the title to the beds of the waters in question. It was held by the Privy Council that (exclusive of harbours) the bed of the lakes and the bed of the rivers, whether navigable or not, formed part of the lands of the provinces and did not pass to the Dominion. One question there raised was whether under subsec. 12 of sec. 91, which conferred upon the Dominion power to legislate in respect of sea coasts and inland fisheries, the title to the fish in waters owned by the province passed to the Dominion. The point involved in the fisheries case was—conceding the land to be vested in the province—is the property in the fish in the waters covering such lands taken away from the province and vested in the Dominion under the general words used in subsec. 12 of sec. 91? And the Privy Council held that it was not.

In the *Fisheries Case* (5) the question was not merely as affecting the lands covered by waters, the fee of

(1) [1894] A. C. 31.
(2) 9 App. Cas. 157.
(3) 5 App. Cas. 409.
(4) 7 App. Cas. 136.
(5) 26 Can. S. C. R. 444; [1898] A. C. 700.
(6) 8 App. Cas. 767.
(7) 14 App. Cas. 295.

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which was in the provinces, but also lands owned by private parties obtained by grants theretofore made to them.

Dealing with the subject the Privy Council determined that in regard to sea coasts and inland fisheries the power conferred upon the Dominion Parliament was merely to regulate but that the property did not vest in them, and that while the Dominion Parliament had exclusive power to make regulations for the control of the fisheries and power to issue licenses to fish on payment of a fee, that did not carry with it a right to grant *an exclusive license to fish in the waters belonging to the province or a private individual.*

The next case urged upon our attention was *Attorney General of Ontario* v. *Mercer* (1).

That case was merely dealing with the one question —whether under section 109 of The British North America Act escheats of lands belonged to the Crown represented by the Dominion, or the Crown represented by the province. The contention on the part of the Dominion was that the word "royalties" must be construed merely in a limited sense as applying to mines and minerals or royalties in the ordinary sense reserved in a grant of mineral rights and that the word royalties should not in any way be applied as referable to lands.

The question submitted was whether the Government of Canada or that of Ontario was entitled to lands situate in the Province of Ontario and escheated to the Crown for want of heirs; page 768.

In dealing with the case the Lord Chancellor (Earl of Selborne) at page 771 states the question to be determined is whether lands in the Province of Ontario escheated, etc. His Lordship then proceeds to deal

(1) 8 App. Cas. 767.

with the title to lands and deals with escheats as if it were a species of reversion.

At page 774 he states:

If there had been nothing in the Act leading to a contrary conclusion their Lordships might have found it difficult to hold that the word "revenues" in this section (referring to section 102) did not include territorial as well as other revenues.

At page 775 the Lord Chancellor states:

Their Lordships for the reasons above stated assume the burden of proving that escheats subsequent to the union are within the sources of revenue excepted and reserved to the provinces, to rest upon the provinces. But if all ordinary territorial revenues arising within the provinces are so excepted and reserved it is not *a priori* probable that this particular kind of casual territorial revenue (not being expressly provided for) would have been unless by accident and oversight transferred to the Dominion.

On page 778 the Lord Chancellor states:

It appears however to their Lordships to be a fallacy to assume that because the word "royalties" in this context would not be inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought therefore to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense as to (at all events) all the subjects with which it is here found associated—lands as well as mines and minerals. Even as to mines and minerals it here necessarily signifies rights belonging to the Crown *jure coronæ*. The general subject of the whole section is of a high political nature. It is the attribution of royal territorial rights, for purposes of revenue and government, to the provinces in which they are situate or arise.

On page 779 the Lord Chancellor says:

Their Lordships are not called upon to decide whether the word "royalties" in section 109 of the British North America Act of 1867 extends to other royal rights besides those connected with lands, mines and minerals. The question is whether it ought to be restrained to rights connected with mines and minerals only to the exclusion of royalties such as escheats in respect of lands,

and they were of opinion that under the word "royalties" were included all ordinary territorial revenues.

Substantially the same views were expressed in the later case of *Atty. Gen. of British Columbia* v. *Atty. Gen. of Canada* (1).

I do not find any court has laid down the rule that a mere right to create something, a mere authority to bring into being a corporate entity or privilege or any-

(1) 14 App. Cas. 295 at p. 304.

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*In re* INTERNATIONAL AND INTERPROVINCIAL FERRIES.

Nesbitt J.

thing of that character for which a fee could be charged is a "royalty" within section 109, but I would rather place such a right under sections 12 and 108 than under 109.

It seems to me therefore that the authority to create a ferry of the character in question is vested in the Dominion and exercisable under sections 12 and 91 of the British North America Act.

The argument of Mr. Blackstock in favour of the exclusive right of the Provincial Governments to license international and interprovincial ferries was rested entirely upon the enlarged construction he gave to the word royalties in the 109th section of the British North America Act. I have already referred to the construction which ought to be given to this word "royalties," but I would add that if Mr. Blackstock's argument prevailed the practical result would be that the several provinces would determine when and where and to whom and for what consideration international and interprovincial ferries should be granted, and the sole task and power of the Dominion Parliament to legislate on the subject would be confined to the determination of the size of the ferry boats, the proper amount of steam they could use, the number of passengers and life preservers they could and should carry and other like useful if humble powers. I cannot believe that these are the objects which the Imperial Parliament alone had in view when conferring exclusive legislative jurisdiction upon the Dominion Parliament on such an important and imperial question as international ferries.

I would therefore answer the question submitted:

1. (*a*) Yes.
   (*b*) Covered by first answer.
2. (*a*) Yes.
   (*b*) Yes.

THERSILE CARRIER ET VIR (DEFENDANTS) ..... ..... } APPELLANTS.

AND

HENRI JOSEPH SIROIS (PLAINTIFF)..... ..... } RESPONDENT.

1905
*May. 12.
*May 15.

ON APPEAL FROM THE COURT OF KINGS BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

*Appeal—Jurisdiction—Matter in controversy—Warranty of title—Future rights—Hypothec for rent charges—R. S. C. c. 135, s. 29.*

In an action for the price of real estate sold with warranty, a plea alleging troubles and fear of eviction under a prior hypothec to secure rent charges on the land does not raise questions affecting the title nor involving future rights so far as to give the Supreme Court of Canada jurisdiction to entertain an appeal. *The Bank of Toronto* v. *Le Curé et les Marguillers de la Nativité* (12 Can. S. C. R. 25); *Wineberg* v. *Hampson* (19 Can. S. C. R. 369); *Jermyn* v. *Tew* (28 Can. S. C. R. 497); *Waters* v. *Manigault* (30 Can. S. C. R. 304); *Fréchette* v. *Simoneau* (31 Can. S. C. R. 13); *Toussignant* v. *The County of Nicolet* (32 Can. S. C. R. 353); and *The Canadian Mutual Loan and Investment Co.* v. *Lee* (34 Can. S. C. R. 224) followed. *L'Association Pharmaceutique de Québec* v. *Livernois* (30 Can. S. C. R. 400) distinguished.

MOTION to quash appeal from the judgment of the Court of King's Bench, appeal side, (1), reversing the judgment of the Superior Court, District of Kamouraska (2), and maintaining the plaintiff's action with costs.

The questions raised upon the motion are stated by His Lordship the Chief Justice in the judgment now reported.

*Stuart K.C.* for the motion.

*T. Chase Casgrain K.C.* contra.

*PRESENT :—Sir Elzéar Taschereau C. J. and Girouard, Davies, Nesbitt and Idington JJ.

(1) Q. R. 13 K. B. 242. (2) Q. R. 24 S. C. 438.

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CARRIER v. SIROIS.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—The amount demanded by the plaintiff's action was $550.10 for an instalment with interest on the price of real property sold to the defendants by the plaintiff. The defendants pleaded that they were troubled in the possession of the property conveyed to them by the plaintiff, that the property was hypothecated to guarantee the payment of an annual ground rent and that they feared eviction.

On behalf of the respondent a motion was made to quash the appeal on the ground that the Supreme Court of Canada had no jurisdiction to hear and determine appeals such as the present where the matter in controversy as disclosed by the demand was less than $2,000, that there was no dispute involved as to the title to the lands, and no future rights were affected. The appellant contended that, under the pleadings, a question arose as to real rights, the warranty of a clear title given in the deed by the plaintiff to the defendants and that the future rights of the defendants were encumbered by the rent charge secured by hypothec upon the property.

It is conceded by the appellants that the amount in controversy between them and the respondents is insufficient to give them a right of appeal, but they contend that the controversy is one relating to the title to the land in question affecting future rights. But under the constant jurisprudence of the court, that contention cannot prevail. I have only to referto *Bank of Toronto* v. *Le Curé et les Marguilliers de la Nativité* (1); *Jermyn* v. *Tew* (2); *Wineberg* v. *Hampson* (3); *Waters* v. *Manigault* (4); *Frechette* v. *Simmoneau* (5);

(1) 12 Can. S. C. R. 25.
(2) 28 Can. S. C. R. 497.
(3) 19 Can. S. C. R. 369.
(4) 30 Can. S. C. R. 304.
(5) 31 Can. S. C. R. 12.

*Toussignant* v. *County of Nicolet* (1) ; *Canadian Mutual Loan and Investment Co.* v. *Lee* (2).

The case of *L'Association Phamaceutique de Quebéc* v. *Livernois* (3), relied on by the appellants has no application. In that case, the matter in controversy clearly *involved* the constitutionality of an Act of the Legislature and came under subsec. *a*, of sec. 29 of the Supreme Court Act, not under sec. *b*, which governs this case.

Motion granted with costs and appeal quashed with costs.

*Appeal quashed with costs.*

Solicitor for the appellants : *Lapointe & Stein.*

Solicitor for the respondent ; *S. C. Riou.*

(1) 32 Can. S. C. R. 353. (2) 34 Can. S. C. R. 224.
(3) 30 Can. S. C. R. 400.

1905
*May 11.
*May 22.

SAMUEL ROULEAU (PLAINTIFF).....APPELLANT;

AND

TREFFLÉ POULIOT AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

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

*Construction of statute—Toll-bridge—Franchise—Exclusive Limits—Measurement of distance—Encroachment—58 Geo. III., c. 20, (L.C.)*

The Act, 58 Geo. III. ch. 20 (L.C.) authorized the erection of a toll-bridge across the River Etchemin, in the Parish of Ste. Claire, "opposite the road leading to Ste. Therèse, or as near thereto as may be, in the County of Dorchester," and by section 6, it was provided that no other bridge should be erected or any ferry used "for hire across the said River Etchemin, within half a league above the said bridge and below the said bridge."

*Held*, Nesbitt and Idington, JJ. dissenting, that the statute should be construed as intending that the privileged limit defined should be measured up-stream and down-stream from the site of the bridge as constructed.

*Per* Nesbitt and Idington JJ.—That there was not any expression in the statute showing a contrary intention and, consequently, that the distance should be measured from a straight line on the horizontal plane; but,

*Per* Idington J.—In this case, as the location of the bridge was to be "opposite the road leading to Ste. Therèse," and there was no proof that the new bridge complained of was within half a league of that road, the plaintiff's action should not be maintained.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Quebec, by which the plaintiff's action was dismissed with costs.

The appellant is the assignee of the rights of the original owners of the bridge franchise under the

*PRESENT;—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Idington JJ.

statute, 58 Geo. III., chap. 20, and brought the action against the respondents praying for a declaration that the construction of a new bridge, across the Etchemin River, alleged to be within the limits prohibited by the statute, and opened by them to the free use of the public, was an infringement of the privileges secured to him under the statute, for an order prohibiting further use of the new bridge and for its demolition at the expense of the defendants and for damages. Upon the trial, the Superior Court dismissed the plaintiff's action on the ground that the new bridge was not within the prohibited limits according to the distance measured along the highway. On appeal by the plaintiff, the Court of King's Bench affirmed the judgment dismissing the action, but on the ground that the new bridge was not within the limits reserved according to the distance measured along the course of the river. The principal contention of the plaintiff on the present appeal was that, under the proper construction of the statute, the distance should be measured in a straight horizontal line, and that according to such measurement the new bridge encroached upon the limits specially reserved by his franchise.

*Belleau K.C.* for the appellant.

*L. P. Pelletier K.C.* for the respondents.

THE CHIEF JUSTICE.—L'appelant, demandeur en cour de première instance, est l'ayant cause des concessionnaires d'un pont de péage autorisé sur la rivière Etchemin par le ch. 20 du statut 58 Geo. III. Il se plaint par son action de ce que les intimés ont construit un pont libre sur la dite rivière dans les limites du privilège concédé à ses auteurs par le dit statut, et en demande la démolition avec $1,000 de dommages. La clause 6 du statut qui régit le litige se lit comme suit :

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The Chief Justice.

VI. Et qu'il soit de plus statué par l'autorité susdite qu'aussitôt que le dit pont sera passable et ouvert pour l'usage du public, dès lors aucune personne quelconque ne pourra ériger ou faire ériger aucun pont ou ponts, pratiquer ou faire pratiquer aucune voie de passage pour le transport d'aucunes personnes, bestiaux ou voitures quelconques pour gages à travers la dite rivière Etchemim à une demie lieue au-dessus du dit pont et au-dessous du dit pont ; et si quelque personne ou personnes construisent un pont ou des ponts de péage sur la dite rivière Etchemin dans les dites limites, elle paiera ou elles paieront aux dits Jean Thomas Taschereau, George Pyke, Pierre Edouard Desbarats, et François Roy, leurs héritiers, exécuteurs, curateurs et ayants cause, trois fois la valeur des péages imposés par le présent acte pour les personnes, bestiaux et voitures qui passeront sur tel pont ou ponts et si quelque personne ou personnes passent en aucun temps que ce soit, ou transportent pour gage ou gain aucune personne ou personnes, bestiaux, voiture ou voitures à travers la dite rivière Etchemin dans les limites susdites, tel contrevenant ou contrevenants encourront et payeront pour chaque personne, voiture ou animal ainsi traversé une somme n'excédant pas quarante chelins courant pourvu que rien de contenu dans cet acte ne sera censé s'étendre à priver le public de passer la dite rivière Etchemin dans les limites susdites à gué ou en canot sans lucre ou gages.

Le pont des intimés est à 53 arpents de celui de l'appelant en suivant le cours de la rivière, à 42 arpents et quelques perches par les chemins actuels et à moins de 42 arpents en tirant une ligne droite à vol d'oiseau, en sorte que l'appelant ne peut réussir que si cette dernière méthode de mesurer la distance entre les deux ponts est celle qui doit prévaloir. La cour supérieure a débouté son action sur le motif que c'est la distance mesurée par le chemin qui régit. La cour d'appel a confirmé le dispositif de la cour supérieure sur le motif que c'est la distance en suivant le cours de la rivière qui doit prévaloir. J'adopte le motif du jugement de la cour d'appel. Le statut ne me laisse pas le moindre doute sur la question. C'est la rivière qui seule doit être prise en considération quand il s'agit d'un tel privilège sur une rivière. Une demie-lieue au-dessus et au-dessous du dit pont veut dire la même chose qu'une demie-lieue en amont et une demie-lieue en aval du dit pont.

Je débouterais l'appel avec dépens.

GIROUARD J.—I concur in the judgment dismissing the appeal for the reasons stated by His Lordship the Chief Justice.

DAVIES J.—I also concur for the reasons stated by His Lordship the Chief Justice.

NESBITT J. (dissenting).—The question in this case is: What is the proper construction to be placed upon a statute 58 Geo. III., ch. 20, sec. 6, forbidding the erection of a bridge or use of a ferry within half a league above or below a bridge by the statute authorized. The trial judge held the half league was to be measured by the roads then in use, the Court of King's Bench, that the measurement was to be made by following the middle course of the stream.

I find the cases well summarized in the 9th volume of the Am. & Eng. Enc. of Law, page 614 as follows:

Distance is to be measured in a straight line in a horizontal plane unless there is a clear indication that another mode of measurement is to be adopted.

I have read the various cases referred to and those referred to in the judgment of the court below and adopt the summation I have quoted. Nothing can be added to the historical treatment of the authorities by Lord Blackburn delivering the judgment of the Exchequer Chamber in 1872 in *Moufiet* v. *Cole* (1), and I fail to find any such expression of clear intent on the part of the legislature in this case as to justify a different construction from the one which the court in the case I have referred to lays down as the proper one. I am sensible of the argument that the law was differently declared in 1817, the year before the legislation was enacted, but I cannot overlook the consid-

(1) L. R. 8 Ex. 32.

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Nesbitt J.

eration that the law has been authoritatively stated in case after case in England to be different from that laid down by Lord Ellenborough in 1817. Any other construction would in my view leave such room for uncertainty as to be a trap for litigation. I cannot adopt the suggestion of my brother Idington that the court can question the location of the bridge constructed under the statute and used for so many years, and as I have said the true construction of the language used is that a circle of half a mile radius is to be drawn around the bridge and the erection of any other bridge within that radius is prohibited.

I would allow the appeal.

IDINGTON J.—The cases cited seem to show that the distance from any given point or thing must, unless there is something in the contract or statute inconsistent with such holding, be measured in a straight line. I see nothing in the statute 58 George III., ch. 20, sec 6, inconsistent with the application of that rule to the expression,

within half a league above the said bridge and below the said bridge.

The plain ordinary meaning of the words accords with running in a straight line better than any other.

There were as far as shown no roads alongside the river when this enactment was passed. Nor is it shewn that the river itself was a navigable stream. That, if shewn, might have made some difference.

On the plan produced as an exhibit the river between the two bridges in question is very crooked and for aught we are told it may be from the Byrne bridge up stream absolutely straight. Measurement by the river may mean one thing up the stream and quite another thing down. When we think of the causes and reasons for imposing prohibition here against the

construction of another bridge on either side of this toll bridge we see the absurd results that might flow from such interpretation.

The bridge was to be

opposite the Saint Therèse road or as near thereto as possible.

No doubt this was to serve the people using that road, and there is just as little doubt that when new bridges would be needed they would be likely intended to serve the people coming by other roads to cross the river. And what roads? Roads that would serve by running in a general way back from the river to the neighbouring country. It obviously was the intention of the legislature to serve by this bridge a district or territory contributory to it, so to speak, on each side of the river.

It was as obviously intended in a general way to prohibit, as a reward to the builders, any new bridge within a half league of the Ste. Therèse road or as near thereto as it was possible to build a bridge.

It is clear that this bridge was not put opposite or at that road. Why is not explained If it had been shown by evidence that by reason of the conformation of the land it was impracticable to put it nearer thereto than it is, then placing the bridge where it is would be within the statute. Without such evidence or explanation the bridge is not where this statutory franchise authorized it to be. It rested on the appellant to show this, and failing to do so I think he must fail; for rights such as he claims are to be construed most favourably to the public whose rights are restricted by such legislation.

The length of time the appellant and his predecessors in title have enjoyed the franchise may enable him to claim the property in the bridge but cannot entitle him to the right of prohibition against rival bridges that the statute gave the original grantees of

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ROULEAU v. POULIOT.

Idington J.

the franchise, and to measure it from the place where this bridge erroneously placed is found to be. No matter what the interpretation of long ago may have been by somebody the real meaning of the statute is what must govern. The case of *Madison* v. *Emmerson* (1) exemplifies this. And the Ste. Therèse road was declared on the argument here to be more than half a league from the new bridge now in question measured in a straight line and that was not denied.

As the cases of *Reg.* v. *The Inhabitants of Saffron Walden* (2); *Jewell* v. *Stead* (3); *Mouflet* v. *Cole* (4), in Exchequer Chambers; *Duignan* v. *Walker* (5); *Stokes* v. *Grissell* (6); *Lake* v. *Butler* (7), followed by *Jewell* v. *Stead* (3) which is, being as to a toll-gate on to a turnpike road, peculiarly applicable here.

Lord Campbell said in this last case that

> unless there is some clear indication in the Act that a different mode of measurement is pointed at, he thought we ought to abide by one general rule of construction.

In another case he illustrates the need for this by showing how in case of a tidal river the distance measured by that would vary as in this, no doubt, between low water in summer and high at spring freshet time.

I am glad to arrive at what I think manifest justice in the case by an adherence to the strict law which must always govern us here.

I think the appeal should therefore be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Belleau, Belleau & Belleau.*

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

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(1) 34 Can. S. C. R. 533.
(2) 9 Q. B. 76.
(3) 25 L. J. Q. B. 294.
(4) L. R. 8 Ex. 32.
(5) 28 L. J. N. S. Ch. 867.
(6) 23 L. J. C. P. 141.
(7) 5 E. & B. 92.

JOHN DODS AND HANNAH DODS (DEFENDANTS)..... ..... } APPELLANTS;

1905

*May 3, 4.

*May 15.

AND

RONALD McDONALD (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND.

*Title to land—Conveyance of fee—Reservation of life estate—Possession—Ejectment.*

In Oct. 1853, D. conveyed to his father and two sisters six acres of land for their lives or the life of the survivor. A few days later he conveyed a block of land to M. in fee "saving and excepting" thereout six acres for the life of the grantor's father and sisters or that of the survivor, or until the marriage of the sisters, on the happening of said respective events the six acres to be and remain the property of M., his heirs and assigns under said deed. Three months later M. conveyed the block of land to R. M. in fee, and when the life estate terminated in 1903 the latter brought ejectment against the heirs of the life tenants who claimed the six acres on the ground that the deed to M. contained no grant of the same and also because the life tenant had had adverse possession for more than twenty years.

*Held*, that as the evidence shewed that the life tenants went into possession under R. M. the title of the latter could not be disputed and the statute would not begin to run until the life estate terminated.

*Held* per Idington J. that R. M. under his deed and that to his grantor had the reversion to the fee in the six acres after the life estate terminated.

The lease of the life estate was given to R. M. with the other title deeds on conveyance of the land to him and on the trial it was received in evidence as an ancient document relating to the title and coming from proper custody. It was not executed by the lessees and no counterpart was proved to be in existence.

*Held*, that it was properly admitted in evidence.

APPEAL from a decision of the Supreme Court of Prince Edward Island maintaining the verdict at the trial in favour of the plaintiff.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Idington JJ.

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v.
MCDONALD.

The facts of the case are sufficiently stated in the above head-note and are fully set forth in the judgments given on this appeal.

*McLeod K.C.* and *Duvernet* for the appellant, John Dods.

*Morson K.C.* for the appellant, Hannah Dods.

*A. A. McLean K.C.* and *Mathieson* for the respondent.

THE CHIEF JUSTICE.—I agree that the appeal should be dismissed with costs for the reasons given by my brother Davies.

GIROUARD J. concurred with Davies J.

DAVIES J.—This was an action of ejectment brought by the respondent McDonald to recover possession from the appellants of six acres of land part of a farm of fifty acres which in the year 1854 he had purchased from one Mutch. Mutch had in the previous year purchased the farm from one Thomas Dods. In the judgment of the Court appealed from, the Supreme Court of Prince Eward Island, Mr. Justice Fitzgerald, who delivered the judgment of the majority and who had also been the trial judge, states the facts very fully. Amongst other facts he finds that Thomas Dods from whom Mutch purchased was in 1853, the time of the purchase, admittedly the sole owner in fee simple in possession of the farm including the locus.

The defendants in their factum on this appeal concede this. In the deed from Thomas Dods to Mutch and also in that from Mutch to McDonald the plaintiff conveying the fifty acre farm, there was a clause about which much dispute arose: it reads as follows:

> Saving and excepting out of the first-mentioned tract of fifty acres, six acres thereof described as follows, namely, (here follows descrip-

tion) for and during the natural life of Robert Dods of Cherry Valley aforesaid, and also during the natural lives of his two daughters Jane and Elizabeth Dods, or until the death of the longest liver of them, or until the marriages of the said Jane and Elizabeth Dods whichever event shall first happen, the said six acres of land being hereby reserved for the use of the said Robert Dods during his life, and of the said Jane Dods and Elizabeth Dods until the death of the survivor of them or until their marriages aforesaid. It being understood that upon the happening of the said respective events, the said six acres of land shall be and remain the property of the said Robert Mutch his heirs and assigns under this deed.

The defendants (appellants) contend first that the true construction of the clause was that the six acres were excepted out of the deed altogether and never passed to Mutch or McDonald at all. Secondly, that as Robert Dods and Jane and Elizabeth Dods in whose favour a life estate or interest was ostensibly being created were none of them parties to these deeds, under the law which existed in Prince Edward Island at the time of the execution of the deed no estate did or could pass to them under it. Thirdly, that the Dods, Robert, Jane and Elizabeth, under whom the defendants claimed were not put into possession and did not accept possession from the plaintiff either under the alleged lease from Thomas Dods to them or under the reservation in the deed; and, lastly, that the statute of limitation began to run one year after they went into possession they being really tenants at will of the plaintiff. Questions were also raised about the effect of the Registration Act which, in the view I take of the facts and the law, become unimportant

The lease above referred to was a document in the form of a lease made between Thomas Dods, the then owner in fee, and his father Robert Dods and his sisters Jane and Elizabeth a few days before the sale and execution of the deed to Mutch by the lessor, whereby the lessor professed to grant to the lessees an estate for their joint lives and the survivor of them reserving a rent of two pence an acre to the lessor.

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v.
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Davies J

The reservation in the deed was attempted to be explained as having reference to this lease and the estate or term thereby created through it made no reference to the nominal rent reserved by the lease and I am inclined personally to think that, in view of the proved facts, there is very much in the contention. It was however strenuously contended on the other hand that the language of the reservation in referring to the estate "thereby created" was not consistent with its having reference to the lease.

The parties referred to in the lease and in the reservation of the deed as the tenants for life, Robert, Jane and Elizabeth Dods, resided with Robert's son Thomas Dods the owner of the fee on the farm at the time of the execution of the deed of conveyance to Mutch and also of that to plaintiff McDonald.

They claimed no title of any kind living there with Thomas simply as members of the family.

The plaintiff produced as part of his evidence the old lease and proved that it had been handed over to him with the title deeds when he got his conveyance from Mutch to whom it had been handed by Thomas Dods when he sold to Mutch

It was signed and sealed by Thomas and his wife and properly witnessed but was not executed by the grantees or lessees, and as no counterpart could be found or was positively found to have existed its production as evidence was strongly resisted.

It was however admitted in evidence by the trial judge as an ancient document relating to the title and coming from a proper custody after the expiration of the term it purported to create.

The evidence shewed and the trial judge held that Mutch had, on getting his deed, entered into possession of the farm, done some work upon it and assisted his grantor Thomas in moving from one part of the farm

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Davies J.

to the *locus in quo*, a dwelling house for his father and sisters to reside in; that he was in possession at the time he sold and conveyed to McDonald, and that the latter had put Robert, Jane and Elizabeth Dods into possession of this house and the six acres under the lease to them for their lives after he purchased the farm and that they had accepted such possession from him under this lease.

There was much controversy as to this latter important fact but after carefully reading all the evidence over I am satisfied there is no sufficient ground to reverse either the ruling as to the admission of this lease or the fact found as to Robert, Jane and Elizabeth Dods accepting possession under it from the plaintiff McDonald. I fully concur in all other findings of fact of the trial judge.

This evidence being admitted proving the lease and supported by the finding of fact as to the acceptance of the possession under the lease by the tenants for life the plaintiff submitted that he had made out a *primâ facie* case at least, and that defendants not having controverted the acceptance of possession as proved, and having put in evidence their title both by will and deed which showed them to claim as devisees and grantees of the life tenants, Robert, Jane and Elizabeth Dods, they were estopped from denying the title of the person from whom these parties through whom they claimed had received the possession or the term or estate for which possession had been given them until they had first on the expiration of the term given up the possession to the person at whose hands they received it.

The original lessees, it is contended, could not deny plaintiff's title to give them the estate and possession they had accepted and the defendants claiming under them were equally estopped.

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The case revolves largely around the determination of the question as to how the Dods were put into and accepted possession. Once evidence was given, as I think was properly found by the trial judge and the court below, in this case sustaining the finding that possession was given and accepted under the lease for the lives of the tenants, then most of the legal difficulties vanish. No statutory title by possession has or could be gained by defendants because the plaintiff's right of entry did not arise until the death of the survivor of the life tenants and the twenty years did not until then begin to run. The wholesome doctrine of estoppel applies to prevent parties who accept possession of lands under a certain title from disputing the title under which they accepted possession. If the defendants in this case had not claimed title under the tenants for life much might have been said as to their right to rely solely upon the plaintiff proving a good title in himself, but the doctrine of estoppel which they have invited by their proofs of title through the plaintiff's tenants prevents them raising any question of latent defects in plaintiff's title.

The case of *Board* v. *Board* (1) was called to the attention of the counsel for the appellants and they were asked to distinguish this case in appeal from the principles governing that decision.

If the Dods accepted possession as found under the lease they and those claiming under them were estopped from denying McDonald's title to give the lease. If, on the other hand, they accepted the possession under the reservation in McDonald's deed they would under the authority cited seem to be similarly estopped. The learned counsel for the appellants appreciated the difficulties they were in if that case of *Board* v. *Board* (1) could not be distinguished. They

(1) L. R. 9 Q. B. 48.

called attention to some observations of Jessell M. R. upon the case in *In re Stringer's Estate* (1), at pages 9 to 11. That learned Master of the Rolls does not however question the authority of the case of *Board* v. *Board* (2) but rather confirms it.

However, accepting as I do the findings of the learned trial judge I have no difficulty whatever, under the authorities and on principle, in upholding the verdict and think the appeal should be dismissed with costs.

NESBITT J. concurred in the dismissal of the appeal.

IDINGTON J.—The respondent McDonald brought an action of ejectment against the appellants to recover six acres of land in Prince Edward Island. The judgment being given in favour of the respondent for recovery of the said land and that judgment having been upheld on appeal to the Supreme Court of that province the appellants seek to reverse such judgment. They claim title by virtue of the Statute of Limitations, and the first question suggested is: When did the time begin to run? When did the right of entry of the respondent first accrue?

In one way of looking at the matter the answer to this must depend on the effect to be given to the deed of 31st October, 1853, by which Thos. Dods who was in possession, and his wife, purported to grant to Robert Dods the father, and Jane Dods and Elizabeth Dods the sisters, of Thos. Dods, the lands in question for the "term and time of the natural lives" of the grantees.

As this deed followed to some extent the form of a lease with apt words for demising and leasing as well as granting in the operative part and also for render-

(1) 6 Ch. D. 1. (2) L. R. 9 Q. B. 48.

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ing to the grantor a nominal yearly rental of two pence per acre, I will refer to it as the lease. A few days later the grantor conveyed by deed of grant, by way of or purporting to be by way of release made in pursuance of an Act of the General Assembly of Prince Edward Island made and passed in the twelfth year of Her Majesty Queen Victoria intituled

an Act for rendering a release as effectual for the conveyance of Freehold Estates as a lease and release by the same parties,

to one Mutch who within about three months later by a similar deed conveyed to the plaintiff two parcels of land therein described.

Following that description and as a continuous part of the same sentence in each deed were added the following:

Saving and excepting out of the said first-mentioned tract of fifty acres, six acres thereof described as follows, namely, fronting on the said road leading to Cherry Valley and extending from the land of the said Alexander McNeill to land in the occupation of Thomas Wright and from the said road back a sufficient distance by a line parallel with the said road to make or include the said quantity of six acres for and during the natural life of Robert Dods of Cherry Valley aforesaid and also during the natural lives of his two daughters Jane and Elizabeth Dods and until the death of the longest liver of them or until the marriages of the said Jane and Elizabeth Dods whichever event shall first happen the said six acres of land being hereby reserved for the use of the said Robert Dods during his life and of the said Jane Dods and Elizabeth Dods until the death of the survivor of them or until their marriages aforesaid.

And then the next sentence in the deed to Mutch is as follows:

It being understood that upon the happening of the said respective events the said six acres of land shall be and remain the property of the said Robert Mutch, his heirs and assigns under this deed together with all woods, underwoods, ways, waters, watercourses, houses, outhouses, yards, buildings, stables, gardens, fences, profits, commodities, privileges and advantages whatsoever to the said land, hereditaments and premises belonging or in any wise appertaining or therewith usually held, used, occupied, possessed, enjoyed, reputed, taken or known as part, parcel or member thereof or of any part thereof, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and of every

part thereof, and all the estate, right, title, trust, interest, property, claim and demand whatsoever, both at law and in equity of them the said Thomas Dods and Jessie, his wife, of, in, to or out of the said lands, hereditaments and premises, or any part thereof, to have and to hold the said lands, hereditaments and premises hereby granted and released or intended so to be with their and every of their rights, members and appurtenances unto the said Robert Mutch, his heirs and assigns, to the use of the said Robert Mutch, his heirs and assigns for ever.

The same words were adopted in the deed from Mutch to McDonald save as to the name of the grantee.

It is urged that these deeds must be read as if there merely had been an exception from the lands described and that therefore there was no grant of the reversion or remainder.

I am with due respect unable to understand how these documents can be read as containing or having been intended to contain or express any such meaning or any other meaning than an exception of the life estate merely. If that be, as I think, the correct construction then these deeds operate by way of a grant of the reversion.

That gave McDonald a right of entry only on the determination of the prior estate of freehold created by the lease and that happened on the death of the survivor Elizabeth Dods in March, 1903.

It is stoutly urged, however, that there never was in fact and in law any such freehold estate as this I am assuming was excepted from the conveyances in question and upon which there could be a reversion and grant thereof. The document though not well drawn clearly would have operated if executed by the lessor or grantor and assented to by the grantees so as to create an estate of freehold as above described.

This document was given by Mutch to the respondent along with the other deeds already referred to at the time of respondent's purchase of the lands conveyed by those other deeds and it appears clear beyond any

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doubt that it was not only so delivered but was brought into existence at or about the time it bears date.

No proof is given of its execution except such as may be presumed in law from its having been produced from proper custody and being such an ancient document.

Was Mr. McDonald the proper custodian of such a deed?

It was a grant to the tenants of the freehold. One would possibly look for such a document in the possession of the grantees rather than in that of the grantor or assignee of the grantor.

One might even look in the registry office as the better place for its safe keeping and safe-guarding the interests of all concerned.

It contained covenants by the grantees with the grantor. For the purposes of these covenants and to secure the grantor and his assigns their due performance he and his heirs and assigns might reasonably claim custody of the document.

In the case of the very events that have happened the existence of this deed as to the six acres was as valuable a muniment of title as any other. The respondent was, therefore, I think within the authorities such a proper legal custodian of this deed as to render it admissible as an ancient document. See *Plaxton* v. *Dare* (1); *Bishop of Meath* v. *Marquess of Winchester* (2); *Croughton* v. *Blake* (3); *Doe d. Neale* v. *Samples* (4); *Doe d. Jacobs* v. *Phillips* (5); *Slater* v. *Hodgson* (6); *Earl of Miltown* v. *Goodman* (7).

Being produced from a proper custody though not what one might think probable, or most proper, as expressed by Baron Parke, in *Croughton* v. *Blake* (3), is

(1) 10 B. & C. 17.
(2) 3 Bing. N. C. 183 at page 200.
(3) 12 M. & W. 205.
(4) 8 A. & E. 151.
(5) 8 Q. B. 158.
(6) 9 Q. B. 727.
(7) I. R. 10 C. L. 27

all that is necessary. And when so produced it is admissible and to be taken as proving itself.

It is said however that its condition on production shows an execution only by the grantors. There are seals where one would expect for the grantees, but no signatures by them.

The attestation clause puts it as if it had been signed as well as sealed by the parties and that is subscribed by a witness, Charles Stewart.

What in law should be presumed from this?

Are we to assume that there was a complete execution by all the parties. The seals without the signatures of the grantees might be taken to be their execution. It would be a good execution. It may be doubtful, however, if without more it would be safe to say that this should be presumed especially as it is said that

> in a case of documents of title, however, acts of possession thereunder should be shewn, though the absence of such evidence goes merely to weight and not to admissibility.

See Phipson on Evidence (3 ed.) p. 468.

It is a fair and reasonable inference, I think, from all that I have referred to and the fact that the document was duly handed to McDonald by Mutch with other deeds, that Mutch got it as a completed document and that it was intended by his grantor Thomas Dods to operate without further execution or signature by the grantees. If that be the case then did these grantees assent to the proffered estate of freehold vesting in them?

Without their acceptance the grant could not operate. Upon this point the evidence of the respondent is conclusive if believed.

He says that when he purchased the grantees or lessees in this lease lived on the property he was purchasing and desired immediate possession of, and

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were reluctant to move over on to the six acres but were finally persuaded to do so. In relation to that part of the negotiation his evidence is as follows:

Q. Who was it built the house on the six acre lot?

A. Thomas Dods.

Q. Was that before or after you had bought the place?

A. I think it was before I had bought it; between the time that Mutch bought it and I bought it from Mutch.

Q. While the Dods were in your house—in the house on the homestead—did you have any conversation with them about moving on the six acres?

A. Well, I spoke to them several times for to move *to their own six acres that were reserved for them for their lifetime for their house.* * *

Q. Did you ever have any conversation with Robert, Elizabeth or Jane Dods about the lease?

A. When they went into posession I told them how they had to go into their own place that they held under their lease or agreement for their lifetime. * * *

Q. And they accordingly went into possession of the six acres?

A. They went in, Mr. Beers and I put them in possession. * *

Q. Thomas's two sisters. Was there anything said about a lease between you people?

A. There was.

Q. Tell what it was?

A. I told them more than once or twice that how the lease was all their lifetime of this place, and whenever they would die—the last of them—that how I expected the property to fall into my hands.

*By Mr. Mathieson:*

Q. That is the six acres?

A. The six acres.

Q. Where were they at the time you had this conversation, on the homestead?

A. I told them of it in their own house.

Q. That is on the six acres?

A. That is on the six acres.

Q. Did you ever have any conversation of a similar kind with them on the homestead while they were living in the house there?

A. Yes; that how they had their life interest in the place, and that is all they had. * * *

Q. And you employed Mr. Beers to help you to get them out of the premises?

A. Yes sir, in a peaceable way.

Q. On account of the conversation that you had with them about the lease, did they do anything?

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A. Well no; they didn't do anything, but they admitted that how the lease was a writing unjust one—that they only had their life out of it.

Q. They didn't do anything about that conversation?

A. Well the conversation was—that it was as much that they admitted.

Q. What was the object of this conversation with them—what did you wish them to do?

A. I wished them to go out of the homestead and go to there own house.

Q. Did they do that?

A. They did.

The learned trial judge implicitly relied upon this and in reading the whole evidence I see no reason why I should disregard his finding.

This evidence can, taken literally, only, I think, have one meaning and that is that the grantees had after due consideration decided to accept the grant tendered them by this deed.

If so they are bound thereby.

The case is thus rendered a very simple one of an estate of freehold that has terminated recently and the respondent as the assignee of the reversion is entitled to eject the appellants who have no longer any rights in the premises and are wrongfully in possession thereof.

It is said, however, by the appellants that there was no grant or conveyance of the reversion.

The evidence shews that the parties met either in relation to the reservation in the deed or the lease and that the plaintiff gave the tenants for life possession of the property.

That brings up the consideration of the title of the respondent and his right to assert claim to the reversion and the right to possession by virtue thereof, upon the determination of the freehold estate.

He must on the facts be presumed to have been in possession when he put the tenants for life there.

The presumption from his possession then would be that of his being then owner of the fee and until such

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presumption has been expressly rebutted continues and he is now at liberty to assert it.

There are many other considerations of weight in this case that would or might bring about the same result.

Whilst wholly dissenting from, as already indicated, the view that the saving and excepting clauses in the deeds should be cut in two in the middle of a sentence as we have been asked to do, to give an effect to them, I am not unmindful of the authorities indicating that there cannot be an exception of an estate for life or a reservation thereof.

If that be a proper view to take here then the whole excepting clause is void as repugnant to the grant and the deed of conveyance to respondent operated so as to transfer the fee simple from Mutch to McDonald as that had been by similar deed transferred from Thomas Dods to Mutch.

And McDonald is entitled to claim thereunder and now to enter upon the determination of the life estate he had given Robert Dods and his daughters.

In this way we would be rid of what has occurred to me throughout this case was a difficulty in the way of giving effect to these deeds in the two-fold way of operating to vest a present estate and also by way of grant to transfer the reversion or remainder.

The way in which that troubled me was not raised in argument and therefore possibly the difficulty does not exist.

There is another view presented by the suggestion that the covenant to stand seized, in this deed, may, though with a stranger, have enured in the light of the declared intentions to the benefit of the tenants for life.

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See *Thorne* v. *Thorne* (1), approved in *Doe d. Lewis* v. *Davies* (2)

I am not so impressed, in view of the particular wording of those deeds, as to dwell upon this, but would refer to the cases of *Hartman* v. *Fleming* (3), and *Wilson* v. *Gilmer* (4), in each of which very eminent authority relied upon the covenant to stand seized, in a way that might operate here, if necessary, and may be well worthy of consideration here and may possibly be relied upon to support respondent's case.

I think that in order to give effect to the obvious intentions of the parties to these deeds it can be done and that with due regard to the ancient principles of real property law.

The case of *Board* v. *Board* (5) if accepted in its entirety, as good law, might well be held to govern our decision here. But there is an obvious distinction drawn by Jessel M. R. in *In re Stringer's Estate; Shaw* v. *Jones-Forde* (6), at pages 9 *et seq.* that may be applicable here.

Though the appellants made claim through the tenants for life here as in *Board* v. *Board* (5), yet in the case of one of them, Hannah Dods, at all events, the right thus acquired did not accrue till after the determination of the estate for life.

And she may be said to have the right to assert her possessory title quite independently of the devise to her by Elizabeth Dods, and put the respondent, as plaintiff, to rest upon the strength of his own title and proof thereof.

It is to be observed that this distinction made by Jessel M. R., though possibly open to the defendant in

(1) 1 Vern 141.
(2) 2 M. & W. 503 at p. 518.
(3) 30 U. C. Q. B. 209.
(4) 46 U. C. Q. B. 545.
(5) L. R. 9 Q. B. 48.
(6) 6 Ch. D. 1.

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*Board* v. *Board* (1) was not made in argument of that case and may have been overlooked.

I prefer to hold that the lease created an estate of freehold and that the acceptance of that as testified by the respondent related back to the execution of the lease and that the later deeds vested title, in either of the ways indicated, to the reversion thus created in the respondent and that he is entitled now to succeed by virtue thereof.

I am equally satisfied to hold that his possession when he put the tenants for life as such in possession must be held presumptive of his ownership of the fee entitling him to succeed on the termination of the lease.

In either of these events he is entitled to succeed.

I think the appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant, John Dods: *D. C. McLeod.*

Solicitor for the appellant, Hannah Dods: *W. A. O Morson.*

Solicitor for the respondent: *A. A. McLean.*

(1) L. R. 9 Q. B. 48.

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*June 26.
*June 27.

JOHN FRANCIS GAYNOR AND BENJAMIN D. GREEN (PETITIONERS) .... ..... } APPELLANTS.

AND

ULRIC LAFONTAINE (EXTRADITION COMMISSIONER),

AND

THE UNITED STATES OF AMERICA (APPLICANT FOR EXTRADITION) ..... } RESPONDENT.

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

*Extradition—Prohibition—Appeal—Jurisdiction—Supreme Court Act, sec. 24 (g)—54 & 55 V. c. 25, s. 2—Construction of statute—Public policy—Criminal proceedings.*

A motion for a writ of prohibition to restrain an extradition commissioner from investigating a charge of a criminal nature upon which an application for extradition has been made is a proceeding arising out of a criminal charge within the meaning of sec. 24 (*g*) of the Supreme Court Act, as amended by 54 & 55 Vict ch. 25, sec. 2, and, in such a case, no appeal lies to the Supreme Court of Canada. *In re Woodhall* (20 Q. B. D. 832) and *Hunt* v. *The United States* (16 U. S. R. 424) referred to.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, affirming the judgment of M. Justice Davidson in the Superior Court, District of Montreal, by which the appellants petition for a writ of prohibition was dismissed with costs.

The case is stated in the judgment of the court delivered by His Lordship M. Justice Sedgewick.

*Macmaster K. C.* and *Stuart K. C.* for the motion.

*PRESENT:– Sedgewick, Girouard, Davies, Nesbitt and Indigton JJ.

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GAYNOR AND GREEN v. UNITED STATES OF AMERICA.

*T. Chase Casgrain K. C.* and *Alexander Taschereau K. C.* contra.

The judgment of the court was delivered by

SEDGEWICK J.—The fact so far as they relate to the present application are shortly as follows:

The appellants are alleged to be fugitives from the justice of the United States of America and having come to Canada a warrant was issued for their arrest by Mr. Ulric Lafontaine, an Extradition Commissioner appointed under the Extradition Act of Canada, who thereupon began proceedings for the purpose of ascertaining whether a *primâ facie* case would be made out as to the commission of an extraditable offence by them.

During the pendency of these proceedings application was made to the Hon. Mr. Justice Davidson, a Judge of the Superior Court of the Province of Quebec, for a writ prohibiting the Extradition Commissioner from proceeding with the investigation. That learned judge refused the application and from his judgment there was an appeal to the Court of King's Bench resulting in the confirmation of Mr. Justice Davidson's judgment.

An appeal having been asserted to this court from the judgment of the appellate tribunal the respondents have made a motion to quash that appeal upon the ground that this court has no jurisdiction to entertain it. Whether it lies within our province to hear the appeal on its merits depends upon the construction to be given to sec. 24 (*g*) of the Supreme & Exchequer Courts Act as amended by 54 & 55 Vict. ch. 25 sec. 2.

The amended section is as follows:

> An appeal shall lie to the Supreme Court * * * * from the judgment in any case of proceedings for or upon a writ of *habeas corpus*, certiorari or prohibition not arising out of a criminal charge.

And in aid to its proper construction sec. 31 of the Act may be quoted :

> No appeal shall be allowed in any proceeding for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty.

We are all of opinion that we have no jurisdiction inasmuch as, in our view, the proceedings and judgment which are now sought to be brought before this court for the purposes of appeal do arise out of a criminal charge, and therefore the judgment complained of is not a judgment appealable to this court.

One or two considerations lead, we think, inevitably to this conclusion. It would appear from the perusal of the criminal law of Canada and of cognate legislation that the whole policy of Parliament has been to prevent prolonged litigation particularly in matters of a criminal nature. For example, the Parliament of Canada after much controversy and discussion with the imperial authority passed an Act abolishing appeals in criminal matters to the Judicial Committee of the Privy Council. Subsection (*g*), above cited, gives evidence of the same policy by preventing an appeal in certain specified cases which arise out of a criminal charge ; and sec. 31, above quoted, makes it clear that in extradition matters there should be no appeal to this court upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty. These considerations afford ground for the contention that, apart altogether from the express words of sec. 24 (*g*), it was certainly the intention of Parliament to limit in every possible way appeals of the character now before us. But looking more particularly at section 24 (*g*), it assumes that proceedings for a writ of prohibition may arise either out of a civil matter or out of a criminal charge. If the meaning contended for by the appellants is the true one then those words "*certiorari* and

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prohibition" added by the Act, 54 & 55 Vict. c. 25, sec. 2, are absolutely meaningless.

If these proceedings now before us are civil proceedings within the meaning of sec. 24 (*g*), then it is impossible to conceive of a writ of prohibition which can arise out of a criminal charge. This, it seems to us, demonstrates the fallacy of the appellants' contention. But apart from that it is indisputable that the charge made before the Extradition Commissioner was a criminal charge. So too, the warrant issued was a proceeding arising out of that charge. A motion made in court to prevent a magistrate from proceeding to investigate that charge is a motion to stop the further proceedings of the investigation of that criminal charge and it, therefore, necessarily follows, in construing the statute according to the canons requiring a literal construction, that the case before us is a case arising out of a criminal charge. Reference may be had to the following cases in support of this opinion ; *Ex parte Wcouhall* (1) ; *Hunt* v. *United States* (2).

The appeal is quashed with costs.

*Appeal quashed with costs.**

Solicitor for the appellants : *Fitzpatrick, Parent, Taschereau, Roy & Cannon.*

Solicitor for the respondent : *Macmaster & Hickson.*

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* Petition for leave to appeal to the Privy Council abandoned and petition dismissed, 26th July, 1905.

(1) 20 Q. B. D. 832.

(2) 166 U. S. R. 424.

LE SYNDICAT LYONNAIS DU KLONDYKE (DEFENDANTS)..... } APPELLANTS;

AND

THOMAS JOHN McGRADE AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

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*March 21, 22, 23.

*May 2.

ON APPEAL FROM THE TERRITORIAL COURT OF THE YUKON TERRITORY.

*Constitutional law—Imperial Acts in force in Yukon Territory—2 & 3 V. c. 11 (Imp.)—R. S. C. c. 50—Title to land—"Torrens system"—Transfer by registered owner—Fraud—Litigious rights—Notice of lis pendens—Irregular registration—Indorsements upon certificate of title—Construction of statute—"Land Titles Act, 1894"—Caveat—57 & 58 V. c. 28, s. 126 (D.)—61 V. c. 32, s. 14 (D.)—Pleading—Objections taken on appeal—Yukon Territorial Court rules—Yukon ordinances, 1902, c. 17—Rules 113, 115, 117—Waiver—Estoppel.*

The provisions of the Imperial Act, 2 & 3 Vict. ch. 11, in respect to the registration of notices of litispendence and for the protection of *bonâ fide* purchasers *pendente lite* are of a purely local character and do not extend their application to the Yukon Territory by the introduction of the English law generally as it existed on the fifteenth of July, 1870, under the eleventh section of "North-West Territories Act," R. S. C. ch. 50.

Under the provisions of "The Land Titles Act, 1894," section 126, a *bonâ fide* purchaser from the registered owner of land subject to the operation of that statute is not bound or affected by notice of litispendence which has been improperly filed and noted upon the folio of the register containing the certificate of title as an incumbrance or charge upon the land. The exception as to fraud referred to in the 126th section of the Act means actual fraudulent transactions in which the purchaser has participated and does not include constructive or equitable frauds. *The Assets Company* v. *Mere Roihi* (21 Times L. R. 311) referred to and approved.

In an action to set aside a conveyance as made in fraud of creditors, the defendant desiring to meet the action by setting up that there was no debt due and, consequently, that no such fraud could exist, must allege these objections in his pleadings. In the present case the defendant, having failed to plead such defence, was allowed to amend on terms, the Chief Justice dissenting.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Idington JJ.

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SYNDICAT LYONNAIS DU KLONDYKE v. MCGRADE.

APPEAL from the judgment of the Territorial Court of Yukon Territory *in banco*, reversing the judgment of Dugas J. at the trial, and ordering that the transfer of certain lands should be set aside as being fraudulent and void as against the respondent and all other creditors of one Edward McConnell, and declaring that the title of the appellants was held subject to the creditors' claims.

The plaintiff (McGrade) was holder in due course, after maturity, of two promissory notes made by one Edward McConnell upon which he had brought a former action, on 9th Sept., 1901, and recovered judgment. One of the notes, dated 26th Aug., 1899, had fallen due on 1st July, 1900, and the other was dated 15th Sept., 1899, and payable on demand. The plaintiff also brought the present action, on behalf of all McConnell's creditors, on 2nd Oct., 1901, to set aside a transfer of the lands now in question made by McConnell to his wife on 7th April, 1900, as being void and fraudulent as against creditors. These lands were subject to the operation of the "Land Titles Act, 1894," and on 2nd Oct., 1901, a certificate of *lis pendens* was issued in the latter action and notice thereof was filed in the office of the Yukon Land Registration District, whereupon the registrar indorsed a memorandum thereof upon the folio of the register constituting the certificate of title as an incumbrance or charge upon the lands. Upon the 21st of June, 1902, the registered owner, Mrs. McConnell, while the action was pending, transferred the lands to the syndicate, appellants, and a new certificate of title was issued to them with a notification thereon that the title was subject to the *lis pendens*.

The appellants were made parties (defendants) to the second action and an amendment allowed by which the transfer was alleged, and it was further charged that the "Syndicat Lyonnais du Klondyke is not a *bonâ*

*fide* purchaser for value without notice, but took the conveyance from the said Luella Day McConnell with full knowledge and notice of all the facts pleaded herein;" and further relief was claimed for a declaration that the said conveyance should be declared fraudulent and void as against the plaintiffs and that the conveyance to the syndicate be declared to be subject to the claims of the plaintiff and all the other creditors of Edward McConnell; that the said Luella Day McConnell and the syndicate should be declared trustees of the land for McGrade and all the other creditors, and that, for that purpose, all proper directions should be given and accounts taken and for such further relief as the circumstances of the case may require.

On the 31st of March, 1902, the defendant Edward McConnell filed his defence denying any indebtedness to the plaintiffs, alleging that before maturity of the first note his liability thereon was absolutely and unconditionally renounced by the person who was then the holder thereof and that, at the time of the indorsement to him, the plaintiff had notice of such renunciation, and also that the second note had been satisfied and discharged by payment before the action was brought. The defence further alleged "that at the respective dates of said conveyances the plaintiff was not, and that he is not now, a creditor of the said defendant, and that there were not at the said dates any creditors of the said defendant whose claims, if any, had not been satisfied and discharged before this action was commenced; and that any of the present creditors of the said defendant, if there are any, which he denies, became such creditors with full notice that the said conveyances had been made and that the said lots were the property of the other defendant, Luella Day McConnell." He also denied that the conveyances

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were made with the intent and design alleged, and insisted that they were *bonâ fide* and for valuable consideration.

The other defendant, Luella Day McConnell, pleaded separately and by her statement of defence denied that she became a party to the conveyances with the design or intention of aiding or assisting the said Edward McConnell to defeat, delay or hinder the plaintiffs or other creditors in recovering their debts, alleged valuable consideration, absence of notice of any such intention or design on the part of the said Edward McConnell and of any indebtedness of the latter to the plaintiffs or to any other persons, that her title to the said land (a grant from the Crown) did not depend upon but was independent of the conveyances, that, at the time that the conveyances were made, the plaintiff, McGrade was not a creditor of the defendant Edward McConnell and there were no creditors of the said defendant and that there were none at the time the second action was instituted, that her Crown grant and certificate of title were obtained solely by her, paid for by her, and that she derived title to the said land by virtue of the Crown grant and certificate of title.

The plaintiffs joined issue on these defendants' statements of defence

The syndicate by their statement of defence deny that they are not a *bonâ fide* purchaser for value without notice, and they further deny that they took the conveyance with full knowledge or any knowledge or notice of the facts set out in the statement of claim, and they claim to be *bonâ fide* purchasers of the land for value, without notice. In the alternative they allege that any *lis pendens* issued was so issued without authority of law, and that the *lis pendens* and the registration thereof were unauthorized, void and of no effect as against them, and that they are not charged with notice by reason of notice

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of action, and that the lands purchased by them were not subject to any claims whatsoever of the plaintiffs by reason of said *lis pendens* or otherwise, and the said statement of claim shows no cause of action against them, because there was no cause of action whereof to charge them with notice or to form any lien upon the lands purchased by them.

At the trial, Mr. Justice Dugas was of the opinion that the promissory notes, having been transferred by simple indorsement after maturity, and subsequent to the alleged fraudulent transfer, the plaintiff, McGrade, has no right or status to bring the action to set aside the conveyances, or to obtain the relief sought on behalf of himself and creditors.

The learned trial judge, however, held that the evidence established that the transfers from McConnell to his wife were made with the object of defrauding the creditors; also that the law and practice of the Yukon Territory did not authorize the filing of a notice of *lis pendens*, because lands in the Yukon were entirely within the "Land Titles' Act, 1894" and its amendments which did not so provide but made provision (sec. 99) for the lodging of a caveat; that a purchaser for valuable consideration, but with notice, was subject to have his contract voided, and that, notwithstanding registration of the conveyance to the purchaser, the equitable doctrine of notice would always stand; nevertheless, that notice having reached the syndicate through a defective or irregular document, viz.: the notice of *lis pendens* filed, it was not an effectual notice and could not bind the parties. He accordingly dismissed the action with costs in favour of the syndicate.

On appeal Mr. Justice Dugas adhered to his judgment at the trial; but Mr. Justice Craig and Mr. Justice MacAulay were of opinion that the plaintiffs

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should succeed. Judgment was given accordingly for the plaintiff with costs, the impeached transfers were declared void as against the creditors, and the title of the syndicate was declared to be subject to the claims of the creditors, with a direction that the lands should be sold to satisfy the claims.

From this latter judgment the present appeal is taken by the syndicate.

*Chrysler K. C.* for the appellants. It is not claimed that either the patents to Mrs. McConnell should be set aside or that the deed from her and the certificate of title to the syndicate are fradulent against the plaintiffs, but, consenting that these instruments should stand intact, they ask that the title to the syndicate be declared subject to the creditors' claims ; and that the syndicate may be declared trustees for all the creditors of Edward McConnell. It is not denied that the deed to the syndicate was given for valuable consideration. The claim is that the deed to Mrs. McConnell is voidable or void under the statute respecting fraudulent conveyances and that the judgment setting aside the deed to her should be binding upon the syndicate as purchasers *pendente lite* because they had notice of *lis pendens* through the medium of the indorsement upon their own certificate of title. It is not alleged that the syndicate had otherwise notice of the claim or that they knew, as a fact, that the deed from McConnell to his wife was made for the purpose of defrauding his creditors nor that they were otherwise parties to the alleged fraudulent dealing between McConnell and his wife. It is conceeded that the purchase by the syndicate was for valuable consideration and in good faith, unless it be bad faith to purchase, *pendente lite*, in the face of an invalid registration notified upon the certificate of title and without knowledge of the alleged fraud.

The syndicate relied entirely upon the clear certificate of title held by the registered owner of the land in respect of which they were dealing with her. "Land Titles Act, 1894," sec. 126. Hardcastle on Statutes, (3 ed.) at page 333 suggests that in the case of an Act which grants a new jurisdiction, a new procedure, new remedies, the procedure, forms or remedies there prescribed and no others must be followed until altered by subsequent legislation. This principle seems applicable to "The Land Titles Act" and the procedure for filing a "caveat" This procedure cannot be set aside and an irregular document called "Notice of *lis pendens*" filed, which is not provided for either by "The Land Titles Act" or by "The Judicature Act" in force in the Territories.

Even assuming that the filing of the *lis pendens* had some effect as notice, what would the syndicate have learned if they had looked into the allegations in this suit? Merely that the transfer by McConnell to his wife was alleged to be a fraud upon the creditors; that the said deed was sought to be set aside and Mrs. McConnell declared trustee for the creditors; that, subsequent to the transfer to Mrs. McConnell, a patent had been granted to her by the Crown and that, thereupon, a certificate of title had issued to her under "The Land Titles Act." No attack was made on the patent, nor that it was in any way connected with the alleged fraudulent transfer or issued to her because or on the strength of said alleged fraudulent transfer, nor was any attack made on the certificate of title issued to her. Mrs. McConnell set up in her answer that her title was not dependent on the transfer to her by her husband, but as the patent and certificate of title were in no way impugned under sections 55, 57 and 126, "Land Titles Act" there was still a clear title in Mrs. McConnell which left her free power of disposi-

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tion as owner and the syndicate was safe in carrying out the purchase.

Even if the *lis pendens* was called a *caveat* and treated as if filed as such, it could not affect the title; a *caveat* that does not comply with the Act is of no avail. *McKay* v. *Nanton* (1), and cases there cited; *McArthur* v. *Glass* (2). Registration of a document improperly registered is not notice; *Atkins* v. *Coy* (3); *Roff* v. *Krecker* (4). Notice of a prior mortgage unrecorded at the time of registering a second mortgage does not postpone the second mortgage; *Edwards* v. *Edwards* (5). Mere notice of prior unregistered documents is of no avail as against a registered document, and the holder of a registered title is a purchaser for value notwithstanding notice of such prior documents. Void documents have no force in law, and, as the *lis pendens* in this case was void, it could not be notice. Claims for which the statute has not provided the means of filing a *caveat* cannot be relied upon as against a registered owner who holds without fraud. *White* v. *Neaylon* (6).

The "Land Titles Act" is in force in the Yukon Territory and alone governs all questions regarding title to lands bought under the Act. The provisions of the English statute 2 & 3 Vict. ch. 11, as to filing *lis pendens*, is not in force in the Yukon Territory, neither are the rules and practice of the courts of law upon this subject as they were repealed by that statute, 2 & 3 Vict. ch. 11, and were not, on the 15th July, 1870, a part of the English law introduced into the Territories. R.S.C. ch. 50, s. 11.

Constructive notice is not sufficient to set aside a registered title. Actual notice amounting to fraud

(1) 7 Man. R. 250.
(2) 6 Man. R. 224.
(3) 5 B. C. Rep. 6.
(4) 8 Man. R. 230 at p. 237.
(5) 2 Ch. D. 291.
(6) 11 App. Cas. 171 at p. 176.

must be clearly proved and *lis pendens* is not notice for that purpose. A registered title stands upon a different footing from an ordinary conveyance. *Wyatt* v. *Barwell* (1); *LeNeve* v. *LeNeve* (2); *Hine* v. *Dodd* (3); *Jolland* v. *Stainbridge* (4); *Chadwick* v. *Turner* (5), *Russell* v. *Cushell* (6); *Agra Bank* v. *Barry* (7) overruling *Wormald* v. *Maitland* (8). Nothing short of actual notice such as makes it a fraud on the part of the purchaser to insist on the registry laws, is sufficient to disentitle the party to insist in equity on a legal priority acquired under the statute. *Ross* v. *Hunter* (9), per Strong J.; *City of Toronto* v. *Jarvis* (10); *New Brunswick Railway Co.* v. *Kelly* (11). Notice under the registration Acts and under the "Land Titles Act" are widely different, and the effect of notice is not the same. The principles are entirely different whether under the Statute of Elizabeth or under the "Land Titles Act." The policy of the "Land Titles Act" is that the public office should supply the means of knowing with certainty the information required by any one dealing with land. *Gibbs* v. *Messer* (12). The principle upon which *LeNeve* v. *LeNeve* was decided, as explained by Lord Hardwick in that case, was that the policy of the registry Acts was to prevent the mischief arising from secret conveyances, and that they did not apply to cases in which a person claiming under a registered deed had notice of prior deeds or equities. *Greaves* v. *Tofield* (13). This case depends upon the construction of the "Land Titles Act." There is no provision for *lis pendens* in the Act. Section 99 provides for a caveat; no caveat

(1) 19 Ves 435.
(2) 2 Wh. & T. L. C. (6 ed.) 39 note; (7 ed.) 175; 3 Atk. 646.
(3) 2 Atk. 275.
(4) 3 Ves. 478.
(5) 1 Ch. App. 310 at page 319.
(6) L. R. 7 H. L. at p. 150, note (3).
(7) L. R. 7 H. L. 135.
(8) 35 L. J. Ch. 69.
(9) 7 Can. S. C. R. 289 at p. 321.
(10) 25 Can. S. C. R. 237.
(11) 26 Can. S. C. R. 341.
(12) [1891] A. C. 48 at p. 254.
(13) 14 Ch. D.

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was filed in this case The syndicate were *bonâ fide* purchasers and justified in taking the conveyance from Mrs. McConnell and paying her the price agreed upon. The plaintiff cannot complain because the law provides a simple remedy which he did not choose to follow.

The term "fraud" in the "Land Titles Act" is a fraud of both of the parties. The purchaser is not to be affected by notice, direct or implied or constructive, of any trust or unregistered interest and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud wherein the purchaser or other person acquiring title has participated or colluded. There is no attempt to fasten any wrong-doing upon the syndicate except that its solicitor advised it that the notice of *lis pendens* was of no avail and that they need not pay attention to it. They were in perfect good faith and in reliance upon the solicitor, the certificate of title and the fact that no caveat had been filed. The plaintiff did not prove complicity amounting to absolute fraud. See *In re Johnson* (1); *Pennell* v. *Reynolds* (2); *Kevan* v *Crawford* (3).

The effect of the judgment is to place the syndicate in the position that it would have been in if it had been a party to the action or a caveat had been duly registered before it obtained its certificate of title and, consequently, it is contrary to the whole spirit and intention of the "Land Titles Act," and to its express language. See remarks of Manning J. in *Cooke* v. *Union Bank* (4); *Gregory* v. *Alger* (5), at pages 573-574, *per* Williams J. and at page 575, *per* Hood J., also *Baker's Creek Consolidated Gold Mining Co.* v. *Hack* (6), at page 223, per Owen C.J., quoting *Gibbs* v. *Messer* (7), at page

(1) 20 Ch. D. 389 at p. 394.
(2) 11 C. B. N. S. 709 at p. 722.
(3) 6 Ch. D. 29.
(4) N. S. W. 14 L. R. Eq. 280.
(5) 19 Vic. L. R. 565.
(6) N. S. W. 15 L. R. Eq. 207.
(7) [1891] A. C. 248.

254; *Longeway* v. *Mitchell* (1); *Allan* v. *McTavish* (2); *Godfrey* v. *Poole* (3).

The plaintiff is not entitled to succeed in this action because the notes were tranferred to him after maturity and after the alleged fraudulent transfers set up in the statement of claim in this cause. See Byles on Bills ( ed.) 183. The indorsements to McGrade did not assign any collateral rights which the payees may have had to set aside the conveyance as fraudulent but only the right to sue upon the notes. See *Shand* v. *Du Buisson* (4); *Hopkinson* v. *Foster* (5).

*Ewart K.C.* for the respondent. All the judges in both lower courts having held that the transfers from McConnell to his wife were made in fraud of creditors, the only remaining points in dispute are: 1. Whether McGrade was qualified originally to launch this action on behalf of himself and all other creditors of his debtor, McConnell; and 2. Whether the syndicate, as purchasers from McConnell's wife of the real estate in question, were affected with actual notice of the pendency of this action at the time that they completed the purchase. The evidence upon both questions, and the law applicable to such matters, have been exhaustively treated in the considered judgments of both Craig J. and MacAulay J. The respondent McGrade confidently relies upon them in the present appeal.

McGrade was the holder of the notes for upwards of $18,000, the larger of which was made on the 26th August, 1899. The conveyances by McConnell to his wife were not made until April, 1900. Consequently, the guilty transferor was indebted thereon at the time of the execution of the impeached con-

(1) 17 Gr. 190.
(2) 8 Ont. App. R. 440.
(3) 13 App. Cas. 497 at p. 503.
(4) L.R. 18 Eq. 283; 43 L.J. Ch. 508.
(5) L. R. 19 Eq. 74.

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veyances. Before the syndicate fyled its defence in June, 1903, for $18,349.94, against Edward McConnell on the notes in question, execution had issued thereon and a return of *nulla bona* had been obtained. McGrade was, therefore, at the time of delivery of his amended statement of claim to the syndicate (29th May, 1903), an execution creditor of McConnell, and was thus a judgment creditor of McConnell both before issue was thus joined and at the date of the trial (6th August, 1903). Even as a simple contract creditor McGrade was competent to bring this action, on behalf of himself and all other creditors of the guilty transferor, under the Statute of 13th Elizabeth. See *Twyne's Case* (1); *In re Mouat* (2); and cases cited by the judges in the court below.

As to actual notice of these proceedings, under 13th Elizabeth, at and prior to the completion of the purchase from Mrs. McConnell, the evidence is clear and uncontradicted that both the syndicate's general agent and solicitor had full and actual notice of the contents of the *lis pendens*, issued and registered, on the 2nd October, 1901; while the purchase and conveyance were not completed until the following year, 21st June, 1902.

The case is one of express or actual notice and the matter was deliberately considered prior to payment by the syndicate to Mrs McConnell. These agents of the syndicate do not deny notice of *lis pendens*, but they risked ignoring it, on an unsound view of its legal effect and of the equitable doctrine of notice applicable to such a case. See Armour on Titles (3 ed.) p. 189; 7 Eng. Encycl. of Law, p. 486.

This appeal turns rather on the general equitable doctrine of notice (9 Eng. Encycl. p. 189 and cases

(1) Smith's L.C. (11 ed.) 24. (2) [1899] 1 Ch. 831.

therein cited); *LeNeve* v. *LeNeve* (1); *Agra Bank* v. *Barry* (2); *Kennedy* v. *Green* (3).

The law of England, as it existed on 15th July, 1870, is in force in the Yukon Territory so far as applicable; hence, the imperial statute, 2 & 3 Vict. ch. 11, is in force there, and the notice of *lis pendens* was properly issued and registered and affects the syndicate as a subsequent purchaser. On the other hand, if that Act be not in force, as argued, then the general English law of *lis pendens*, as against a purchaser with actual notice thereof, is applicable, namely, the law of *lis pendens* as it existed in England prior to 2 & 3 Vict ch. 11.

As to the points argued, so far, we cite generally: Best on Evidence (7 ed.) p. 578; Freeman, Judicature Acts, 277; *Reese River Mining Co.* v. *Atwell* (4); Shelford Real Property Acts, (9 ed.) p. 366; Ont. Jud. Act, sec. 97; Holmstead & Langton, p. 135; *Blair* v. *The Assets Co.* (5); *Colonial Bank of Australasia* v. *Pie* (6); *Baxter* v. *Middleton* (7); *Parker* v. *Parker* (8); *Morewood* v. *South Yorkshire Railway and River Dun Co.* (9)

THE CHIEF JUSTICE (dissenting).—I would allow this appeal in part without costs, by striking out of the judgment the words

and that such lands be sold to satisfy the execution of the appellant issued out of the said Territorial Court of the Yukon Territory against the defendant, Edward McConnell.

See *Oliver* v. *McLaughlin* (10).

For the reasons given by Mr. Justice Macaulay in the court below, I would confirm the part of the judg-

(1) Amb. 436.
(2) L. R. 7 H. L. 135.
(3) 3 Mylne & K. 699.
(4) L. R. 7 Eq. 347.
(5) [1896] A. C. 409.
(6) 6 Vic. L. R. (Eq.) 38; Hunter's Torrens Cas. 122.
(7) [1898] 1 Ch. 313.
(8) 32 U. C. C. P. 113.
(9) 3 H. & N. 798.
(10) 24 O. R. 41 at p. 49.

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ment declaring the deed from McConnell to his wife void and fraudulent as against his creditors and that the syndicate holds title subject to the claims of the said creditors.

I do not see the least room for doubting that the syndicate purchased with full knowledge of the danger they were exposing themselves to.

As to the amendments suggested by my brother Nesbitt, I am not in favour of allowing it. It has not been asked for and I do not see upon what ground the Syndicate should be permitted to "*bis vexari*" their adversaries.

SEDGEWICK and DAVIES JJ. concurred in the judgment dismissing the appeal with costs and allowing the amendment by the appellants upon terms, for the reasons stated by Nesbitt J.

NESBITT J.—As pointed out in the judgment of my brother Idington which I have had an opportunity of reading, the defendants, the syndicate, are bound by the rules of pleading in force in the Yukon, rules 113, 115 and 117 of the ordinances 1902, by the allegation of the debt, the fraudulent intent between the McConnells and by the amended pleading of the amount of the judgment, and cannot be heard to dispute the facts alleged. It is to be regretted that this is so for the argument of Mr. Chrysler convinced me that had these points been open to him we should have held following *Ex parte Mercer*; *in re Wise* (1), that no case was made out for relief against the syndicate.

Assuming that we are bound to hold that the deed between the McConnells was a fraud against the plaintiff, we then have this deed attacked in an action commenced before the purchase by the syndicate from

(1) 17 Q. B. D. 290.

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Mrs. McConnell. This distinguishes the case from *Dalglish* v. *McCarthy* (1), which I thought upon all fours with this case and which, apart from section 126 of the "Land Titles Act" (2) would have clearly brought the case within the doctrine of a purchase *pendente lite*. I agree that the 2 & 3 Vict. ch. 11, sec. 7, is not applicable to the Yukon, but this Act is in relief of *bonâ fide* purchasers and so, but for the section I refer to, the purchaser would be under the old rule of law and bound by the result of the litigation of which he had no notice. I need not refer to cases on this point.

What then is the effect of section 126, which is in the following words:

> Except in the case of fraud, no person, contracting or dealing with, or taking or proposing to take, a transfer, mortgage, encumbrance or lease from, the owner of any land, for which a certificate of title has been granted, shall be bound or concerned to inquire into or ascertain the circumstances in, or the consideration for which, the owner or any previous owner of the land is or was registered, or to see to the application of the purchase money or of any part thereof, nor shall he be affected by notice direct, implied or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding; and the knowledge that any trust or unregistered interest is in existence, shall not of itself be imputed as fraud.

I do not think a narrow interpretation should be placed on this; and I do not agree with some of the observations of my brother Idington as to its construction. I do not think the registrar had any right to register a *lis pendens*, nor do I think the form of certificate issued by him can have the effect of cutting down the effect of section 126. While there is a discretion vested in the registrar it must be exercised within the limits prescribed by the Act. The whole scope of the New Zealand Act of 1885 (which I have gone over, so far as this point is concerned and which is substantially the same as the Act in question) is fully considered in the case of *The Assets Company*

(1) 19 Gr. 578.

(2) 57 & 58 Vict. ch. 28.

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v. *Mere Roihi* (1). This case came to hand since the argument. The Act was passed in aid of the safe and easy transfer of property and to free such transfer from embarrassing questions of notice of trusts and even from knowledge of their existence, and I think the best interests of the commercial community are served by giving the freest and widest interpretation to the latter part of the section. The case seems, however, because of the pending action and actual notice and knowledge of the frauds by which Mrs. McConnell became the registered owner, to fall expressly within the language of the judicial committee in the case quoted (at page 316)—

> By fraud in those Acts was meant actual fraud—i.e., dishonesty of some sort; not what was called constructive or equitable fraud, an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flowed from fraud. Further, it appeared to their lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he bought from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, *must be brought home to the person whose registered title was impeached or to his agents.* Fraud by persons from whom he claimed did not affect him unless *knowledge of it was brought home to him or his agents.* The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make did not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused and that he abstained from making inquiries for fear of learning the truth, the case was very different and fraud might be properly ascribed to him. A person who presented for registration a document which was forged or had been fraudulently or improperly obtained, was not guilty of fraud if he honestly believed it to be a genuine document which could be properly acted upon. In dealing with colonial titles depending on the system of registration which they had adopted, it was most important that the foregoing principles should be borne in mind, for if they were lost sight of that system would be rendered unworkable.

I therefore think that, although in this case, if the suit had not been commenced the syndicate could have relied on section 126 as a full protection, they cannot

(1) 21 Times L. R. 311.

do so where the suit has been begun impeaching the conveyance and the syndicate have full notice of it.

As Bump on Fraudulent Conveyances says : [sec. 17].

If another receives the property with notice of the fraud, he is aiding the debtor to cheat his creditors, and this the law never tolerates.

The first deed is voidable only and when the title [sec. 492]

has passed into the hands of an innocent holder, even this infirmity is cured and the title becomes sound and indefeasible.

If he does not give a valuable consideration and *if he has notice of the fraud*, he is in the same position towards the creditors as the fraudulent grantee, for he is, in the contemplation of the law, a participant in the fraud [sec. 493.]

Kerr on Fraud, p. 324 :

The right to impeach a transaction on the ground of fraud has no place against third parties who have paid money and acquired a legal title to property without notice of fraud.

May on Fraudulent Conveyances, after stating that until the first deed is

made void by "creditors and others" it is a valid deed and one by virtue of which the legal estate vests in the voluntary grantee, subject to its being divested,

proceeds as follows :

The right of the person defrauded under these statutes to elect to avoid a deed as fraudulent may be lost in either of the following ways :

First, it may be lost by the deed having become for value, by a consideration *ex post facto* before any steps are taken by that person to impeach it.

Secondly, the voluntary grantee may have divested himself of the property by a *bonâ fide* transfer of it for value to a *bonâ fide* purchaser for value *without notice of the fraud.*

See May 325 and also 317.

I have gone into the case thus fully because it raises a most important question as to the proper construction of section 126 of "The Land Titles Act." As our judgment, however, is based on the ground that owing to the syndicate not having pleaded specifically that no debt existed on the note sued on which plaintiff

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was entitled to recover and that McConnell's deed to his wife was not for the purpose of defrauding the plaintiff and his other creditors, and as the only evidence given by the plaintiff as against the McConnell plea to that effect seems to shew that had the syndicate so pleaded they might have been entitled to judgment in their favour, I would send the case back and allow them, if they so desire, to so amend their pleadings and to raise this point, but, on condition of their first paying all costs incurred since these pleadings were filed within thirty days after taxation thereof and filing their amended pleading within the same time. If they establish this defence they should succeed; if they fail on such defence then the present judgment to stand.

IDINGTON J.—The appellants purchased from Luella Day McConnell real estate in the Yukon. This she had got from her husband Edward McConnell by conveyance of April, 1900, which the trial judge and the court *en banc* in the Yukon have both found or respectively found and assumed were fraudulent and void as against creditors. The respondent, McGrade, had become the holder of promissory notes made by the said Edward McConnell and, on the 9th September, 1901, sued him to recover the amounts thereof. Pending that action the respondent, on the 2nd October, 1901, began this action on behalf of himself and all other creditors of said Edward McConnell against Edward McConnell and his wife, to have said deeds of conveyance declared fraudulent and void as against creditors.

By deed of 21st June, 1902, Mrs. McConnell conveyed said real estate to the appellants, the Syndicat Lyonnais du Klondyke, for the alleged consideration of $40,000 and they claim under said deed to be purchasers in good faith for value and without notice, or

if not, at least by virtue of the provisions of "The Land Titles Act," to have an unassailable title.

On the 29th January, 1903, the respondent McGrade recovered judgment in the said suit against Edward McConnell for the amount of the promissory notes in question and judgment having been entered up he, McGrade, applied in this action and got leave to amend and to add the appellants as defendants herein and did so, alleging amongst other things the recovery of the said judgment against Edward McConnell.

The appellants, as defendants, thereupon pleaded to the amended statement of claim a defence that neither denied the said debt being due nor the said judgment nor the fraud charged in regard to the conveyance from McConnell to his wife. At the trial the McConnells made no defence, but, having by their statement of defence denied liability and the alleged fraud, it became necessary for the plaintiff to put in formal proof of both

Amongst other things filed for this purpose was proof of the judgment that had been so recovered, and some further evidence I need not touch upon here for reasons which will presently appear. Judgment was duly entered herein accordingly by the learned trial judge against the McConnells who have not appealed.

The appellants, as I have said, did not by their statement of defence raise any defence as to the indebtedness of McConnell to the respondent or the fraudulent character of the deeds of conveyance from McConnell to his wife, but contented themselves with the defence which I may paraphrase as being that of *bonâ fide* purchasers without notice, that the alleged certificate of *lis pendens* filed in the office of the registrar was not in accordance with the law, and that registration thereof was illegal and of no effect, and that in in any event notice derived from such irregular and

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illegal registration of the certificate of *lis pendens* was null against appellants under the "Land Titles Act." Though neither at the trial nor *en banc* upon appeal therefrom nor in their factum here was there any objection taken by the appellants for want of proof, as against them, in respect of the debt, or the fraudulent character of the deed from McConnell to his wife, it is now taken here orally.

I do not think it is at this stage open to the appellants to take any such objection under such circumstances. I do not think, in view of the requirements of the Yukon Consolidated Ordinances, 1902, ch. 17, rules 113, 115 and 117, requiring defences to be pleaded, that such objections, without pleadings, were ever open to the appellants. It would seem elementary law that upon such legislation the case of each defendant must be tried upon and by the issues he sees fit to set up and is neither to be helped nor hindered by anything his co-defendants may by their pleading have set up.

Rule 113:

> Every allegation of fact in any pleading not being a petition or summons if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the opposing party shall be taken to be admitted except as against an infant, lunatic or person of unsound mind not so found judicially.

I assume, therefore, that the judgment appealed from was rightfully entered against the appellants unless by virtue of their own pleading they have made good the defences specially pleaded by them. In their pleading they do not specifically claim the protection for their title of the provisions of the "Land Titles Act." What they do seek to set up is rather pointed at than pleaded. Assuming the protection of the statute to have been properly pleaded, if, and so far as, open to the appellants, I think we can better understand the position

the appellants are in by referring to the doctrine of *lis pendens*.

The appellants bought, if they did buy, *pendente lite*. They did so in a territory where the laws of England relating to civil and criminal matters, as the same existed on the 15th day of July, A.D. 1870, were in force in so far as the same were applicable to the Yukon Territory, and in so far as the same have not been been repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada or by any Ordinance of the Lieutenant-Governor in Council. (See "North-West Territories Act," R.S.C. ch. 50, sec. 11).

That part of the law of England that provides for the registration of notice of *lis pendens* and the restriction of the law as expressed in the maxim of *pendente lite nihil innovetur*, so that innocent purchasers *pendente lite* might be protected, is not in force in the Yukon. The registration provisions in England being of a purely local character were not carried into the Yukon by the general introduction of English law. Counsel wisely abstained from arguing that they were.

It was urged that, notwithstanding the absence of such legal enactment in any way, the general law of England as it existed before such laws for registration and legislation restrictive of the effect of *lis pendens* or since, and so far as unaffected by it, did not touch the case of a suit such as this, wherein it is sought to have a deed fraudulent as against creditors so declared and set aside. I am unable to distinguish such a case from the many other cases in which the *lis pendens* relating to real estate or an interest therein has been repeatedly held to bind purchasers acquiring *pendente lite* from or through the defendant

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of an estate or interest in the real estate brought in question by the *lis pendens*

2 Coke on Littleton, 102, *a.b.* gives this illustration:

> Upon a judgment in debt the plaintiff shall not have execution but only of that land which the defendant had at the time of the judgment for that the action was brought in respect to the person and not in respect to the land, but if an action of debt be brought against the heirs and he alieneth hanging the writ yet shall the land which he had at the time of the original purchase be charged for that the action was brought against the heirs in respect of the land.

It is illustrated also at p. 344 (*b*) of Coke on Littleton by the proceedings of *quære impedit* as against the ordinary in relation to presentation by one not having the right of presentation.

The doctrine has been applied in the cases of foreclosure and redemption as in *Winchester* v. *Paine* (1) and cases cited there; *Martin* v. *Styles* (2) in relation to an agreement respecting land; *Garth* v. *Ward* (3) as to establishing a will as against an heir and affecting his vendee; *Landon* v. *Morris* (4), to make good a representation as to title to land; *Walker* v. *Smalwood* (5), to enforce a charge of debts upon lands, and in numerous similar cases including that of creditors as against the heir at law.

In *Murray* v. *Ballou* (6) the late Chancellor Kent reviews the early law and refers to these and other cases illustrating it. See Cases in Equity by Martin, at p. 344 *et seq.*

The registration Acts, as far as I can see, seem to recognise the cases such as that in hand as peculiarly of the classes that come within the principle of *lis pendens* binding all purchasers from defendants *pendente lite.*

The doctrine is reviewed again and so stated by Lord Cranworth in *Bellamy* v. *Sabine* (7) at p. 158

(1) 11 Ves. 194.
(2) [1663] Ch. Cas. 152.
(3) 2 Atk. 174.
(4) 5 Sim. 247.
(5) Amb., 676.
(6) 1 Johns. Ch. (N.F.) 565.
(7) 1 DeG. & J. 566

*et seq.* as to remove the impression got from a loose way of referring to it as notice where he says :

It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, for the language of courts often so describes its operation. *It affects him not because it amounts to notice but because the law does not allow litigant parties to give to others pending the litigation rights to the property in dispute so as to prejudice the opposite party.*

Now, has this doctrine been invaded or modified by "The Land Titles Act?" Or are the provisions of "The Land Titles Act" to be read as subject to this general doctrine of the English law?

The earliest restriction upon the operation of *lis pendens* is contained in the order of Lord Bacon that

no decree bindeth any that come in *bonâ fide* by conveyance from the defendant before the bill exhibited and is made no party neither by bill nor order; but where he comes in *pendente lite* and while the suit is in full prosecution and without any colour of allowance or privity of the court there regularly the decree bindeth.

Registration Acts both in England and in this country have proceeded upon the principle of restricting the operation of *lis pendens* for the beneficent purpose of protecting innocent grantees, whilst according to a plaintiff in a pending suit ample opportunity for protecting his rights. The "Land Titles Act, 1894," seems to have been designed for the same purpose as registration Acts, merely extending their operation and at the same time facilitating the transfer of real estate. Sec. 55 provides that:

The owner of land for which a certificate of title has been granted, shall hold the same *subject (in addition to the incidents implied by virtue of this Act) to such encumbrances, liens, estates or interests, as are notified on the folio of the register* which constitute the certificate of title, absolutely free from all other encumbrances, liens, estates or interests whatsoever, except in case of *fraud wherein he has participated or colluded*, and except the estate or interest of an owner claiming the same land under a prior certificate of title granted under the provisions of this Act.

Sec. 57 provides:

Every certificate of title granted under this Act shall (except *in case of fraud, wherein the owner has participated* or colluded), so long as the same

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remains in force and uncancelled under this Act, be conclusive evidence in all courts as against Her Majesty and all persons whomsoever that the person named therein is entitled to the land included in the same, for the estate or interest therein specified subject to the *exceptions* and reservations mentioned in the next *preceding section, &c., &c.*

Of those " exceptions and reservations mentioned in the next preceding section," there is provided as follows:

(*e.*) Any decrees, orders or executions against or affecting the interest of the owner of the land, which have been registered and maintained in force against the owner.

Section 59 provides that:

After the certificate of title for any land has been granted no instrument shall be effectual to pass any interest therein or to *render the land liable as security for the payment of money* as against *any bonâ fide transferee of the land* under this Act, unless such instrument is executed in accordance with the provisions of this Act *and is duly registered thereunder; and the registrar shall have power to decide whether any instrument which is presented to him for registration is substantially in conformity with the proper form in the schedule to this Act or not*, and to reject any instrument which he may decide to be unfit for registration.

The word " instrument " is interpreted by the second section of the Act to mean

any grant, certificate of title, conveyance, assurance, deed, map, plan, will, probate, or exemplification of will, letters of administration or an exemplification thereof, mortgage or encumbrance or any other *document in writing relating to the transfer* of or other dealing with land or evidencing title thereto.

It will thus be seen that the certificate is subject to such incumbrances, liens, estates or interests as *are notified on the folio of the register*, and that the registrar has power to decide whether any instrument which is presented to him for registration is substantially in conformity with the form in the Act.

It is to be observed that on the facts now under consideration, there was at the time of the sale from Mrs. McConnell to the appellants no decree, order or execution against her or her husband affecting the interest of the owner in the land. The interest that the pre-

sent respondent had in the land or in relation thereto was a something that is not provided for in express terms by the sections I have quoted, or, I may say, in any other part of the Act. Is it, therefore, to be taken for granted that so valuable a right as plaintiff, or those in a position like him, have in the lands of their debtor which have been fraudulently conveyed, are left without protection especially when we consider that that had, by the doctrine of *lis pendens*, in the English law for so long such complete protection, and that the scope and purview of this "Land Titles Act" was only to furnish a system of registered titles and interests in land?

It is quite clear from the provision of 61 Vict. ch. 32, s. 14, amending the "Land Titles Act," that execution creditors are to be protected and the right therein *given to lodge a caveat is furnished as a means for their protection.* It was urged that this method was open to the respondent, but obviously that was not the case here, for he had not recovered judgment, yet had apparently a right on behalf of himself and all other creditors to impeach the conveyance from McConnell to his wife for months before he was able to recover judgment and issue execution and avail himself of this caveat. It was during that interval that the appellants intervened and made the purchase now in question.

I am inclined to think that there is much to be said for the position that respondent may take in claiming that having regard to the scope and purview of the "Land Titles Act" it was never intended to sweep away creditors' rights such as plaintiff had at the time of the appellants' purchase. Is the "Land Titles Act" there fore not to be read as the "Bills of Sale Acts" respecting chattels in England or here, when providing that all instruments not registered were to be fraudulent and

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void as against creditors, yet were held to be in operation restricted to those conveyances of interests upon which the provisions of the Act were intended to operate and not to be extended to those rights and interests to which the Act did not in express terms extend ? (See such cases as *Ex parte Hubbard, in re Hardwick* (1) ; *Charlesworth* v. *Mills* (2) ; *Hamilton* v. *Harrison* (3). It deals with instruments which are defined, with executions which are defined, and all the rights incidental thereto that were capable of registration. Can it be said to have been intended to take away those rights or interests that were not capable of registration ?

I do not think that it is necessary to determine here expressly the point I have suggested, but I think what I have said is worthy of consideration when we come to interpret the words in sec. 55 of the "Land Titles Act, 1894," declaring the certificate to be subject to such incumbrances, &c, as are notified on the folio of the register and the registrar's powers referred to in sec. 59, and having regard to the fact that here there was an instrument constituting a notice entered upon the register and expressly set forth upon the certificate of title upon which the appellants rely for their protection. That certificate had written upon it the following :

> The title of Le Syndicat Lyonnais du Klondyke is subject to a *lis pendens* issued out of the T. C. Y. Ty. between T. J. McGrade *et al.*, plaintiffs, and L. D. McConnell, defendant, dated 2nd October, 1901, and registered at 11.45 a.m. the 2nd October, 1901, as No. 4637.

How can it be said even if the appellants had properly pleaded the protection of the "Land Titles Act" and the sections therein, claimed by them to be intended to give them an absolute title, that a certificate of this kind

(1) 17 Q. B. D. 690. (2) [1892] A. C. 231.
(3) 46 U. C. Q. B. 127.

can give protection against respondent's claim? They claim by virtue of the Act giving vitality to the certificate. To make good that claim they must, I think, rest upon a certificate, if even then they would be entitled to protection, that is clearly within the Act and in no wise beyond its provisions or suggesting upon its face any other title or interest than that they claim. They are claiming obviously against the common law right of the respondents and must bring themselves clearly within the provisions of the law that would exempt them from the operation of the common law. I think they have not succeeded in doing so. Moreover, I think when the facts are borne in mind surrounding their acceptance of the certificate, the express notice thereof, the full consideration thereof, the probable communication with their grantor on the subject, and their determination to risk the interpretation of the statute, despite the rights of others which I take it they well knew of and understood, that the appellants cannot escape from the conclusions arrived at by Mr. Justice Craig in light of the authorities cited in the latter part of his judgment, that they were using the Act of Parliament as an instrument for accomplishing a fraud and thereby made themselves parties who have participated in the fraud which their action alone was calculated to render successful, if it was not the main purpose and object of the whole transaction.

I need not repeat the reasons given in the concluding part of Mr. Justice Craig's judgment, but content myself with expressing concurrence therein.

Sec. 126 of the "Land Titles Act" does not in this view furnish any protection to the appellants.

I think the appeal should be dismissed with costs.

Since writing the foregoing my attention is drawn by my brother Nesbitt to the case he refers to; *The Assets Co.* v. *Mere Roihi* (1); just come to hand, which

(1) 21 Times L. R. 311-317.

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seems in point and, if I had seen it earlier, I might have been saved some of my labour.

I desire to add that I concur in the leave given appellants to amend on terms.

*Appeal dismissed with costs.*

Solicitors for the appellants: *Bleecker & O'Dell.*

Solicitors for the respondents: *Clark, Wilson & Stackpoole.*

LE SYNDICAT LYONNAIS DU KLONDYKE (PLAINTIFFS ON COUNTERCLAIM) APPELLANTS;

AND

JOSEPH BARRETT (DEFENDANT ON COUNTERCLAIM) RESPONDENT.

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*Mar. 23, 24.

*May 2.

ON APPEAL FROM THE TERRITORIAL COURT OF YUKON TERRITORY.

*Mines and minerals—Vendor and purchaser—Sale of mining locations—Consideration in lump sum—Separate valuations—Misrepresentation—Deceit and fraud—Measure of damages.*

Upon representations made by the vendor the plaintiffs purchased several mining locations, the consideration therefor being stated in a lump sum. In an action of fraud and deceit brought by the purchaser against the vendor the trial judge, in discussing the total consideration for the properties purchased, found that there was evidence to shew the values placed by the parties upon each of two of these properties as to which false and fraudulent representations had been made, and which had turned out worthless or nearly so.

*Held*, reversing the judgment appealed from, the Chief Justice and Idington J dissenting, that the finding of the trial judge as to the consideration ought not to be disturbed upon appeal and that the proper measure of damages, in such a case, was the actual loss sustained by the purchaser by acting upon the misrepresentations of the vendor in respect of the two mining locations in question irrespectively of the results or values yielded by the other locations purchased at the same time and as to which no false representations had been made. *Peek* v. *Derry* (37 Ch. D. 541) followed.

APPEAL from the judgment of the Territorial Court of the Yukon Territory reversing the judgment of Mr. Justice Craig at the trial, and dismissing the appellants' counterclaim against the respondent, with costs.

The history of the case is stated by Mr. Justice Craig, the trial judge, as follows:

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Idington JJ.

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"The agents of the syndicate, Paillard and Tarut' were invited by Barrett to visit these properties, Paillard being the syndicate's manager and agent, and Tarut their assistant manager or operating manager. They were well known to be men who came to this country for the purpose of investing in mining properties, and met Mr. Barrett, who was the owner of these various claims. * * * There is no doubt in my mind that they were prospective purchasers of any property which they thought would be profitable for them to invest in; that their position in the country as such was known, and that those persons having properties which they were willing to dispose of naturally would seek out these men. Paillard and Tarut were quite willing to invest in mining properties; that was their object here, and they were going about the country looking at claims. As to the visit in April * * * they simply went as men looking about the country. They went on the claim and remained two or three days, and I think it would take them that time to walk over the properties even in a cursory manner. They went down some shafts which were open, spent from twenty minutes to half an hour in the drifts, and walked about and looked at the drifts; did not do any panning in the drifts, but examined the sides and walls with a candle. When they came to the surface of the ground they were shown by Barrett the various drifts or locations of them, and where they had been worked out. Barrett himself says in his evidence that nothing was said about purchasing, but it is admitted that a price was named of $260,000 for these claims, including the dumps, before the parties left, and that they said they were not then considering buying. Barrett himself in his evidence, says: 'We discussed this property after the April visit; I had no notion of a sale; we spoke

about the creek claims. There was no intention of leading up to a sale in the conversation; had several such conversations; simply idle conversation without any object.' This evidence came up in reference to another matter which I have to refer to later on, but it is Barrett's sworn statement, and while he contends with one breath that he relies upon the investigation of April as proof that the syndicate knew what they were buying, yet in the other breath, when meeting another aspect of the case, he gives the evidence which I have just cited. But this can matter little because I think that any investigation, if it could be called such, which these agents of the syndicate made in April, was so trifling as not to be called an investigation at all. Still, whatever they did see at that time would no doubt be in their minds, and be probably to a certain extent remembered by them at the subsequent visit in June In view of the evidence given by the agents, and what Barrett says as to the idle nature of the conversation regarding the April visit, I do not find that the syndicate agents went on the ground in April with any intention of purchasing the claim, or with a view of ascertaining the nature of the ground with intent to buy.

"We now come to the June visit, and at this visit they certainly went on the ground as prospective purchasers. They were there three or four days visiting these various claims. As to what they did when there I have not the slightest doubt at all. They went on to the claim with Barrett. They asked Barrett to prepare a plan of the ground; Paillard and Tarut both swear to this, and Barrett does not deny it. This is important. The answer which Barrett gave, according to the evidence of these men, was that he was not expert enough to prepare such a plan, but he would shew them the ground and give them all the in-

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formation. I consider this evidence is important, and is consistent with the evidence given by Paillard and Tarut throughout. They walked over the top of the ground, entered one or two shafts which were then open, because in the great majority of the cases where the old drifts had been taken out the shafts were filled and there was no possibility of entering the drifts. In the drift which they did go down (No. 3) they went about with a candle and looked at the sides. Barrett says they saw gold in the walls. This they say they do not remember. They also went down new shafts in drift 7 on 32 which Barrett was then sinking. They saw machinery. For some time they sat near the shaft and counted the buckets coming up, and in relation to this matter there was an endeavor made * * * to shew that in counting the buckets they were trying to ascertain the value of the property. This to my mind is absolutely absurd. How a person could tell the value of the dirt hauled out of the shaft by counting the buckets passes my comprehension. It was an attempt to throw dust in the eyes of the court, which was very silly. The object of counting the buckets clearly was, both from the evidence of these parties, and from the evidence of the engineer, to see how the machinery was working. In addition to this they either panned themselves or saw some panning done both from the dump and from the faces of open cuts on claim "12" and from the dumps and drifts on claim "32", and they also saw two or three small cleanups. Barrett pointed out to them where the ground had been worked, that is, the extent of the workings. The main ground of complaint * * * is that the nature of the ground, that is, its richness, was not correctly given to them, and in addition that certain drifts and workings which appeared and were discovered on the ground after the

sale, were not pointed out to them by Barrett, and in fact, that in pointing out what had been worked out he gave the impression, therefore, that the ground not so pointed out was still virgin ground and intact. The agents say that while on the ground they noted particularly the extent of the ground worked out as represented by Barrett, and that Paillard took notes of these representations in a note-book which he had with him, and the taking of these notes, it seems to me, is consistent with the statement that they took notes of what Barrett said with intent to rely upon it. Of course it may be argued on the other hand, that it is singular that these parties, in a large transaction, and relying upon representations, did not have those representations in writing and signed by Barrett when they were so various and covered so many distinct points hard to remember. This note book was produced at the trial, and the notes were fyled as exhibits. While I cannot myself follow the notes clearly, yet Paillard in his evidence, pointed out that he had made these notes, and no attempt was made by counsel to shew that the notes did not correspond with the evidence which he was giving in regard to the representations, and I take it that the notes correctly conform to the evidence which he gave, the only question of fact being—were the notes made at the time that Barrett made the representations on the claim? Paillard and Tarut swear they were, the only evidence against that being that the parties present did not see them. Whether or not Paillard and Tarut made pannings themselves, it is certain that some pannings were made for them and in their presence, not extensive probably in all, at the June visit. Some eight or ten pans were washed. This is the extent of the investigation made by the defendants. They sank no holes whatever; there is not a title of evidence to

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shew that any investigation was ever made on the virgin ground to prove its richness or otherwise. Whatever statements Barrett made as to that they took his word, and the question whether he did or did not make these representations I will deal with later; but it is beyond a doubt that they themselves did not at all explore the untouched soil. They saw pannings made of ground taken out of the then workings. That is the only investigation, if it can be called an investigation, which they made of the placer ground. As to the extent of the old workings, it is also equally clear to my mind that they made no investigation themselves, and it is not seriously contended that they did make any investigation themselves to ascertain the extent of the old workings. Whatever information they had as to those old workings they got from Barrett and could get it from no one else. In the nature of things it was impossible for them to learn the extent of the old workings because, as is admitted, the shafts entering these old workings were not open. Barrett does not deny that he pointed out the old workings. He does deny the representations alleged respecting the richness of the ground to a certain extent. We are now in this position; two men from France who had previously had some experience in the Klondyke—limited, it is true, but they had bought claims before, and spent some little time in the territory, had gone home to France and organized a new company—came out here and bought this property, paying for it the very large sum of $167,000. They made the investigation which I have indicated and no more. The contention is that the investigation which they made was a sufficiently independent investigation to enable them to rely upon their own judgment and not upon the statements of Barrett, and if their present contention be correct they might just as

well have taken the representations anywhere else as on the claim; that it was a useless piece of work for them to go on the claim at all if they so fully relied on Barrett as they now contend they did. I cannot myself see the force of that argument. * *

* * They contend that they relied absolutely on Barrett and his representations; they went upon the property which they were thinking of purchasing for the purpose of seeing it, its situation, the extent of the workings and the mode in which it was worked, and it is reasonable to believe they would do that and at the same time rely upon Barrett's representations as to the nature of the soil. As I have said before, as to the extent of the workings they had to rely upon Barrett. These properties are all placer claims. In this territory gold in placer claims is found in various conditions. In the creeks it usually runs in well defined pay streaks, parts being richer than others, the theory being that the gold is deposited by its own weight and settles to the bottom through the loose gravel as washed down. It is also found on hillsides and benches in varying depth and in varying quantities, sometimes a wide extent and of considerable depth, and the nature of the pay depends entirely upon the quantity of placer ground in one place, and the ease with which that can be worked or operated, and many things enter into the cost of working these grounds—the difficulty of handling water, the amount of waste to be removed, the depth of the shaft to be sunk, the price of wood in that vicinity, and the distance from centre of supplies. Some attempt was made during the trial to show the syndicate did not work these claims properly, but I will take no account of that because it was not followed up in such a manner that I could make any deduction from the evidence, because it was clearly sworn to

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that the cost of operating mines depends entirely upon the surrounding conditions, and no comparison could be made unless all the conditions of the various claims worked were considered.

"As to the extent of the old operations, as I have said, the syndicate had to rely upon Barrett, and did rely upon what he said. * * * They contend respecting claim "32" that Barrett in pointing out a drift known as "drift 9" said that the extent of the workings was only about 30 by 30 feet, whereas it was afterwards discovered that over 8,000 square feet of bed rock was uncovered and taken out. Barrett denies making any such representation, but says that he told them that the former owner had told him he had worked out only that small quantity. On this point there is the evidence of two against one, and I must believe the two. I believe that Barrett must have known of the extent of that working, and I find as a fact that the extent of the workings is as sworn to by the agents, and that Barrett did say that only 30 by 30 feet was worked out. Coming to claim 12, I have more difficulty. * * * The contention is that Barrett in showing the extent of the old workings pointed out only a drift marked "3" on the plan, and did not point out another drift marked "4" * * * since discovered to have been worked out. Paillard and Tarut both say that he pointed out drift "3," known as "Lamar drift," but did not point out drift "4," know as the "Cassidy drift." Barrett swears that he did point out both drifts. Paillard and Tarut say that the name of Cassidy was not mentioned. A man called Soper, * * * in this respect confirms Paillard and Tarut as to the location of the drift, but he says that the name of Cassidy was used. Now, the name is not important in this connection; the location of the drift and the extent of it is the all

important thing, and here we have the evidence of Paillard and Tarut and Soper to this, that Barrett did not point out any drift where "4" now exists. It is true that a witness called Renaud, called on behalf of Barratt, swears that Barrett asked him in the presence of Paillard and Tarut if it was Cassidy's drift that "we saw on the right, and I said I thought it was one of Cassidy's or Lamar's." This would indicate that the name of Cassidy was used again, but Cassidy himself was called on behalf of the syndicate and he says that no indications could be seen of where this shaft was. Barrett's witnesses swear that the cribbing could be seen. Cassidy denies this. He was the man who made the drift; he also swears that the shaft was not timbered, but that a scaffolding was erected upon the top of the shaft for the purpose of hoisting the dirt, which scaffolding he says had disappeared. Tailings were all over the place and might as readily have come from one drift as the other, and no one could tell whether the tailings had come from three, four, or the adjoining claim. I am inclined to think that the weight of evidence is with the syndicate on this matter, and that Barrett did not point out drift "No. 4."

"As to the richness of the ground, * * * Paillard's evidence is the following, * * * 'He (Barrett) showed us the part worked out and the parts left to be be worked; he gave us the figures for each and every drift; I put them on my memorandum at the same time, and he said that the same pay would be found all over the claim.' Further on Paillard swears that Barrett said that 'the same pay which had been found in those different drifts was to be found all over the claim from rim to rim; he told me that several times.' Further on: 'Q. Did he state to you at any time how he arrived at the knowledge

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that '32' was a claim that would yield such enormous profit?—A. He said that judging from the amount of gold he had taken from those drifts, and being certain that the same pay was to be found all over the claim. Q. Did he tell you how he was certain?—A. He said that he was certain that the same pay was to be found from rim to rim. Q. Did he say what made him certain as to that?—A. He said he had prospected the claim, so that he was certain. Q. What parts of it did he say he had prospected?—A. He shewed us several holes that he had sunk on that ground. Q. Did he say what part of the claim he had prospected?—A. Yes, he said he had prospected on the right limit and on the left limit; that is to say, from each side of the drifts worked at the time. Q. If he hadn't made these representations to you which you have stated would you have purchased the property at any such price?—A. No. Q. What did you rely on in making the purchase?—A. I took his word. Q. As to what?—A. I took his word on what he said to me about the yielding of the property. Q. Did you make any examinations yourself?—A. We went merely on the ground and simply I put down the explanation of Mr. Barrett except the occasion when I went to the drift, but we didn't examine drifts at all.' Asked by myself: 'Q. You tell me that you bought this property relying solely on the representations of Mr. Barrett?—A. Yes. Q. And made no investigation either by yourself or by any other person on your behalf?—A. No. Q. And depended entirely on the word of Mr. Barrett?—A. Entirely; I have every confidence in Mr. Barrett.'

"These are the representations relied upon and this story is confirmed by Tarut, who was present with Paillard all the time. Barrett in reply denies this, and he is the only witness who can answer the defendants.

He was asked: 'Q. Did you ever make any representations of that kind? A. There was something talked about it. They asked me if I thought the pay was as good on the creek as where I was working. I told them I had no reason to believe it was not as good because I did not know.' That is Barrett's answer to the direct evidence of these men. Let us consider the conduct of the parties: Paillard and Tarut certainly made no investigation as to the richness of the soil beyond panning or seeing the panning done of the dirt coming up from the then drifts. As to the balance or unworked portion of the ground, (which was really what they were buying, and not the holes which had been worked out) they made no investigation. Barrett had been on the ground since 1899. If any one knew it he should know it. This company was investing a large amount of money and claim '32' was supposed to be a rich one. Is it reasonable to suppose that these men would have bought the ground without some statement as to the possible richness of the undeveloped part? That Barrett did make some representation even from his own shewing is clear. He admits that he told them about two holes that he had sunk on the right and left of the old drifts. In one he swears that he told them that he got $25 in a rocking of an hour and a half, and in another that he got good pay. He did make these statements; he does not deny it; and he says that these statements were true, and that these are the only holes he spoke of except that he said that the pay which he got out of the old drifts which he had worked was good, and that he had worked the claim to a considerable profit. Barrett says that this was all he knew about the property and that it was all he said he knew; that he did not represent the pay as they said he did, to be good and equally good from

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rim to rim. He also says that he did not tell them the output of the various drifts, but that he did give them the output of some. I do not see why he should deny that because he threw open his books to them for inspection and prepared a statement as to the output. There was no reason why he should conceal the output of those drifts. It would be the most natural thing in the world for the syndicate to ask when investing this money what the output had been and what the previous profit had been. The question for me to determine is: Did Barrett make these representations or not, or did he simply say—'From my knowledge of the ground I have reason to believe that the pay is good and will continue good?'—which is practically what he says—'I told them I had no reason to believe it was not as good because I did not know.' The workings of the claim 32 are confined to the centre of the claim practically, and run up and down the valley, and are drifts 2, 3, 6, 7, 8 and 9, which extend throughout the claim from end to end of a nearly uniform width of about 200 feet by 500, which is the length of the claim. These claims have been worked since the year 1898, and it strikes one as singular that the claim should be in this shape and that the working should be confined to the centre of the claim in this manner. It also strikes me as singular why the operations should stop, as they did stop, in a practically straight line up and down the claim, and did not branch off into the limits of the property. Barrett says, and some of his witnesses swear, that when they stoped on the edge of 3 and 2 and 6, the pay was just as good as the pay which they took out in any other part of the drift, that is, that pay did not get low and run out; and to explain why they ran up and down the creek instead of cross-wise they say it would have been too far to wheel the dirt. Now,

that is not a reasonable contention. We do not know where the shafts were, but supposing the shaft to be in the centre, then it was not harder to wheel the dirt from the side of the claim near the unworked portion to the centre than it was to wheel it from the end, nor as hard, and if the shafts had been at either end the same argument applies and is stronger. Looking at the operations, without any evidence at all, it strikes one that the pay gave out or became poor at the outer edges of those drifts, and with the evidence which was given I am convinced that that was the fact. Now, as to whether there is or is not pay outside of those old drifts, so far as the evidence given goes, one must conclude that there is no pay. The defendants after purchasing, worked out the regular shaped drifts * * * at considerable loss; the pay was exceedingly poor; of that I have no doubt. It was in this vicinity that Barrett told them he sank the shaft which resulted in good pay. It is certain that if that is so the operations carried on by the defendants did not confirm Barrett's panning. As to the other side of the drifts—the part lying below 3 and 7, we have evidence of nine shafts being sunk * * * and in some cases considerable drifting done from them. In none of these was pay got. By 'pay' is meant placer gold that will pay to take out, and certainly no such pay as was found in the old drifts worked was got in those prospecting shafts. * * * There is no evidence to rebut the positive evidence that in all these holes the pay was extremely poor, small pans being got and at other times not even colours. It was contended that the prospecting done as evidenced by these holes, is not sufficient to base any opinion on as to the value of the unworked ground. * * * While it is but barely possible that spots may be found containing good pay between these holes yet I am

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satisfied that the prospecting there done is sufficient to show that the placer gold in that part is not even and extensive and of the same grade and quantity as was taken out of the worked drifts. Wilkins, a very intelligent witness of large experience, says what he found he would not call pay at all. * * * Bell, another expert miner, confirms him. It is true that other witnesses—Butler, a man also of large experience, says that he would not be satisfied with that prospecting, but would require to run drifts or tunnels between these various shafts so as to cross cut, and that pay might be found in that part which these shafts had not struck. No one denies that. It is possible that some pay may exist in spots between these shafts, but it must dodge around in a very curious manner to avoid all these shafts if it is there at all. Shafts were also sunk by laymen at E and D shown on the plan, and no pay found. Here we have both sides of the old workings explored, and so far as the explorations have gone (and they have been pretty general over the ground) no pay has been struck. I am of the opinion that for future operations claim '32' is worthless as a mining proposition

"Now, did Barrett know this? No man was in a better position than he was to know it. Witnesses were called who had taken lays of this ground, and it is also proven that Barrett knew of these lays when they were granted. The laymen swear that the lays extended up the creeks from the lower part—three 50 foot lays which would take in 150 feet of the claim and that Barrett must have known of the holes G, F, H, K and IJ. Barrett says he did not know of those shafts. It is hardly reasonable to believe that a man owning a property and being interested in it and knowing that lays were operated on it, and that the lays had been abandoned, would not make some in-

quiry as to why they were abandoned, and would not know the result of the operations on this very ground of which he was the owner. It passes my comprehension and my belief that any one operating a mining claim would be so indifferent as not to know what the result of these laymen's operations had been. I believe that Barrett knew that this ground had been explored and was as it has turned out to be now. There is nothing to contradict his own story that he found good pay in three shafts that he sank * * * but if Barrett found good pay in those places then the subsequent operations made by the then explorers resulted differently. * * * Viewing all the circumstances, considering the fact that the syndicate made no investigation of the virgin ground, and that Barrett was in a position to know when they were not, I believe he made the representations which they say he made, and that he knew at the time he was making it that it was not correct. There is no doubt in my mind that these parties have been overreached, that they have acquired in '32' a practically worthless property. * * * These men say that they come from a country where business is not conducted upon these principles, where a man's word is taken. They say they were introduced to Mr. Barrett and met him several times at the house of Mr. Justice Dugas. * * * 'We did trust Mr. Barrett implicitly; we had been introduced to him by Judge Dugas, and it is a French custom when a high official such as Judge Dugas, one of the best men in the territory, introduces you—it is French custom to believe in him entirely.' And they say throughout their evidence that they did trust Barrett because they found him as they say they did find him. It is not denied—Barrett admits—that a very great part of the conversations which were carried on were carried on in Mr. Justice Dugas' house. Now, I

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can conceive that these men, coming from a different atmosphere, and meeting Barrett as they say they did, would be inclined to believe in him, that any suspicions they might have would be lulled in this way, and that they were the easier taken in. It did not occur to them that Barrett might have been imposing on the good nature not only of themselves, but of the judge, and under the cloak of this good company he was endeavouring to unload upon them properties which he had worked out. In this connection * * * Barrett endeavoured to show that no property ever carried pay from rim to rim, and particularly that Dominion Creek could not, as it is spotty, and that any one who believed such a story would be foolish, and it is true that all the witnesses with one or two exceptions, swore that if any man told them a yarn like that they would not believe him. Wilkins, one of the main witnesses for the syndicate, said he would not take any man's word for any such statement, but Barrett himself says that he has known a claim with pay from rim to rim, and it would not be unreasonable to believe a man if he said so. This he modified afterwards on re-examination, when his counsel saw the effect of what he was saying, by saying that when he knew of claims containing pay from rim to rim he meant claims which had pay in spots from rim to rim, but not even an extensive pay. I agree, upon the whole evidence, that it is most unusual, in fact, exceedingly rare, to find any claim in the Yukon Territory which carries pay as represented; that is, even and extensive pay from rim to rim, pay as a rule being found only in certain channels or spots on the claim, larger or smaller, but not at all, as a rule, spread over the entire claim, and I believe that any man having experience in the Yukon Territory would not have believed a person making such a

statement without investigation. Now, as to the meaning of even and extensive pay, I take it that the impression which they then got, and which Barrett intended to convey, was that the pay in the portions of the ground unworked was of the same nature and extent as the pay in the ground already worked out, and that basing a calculation upon the result of the former works and the area of the ground unworked, a very large profit would result from future operations. Of course, when one would say 'even and extensive' it could not possibly mean that every pan would be alike; that is manifestly impossible; but it would mean that the pay over the whole ground would in the wash up average the same, and that the same pay would be found all over the claim. As to claims '9' and '12,' I have already touched upon '12' so far as the extent of the operations is concerned. As to the extent of the pay I do not find the evidence so clear on behalf of the defendants. They swear that Barrett told them that pay was good and that the claim could be worked to a profit and that the same pay would be found all over the claim as was found on the face of the hillside, and in the part already worked. Barrett denies this, and it is evident that some considerable panning was done on the hillside, and I do not think the representations are as clear cut in regard to this claim at least, or not sworn to as clearly as in the other—'32.' In regard to '9,' the question of the value of the ground did not come up directly beyond the question of the output of a certain claim, and it is also confused, so that I cannot give any judgment or come to any conclusion upon the fact. I, therefore, do not find that the representations as to the extent of the pay have been proved in regard to these two claims and '12' hillside. Barrett says that he had worked the claim to a profit, but

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I cannot find that the representations were of the same direct nature respecting 12, nor as to 9, so far as the nature of the ground is concerned."

The learned trial judge in assessing damages continued as follows :—"There is also evidence that something was said of each parcel of four being valued at $35,000, and this claim No. 32, which I am considering, was taken at $35,000. That, I may say, however, was not definitely ascertained or sworn to, but some such conversation did take place. More than that, one Stearns was the owner of a half interest in this claim and that half interest was got in at $17,500; therefore the whole claim upon that basis would be worth $35,000. All these various pieces of evidence coming together would lead me to believe that the value fixed by Barrett to the knowledge of the syndicate, for this claim, in estimating the total value, was $35,000. The claim is now worthless. It could not be sold at all to-day for any money in my opinion. Will I assess the damages at $35,000, the price paid while allowing the defendants to retain? If revision of the contract had been asked for I have no doubt that would be the measure, less the profit derived from the claim. Now the syndicate have taken out a net profit from this claim of $13,317. Am I to allow this profit in estimating? If any other damage than the actual damage or loss sustained, in fact based upon restoration, would be allowed, then I may ignore the profit. The defendants also made a loss, but I think the net profit is $13,317 The question which is troubling me is—shall I deduct the profit from that value? If I am to go upon the principle of allowing profit and loss from the various workings I will have to estimate the loss for the working of drift 9, that is, I will have to calculate the value of the ground taken out of that claim in excess

of what was represented by Barrett to have been taken out and in all other parcels as well. But I have no means of ascertaining this without a reference. No evidence on the question of total profit and loss was given. If this property had been sold before or after the working of drifts '7' and '5,' which were made by the syndicate, what would it have brought if intending purchasers were ignorant of the result of the prospects made upon the claim which revealed its worthlessness? I cannot tell this and there is no possibility of ascertaining it now. On the whole I think I am justified in allowing as damages the full price paid for this claim at $35,000 as loss of bargain. If I should have assessed upon the other principle I now make the calculation in case I may be wrong. There should be allowed $35,000, less the net profit of $13,317, but adding to that the value of the ground taken out of 'drift 9' in excess of representation; also the syndicate should have interest upon the balance of their money from the date of the purchase until judgment. Then, as to the balance of the damages, the only other claim against which I allow damage is claim No. 12, and that is for the Cassidy drift, known as drift 4. In this I have no trouble in coming to the amount of the damages. It is sworn that the total product was $11,000 from this drift, but that it was worked upon a lay, in which the laymen received fifty per cent, which was a fair allowance; therefore, the loss in this case is $5,500, which will be added to the other, making the total damages against the defendant Barrett $40,500. There will be judgment for the syndicate for this amount on the cross action."

And directions were given as to the taking of accounts, etc.

On appeal to the full court the decision of the trial court judge was set aside by the judgment now

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appealed from and the syndicate's counterclaim against Barrett was dismissed with costs.

The questions raised upon the present appeal are stated in the judgments now reported.

*Chrysler K.C.* for the appellants.

*Aylesworth K.C.* and *Ridley* for the respondents.

THE CHIEF JUSTICE (dissenting.—I unhesitatingly would dismiss this appeal upon the simple ground taken by the majority in the court below, that these appellants, assuming that their allegations of misrepresentation and fraud have been proved, have not proved that they have suffered any damages. No separate valuation was put upon these properties, and it is quite consistent with the evidence that the value of the properties purchased by the appellants, apart from "Claim No. 32," exceeded the $167,500 they paid, and there is no evidence whatever as to the value of "Creek Claim No. 12" at the time of the trial. Now, if the appellants got $167,500 worth of property or more, what damage have they suffered ? The fact that they do not ask for the rescission of the contract would tend to indicate that they have not made such a bad bargain. I would also have found it impossible to reverse for the reasons that I gave in *Kirkpatrick* v. *McNamee* (1) upon an analogous appeal.

GIROUARD J.—I would restore the judgment of the trial judge purely and simply, but as the majority of the court think that the amount of the damages should be reduced I will not dissent.

DAVIES J.—I concur generally in the judgment of my brother Nesbitt, and think the appeal should be allowed and the judgment of the trial judge restored subject to the variation hereinafter stated.

(1) 36 Can. S. C. R. 152.

The findings of fact of the trial judge should not, I think, under the circumstances, be reversed. A great deal depended upon the manner in which the witnesses gave their evidence and I do not find anything in the evidence which would justify me in reversing these findings. So far as they affect this appeal the learned judge found as a fact that the appellants' agents in the purchase of the properties bought by them relied upon the representations made to them by the defendant Barrett at the time the bargain was made and the purchase completed. He had the means of knowledge and they had not. They "took his word about the yielding of the property" and "relied solely upon his representations" as to that fact. The representations were as to "Plot 32" substantially that he, defendant, was certain the same pay was to be found from rim to rim; that he had prospected the claim so that he was certain; that he shewed them several holes that he had sunk on that ground and that he had prospected on the right limit and on the left limit, that is to say, from each side of the drift worked at that time, and that if he had not made these representations to them they would not have purchased the property at any such price.

The learned judge found as a fact not only that these representations were made and that the purchaser relied upon them in purchasing the property, but that they were false to the knowledge of the defendant Barrett when he made them. The representations made with reference to the "Cassidy claim, No. 4" were also found by him to be false to the knowledge of respondent Barrett, and that the appellants relied upon them in making the purchase. That being so the action would lie for deceit and fraud and the question would then remain whether or not, the representations being false as to two of the properties purchased,

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damages could be recovered irrespective of the other properties included in the purchase and irrespective of the results or values which these other properties yielded as to which no false representations were made.

The learned judge found as a fact that in making up the total consideration for the entire property purchased there was evidence shewing the values which had been placed by the parties upon each of the two properties as to which false and fraudulent representations had been made with respect to their yielding qualities.

On this point the evidence I am bound to say is not as clear and conclusive as I could wish but I accept the finding of the trial judge as correct upon the point.

Then, as to the measure of damages recoverable, it is clear that such damages must in actions for false and fraudulent representations not only be proximate but must be clearly defined and ascertained. All speculative values or damages must be excluded. The plaintiffs' loss is not in an action for deceit the value of his bargain. If the false statements relied on had not been made the plaintiff would have retained the consideration he paid but would have had nothing more, and the difference between that consideration and the actual value of the property represents all the loss that the defendants' wrong has caused.

The rule is laid down by Ch. J. Fuller of the Supreme Court of the United States in delivering the judgment of that Court in the case of *Smith* v. *Bolles* (1), who says :

> What the plaintiff might have gained is not the question but what he has lost by being deceived into the purchase.

And further :

> What the plaintiff paid for the stock was properly put in evidence not as the basis of the application of the rule in relation to the difference between the contract price and the market or actual value but as estab-

(1) 132 U. S. R. 125.

lishing the loss he has sustained in that particular. If the stock had a value in fact that would necessarily be applied in reduction of the damages.

This is also the English rule. In *Peek* v. *Deek* (1) Cotton L. J. said :

> The damage to be recovered by the plaintiff is the loss which he sustained by acting on the representations of defendant. That action was taking the shares. Before he was induced to buy the shares he had the £4,000 in his pocket. The day the shares were allotted to him which was the consequence of his action he paid over that £4,000 and he got the shares. And the loss sustained by him in consequence of his acting on the representations of the defendant was having the shares instead of having in his pocket the £4,000. The loss therefore must be the difference between his £4,000 and the new value of the shares.

It is true that both the English and American cases were those of fraud in the sale of a chattel. But the reason of the rule must, I take it, be equally applicable to the purchaser of mining properties such as those here in dispute and would be the difference between the value of the property and the price paid. It has been so followed in the Federal Courts of the United States. See *Atwater* v. *Whiteman* (2); *Glaspell* v. *Northern Pacific Railroad Co.* (3).

In the case now before us the trial judge found that the price paid for the property "No. 32" was $35,000. He also found that the purchaser had before the trial realized a net profit from the working of part of that lot of $13,317, and that the property as it then stood after deducting that $13,317 was practically worthless. This net profit being deducted from the price paid would leave the damages on lot "No. 32" at $21,683 which was the actual loss or damage sustained by the plaintiff on that lot. Then, as to the damages on the other property "Claim No. 12," for the "Cassidy drift" known as "No. 4," he finds, on the same principle, the damages to be $5,500 which added to the $21,683

(1) 37 Ch. D. 541 at p. 591. (2) 41 Fed. R. 427.
(3) 43 Fed. R. 900.

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would make $27,183, for which amount judgment should be entered.

NESBITT J.—I have had the advantage of reading the very carefully prepared judgment of my brother Idington, and shall therefore content myself with shortly stating why I am unable to agree with his conclusions. I fully concur with his statement of the law as to what is necessary to be proved in an action for fraudulent deceit The learned trial judge, however, who had the law there fully argued before him, and was quite alive to the necessity of distinct proof of the various matters referred to by my brother Idington, has found in a very fully considered judgment against the defendant Barrett. He says that having in view the fact that the defendant made no investigation of the virgin ground—

> I believe he (Barrett) made the representations which they say he did and that he knew at the time he was making it that it was not correct. There is no doubt in my mind that these parties have been overreached; that they have acquired in 32 a practically worthless property.

In dealing with the other claim "12" he goes into the evidence very fully and concludes that "drift No. 4" was not pointed out and further concludes that inspection would not have revealed the drift. The learned judge found the greatest difficulty in coming to a conclusion as to how he should assess the damages He finds that while the price agreed upon was $167,500 that in reference to "32" the result of the evidence is:

> There is also evidence that something was said of each parcel of four being valued at $35,000. That, I may say, however, was not distinctly ascertained or sworn to, but some such conversation did take place. More than that, one Starnes was the owner of a half interest in this claim and that half interest was got in at $17,500; therefore, the whole claim upon that basis would be worth $35,000. All these various pieces of evidence coming together would lead me to believe that the value fixed by Barrett to the knowledge of the defendant for this claim in estimating the total value, was $35,000. The claim is now worthless.

He then proceeds:

It could not be sold at all to-day for any money in my opinion. Will I assess the damages at $35,000 the price paid while allowing the defendants to retain? If revision of the contract had been asked for I have no doubt that would be the measure, less the profit derived from the claim. Now the defendant syndicate have taken out a net profit from this claim of $13,317. Am I to allow that profit in estimating? If any other damage than the actual damage or loss sustained, in fact based upon restoration, would be allowed, then I may ignore the profit. The defendants also made a loss, but I think the net profit is $13,317. The question which is troubling me is—shall I deduct the profit from that value? If I am to go on the principle of allowing profit and loss from the various workings I will have to estimate the loss for the working of drift 9, that is, I will have to calculate the value of the ground taken out of that claim in excess of what was represented by Barrett to have been taken out and in all the other parcels as well. But I have no means of ascertaining this without a reference. No evidence on the question of total profit and loss was given. If this property had been sold before or after the working of drifts 7 and 5, which were made by the defendant company, what would it have brought if intending purchasers were ignorant of the result of the prospects made upon the claim which revealed its worthlessness? I cannot tell this and there is no possibility of ascertaining it now.

On the whole I think I am justified in allowing as damages the full price paid for the claim at $35,000 as loss of bargain. If I should have assessed upon the other principle I now make the calculation in case I may be wrong. There should be allowed $35,000 less the net profit of $13,317, but adding to that the value of the ground taken out of drift 9 in excess of the representation; also the defendant company should have interest upon the balance of their money from the date of the purchase until judgment. Then, as to the balance of the damages, the only other claim against which I allow damage is claim No. 12, and that is for the Cassidy drift, known as drift 4. In this I have no trouble in coming to the amount of damages. It is sworn that the total product was $11,000 from this drift, but that it was worked upon a lay, in which the laymen received fifty per cent, which was a fair allowance; therefore, the loss in this case is $5,500, which will be added to the other, making the total damages against the defendant Barrett of $40,500. There will be judgment for the defendant syndicate of this amount on the cross-action, and there will be judgment for the bank, the plaintiffs, against the syndicate for the amount sued for by them, with costs.

I think that the true rule is laid down by the Supreme Court of the United States in *Smith* v. *Bolles* (1), in the following language:

(1) 132 U. S. R. 125.

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He was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendants' fraudulent conduct, not the expected fruits of an unrealized speculation.

Also *Mullett* v. *Mason* (1).

The damages recoverable are such as result from false representations in so far only as the defendant is presumed to have known they were false. See Kerr on Fraud (3 ed.) p. 369.

I think, therefore, that assuming $35,000 was the price fixed for thirty-two the plaintiffs are entitled to the actual loss suffered.

It was urged very strenuously that the rule laid down in *Peek* v. *Derry* (2), in the Court of Appeal in England, was the rule applicable here, and that plaintiffs were compelled to show that the balance of the property remaining in their hands was not of such value that no loss might ultimately be suffered. I do not think that this is correct. I think that as to the balance of the property, although the purchase money is a lump sum, as the trial judge has found, that, in making up that lump sum, thirty-two was taken at $35,000, that, in absence of proof to the contrary by the plaintiffs, it must be presumed that the representation as to the balance of the property was true and that the property is worth the price agreed upon between the parties and that as the plaintiffs could not claim for speculative profits in connection with it, so the defendant cannot claim that there may be speculative value over and above the value at which it was taken between the parties, and the plaintiffs are entitled by their bargain to any speculative values which may exist in the properties, or to any enhanced value which may arise after the sale. The defendant cannot claim these enhanced values as an offset to the damage arising from fraudulent representation in respect to a distinct and separate parcel. The price at which the property

(1) L. R. 1 C. P. 559. (2) 37 Ch. D. 541.

is sold is not conclusive as to its value though very strong evidence, and so thought Lord Denman in *Clare* v. *Maynard* (1), at page 743. Had the sale been of all the properties for a lump sum without referring to the price separate as to one of them I still think it is a question of evidence entirely as to damages suffered in respect of one parcel. It may be difficult of proof. It cannot be the law that if I purchase five undivided mining properties and in developing the first one at a large expense I find I have been swindled and an action of deceit lies against the seller that I cannot recover the damages I have suffered from such fraud in respect of that property. I think the rule would be in such a case that if I could prove what the fair proportionate value of such property was to the other properties included in the purchase, and so establish what my loss was in respect of that one, I am entitled I think to assume that the representations as to the others are correct and that there is no loss to me in regard to them. But surely I cannot be compelled at a vast expenditure of money to go on and explore these properties to shew that they too are worthless, or if I do go on and explore them and find speculative value in them that this can be set off against my loss on the one on which loss has been occasioned. I am entitled by my bargain to get the benefit of any such speculative values if they should be found. The seller cannot claim the benefit of them. He is entitled on the contrary, until his representations are proved to be false and fraudulent, to have it assumed that the properties are of the character represented, and if the true proportionate value can be established at which they were taken in making up the lump sum, then the difference between the true proportionate value and the lump sum which

(1) 7 C. & P. 741.

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I have paid for the whole would be my actual loss by reason of the fraud in reference to one, if that one worthless. I could also add the legitimate expense I have undertaken by reason of the fraud such as was necessarily to be expected to be undertaken as attributable to defendant's fraud.

Mr. Aylesworth illustrated a case of purchase of fifty shares of stock in one company and fifty shares in another company and the purchaser retaining both stocks and bringing an action for deceit. One stock proved, at the trial, to be utterly worthless and the other to have risen largely in value since the date of the purchase. He claimed that as it was only the actual loss which could be recovered in an action of deceit, that the person committing the fraud was entitled to set off the loss arising from the worthlessness of one stock by appealing to the enhanced value of the other. I do not think this is sound. I think the purchaser is entitled to the benefit of his bargain of the fifty shares with all its possibilities and that the vendor is liable for the fraudulent deceit in reference to the other. We are not, however, in view of the trial judge's finding in this case, driven to solve this difficulty because he finds that "claim 32" had a price set apart for it and we are able to arrive at the damage arising to the purchaser from the fraud which has been practiced. Apart from the question of damages I do not think we can, in view of the authorities, substitute ourselves in such a case as this for the trial judge, and I think that the findings of fact should not have been interfered with and they should be restored by this court. The memorandum book so much relied upon does not impress me in the same way as it has my brother Idington. The entries made in it are of an

entirely distinct character from the representations relied upon.

The learned trial judge sat in appeal and after hearing full argument and the judgments of his brother judges he reiterates the view already expressed, and as it is peculiarly a case in which the local conditions of mining and certainly demeanor in the box plays such an important part I cannot feel that it is right for an appellate court to come to a conclusion that the trial judge was clearly wrong in his findings of fact. I would, therefore, restore the judgment with the variation suggested by my brother Davies.

Mr. Aylesworth also urged that as the counterclaim of the syndicate had been dismissed as against the plaintiffs no judgment could be given in the counterclaim against Barrett who has come in at the trial and consented to the case being gone on with against him. There is no direct authority I can find but it seems to me to be the better view that as the court was given jurisdiction by consent judgment can be entered. It may be that Barrett should be held to have nominated the trial judge the tribunal to dispose of the dispute between himself and the Syndicat in which case his judgment would not be appealable. See *Attorney-General of Nova Scotia* v. *Gregory* (1).

I think the appellant is entitled to costs in this court and in the courts below.

IDINGTON J. (dissenting).—On the 23rd day of June, A.D. 1901, the defendant, the Syndicat Lyonnais du Klondyke, through its manager, L. Paillard, purchased from the defendant Barrett, one of the defendants by the original action, and defendant in the counterclaim, the following mining claims and machinery on same:

1. Creek Claim No. 32, below Upper Discovery, on Dominion Creek;

(1) 11 App. Cas. 229.

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2. Creek Claim No. 12, above Lower Discovery, on Dominion Creek;

3. Hillside placer mining claim opposite the upper half of No. 12, above Discovery, on the left limit of Dominion Creek;

4. Creek Claim No. 9, above Lower Discovery, on the same creek;

5. Creek Claims, upper and lower halves of No. 2, Cariboo Creek;

6. Hillside opposite the upper half of 28, on the left limit of Eldorado Creek;

7. A one-fifth interest in about 150 claims on Barlow Creek.

Also a roadhouse or hotel on mining claim No. 36, below Upper Discovery, on Dominion Creek, and a stock of provisions and liquors as described in the chattel mortgage, Exhibit "C" (referred to in the evidence, page 22) at the price of $167,500, payable $75,000 in cash and the balance of $92,500 secured by mortgage and note.

The appellants having received conveyances of these properties entered into possession and worked part of the property. The Canadian Bank of Commerce, as holders of this note and mortgage, sued appellants on the 16th May, 1902, therefor, and they set up fraud, and by a counterclaim that raises in effect an action of deceit, sought to recover from the bank and the respondent Barrett, damages arising from this deceit Barrett was not thus brought into the suit until the trial when he at once, upon amendment being directed and allowed, pleaded to the counterclaim denying the alleged fraud.

All other questions and issues are now out of the case and the counterclaim dismissed as to the bank. The trial judge, while dismissing the bank, found against Barrett in respect of four out of a much larger number of alleged misrepresentations which he was charged with making.

These findings are not literally as alleged, though said to be founded upon those set out in the pleadings. The appellants' factum summarizes them as follows:

(*a.*) That with regard to Creek Claim No. 32, below Upper Discovery, said defendant Barrett had prospected the claim all over;

(*b.*) That the pay-streak on said claim was even and extensive extending from rim to rim, and the said Barrett guaranteed that it was as good

in the part unworked as in the part he had worked out himself, and that, by reason of his knowledge of what it contained and calculating upon the area worked by him, it would yield profits exceeding $400,000.

(c.) That, for the purpose of prospecting said claim, he, Barrett, had taken out a small drift at the upper end towards the left and that the ground taken out of said drift would not exceed 900 superficial feet.

(g.) That, excepting certain specified work, no work had been done on the upper part of Creek Claim 12.

To appreciate the evidence in support of these findings, we must bear in mind that fraud is proved when it is shown that a false representation had been made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false, and that to prevent a false statement from being fraudulent there must always be an honest belief in its truth. Moreover, in an action of deceit, the plaintiff cannot establish title to relief simply by showing that the defendants have made a fraudulent statement; he must also show that he was deceived by this statement, and acted on it to his prejudice. To be a ground for an action of deceit the false statement must be material. It is an inference of fact, not of law, that the representation was the inducement. It is not sufficient defence to prove that the person deceived made some investigation into the facts.

The appellants were represented in the transaction by Paillard, and for the purposes of considering the evidence, and indeed the whole case, I will deal with him as if he were a party. He has stated what induced him to enter into the contract as follows :—

Q. What was the figure ?—A. The figure we agreed upon was $167,500.

Q. What induced you to come to such an agreement and give such price ?

A. Because he represented to us that the claims were pretty good, that it was a good investment and that, for instance on 32, I would get as much in proportion as he had taken out before, that the claim 32 would yield a profit of $400,000, that the expense would not be over 40 per cent of the gross output ; I said to him several times that I relied entirely upon his word.

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At another time he stated :

Q. Did you rely upon yourself for any facts at all ?

A. No, I took only the figures of Mr. Barrett, that is all. I could rely only on those figures.

It will be observed that in these two statements there is no distinction attempted to be drawn between the representation as to the figures and the representation or representations that I may refer to as of a general character, speaking in regard to the value or supposed value of the investment. It is necessary to bear this in mind in considering Exhibit "F 3," which contained memoranda made at the time in Paillard's note-book. This note-book is referred to by Paillard in his evidence as follows :

Q. Did you make any other investigation on 32 ?

A. *We went all over the ground* and we asked Mr. Barrett the parts worked out and not worked out.

Q. You asked him as to the parts worked out, and did he give you any measurements ?

A. He gave us a measurement.

Q. I think you told my learned friend that you put that down carefully in a memorandum book ?

A. Yes.

Q. Everything he said to you about the measurement ?

A. Yes.

Q. Everything he told you about the *quality* of the ground ?

A. Yes.

Q. And in fact everything he said from the time you went there until the purchase was concluded was kept track of ?

A. Not perhaps everything.

Q. Everything of moment ?

A. Yes.

Q. You carefully put that down in a memorandum book ?

A. Yes.

Q. With what object did you do that ?

A. It was to have an idea of the ground worked out in that claim, to see how much ground was left to work, and to see how much that claim had yielded, and to *see how much it would yield.*

He says the entries thus made on this note book were made at the time, standing upon the property

that was being bargained for, and in the course of the talk he had with Barrett in relation thereto.

It strikes me as most singular that in these memoranda there is not to be found a single reference to any one of the grounds upon which the misrepresentations are now rested.

I have no doubt that Paillard got all that appears in Exhibit "F. 3" for the express purpose of testing the value of the property and forming from that his own judgment, and that he discarded as of no consequence what he was told, if ever told, about even and extensive continuation of the same rich products from rim to rim; the $400,000 prospective profits; the 30 x 30 feet at foot of No. 9 shaft; Barrett's assertion of having prospected all over, and the materiality of that now raised as to numbers 3 and 4, the products of which might have come out of one shaft as well as two.

The commendation and all that bears that character is left out of the note book. What one expects a prudent man to have noted is noted, and what a business man of that kind would discard has been discarded. It destroys by what it includes, and what it omits, the theory now put forward by Paillard of his having relied entirely on these representations now in question.

The excuse is given that Paillard did not put down those because they did not deal in quantities.

The quantities given were but the means of testing the quality of the property.

Why should express representations of quality in such a case be omitted if stated and relied upon?

The excuse given does not appear to me well founded. The manner of making the representations stated by Paillard and the circumstances of giving them are stated as follows:

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Q. What occurred when you went to him?

A. Mr. Barrett showed us the properties; he took us on the ground.

Q. What ground first?

A. First, he took us on 32 below upper; I requested him to make a plan in *order to understand better his explanations, and he said it was better to see on the ground itself; he showed us the part worked out and the part that was left to be worked; and he gave us the figures for each and every drift; I put them on my memorandum at the same time.*

Q. What did he say, if anything, as regards the drift of 32?

A. *For each drift he gave me the figures of the output of that drift, and he said that the same pay would be found all over the claim.*

Q. What figures did he give you?

A. *He gave me several figures, one for each drift.*

## And again:

Q. Did he state to you at any time how he arrived at the knowledge that 32 was a claim that would yield such enormous profit?

A. He said that judging from the amount of gold he had taken from those drifts, and being certain that the same pay was to be found all over the claim.

Q. Did he tell you how he was certain?

A. He said that he was certain that the same pay was to be found from rim to rim.

Q. Did he say what made him certain as to that?

A. He said that he had *prospected* the claim so that he was certain.

Q. What parts of it did he say he had prospected?

A. He showed us several holes that he had sunk in the ground.

Q. Did he say what part of the claim he had prospected?

A. Yes, he said he had prospected on the right limit and on the left limit, that is to say, from each side of the drifts worked at the time.

Q. If he hadn't made these representations to you which you have stated would you have purchased the property at any such price?

A. No.

Q. What did you rely on in making the purchase?

A. I took his word.

## Again (p. 100):

Q. Coming to the particulars of the alleged misrepresentations, we will take up the first one, that is A., respecting creek claim 32; did he show you the holes on the claim?

A. He showed us some holes; yes.

Q. Did he show you all the holes that you have on this plan, Ex. "H. 2"?

A. No; all the holes that are on that plan were not there at the time.

Q. Did he show you all ths holes that were there at the time?

A. He showed me several holes; I don't know if they are all on this plan or not.

Q. Can you point out any holes on this plan that were there at the time he showed you?

A. I can mention the holes that are on this plan that he showed us.

Q. I want to know if there are any holes on that plan which were there at the time that he didn't show to you?

A. I don't know if there were more holes that he didn't show me because there were some tailings on the ground.

Q. Have you any holes marked on that plan as being there at the time when you made the examination which he didn't show you at the time?

A. I don't see any.

Q. Well then, when you say prospected all over, you mean that he said that he had sunk these holes?

A. He said he had prospected the claim all over.

Q. And he showed you the holes that he prospected?

A. He showed me some of them, but I don't know if he showed all the holes that he had sunk because there was some tailings.

(P. 102):

Q. You say in item B, of your alleged misrepresentations that calculated by the area it would yield $400,000; that is 32?

A. Yes.

Q. Did he absolutely guarantee to you that?

A. He said he was sure the pay would yield a net profit of $400,000 according to what he had and that he was sure the pay was the same on the balance of the claim; he said he was certain.

Q. How could he be certain?

A. I don't know; he said he had prospected all the claims so that he knew pretty well what was in that claim.

(P. 122):

Q. Have you any entry in your memorandum book with regard to the representation which you say Mr. Barrett made that the claim would yield you a profit of $400,000?

A. No.

Tarut, the assistant of Paillard, who went with him, says, p. 124:

Q. For what purpose did you go?

A. We went at that time for examination of the claim.

Q. After you got there what did you do?

A. Mr. Barrett took us over the ground and showed us all the limits of the claim, his plant, and gave us every opportunity about seeing the claim.

Q. Well, what claims were talked of, if any?

A. He took us the first to 32 and Mr. Paillard requested him to make a sketch of the claim. He said that he was not able to do so, but that

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he would give Paillard full information and then Paillard wrote down the information and made a sketch according to his statement.

Q. Where was this done?

A. This was done on the ground, on 32.

Q. Do you remember what was said by Barrett as to 32?

A. He told us that the pay was even from rim to rim; that he had prospected the claim all over and had ascertained this fact, and he showed us an old shaft where he had taken out $25 in an hour and a half from rocking; this was close to the right limit in the upper part of the claim. On the right limit he showed us a hole where he had found good pay.

Q. Did he say anything further as regards the claim?

A. He gave us the output that had been taken out for each drift.

And, p. 125, after stating quantities taken, he is asked:

Q. Anything after that?

A. After that he said the area of what was worked on the claim, and for drift No. 1 we *estimated, according to his statements*, that there was 2000 square feet worked out.

What is meant by the term "prospecting," so frequently used by these gentlemen? What did Paillard think it meant? Did he not take it to mean what he had been shown there, the tests put before him? It is not said by Paillard that he understood it in any other sense. It ought not to be taken in any other sense than what any person of ordinary intelligence standing where they stood on the property, going from one hole to another on it as they did, seeing what could be seen there, measuring results as given and noted down, might, when such a phrase was used, reasonably he expected to intend it to mean.

Barrett was speaking of and in relation to this very means of exploration of which Paillard was taking notes. The meaning of prospecting here is not what others might think or attach to it as a generic term or descriptive of the exceeding care that a cautious man might use for himself to test such property. The evidence relating to that and that kind of work was, I submit, beside the question and misleading. It

seems to me that the learned trial judge did not correctly appreciate the evidence

Listening to witnesses explaining what was not for the purpose then in hand a technical term shows this. This is not a case for rescission, where it might be possible to conceive of this language having led to such misconception as to entitle one who did not really understand it to relief.

It is an action of deceit of which the very essence is that there should be no doubt of what the speaker intended and the listener understood by the language used.

Is it not a most remarkable feature of the case that this man who is charged with fraud has not in a single instance of those numerous and important specific statements set down as from him in this note book, been proven to have made in regard to any of them a single false statement?

Is it not equally remarkable that such proof failing it is sought to rest the charge of deceit on evidence of conversations which all authority warns against as fruitful of errors? Misunderstanding of each other's meaning in conversation and the possible faults of memory at the end of two years as to the exact language used, render it dangerous to try to so fix upon any one a charge of fraud.

The learned trial judge infers from the knowledge Barrett had that he knew a great deal more than I can find the evidence as showing he knew or pretended he knew.

There may be much ground of suspicion that the pay-streak in the main drifts had been so rich that Barrett was afraid the rest would not prove as fruitful as that had so far been. We must have much more than suspicion, we must have clear proof of it, or facts from which we cannot infer anything but fraud, before

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we can act. We cannot infer it from the results here in so hazardous and uncertain a business as mining.

The fact that the learned trial judge allowed himself for an instant to impute to Barrett the knowledge before the sale of the results derived from digging the holes G. F. H. K. and IJ, which were dug after the sale tends, I submit with every respect, to deprive his judgment of that weight which it is usual to give to the trial judge's opinion.

Then, did Paillard rely upon these representations now relied upon? The learned trial judge says:

> At first I was amazed that the men should have believed, as they say they did believe.

With great respect I am unable to understand how he ever got rid of his first impression. The story of Paillard relying entirely on these alleged unnoted misrepresentations is exceedingly improbable. Consideration of this point is of importance in a twofold aspect. If the stories were not relied on then there is no ground of action. And if they are incredible or improbable that tends to discredit the man who says he did rely on them. Take the one that "the claim 32 would yield a net profit of $400,000." This property was one of four (included in this sale) that the man so implicitly relied on put before the witness Paillard as of an equal value, and on this basis he furnished equally good expectations to the witness of realizing $1,600,000, and this Barrett was giving away for $167,500, and the gentleman of education, who had been in Dawson City in the Yukon on mining business for two years previously to receiving this tale, swears he believed and relied upon it and was induced thereby to enter into this contract. And he believes all that from the mouth of a man who was a comparative stranger.

I call attention the more readily to all this in weighing Mr. Paillard's evidence, because I find him by the

following evidence telling something that a regard for his own honour ought to have seen put right by the end of this trial; (p. 93):

Q. And did you receive a letter in reply ?
A. Yes.
Q. Where is that letter ?
A. That letter is lost.
Q. You received another letter about this too ?
A. Yes.
Q. That met a like fate ?
A. That was lost too.
Q. And they were burnt ?
A. No, not that I know of.
Q. You have an office on the claims out there ?
A. Yes.
Q. Some place to keep documents ?
A. Yes, we have an office.
Q. These letters disappeared almost immediately after you received them, didn't they ?
A. No.
Q. We hadn't them on the 14th October, the time the examination was held ?
A. Yes, I could not find them at that time.
Q. When did you receive them ?
A. I think I received the first of them in the beginning of September.
Q. The examination was held on the 18th October ?
A. That may be. I don't remember.
Q. These letters were valuable papers, were they not ?
A. I didn't consider them.
Q. They referred to a large transaction ?
A. Yes.
Q. And I suppose they contained the commendation or blame of you entering into this large transaction ?
A. Yes.
Q. And yet they disappeared ?
A. They were mislaid.

If he relied on what he now is said to have relied on, the correspondence with his principals would have shown it and been quite clearly admissible to refresh his memory, if on no other ground.

It is not the case of the destroyer of the documents, so there is in law possibly no legal presumption against

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him. But the principle lying at the bottom of that rule may as matter of reason be well applied.

I have dealt with the case as we, I think, ought to regard it from the salient points of view. We have to determine whether or not the court below were right in overruling the judgment of the learned trial judge.

Though I have not here set out an analysis of the evidence in detail I have read everything, including not only that referred to by the factums but also all that which in the case is presented on behalf of the appellants, and much of it many times, and find nothing sufficient therein to correct or change, but rather on the contrary to deepen, the general impressions received and presented above.

When one approaches the other evidence from the point of view I have taken in regard to Mr Paillard I think there can be no doubt, in the absence of a report to the contrary expressly discrediting the witnesses testifying against him, that the evidence they gave is entitled to equal credibility with that of Mr. Paillard or any other, and the weight of evidence manifestly is thus found against the appellants. The main claim of misrepresentation thus falls to the ground, and the others I think must go with it.

For example, I find Paillard thought at one time after investigating the matter that the so-called 30 x 30 feet area which is spoken of as the excavation of No. 9, was much less than about one half what he now alleges. As to that matter there is not any reliable basis for saying more than that probably the area exceeded 30 x 30 feet somewhat, but how much, or how much at least, is not shown The story as to Cassidy and his work, and whether there were two shafts or one seen or shown, does not seem to me of much importance. Paillard at any one time after discovering these things did not seem to attach more importance to them

than as being probable mistakes. It was by dwelling upon the extravagant meaning attached to the word "prospecting" that seems to have led to the fundamental error in this case of imputing to Barrett a representation he cannot necessarily be said to have intended, and then imputing to him a knowledge that he is not shown to have possessed or to have pretended to possess.

And the basis for the asssessment of damages for $35,000 is thus gone. That being the case, I need not dwell upon the features of the case in which the further sum of $5,500 is allowed. Not only does it fail by reason of the weight of evidence being against it, but the principle upon which such assessment was made is, I think, entirely wrong. This brings me to the question of damages, which I need not in the view I take decide, and say upon what basis they should be assessed. I am quite clear that they have been assessed upon an entirely erroneous basis. The plaintiff in an action for deceit is entitled only to such damages as he can show he has sustained. This contract was not a joining of a number of sub-contracts together resulting in a total, but was one entire contract for the block sum already stated Whatever Barrett may have thought or said, Paillard expressly discards any other way of looking at the matter at the time of the bargain than as a complete whole. His company may not have been damnified a single cent. We have not the evidence upon which, whatever may be the correct legal method of assessing damages in this case, we can apply successfully the legal principle that only for such damage as the appellants sustained could they recover damages here. They had a very obvious remedy in rescission if, when their suspicions were first awakened, they had taken steps

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to that end. They had done no more than in the case of *The Lindsay Petroleum Co.* v. *Hurd* (1). The appeal should be dismissed with costs.

*Appeal allowed with costs.*

Solicitors for the appellants: *Bleecker & O'Dell.*

Solicitors for the respondent: *Pattullo & Ridley.*

(1) L. R. 5 P. C. 221.

A. R. WILLIAMS.....APPELLANT;

AND

THE GRAND TRUNK RAILWAY COMPANY OF CANADA..... } RESPONDENTS.

1905.

* May 29.
* May 30.

ON APPEAL FROM HIS LORDSHIP MR. JUSTICE SEDGEWICK, IN CHAMBERS.

*Appeal—Special leave—Judge in chambers—Appeal to full court—Jurisdiction.*

No appeal lies to the Supreme Court of Canada from an order of a judge of that court in chambers granting or refusing leave to appeal from a decision of the Board of Railway Commissioners under sec. 44(3) of the Railway Act, 1903.

APPEAL from an order made by Mr. Justice Sedgewick, in chambers, refusing leave to appeal from a decision of the Board of Railway Commissioners on a question of jurisdiction.

The application was made to the judge in chambers under sec. 44, sub-sec. 3 of the Railway Act, 1903, which provides that an appeal shall lie from the Board on a question of jurisdiction, but leave therefor must be obtained from a judge.

Counsel having opened the court raised the question of its jurisdiction to entertain an appeal from the order of Mr. Justice Sedgewick.

*Shepley K.C.* for the appellant cited the provision of the Railway Act authorizing the appeal on leave and *Ex parte Stevenson*(1).

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, and Idington JJ.

(1) [1892] 1 Q.B. 394, 609.

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WILLIAMS v. GRAND TRUNK RY. CO.

*Ewart K.C.* and *Cowan K.C.* for the respondents referred to *Lane* v. *Esdaile*(1); *In re Central Bank*(2); *Brown* v. *Bamford*(3).

*Glynn Osler* for the City of Toronto and *A. G. Blair* for the Board of Railway Commissioners, submitted the case to the court without argument.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—By sub-sec. 3 of sec. 44 of the "Railway Act, 1903," it is provided that:

> An appeal shall lie from the Board to the Supreme Court of Canada upon a question of jurisdiction, but such appeal shall not lie unless the same is allowed by a judge of the said court upon application and hearing the parties and the Board.

Under that section an application was made before Mr. Justice Sedgewick by Williams & Co. for leave to appeal to this court from an order of the Board of Railway Commissioners upon the question of the jurisdiction of the said Board, which had been raised by the said applicants. Mr. Justice Sedgewick, after hearing the parties, refused the leave asked for. The applicants now move for leave to appeal from that refusal.

This application is opposed on the part of the Grand Trunk Railway Company on the ground that no appeal lies from Mr. Justice Sedgewick's order.

We are of the opinion that this contention must prevail and the application must be refused. The judge to whom the application is made would not have the power to refer it to this court. A statutory enactment of this nature cannot be extended by interpretation. Jurisdiction is conferred upon a judge to grant or refuse the leave to appeal, as a *persona*

(1) [1891] A.C. 210. (2) 17 Ont. P.R. 370, 395.
(3) 9 M. & W. 42.

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*designata,* but not to the court. Whether he gives leave or refuses it, the right to apply for leave is exhausted. The right of appeal is a statutory right, and when given under conditions, it does not exist, if not falling exactly under these conditions or in conformity with it.

I refer to *Ex parte Stevenson*(1); *Lane* v. *Esdaile*(2); *Farquharson* v. *The Imperial Oil Co.*(3); *The Canadian Pacific Railway Co.* v. *The Little Seminary of Ste. Thérèse*(4); *Birely* v. *Toronto, etc., Railway Co.*(5).

The application is dismissed with costs.

*Appeal dismissed with costs.**

Solicitors for the appellant: *Macdonald, Shepley, Middleton & Donald.*

Solicitor for the respondents: *W. H. Biggar.*

* Leave to appeal to the Privy Council was refused, 2nd August, 1905.

(1) (1892) 1 Q.B. 394, 609.
(2) (1891) A.C. 210.
(3) 30 Can. S.C.R. 188.
(4) 16 Can. S.C.R. 606.
(5) 25 Ont. App. R. 88.

1905.
*May 31.
*June 2.

RUSSELL ALBERT HULBERT AND MARSHALL A. WORTH (DEFENDANTS) ..... APPELLANTS;

AND

MICHAEL PETERSON (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

*Chattel mortgage—Registration—Subsequent purchaser—Removal of goods.*

For purposes of registration of deeds the North-West Territories is divided into districts, and it is provided by Ordinance that registration of a chattel mortgage, not followed by transfer of possession, shall only have effect in the district in which it is made. It is also provided that if the mortgaged goods are removed into another district a certified copy of the mortgage shall be filed in the registry office thereof within three weeks from the time of removal otherwise the mortgage shall be null and void as against subsequent purchasers, etc.

*Held,* reversing the judgment in appeal, that the "subsequent purchaser" in such case must be one who purchased after the expiration of the three weeks from time of removal, and that though no copy of the mortgage is filed as provided it is valid as against a purchase made within such period.

APPEAL from a decision of the Supreme Court of the North-West Territories affirming the judgment at the trial in favour of the plaintiff.

The defendant Hulbert was mortgagee of chattels under a mortgage from one McDonald and had registered his mortgage in the District of Edmonton. Mc-

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Idington JJ.

Donald removed the mortgaged goods into the District of Calgary and, within three weeks from the time of such removal, sold them to the plaintiff Peterson. Some two months later the defendant Hulbert sent his co-defendant Worth, a bailiff, to seize the goods. Worth took them out of plaintiff's possession, and the latter brought an action for conversion, in which he obtained a verdict for $125.

After the removal of the goods into Calgary District, Hulbert failed to comply with the provision of the Ordinance requiring a certified copy of the mortgage to be filed within three weeks, and his mortgage became void as against the plaintiff, provided the latter was a subsequent purchaser under the Ordinance.

The court below held that subsequent purchaser in the Ordinance meant a purchaser subsequent to the removal and not subsequent to the expiration of the three weeks within which the copy must be filed.

*Beck K.C.* for the appellant, having stated the point in issue the court called upon counsel for respondent to maintain the judgment appealed from.

*Masters K.C.* for the respondent. Registration Acts were passed to prevent frauds arising from mortgagors retaining possession of mortgaged property, and should be construed strictly. *Boulton* v. *Smith*(1); *Harding* v. *Knowlson*(2); *Olmstead* v. *Smith*(3).

The cases relied on by the dissenting judge below and by appellants in their factum of failure to renew a chattel mortgage on expiration of a year from registration and a purchase within the year are distinguishable. They were decided entirely on the ground

(1) 17 U.C.Q.B. 400; 18 U.C. Q.B. 458.
(2) 17 U.C.Q.B. 564.
(3) 15 U.C.Q.B. 421.

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of notice and that the purchaser merely replaced the mortgagor. *Hodgins* v. *Johnston*(1) is one of those cases. The other, *Clarke* v. *Bates*(2), has no application. That was a case of removal under a statute in the same terms as the Ordinance in this case, but it was decided on the ground that the goods were removed by a stranger and not by the mortgagor.

Even in case of failure to renew a mortgage a purchase within the year has been held good. *McMartin* v. *McDougall*(3); *Courtis* v. *Webb*(4); *Boynton* v. *Boyd*(5).

In *Clarkson* v. *McMaster*(6), this court held that where by statute possession of mortgaged chattels would not validate a mortgage void for want of registration as against creditors becoming such before possession taken, the mortgage remained void as against those becoming creditors after possession.

The judgment of the court was delivered by

SEDGEWICK J.—The defendant Hulbert was mortgagee of the goods in respect of which this action was brought. The mortgage is dated the 18th April, 1902, and was registered in the office of the Registration Clerk for the Edmonton Registration District on the 28th day of April, 1902. About three months later the mortgagor removed the goods to the Calgary Registration District. Within three weeks after such removal he sold the goods in the latter Registration District to the plaintiff. About six weeks after the sale, the defendant Hulbert, hearing of the removal and

(1) 5 Ont. App. R. 449.
(2) 21 U.C.C.P. 348.
(3) 10 U.C.Q.B. 399.
(4) 12 U.C.C.P. 334.
(5) 25 U.C.Q.B. 576.
(6) 25 Can. S.C.R. 96.

sale, took the goods from the plaintiff, whereupon he brought this action for the conversion of the goods. The mortgage was never registered in the Calgary District.

The only question involved in this case therefore is: Was the plaintiff's title subject to the defendant Hulbert's mortgage?

Section 29 of the Bills of Sale Ordinance provides:

> In the event of a permanent removal of goods and chattels mortgaged * * to another registration District * * a certified copy of such mortgage * * shall be filed with the registration clerk of the District to which such goods and chattels are removed, within three weeks of such removal, otherwise the said goods and chattels shall be liable to seizure and sale under execution, and in such case the mortgage shall be null and void as against subsequent purchasers and mortgagees in good faith and for valuable consideration as if never executed.

The case was tried before Sifton C.J. who gave judgment for the plaintiff and this judgment was affirmed on appeal by the Supreme Court of the Territories, Scott J. dissenting.

We are all of opinion that the appeal must be allowed, because in our view the expression "subsequent purchaser" in the section just quoted means a purchaser after the expiration of the three weeks specified as the period within which the mortgagee must file his mortgage. During those three weeks he had all the rights with the common law and the Bills of Sale Ordinance secured to him, and any dealing with them by the mortgagor was in violation of or repugnant to those rights within that period and absolutely unavailing as against the mortgagee. We therefore think that the appeal should be allowed and the action dismissed, the whole with costs, the costs in

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the courts below to be taxed according to the proper scale.

*Appeal allowed with costs.*

Solicitors for the appellants: *Rutherford & Jamieson.*

Solicitors for the respondent: *MacDonald & Griesbach.*

THE MONTREAL STREET RAILWAY COMPANY (DEFENDANTS). } APPELLANTS.

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*May, 9, 10
*June, 13.

AND

ANGELINA BOUDREAU AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

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

*Operation of machinery—Continuing nuisance—Negligence—Droits du voisinage—Vibrations, smoke, dust, etc.—Series of torts—Statutory franchise—Permanent injury—Abatement of nuisance—Prospective damages—Method of assessing damages—Limitations of actions—Prescription of actions in tort—Arts.* 377, 379, 380 *and* 2261 *C.C.*

Where injuries caused by the operation of machinery have resulted from the unskilful or negligent exercise of powers conferred by public authority and the nuisance thereby created gives rise to a continuous series of torts, the action accruing in consequence falls within the provisions of art. 2261 of the Civil Code of Lower Canada and is prescribed by the lapse of two years from the date of the occurrence of each successive tort. *Wordsworth* v. *Harley* (1 B. & Ad. 391); *Lord Oakley* v. *Kensington Canal Co.* (5 B. & Ad. 138); and *Whitehouse* v. *Fellowes* (10 C.B.N.S. 765) referred to.

In the present case, the permanent character of the damages so caused could not be assumed from the manner in which the works had been constructed and, as the nuisance might, at any time, be abated by the improvement of the system of operation or the discontinuance of the negligent acts complained of, prospective damages ought not to be allowed, nor could the assessment, in a lump sum, of damages, past, present and future, in order to prevent successive litigation be justified upon grounds of equity or public interest. Judgment appealed from reversed, the Chief Justice and Girouard J. dissenting. *Fritz* v. *Hobson* (14 Ch. D. 342) referred to. *Gareau* v. *The Montreal Street Railway Co.* (31 Can. S.C.R. 463) distinguished.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Idington JJ.

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APPEAL from the judgment of the Court of King's Bench (1), appeal side, reversing, in part, the judgment of the Superior Court, District of Montreal, (Fortin J.), and increasing the damages claimed by the action of the plaintiffs, with costs.

The action was instituted in December, 1902, by the proprietors of property in the vicinity of the power house of the Montreal Street Railway Company, in the City of Montreal, and alleged that the company constructed immense works and installed heavy machinery therein, in 1893, for the operation of their system of electric tramways; that since then the company added to the constructions so erected and increased the power of their machinery, particularly during the years 1896 and 1897, and since that time; that the machinery has been and still is in operation both day and night and constitutes a continual nuisance and source of injury to the owners and tenants of the property in question, and renders the buildings thereon erected uninhabitable. The action claimed damages (*a*) for depreciation in value of the land, $3,233, (*b*) for loss of rent since 1893, $800, and (*c*) for inconvenience, diminution in the enjoyment of the property, troubles and damages generally caused to the dwellings, $1,500, making a total of $5,333, damages past and future claimed on account of the continuing nuisance resulting from the operation of the defendants' works.

By their defence, in addition to pleading the general issue, the company specially denied that any depreciation in value had taken place and that if any depreciation had taken place it was not their fault; alleged

(1) Q.R. 13 K. B. 531.

that the property is situate in a manufacturing district and was, when the power-house was constructed, unsuitable for residential purposes, and that if the plaintiffs or their tenants have suffered inconvenience it is only what should be reasonably expected in view of the nature of the locality and the character of the buildings in the vicinity; that the company's buildings and the work carried on therein are proper and suitable to the locality, necessary for the purpose of carrying out the objects of public convenience for which the company was incorporated, lawfully erected in a skilful and proper manner in virtue of the powers, franchises and privileges conferred upon the company by law, and could not constitute grounds for a claim for damages, nor are they a nuisance to the neighbouring proprietors; that the operations are carried on with due and proper care; and they further pleaded prescription.

The case was tried without a jury by Mr. Justice Fortin, who maintained the action in part only, holding that the defendants had caused to the plaintiffs, by the operation of their power-house by vibration, smoke, soot, etc., certain damages, which he estimated and fixed at $300 for the two years preceding the institution of the action. The remainder of the claim was disallowed on the grounds, (1) that any damages suffered more than two years before the institution of the action were prescribed, and (2) that no permanent damages or damages to be suffered in the future could be allowed as the defendants might, at any time, discontinue their operations or so modify them as to put an end to the inconvenience complained of. Judgment accordingly went for $300 and costs.

The plaintiffs appealed from this judgment with

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the result that the court of appeal increased the damages awarded to $1,500, the reasons given being that the defendants had abused their rights to the detriment of the plaintiffs and caused them inconvenience exceeding what a neighbour is required to endure; that this violation of the rights of neighbourhood (*droits du voisinage*) continued from 1893 to the time the action was instituted, and that under the circumstances, prescription under art. 2261 C.C., did not apply, and that defendants' establishment was of a permanent character which had the effect of unduly depreciating the value of the plaintiffs' property. The court then preceeded to declare that it was in the interest of the parties to settle once for all and definitively, both for the past and for the future, the damages resulting from the operation of the defendant's power-house, fixed the amount of the damages so suffered at $1,500, and gave judgment for that increased amount with costs.

From this judgment, the present appeal is taken by the defendants who submit that the judgment of the Superior Court should be restored.

*Campbell K.C.* and *Hague* for the appellants. The court below in assessing damages and including future damages due to the assumed permanency of the nuisance complained of did not frame the judgment on the principle of *Gareau* v. *Montreal Street Railway Co.*(1) in such a way as to render that judgment, if accepted, a final settlement of all damages. On the contrary it gave respondents $1,500 unconditionally and simply upon their action as brought, that is to say for the damages suffered. The conclusions are, thus, inconsistent with the reasons

(1) 31 Can. S.C.R. 463.

upon which the judgment is based. It appears also from the special reasons given by Lacoste C.J. that the appeal court disagreed with the Superior Court on the question of prescription, on the ground that the nuisance was continuous and, so long as it continued, prescription did not run; and, on the question of future damages, distinguished this case from *Drysdale* v. *Dugas*(1) in which no future damages were allowed. The learned Chief Justice explains that the $1,500 was made up of $1,000 for depreciation in the value of the property, and $500 for loss of rent and general damages, but that the court purposely awarded a lump sum in order to leave more latitude in the event of the case being carried further.

In the first place the appellants take issue on the plaintiffs' title to the properties in respect of which damages are claimed. At the time of the action the plaintiffs had merely a right of redemption in this property, having sold it *à droit de reméré* several months previously. This constituted complete alienation, subject to the condition, and divested the plaintiffs of any right to the present action: Arts. 1546, 1547, 1553, 1554, 1560 C.C.; *Bourque* v. *Lupien*(2); *Lamontagne* v. *Bédard*(3); *Salvas* v. *Vassal*(4).

The evidence does not justify the claim that the value of the property was depreciated owing to the vicinity of the power-house and the finding of the trial judge in this respect should not have been interfered with, and nothing should be awarded for depreciation in values as a result of the construction and operation of the power-house. It appears that the character of the locality, having been always more or

(1) 26 Can. S.C.R. 20.
(2) Q.R. 7 S.C. 396.
(3) Q.R. 14 S.C. 442.
(4) 27 Can. S.C.R. 68.

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less a manufacturing district, is now becoming entirely so, and consequently the houses are becoming less desirable to tenants as the result of such changed conditions and neglect to keep the buildings in proper repair. The question of depreciation is purely a matter of fact, as to which the trial court should not be reviewed by a court of appeal. *Cossette* v. *Dun*(1) *per* Gwynne J. at page 257; *Gingras* v. *Desilets*(2; *Ryan* v. *Ryan*(3) *per* Gwynne J. at page 406.

The trial court allowed no future damages. The appellate court has, however, taken them into consideration. In this they were clearly in error. The court cannot adjudicate beyond the conclusions: art. 113 C.P.Q.; *Cheveley* v. *Morris*(4); *Watkins* v. *Morgan* (5). No future damages were claimed; the claim was confined to damages actually suffered at the time the action was taken, and plaintiffs' counsel strenuously objected to evidence of any facts subsequent to that time. There is nothing in the judgment appealed from to prevent a fresh action for continuing the alleged nuisance. It is an unconditional absolute award beyond the conclusions of the declaration, and, as such, clearly irregular and *ultra vires*.

Even if future damages had been prayed for they should not have been awarded. If damages were suffered, they resulted not from the construction or existence of the power-house, but from the operation of the machinery. In *Drysdale* v. *Dugas*(6) such damages were refused, and there is no reason in the present case to adopt a different rule. The appellants were clearly within their rights in building the power-house and in installing machinery therein. The only

(1) 18 Can. S.C.R. 222.
(2) Cout. Dig. 95.
(3) 5 Can. S.C.R. 387.
(4) 2 W. Bl. 1300.
(5) 6 C. & P. 661.
(6) 26 Can. S.C.R. 20.

complaint can be that they have been operating their machinery in such a way as to interfere with their neighbours' rights. If they have done so it is the negligent or wrongful method of operation and not the mere operation of the machinery (*per se* a lawful act) which is the sole cause of the damage complained of. The court had no right to presume the continuance of wrong-doing, nor the infliction of injuries in the future. Art. 1053 C.C. makes no provision for anticipation of damages that might occur in the future even from the same cause of action. It is clearly impossible for any court to say what future conditions will be. The nature of the locality may change irrespective of the presence of the power-house; the operations may, at any time, be discontinued or so modified as to do away entirely with complaint. The methods adopted in modern machinery are constantly changing, and there is no reason why the court should assume that the present conditions will be eternally the same. The permanent character of the buildings and the length of the charter have nothing to do with the question. In *Carpentier* v. *Ville de Maisonneuve*(1), the nuisance complained of was from an establishment for supplying electric light; the court refused to assume that the nuisance complained of would be permanent. In France future damages are sometimes allowed, but always on condition that the actual state of things continues and with the reservation that the parties are always free to ask that the amount of the damages be increased or reduced. 6 Laurent, No. 152, p. 207; Pand. Fr. Rep. "Etablissements dangereux," No. 688-689; Dalloz, Supp., "Manufactures," No. 88; 4 Aubry & Rau, No. 308. Even assuming anything to justify condemnation

(1) Q.R. 11 S.C. 242.

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in respect of future damages, the court of appeal has neglected to avail itself of the conditions and restrictions which the jurisprudence of France so reasonably requires. If the power-house were to cease to exist or to cease operations to-morrow, appellants will have compensated respondents, in advance, for purely chimerical damages based upon mistaken anticipations.

In respect of any damages suffered more than two years before the action was taken the two years' prescription under art. 2261 C.C. must apply. Whatever damage was done was the result of acts the time of which was certain and fixed before the action was taken. The damages for loss and general inconvenience were fixed and certain then, and the damage which subsequent acts of negligence might cause was entirely distinct and as such constituted a new cause of action. *Kerr* v. *The Atlantic & North-West Railway Co.*(1), *per* Taschereau J.; *Breakey* v. *Carter*(2). Two years before the present action was instituted the respondents might have sued for loss of rent and inconvenience to the extent of the damages which they had then suffered for two years before, and which they are now including in this action. Surely, having neglected to take the action then, they are now debarred from their right under art. 2261 C.C. The damages may be of the same nature, but they are not the same damages. See also *Wilkes* v. *Hungerford Market Co.*(3).

*Mignault K.C.* and *Lamothe K.C.* for the respondents. As the defendants did not appeal from the judgment of the Superior Court decreeing their responsibility, the only questions which can arise under

(1) 25 Can. S.C.R. 197. (2) Cout. Dig. 1143.
(3) 2 Bing. N.C. 281.

the present appeal are: First, Was the action prescribed as to any damages suffered more than two years previous to its institution? Secondly, Have the plaintiffs the right to claim damages for permanent depreciation of their property and buildings? We will therefore not refer any further to the question as to title nor discuss whether the defendants are in law responsible for damages caused by vibration, noise, etc., inasmuch as they have not appealed, and because this point has been conclusively settled by *Gareau & The Montreal Street Railway*(1) and *The Montreal Water and Power Company* v. *Davie* (2).

As to the contention of the appellants that they are exercising powers conferred upon them by their charter of incorporation and are exempt from liability for damages caused thereby, see *Canadian Pacific Railway Co.* v. *Roy*(3); *Royal Electric Co. & Hévé* (4); *Montreal Water and Power Co.* v. *Davie*(2). If this ground was a good defence surely they should not have acquiesced in the judgment of the Superior Court.

The damages suffered cannot be prescribed under art. 2261 C.C., which establishes a prescription for damages resulting from offences or quasi-offences. The damages in the present instance resulted from a continuing cause, and from a violation of the law of neighbourhood, and being, as such, damages due under a quasi-contract rather than by reason of a *délit,* the prescription applicable to offences and quasi-offences could not apply. Where the cause of damage is a continuing one damages for the whole

(1) 31 Can. S.C.R. 463; Q.R. 10 K.B. 417.
(2) 35 Can. S.C.R. 255.
(3) [1902] A.C. 220.
(4) 32 Can. S.C.R. 462.

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period during which the cause of damage has existed can be claimed. *Kerr* v. *The Atlantic and North-West Railway Co.*(1); *The Town of Truro* v. *Archibald* (2); Rép. gén. jur. Belge, *vo.* "Prescription," No. 59; Sourdat, "Responsabilité," vol. 2, No. 1485; *Grenier* v. *City of Montreal*(3); *Bell* v. *Corporation of Quebec*(4); *Robert* v. *City of Montreal*(5); *Beauchemin* v. *Cadieux*(6). This is an implied quasi-contract whereby each proprietor obliges himself to so use his property as not to damage his neighbour's, and damages resulting from the prejudicial use of his property are not subject to the prescription of two years under art. 2261 C.C. which applies to *délits*. See *Breakey* v. *Carter*(7); Pothier, 2nd Appendix to the Treatise on Partnership, Nos. 230, 241 (ed. Bugnet, vol. 4, p. 330, No. 235); Baudry-Lacantinerie, "Biens," No. 217; "Propriété," No. 223. The appellants claim that they have exercised every precaution in installing their machinery; they deny that they have been guilty of any fault, but assert that they have only exercised their rights. Under these circumstances, if they are responsible for any damage by reason of the use they make of their property, and their responsibility is now *res judicata,* they cannot claim the benefit of the two years' prescription affecting offences or quasi-offences, the first characteristic of which is the illegality of the act complained of. Consequently the claim was not barred by prescription of two years, and the plaintiffs are entitled to claim all damages suffered by them from the time of the establishment of the power-house down to the institution of the action.

The Court of King's Bench was clearly right in

(1) 25 Can. S.C.R. 197.
(2) 31 Can. S.C.R. 380.
(3) 25 L.C. Jur. 138.
(4) 2 Q.L.R. 305.
(5) 2 Dor. Q.B. 68.
(6) Q.R. 22 S.C. 482.
(7) Cout. Dig. 1143.

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considering the power-house as a permanent institution. The depreciation caused to the property is of a permanent nature, and there is no hope of the property ever regaining its former value. We are entitled to damages for inconvenience or loss of enjoyment, and also to damage resulting from the depreciation of the property itself, and from the impossibility of disposing of it. All our rights of property, the rights of enjoyment, use and disposal, have been affected by the power-house, and the depreciation being an actual fact all damages can be recovered. See Dalloz, Supp., *vo.* "Manufactures, fabriques et ateliers," Nos. 86, 88, 176; Req. 8 mai 1850, *Affaire Cartier*(1); Req. 20 février 1849, *Affaire Desrone*(2); Paris, 18 mai 1860, *Affaire Robin*(3); Dalloz, Supp. *vo.* "Propriété," No. 70; 2 Aubry & Reu (5 ed.) p. 307, par. 194; Clerault, des établissements dangereux, ch. VIII., No. 130; Serrigny, de l'organization et de la compétence, No. 870; 2 Sourdat, de la responsabilité, 1189 et 1191; 12 Demolombe, 1, Nos. 654, 660; 6 Laurent, Nos. 136, 146, 152, 153; Req. 4 mai 1827, S.V., 27, 1, 435, 436; Cass. 17 juillet 1845, S., 45, 1, 825; *St. Helen's Smelting Co.* v. *Tipping* (4); *Baltimore & Potomac Railroad Co.* v. *Fifth Baptist Church*(5).

The Court of King's Bench has considered it in the interests of the parties to put an end to any further litigation, and granted $1,500.00 for all damages, past, present and future, including the depreciation of the property and the loss of the enjoyment and use of the same, following *Gareau* v. *The Montreal Street Railway Co.*(6). The appellants acquiesced in a condemna-

(1) Dal. 54, 5, 655.
(2) Dal. 49, 1, 148.
(3) Dal. 60, 2, 116.
(4) 11 H.L. Cas. 642.
(5) 108, U.S.R. 317; 137 U.S.R. 568.
(6) 31 Can. S.C.R. 463.

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tion of $300 for two years, and consequently every two years they can be called upon to pay a similar sum. The only difference between the parties now is $1,200, which will put an end to further litigation and cover all damages. This judgment was most fair and equitable for all parties, and the respondents are willing to accept this award in final satisfaction of their claim.

The Superior Court concluded that no damages beyond two years preceding the action, or of a permanent character could be granted, and did not pass upon the evidence relating to depreciation of the property, or to loss of enjoyment. Consequently the Court of King's Bench was the first to pass on this evidence. That court made a most careful study of the evidence and, in its opinion, this evidence is stronger than the evidence in the *Gareau Case*(1). That finding is fully justified by the evidence, and should not be interfered with on appeal.

THE CHIEF JUSTICE (dissenting).—I dissent from the judgment of the majority of the court for the reasons stated by Mr. Justice Girouard.

GIROUAIRD J. (dissident).—Tout en partageant l'opinion de M. le juge Fortin qu'une réclamation comme celle des demandeurs se prescrit par deux ans, aux termes de l'article 2261 du Code Civil, je suis arrivé à la conclusion que la cour pouvait et devait même mettre fin au litige tant pour le passé que pour l'avenir.

L'établissement de l'intimée, qui est la cause des dommages, a été construite à perpétuelle demeure, et fait même partie de l'immeuble; art. 377, 379, 380

(1) 31 Can. S.C.R. 463.

C.C.; et il est raisonable de considérer la cause des dommages comme permanente. Cette règle de droit s'impose comme nécessité de la situation; sans elle, le propriétaire serait sans remède efficace. Par example, veut-il vendre pendant la durée de la nuisance qui est cause du dommage à sa propriété ? De suite, il subit une diminution du prix proportionnelle au dommage souffert. Pour lui ce dommage se fait sentir d'une manière permanente et c'est de cette manière que les tribunaux doivent l'apprécier.

Il n'y a aucun texte de loi qui s'oppose à cette décision. Il y a de plus une grande raison d'équité et d'intérêt public de l'adopter; elle tend à empêcher la multiplicité des procès. Je concours pleinement dans le judement de la cour d'appel et particulièrement les motifs suivants:—

Considérant que l'établissement de l'intimée a un caractère de permanence, ce qui influe davantage sur la valeur actuelle de la propriété des demandeurs et la déprécie notablement;

Considérant qu'il est de l'interêt des parties de régler une fois pour toutes et définitivement tant pour le passé que pour l'avenir, les dommages qui résultent de l'exploitation de l'usine de l'intimée;

Considérant que les dommages s'élèvent à la somme de $1,500.

DAVIES J.—I concur in the reasons stated in the judgment of Mr. Justice Nesbitt.

NESBITT J.—In this case the plaintiffs sued as proprietors of a property contiguous to the power-house of the company alleging that owing to the negligent operation of the company's works damage was suffered.

The trial judge held that the plaintiffs were limited to the recovery of damage by the prescription of two years under art. 2261 of the Civil Code and could not recover for permanent damage. The Court of King's Bench held that the prescription did not ap-

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ply and also assessed damages as for a permanent injury and gave a sum to represent the damage once for all.

In my view, the action was one for tort and the negligence gives rise to a continuous series of torts which can be brought to an end by the defendant discontinuing the act and is within the article of the Code referred to, and the damages prescribed by two years' limitation.

The power-house of the defendants is on their own land and its operation is the cause of the tort to the plaintiff and cannot in the eye of the law be recoggarded as permanent no matter with what intention it is built. The work is done by public authority but so negligently as to cause injury to the plaintiffs and it is to be supposed will be remedied and the plaintiffs, therefore, can recover only for loss to the date of the tort, although in one case where the nuisance was abated before the trial the damages, on the ground of convenience, were assessed up to the time of the abatement of the nuisance. See *Fritz* v. *Hobson*(1); *Wordsworth* v. *Harley*(2); *Lord Oakley* v. *Kensington Canal Co.*(3); *Whitehouse* v. *Fellowes*(4).

In the case of works authorized by law, where the power of expropriation is given upon due compensation, the rule has grown up of assessing the damages once for all, since the work complained of is assumed to be permanent and the defendant would have the right to erect the works complained of upon setting the necessary machinery of the law in train. In the case of trespass upon the plaintiff's land where, to remedy the wrong, another trespass would have to be committed, the injury is not continuing but inflicted

(1) 14 Ch.D. 542.
(2) 1 B. & Ad. 391.
(3) 5 B. & Ad. 138.
(4) 10 C.B.N.S. 765.

once for all and full compensation is to be recovered in one action and so in actions of personal tort causing injury to the person. I think, therefore, the course pursued by the court below, while calculated to put an end to successive litigation and in the interests of the parties, was not justified and the judgment of the trial judge should be restored with costs.

IDINGTON J.—The learned trial judge, properly as I think, disallowed respondent's claim for past damages beyond the time limited by art. 2261 of the Civil Code.

He also refused, I think properly, to allow prospective damages.

He omitted making any allowance for damages to the buildings or to the property itself as reduced in value by anything that happened up to the time of the action being begun and, in this respect, he may possibly have erred.

It is impossible, considering the way in which the evidence has been given, to form a satisfactory opinion as to what damages may have happened to the property within the two years preceding the action. If these damages should, in the judgment of the respondents, be substantial, I think, in the result I am about to state, they should have an opportunity of having such damages assessed in respect of the causes of action confined to the two years in question and beyond the damages which the learned trial judge has allowed here for the loss in respect of the use or current enjoyment of benefits or profits from the use of the property during the said two years.

The Court of King's Bench, in appeal, has estimated damages upon a basis that includes prospective damages. It is possible, on the evidence, to arrive at a reasonable amount on that basis if prospec-

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tive damages are allowable for the evidence was given looking to that result. I am of opinion, however, that, in allowing prospective damages, the appellate court has erred.

*Holmes* v. *Wilson*(1) decided that an action for "keeping and continuing a buttress" on the land of another after the recovery for the trespass of erection can be maintained.

*Thompson* v. *Gibson*(2) seems expressly in point, for there it was held that an action for continuing a nuisance will lie. Numerous cases are cited. Some of them go to shew that the assignee of the property could bring an action even though he might have the right to abate the nuisance. This was in 1841, for damages to a market by the erection of a building.

*Battishill* v. *Reed*(3) illustrates the damages that might be allowed for injury to the property and admits and approves the principle upon which the foregoing cases rested. The action was brought by a reversioner only and he was restricted, therefore, to the amount actually necessary to be spent upon the structure to remove the cause of offence.

*Bankart* v. *Houghton*(4) was a case where judgment was recovered at common law and then a bill filed to restrain execution thereof and also future actions on the ground of acquiescence. The motion was dismissed, the court holding that acquiescence could not be relied on as an answer to damages.

In *Backhouse* v. *Bonomi*(5) it was held, relying upon these cases and others, that the action for future subsidence could only be bound by the lapse of time from the subsidence, though the excavation caus-

(1) 10 A. & E. 503.
(2) 7 M. & W. 456.
(3) 18 C.B. 696.
(4) 27 Beav. 425.
(5) 9 H.L. Cas. 503.

ing it had occurred long before. It seems to be conclusive as the judgment of an appellate court of high authority in every respect upon the point of the right to bring the action accruing from the time the damage happens. That seems to involve all the other questions in dispute in this case in relation to the assessment of damages.

*Mitchell* v. *Darley Mayne Colliery Co.*(1) reiterates all this, reviews the authorities again, overrules *Lamb* v. *Walker*(2), and leaves the law, I think, as I have just stated it.

*Hole* v. *Chard Union*(3) in the Court of Appeal decided that a nuisance from a sewer created continuing damages and gave actions in the future but the difficuty was overcome there by means of the order xxxvi, R. 58, which provides that:

> Where damages are to be assessed in respect of any continuing cause of action they shall be assessed down to the time of the assessment.

This reiterates the law, shews the modification by apt legislation in England, which we have not got here, to apply to the cases under consideration.

I am constrained to hold, therefore, to the opinion that there cannot in law be any assessment against the will of the parties in regard to prospective damages that will bind all concerned and protect the company against future claims.

If we could import as a principle of action the method adopted in France, as shewn by the authority quoted from Laurent, we could meet these cases admirably. In the absence, however, of legislation I do not see how that can be done here. It seemed to be conceded in argument that such is the case. But this

(1) 14 Q.B.D. 125. (2) 3 Q.B.D. 389.
(3) [1894] 1 Ch. 293.

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was attempted to be met by treating the establishment of the works as permanent, which, as to the location of this power-house in question creating the nuisance, I do not find to be the case.

*Gareau* v. *The Montreal Street Railway Co.*(1) does not seem to aid us except in recognizing the rights of the respondents to recover damages flowing from the vibrations complained of as produced by appellant's machinery.

This court there suggested an amount that would be proper to allow and that was acceded to by the parties appellant there. What was suggested in argument here as a proper disposition of the rights of the parties, following the lines of that case, might well be worth the parties' while considering, but I fail to see how we can impose our will upon them in the present state of the law.

I would prefer to allow a new trial to enable respondents, if they should desire it, to establish substantial damages to the structure for the two years before their action, but, as that seems impossible, I agree that the judgment of the Court of King's Bench, in appeal, should be reversed, and the judgment of the trial judge restored.

I think the appeal should be allowed with costs.

*Appeal allowed with costs.*

Solicitors for the appellants: *Campbell, Meredith, Macpherson & Hague.*

Solicitor for the respondents: *J. C. Lamothe.*

(1) 31 Can. S.C.R. 463.

THE OTTAWA NORTHERN AND WESTERN RAILWAY CO. (DEFENDANTS) ..... APPELLANTS.

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*May, 9, 10
*June, 3.

AND

THE DOMINION BRIDGE CO. (PLAINTIFFS) ..... RESPONDENTS.

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

*Pleading — Cross-demand — Compensation — Arts.* 3, 203, 215, 217 *C.P.Q.—Practice—Damages—Construction of contract—Liquidated damages—Penal clause—Arts.* 1076, 1187, 1188 *C.C.—Estoppel—Waiver.*

A debt which is not clearly liquidated and exigible cannot be set off in compensation of a claim upon a promissory note except by means of a cross-demand made under art. 217 of the Code of Civil Procedure of the Province of Quebec. Judgment appealed from affirmed, Nesbitt and Idington JJ. dissenting.

By a clause in a contract for the construction of works, the completion thereof was undertaken within a specified time and in default of completion as stipulated it was agreed that the contractor should pay "as liquidated damages, and not as a penalty, the sum of fifty dollars for every subsequent day until the completion." The works were not completed within the time limited, and, in consequence, both parties joined in a petition to a municipal corporation for extension of the time during which subsidies it had granted towards the cost of the works could be earned. The petition was granted and the works were completed within the extension of time allowed by the corporation.

*Held,* Nesbitt and Idington JJ. dissenting, that damages accruing under the clause in question did not, upon mere default, become sufficiently liquidated and ascertained so as to be set off in compensation against a claim upon a promissory note.

*Held, per* Girouard and Davies JJ. (Nesbitt and Idington JJ. *contra*), that by joining in the petition for extension of time the party in whose favour the penal clause might take effect had waived the right to claim damages thereunder during the period of the extension so obtained in the interests of both parties to the contract.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Idington 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 Montreal, by which the plaintiffs' action was maintained with costs.

The Dominion Bridge Company, respondents, brought the action for $4,571.65 on a promissory note made by the railway company, appellants, for the balance due the bridge company on a contract between the Ottawa and Gatineau Railway Company, the Pontiac and Pacific Railway Company and Horace Janson Beemer, of the one part, and the said bridge company, of the other part, whereby the bridge company agreed to supply, build and erect the metal superstructure of the interprovincial bridge across the Ottawa River between the City of Ottawa and the City of Hull.

The railway company contested the action and, among other defences, pleaded that, under the contract, the bridge company had undertaken that the works would be fully completed in August, 1900, but had failed to finish their part of the works within the time limited and did not complete them until some time in January, 1901; that by a clause in the contract, in case of such default, it was stipulated that the bridge company should pay "as liquidated and ascertained damages for such default, and not as a penalty, the sum of fifty dollars for every subsequent day until the completion of the said bridge superstructure"; that the default continued for 155 days, and, thereby, there became due by the bridge company in virtue of said clause, to the defendants, $7,750.00 as damages, liquidated and ascertained, still owing and unpaid, at the time of the action, and which the defendants offered, *pro tanto,* in compensation against any sum that might be due to the plaintiffs. The defend-

ants, however, did not set up this claim for damages by a cross-demand.

The respondents met this plea by three objections: First, that the appellants had not alleged that they had suffered any damages by the delay; Secondly, that the superstructure and piers which the railway companies and Beemer had undertaken by the first contract, were to be fully completed on the 1st of September, 1899, and that this work was not completed until November following, and that, having themselves been the cause of the delay, the penalty clause cannot be enforced; Thirdly, that both appellants and respondents had subsequently joined in a petition to the Council of the City of Ottawa (which had granted subsidies for the construction of the bridge, provided it was completed and opened to the public on or before the 9th of September, 1900) to extend the time during which the subsidies could be earned and received; that, consequently, the penalty stipulated had failed by reason of such petition, and that the appellants had, by waiver as well as by acquiescence in the respondents' acts, lost the right to enforce the said clause respecting damages.

The Superior Court condemned the defendants to pay the $4,571.65, with interest, and rejected the defendants' plea setting up the claim for liquidated damages in compensation.

The defendants appealed to the Court of King's Bench, which affirmed the judgment of the Superior Court, four of the judges affirming on the sole ground that the debt offered in compensation was not *claire et liquide,* sufficiently liquidated, and, therefore, could not be offered in compensation; the fifth judge, Blanchet J. differing from the majority on this point and being to confirm on the sole ground that

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the appellants had renounced their right to claim liquidated damages by joining in the request with the bridge company to the City of Ottawa for an extension of the time of the earning and the payment of the subsidies. The majority of the court, in referring to this ground taken by Mr. Justice Blanchet, were of opinion that the acts recited were not a renunciation.

The questions raised on the present appeal sufficiently appear in the judgments now reported.

*Campbell K.C.* and *K. R. Macpherson* for the appellants. Notwithstanding the strict words of art. 217 C.P.Q., compensation takes place by the sole operation of law, and the issue is properly raised by simply pleading it. Arts. 1076, 1188 C.C., arts. 3, 203 and Sch. E. 4, C.P.Q. In this case, which fulfils all the requirements of the articles of the Civil Code, just cited, the damages sought to be set off, although not absolutely *claire et liquide,* are so easy of proof that they fall within the principle laid down in *Hall* v. *Beaudet* (1); *Duguay* v. *Duguay* (2); *Ross* v. *Brunet* (3); *Decary* v. *Pominville* (4). This is also the doctrine of the French law: 2 Pothier, No. 628; 28 Demolombe, Nos. 522, 523, 524, 525; 18 Laurent, No. 405; Merlin, Rep. de Jur. *vo.* "Compensation," para. 2, No. 1; 4 Aubry & Rau, p. 227. The clause of the contract is a liquidation of the damages exempting the railway companies from any proof as to the amount, and leaving it only necessary for them to establish the number of days during which the works remained incomplete. See also *Kneen* v. *Mills* (5); Mignault No. 5, p. 424; Delorimier No. 8, p. 347; 3 Larombiere, art. 1231; 6 Toullier, Nos. 813-814. In *McDonald* v. *Hutchins* (6),

(1) 6 L.C.R. 75
(2) 2 Rev. de Jur. 212.
(3) 5 R.L. 229.
(4) M.L.R. 5 S.C. 366.
(5) M.L.R. 7 S.C. 352.
(6) Q.R. 12 K.B. 499.

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cited by Blanchet J., it was held "that no evidence was permissible or required to prove damages resulting from the inexecution of an obligation within a specified time where these damages have been agreed upon by the parties to the contract at a certain stipulated sum or rate per day."

The defendants were, consequently, within their rights in pleading compensation and set-off, and there was not, in this case, any necessity of filing a cross-demand. Whether the opinion of the majority of the court below on this point is technically correct or not, it is within the power of this court, the whole merits of the contestation being now before it, to define and determine the respective responsibilities of the parties, and to declare the plaintiffs' claim compensated, and no ends of justice will be served nor principles of law vindicated by refusing the claim of the appellants and forcing them to prolong this litigation by an independent action.

The plaintiffs were not delayed or inconvenienced in any way by any act or default of the defendants in respect to the completion of the portions of the bridge to be constructed by the railway companies: *Holme* v. *Guppy*(1); *Bettini* v. *Gye*(2); *Graves* v. *Legg*(3); The completion of the works by the railway companies was not a condition precedent: *Wheelton* v. *Hardisty* (4).

The application for extension of time for the completion of the works was proposed and carried out by the plaintiffs. The railway companies only joined in it because they were forced to do so in order to avoid large pecuniary loss by the forfeiture of the subsidies.

(1) 3 M. & W. 387.
(2) 45 L.J.Q.B. 209.
(3) 23 L.J. Exch. 228.
(4) 27 L.J.Q.B. 241.

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There was no waiver either express or implied, and although Blanchet J. quoted authority for his opinion, it was not shared by the majority of the court below. That defendants never waived their rights is abundantly clear from the evidence of the plaintiffs' engineers and one of the directors that the works to be performed by the railway companies could have been completed within the time specified in the original contract and in time to earn the subsidies, even though the extension had not been granted.

*Gormully K.C. and Cross K.C.* for the respondents. It is clear that, the number of days during which the default continued being disputed, the alleged penalty is not a debt certain and demandable and does not possess the essential characteristics of a claim which could be set off against a claim due under a promissory note. Arts. 1178, 1188 C.C.; Art. 217 C.P.Q.; Pothier, "Obligations," No. 628; Mourlon, No. 1442; 16 Laurent, No. 304; Dalloz, 96, 2, 180; *Finnie* v. *City of Montreal*(1); Pand. Fr. *vo.* "Obligation," Nos. 5692, 5693, 5701, 5703, 5709. The penalty is not exigible because of the appellants' own default, or rather, because of the default of the persons with whom respondents contracted to comply with their precedent or reciprocal obligations under the contract to complete their share of the bridge work within the time limited. *Holme* v. *Guppy*(2). Moreover, they joined in the petition to the City of Ottawa for an extension of the time fixed for the completion of the works and, thereby, lost the right to enforce the penalty, by acquiescence in the modification of the contract whereby the necessity of completion of the works within a specified time ceased. The application was acceded to; the bridge

(1) 32 Can. S.C.R. 335. (2) 3 M. & W. 387.

was completed at a later date and the bonuses were secured and paid. Under these circumstances there was failure of the consideration for which the penal clause was stipulated, and both contracting parties having secured the benefit of the bonus, the benefit which in the very words of the contract it was the object and intention of the parties to secure, the appellants cannot now claim the penalty in addition. Dalloz Rep. supp., *vo.* "Obligation" Nos. 665, 1594, 1619; Dalloz, 79, 1, 122, notes 1 and 2; 54, 1, 288; *Dodd* v. *Churton* (1); *Kerr Engine Co.* v. *French River Tug Co.* (2); Pand. Fr. *vo.* "Obligations" No. 2562; Rolland de Villargues, *vo.* "Clause pénale" Nos. 49, 50.

The claim for damages cannot, in any event, be set off under a plea of compensation. Such damages can be recovered and set off only upon a cross-demand filed according to the provisions of articles 203, 215 and 217 of the Code of Civil Procedure. This has not been done, and, consequently, compensation cannot be declared by the court.

THE CHIEF JUSTICE.—Je renverrais cet appel sur le motif donné par la cour du banc du roi que la créance de l'appelante n'étant pas claire et liquide ne peut être opposée en compensation de celle de l'intimée et qu'elle ne pouvait d'ailleurs être reclamée dans l'instance que par une demande reconventionelle. L'article 217 du Code de Procédure ne me paraît pas laisser de doute sur la question, et, comme le remarque le savant juge en chef de la cour du banc du roi, la jurisprudence en ce sens est maintenant fixée sur la question.

(1) [1897] 1 Q.B. 562.

(2) 21 Ont. App. R. 160; 24 Can. S.C.R. 703.

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GIROUARD J.—Je serais porté à croire, avec la majorité de la cour d'appel, que, dans les circonstances de cette cause, la compensation des dommages liquidés ne peut avoir lieu sous l'empire du nouveau code de procédure civile (art. 217), sans former une demande reconventionelle, surtout lorsqu'il y a objection de la part du défendeur. Mais je préfère renvoyer l'appel avec dépens pour le motif adopté par M. le juge Blanchet. Pour les raisons qu'il développe, je n'ai aucune hésitation à conclure avec lui qu'il y a eu prolongation du délai stipulé pour l'execution des travaux, à laquelle l'appelante a non seulement acquiescé, mais qu'elle a demandé elle même pour le bénéfice de toutes les parties intéressées—elle même comprise.

DAVIES J.—The respondents sued the appellant to recover a balance due on a promissory note for $4,571.65, and the appellants representing, under a change of name, The Ottawa & Gatineau Railway Co., and the Pontiac Pacific Railway Co., pleaded by way of compensation under the Code certain liquidated damages payable to them under a contract made 26th April, 1899, between the two said railway companies, now merged in and represented by the appellants, and the bridge company, respondents, for the building and erection of the superstructure of the Interprovincial Bridge between Ottawa and Hull, which was being constructed by the companies and parties the appellants now represent, and in which it was stipulated that:

> In case the said superstructures should not in all respects be completed on or before the first day of August, 1900, then the bridge company should pay to the parties of the second part (now represented by the appellant company) as liquidated and ascertained

damages for such default and not as a penalty the sum of $50 for every subsequent day until the completion of the said bridge superstructure.

The railroad companies and persons now represented by the appellants, who had undertaken to erect the Interprovincial Bridge and had secured certain subsidies towards its construction from the Dominion and provincial governments, and from the Cities of Ottawa and Hull, not being considered financially strong, had secured the co-operation of a financial syndicate to assist them and contemporaneously with the execution of the contract for the construction by the bridge company of the superstructure, another contract was entered into between the same parties and the financial syndicate as a third party in which, after reciting the contract by the bridge company for the erection of the metal superstructure and the disposition of the different bonuses and subsidies granted and expected towards the construction of the bridge, the syndicate agreed with the bridge company to supply the railroad companies and persons with whom it had contracted, now represented by appellants, with all the necessary funds to enable them to carry out the construction of all those portions of the bridge and its approaches as had not been undertaken by the bridge company by their past recited agreement, so as to enable such companies and parties to carry out and complete the works in the third clause of the agreement within the respective times therein mentioned.

The railroad companies and persons represented by appellants thereupon in the said third clause agreed with the bridge company, respondents (*inter alia*), that:

All of the substructures and piers of the said bridge should be

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fully completed and ready for the building and placing by the bridge company of the metal superstructures thereon on or before the first day of September, 1899.

The learned trial judge found in accordance with the evidence that the defendants (appellants) did not complete the substructure till some months after the stipulated time, and that the delay in the completion by the bridge company of the superstructure contract was not caused by the delay of the defendants in constructing the substructure, but by the difficulty of the bridge company in obtaining structural steel. He further found that the work of the defendant in completing the approaches and in finishing the bridge ready for traffic was not delayed by the delay in the plaintiff's work, that, thus, the defendant suffered no damage by plaintiffs' delay, and that the conditions of the payment of the subsidies as to time were at the request of both parties, plaintiffs and respondents, extended for six months, so that no damage resulted from loss on that score.

In the result he held that as the several obligations of the parties for the construction of the substructure and the superstructure were dependent, the covenant on the part of the defendants for the construction of the substructure within the specified time limit was a condition precedent to their right to the liquidated damages provided for, and not having been complied with, the liquidated damages could not be recovered as such or be opposable in compensation against plaintiffs' claim on the note.

He further held that even if the penalty or liquidated damages were held to be recoverable in whole or in part the debt represented by them was not "liquid" either as to its existence or amount within the meaning of the Code. An appeal to the Court of King's

Bench was dismissed on the latter ground. Mr. Justice Blanchet, however, while concurring in dismissing the appeal, did so on the ground that the parties by their conduct and actions in applying for extensions of time for the completion of their work to the governments and corporations paying the subsidies had thereby waived the agreement to pay stipulated damages for non-compliance with their contractual agreements as to time.

I confess that I have had great doubts on the questions involved. After much consideration, however, I have reached the conclusion that the two clauses in the contract deeds providing, the one for the completion of the substructure, and the other of the superstructure, at specified times, were mutual and dependent one on the other, and that as the defendants failed to complete the substructures for some months after the period they had stipulated to do so, and there are, to say the least, grave doubts as to whether their default was not the occasion, at least in part, of plaintiffs' default in completing the superstructure, they lost the right to recover the liquidated damages stipulated for and were relegated to their ordinary right to recover just such damages as they could prove they sustained.

The construction of the substructure was, of course, a necessary condition precedent to the erection of the superstructure. Whether a contractual obligation had been specifically entered into by the appellants for the construction of such substructure or not it would necessarily have to be implied, and if by delay on the appellants' part in providing the substructure or the approaches the bridge company was prevented completing its superstructure contract within the stipulated time, the provision for stipulated damages

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could not be invoked and the appellant would be relegated to his ordinary proof of damages. Then, why was any stipulation required by the bridge company as to the completion of the substructure and approaches? Simply, as was so strongly argued by the respondents' counsel, because they desired to incorporate the element of time in the condition. The building of the substructure being a condition precedent the time within which it should be built was inserted and made part of that condition. If a condition precedent it must, of course, have been fully performed and satisfied in order to render the promise absolute, and it lies upon the promisee to prove the performance or an excuse for non-performance. *Heard* v. *Wadham*(1); *Clack* v. *Wood*(2).

> The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties and, however transposed they may be in the deed, their procedure must depend upon the order of time in which the intent of the transaction requires their performance. Mansfield C.J. *Kingston* v. *Preston*, (3); Leake on Contracts (4 ed.) p. 456.

Of course it makes no difference whether the parties have put their contract in one or more deeds. Their intent must be gathered from the entire contract, and if there are contemporaneous deeds on the same subject matter affecting the relative rights of the parties *inter se,* they must, of course, be read together. If the covenant by the appellants to build the substructure and approaches by a specified time was in the same deed as the covenant by the bridge company to finish the superstructure, the dependence of the one covenant upon the other might seem more marked. But the fact of the mutual

(1) 1 East 619 at p. 631. (2) 9 Q.B.D. 276.
(3) 2 Doug, 689.

covenants being in separate deeds cannot make any difference in their construction.

The law is stated very clearly with respect to the right to recover liquidated damages where impossibility of performance is caused by an act of a party to the contract in Leake on Contracts (4 ed.) p. 496, where all the cases are collected. The latest case appears to be that of *Dodd* v. *Churton* (1). In that case the act of the promisee, which, it was held, discharged the promisor from his liability to pay liquidated damages at a stipulated rate for each week's delay, was the requiring of certain extra work to be done as it was stipulated in the contract he had a right to require. The additional works called for only involved two weeks' delay after the specified date. The actual delay was for twenty-five weeks longer, and for these twenty-five weeks the owner claimed from the contractor the stipulated and liquidated weekly damages. The Court of Appeal held, however, the contractor had been exonerated, and that if the clause relating to stipulated damages was intended to be applicable to a condition where extra work had been required to be done it must be explicitly made so applicable. All the authorities are reviewed in this case, and the application of the principle it lays down to the case before us is fatal to the right claimed by appellants.

As I understand that principle, it is that if the owner by the ordering of extra work or by the doing or omitting to do any act which he ought to have done or omitted has delayed the contractor in beginning the work or necessarily increased the time requisite for finishing the work he thereby disentitles himself to claim the penalties for non-completion provided for by the contract.

(1) [1897] 1 Q.B. 562.

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It avails not for the promisee to say there were other reasons besides my default for your failure to fulfil your covenant, in fact the real cause of your failure lay with and in yourself, and my failure was not the reason of yours. Such reasoning would avail in any action in which the actual damages suffered were sought to be recovered, but not in an action to recover stipulated iquidated damages in the nature of a penalty. Where the promise broken is dependent on a promise of the promisee which in itself is a condition precedent of the fulfilment of the promise sought to be enforced, and such condition precedent is not performed, only the actual damages and not the stipulated can be recovered.

In this case I am not satisfied that the appellants' delay and default with regard to the substructure did not delay the respondent in completing the superstructure, nor am I satisfied that the conduct of the parties subsequently did not operate as a waiver. I therefore concur in the conclusion of the Chief Justice that the damages claimed cannot be opposed by way of compensation to plaintiffs' claim on the note.

NESBITT J. (dissenting).—The plaintiffs, the bridge company, sued upon a note made by the railway company, and to this there is no defence other than the claim by the railway company that the bridge company were in default under a contract by which it agreed:

> And in case the said superstructures shall not in all respects be completed on or before the 1st day of August, 1900, then the bridge company shall pay to the parties of the second part as liquidated and ascertained damages for such default and not as a penalty the sum of $50 for every subsequent day until the completion of the said bridge superstructures covered by sub-clause a of clause 2 hereof.

The first objection taken is a matter of procedure, viz.: that this defence is set up as a matter of compensation. Art. 1188 provides:

> Compensation takes place by the sole operation of the law between debts which are equally liquidated and demandable and have each for object a sum of money or a certain quantity of indeterminate things of the same kind and quantity.

On this point I do not desire to reiterate the reasons given by Mr. Justice Blanchet in the court below.

The next objection was that two other parties should be plaintiffs, and I again adopt the reasoning of Mr. Justice Blanchet upon this point without repeating his language.

The next objection is that by another contract the defendants were to provide the approaches, etc., eleven months before the date stipulated in the contract I have referred to when the penalties should begin to run.

The defendants answered this by alleging that the evidence clearly established that their default in no way had relation to the failure to complete the approaches, and that it is indisputable that such default to supply the superstructures arose from the plaintiffs' inability to obtain structural steel. The plaintiffs, I think, cannot rely upon this being a condition precedent, as I think it is proved the delay did not affect the plaintiffs' default, and the case seems to me to differ from such cases as *Holme* v. *Guppy*(1) and *Dodd* v. *Churton*(2). See the language in *Wright* v. *Cabot*(3); Hudson on Building Contracts (2 ed.) p. 237; *Russell* v. *Da Bandiera*(4); also *Dodd* v. *Churton*(2), at pp. 566 and 568, where Lord Esher M.R.

(1) 3 M. & W. 387.
(2) [1897] 1 Q.B. 562.
(3) 89 N.Y. 570.
(4) 13 C.B.N.S. 149, at p. 203.

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and Chitty L.J. both indicate the condition *must have effected the delay.*

The plaintiffs further object that no damage is shewn and appeal to article 1066, C.C., which is as follows:

> The creditor, without prejudice to his claim for damages, may require also that anything which has been done in breach of the obligation shall be undone, if the nature of the case will permit, and the court may order this to be effected by its officers, or authorize the injured party to do it, at the expense of the other.
>
> But if the obligation has been performed in part, to the benefit of the creditors, and the time for its complete performance be not material, the stipulated sum may be reduced unless there be a special agreement to the contrary.

The defendants reply art. 1076, C.C., which is as follows:

> When it is stipulated that a certain sum shall be paid for damages for the inexecution of an obligation, such sum and no other, either greater or less, is allowed to the creditor for such damages.

I need only refer to the latest case upon the point, *Clydebank Eng. & Shipbuilding Co.* v. *Don Jose Ramos Yzquierdo y Castaneda*(1), to establish the proposition that this $50 a day is not a penalty. In this case the sum reserved was fixed by the parties to cover many elements of damage which might be suggested, such as payment of interest while the payment of subsidies was delayed; loss of the use of the bridge, etc., and, indeed, the railway companies gave notes during the process of manufacture which were deducted by the bridge company from the subsidies assigned to it, and interest for the delay occasioned by the bridge company was deducted by the bridge company from the railway company.

The next objection, and the only one in which Mr.

(1) [1905] A.C. 6.

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Justice Blanchet agreed with the plaintiffs was, that owing to the defendants having petitioned for an extension of the time within which the subsidies were payable there as an implied consent to waive the damage clause. I cannot agree in this view. The defendants were to be paid subsidies conditional upon completion within a time stated. The plaintiffs were under contract with the defendants to finish within that period, and under contract to pay a certain *per diem* sum for failure. The plaintiffs notified the defendants they could not finish within that period owing to their inability to get structural steel. The defendants were compelled by this default to apply for the extension of the time for payment of subsidies, and I fail to see how that affects the contract of the plaintiffs with them to complete. No other practical course was open to the defendants, and in the absence of an express agreement to waive their right against the plaintiffs under the contract I cannot see how they have lost them. I was inclined to think the doctrine referred to in *Hughes* v. *Metropolitan Railway Co.* (1) would assist the bridge company, and that it might say that, while no waiver at law existed in its favour, yet the defendants by applying for the extension had (unintentionally it may be) led it to suppose that the contract for time would not be insisted upon, and I would have been of the view that it was a good answer but for the fact that the bridge company asserted that the application for time would have no effect on its conduct, and it would finish so soon as it could. We cannot imply in a party's favour what he himself says is not the fact.

In my view the plaintiffs are liable to the defend-

(1) 2 App. Cas. 439, at pp. 452-3.

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ants for the $50 per day for every day they were in default under the clause I have quoted, and the appeal should be allowed with costs in all courts.

Since writing the above I have read the judgments of the Chief Justice and my brother Girouard, and although I would at once withdraw any view I might entertain on a question of procedure in Quebec, which was contrary to one expressed by them, I think that as all the fact were fully tried out, and it was not suggested any further evidence could be adduced on a trial in which the defendants claimed the sum stipulated for as a *per diem* allowance, the justice of the case demands this court should make any amendments necessary to dispose of the real question in issue. See *Price* v. *Fraser* (1).

IDINGTON J. (dissenting).—The respondents sued appellants upon their promissory note and they set up a defence of compensation arising out of another transaction between the same parties.

The appellants are the successors of other companies whose rights, and the rights of one Beemer, are vested in them in respect of a covenant contained in a deed dated 26th April, 1899:

This covenant is as follows:

> And in case the said superstructures shall not in all respects be completed on or before the first day of August, A.D. 1900, then the bridge company shall pay to the parties of the second part as liquidated and ascertained damages for such default, and not as a penalty, the sum of fifty dollars for every subsequent day until the completion of the said bridge superstructure covered by sub-clause *a* of clause 2 hereof.

The work was not done within the specified time. The parties of the second part, referred to as such

(1)31 Can. S.C.R. 505, at p. 514.

in the covenant, are those whose rights the appellants have acquired.

It has been contended that those liquidated damages are not *claire et liquide* such as can be set up by simple defence of compensation, and that any rights appellants may have to claim the same can only be asserted by means of a cross action or an independent action.

I think, if simplicity of character in the claim and its susceptibility of easy proof are the tests to apply to find out whether it is within the meaning of article 1188 of the Civil Code, this stands that test very well.

That is certain which can be reduced to certainty.

It is admitted such a principle may in some cases be invoked to bring claims within the meaning of this article.

It is shewn here much evidence has been taken and how many questions the parties have tried to raise, and we are asked to consider the point in light thereof, and pressed that if we do we must conclude that the claim was not *claire et liquide* as the authors say it ought to be.

I dissent from that. I think the claim must, as regards the length of the evidence and argument, be looked at by the results arrived at. If the evidence and other things, such as pleadings, contentions and arguments, have been unfounded they cannot be considered in deciding as to the point of simplicity or complication of the claim. Litigants can, if so disposed, always make the clearest and simplest look the very reverse.

It is quite clear that the respondents covenanted to pay so much per day after a certain date if their work was not then finished, and there has been no real contest as to the fact that the work was not finished

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then, or until a date at which that *per diem* allowance would exhaust all the appellants can claim in this action.

The respondent sets up also that the covenant in question was conditional upon the performance by the appellants of their covenant to have the substructure of the work in question done by a certain date.

These respective covenants of the parties are in separate deeds.

I do not attach much importance to that. Even if they had formed a part of the same deed we must, in construing them, have asked, as we do now: Did the parties intend and express the intention that the one covenant should be dependent on the other?

If they intended so they have here clearly omitted to do so.

Is there anything to be implied in the contract or both contracts read as a whole to supply this want of expression?

I am unable to see how.

The covenant of the appellants with, and required by, respondents from appellants' assignors

> that the substructures and piers of the said bridge shall be fully completed and ready for the building and placing by the bridge company of the metal superstructures thereon on or before the first day of September, 1899, etc.

exists in a document that has relation to, and aimed entirely at, securing the fulfilment of the conditions upon which subsidies therein referred to were to be earned, and secured to the respondents as their source of payment or security for payment.

It could not be said to have relation to anything else save that all documents between the parties had reference to the common purpose of a bridge to be erected.

It sometimes happens that parties engage in works of construction where one of them to permit of due expedition by the other of his work, must give assurance that a particular part of such work will be done and out of the way of the other by a given date, and in such cases we often find mutual covenants for liquidated damages or penalties.

The frame of the contract in such cases evidences the intention and, with or without the provisions for damages being mutual, there sometimes occur expressions of mutuality that enables the court to imply dependence of the one covenant in the performance of the other. The case of *Dodd v. Churton*(1) illustrates, in a way, one form of the many such cases that can be found in the books, but this case in hand, so far as I can see, is not brought within any of them.

I think the respondents had just that security that every contractor has, that the law implies that he for whom the work is being done shall not omit to do all that is needed in reason to be done to enable the work to proceed with due regard to the time specified for its completion.

If the owner fails to observe this implied obligation, and by reason thereof there has been delay, then the contractor is absolved from his covenant for performance or penalties or damages absolutely or partially as the terms of the contract may declare or imply.

If the north end pier had been shewn to be a necessity for the possible execution of the respondents' work at the other end of the bridge, or its absence a serious obstacle to the work, then they might have been absolved. Nothing of the kind is shewn. It is a daily occurrence that one class of work may be pro-

(1) [1897] 1 Q.B. 562.

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ceeding on one part of the structure whilst another may not yet be quite begun.

Here there was nothing done or omitted to be done by the appellants that by reason thereof can fairly be said to have occasioned respondents' delay that is now in question.

I include in that all that has been said or can be said to have arisen from the appellants joining in the application to the City of Ottawa for an extension of time.

There was nothing inconsistent in all that took place in that connection with the completion by the respondents of their work within the specified time or the continued existence of the obligation then resting upon them to have it so completed.

How or upon what principle of law, short of some inconsistency being created, between the sanction to be given by the City to the extension asked, and the continuance of the obligation or possibility of the due fulfilment thereof, such consent as appellants gave could release the obligation, I am quite unable to comprehend.

Had there been created such a conflict by the acts to which appellants' assignors were parties, then there must of necessity have been implied a rescission or modification of the original contract.

That not being the case I think the appeal must be allowed with costs and the action be dismissed with costs, save such costs as the plaintiffs therein may be entitled to up to the time of the communication of Beemer's want of interest in the claim.

*Appeal dismissed with costs.*

Solicitors for the appellants: *Campbell, Meredith, Macpherson & Hague.*

Solicitor for the respondents: *A. G. Cross.*

THE MONTREAL STREET RAILWAY COMPANY..... } APPELLANTS;

AND

THE MONTREAL TERMINAL RAILWAY COMPANY..... } RESPONDENTS.

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*May 15, 16.
*June 13.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

*"Railway Act,* 1903,"*secs.* 23, 184—*Construction, etc., of street railway or tramway—Removal of tracks, etc.—Board of Railway Commissioners for Canada—Jurisdiction—Condition precedent —Use of highways in cities and towns—Consent by municipal authority—Approval of by-law—Quebec Municipal Code, arts.* 464, 481.

In the case of a street railway or tramway or of any railway to be operated as such upon the highways of any city or incorporated town, the consent of the municipal authority required by sec. 184 of the "Railway Act, 1903," must be by a valid by-law approved and sanctioned in the manner provided by the provincial municipal law, and, in the absence of evidence of such consent having been so obtained, the Board of Railway Commissioners for Canada have no jurisdiction to enforce an order in respect to the construction and operation of any such railway.

The order appealed from was reversed and set aside, the Chief Justice and Girouard J. dissenting.

APPEAL from an order of the Board of Railway Commissioners for Canada made on the 27th December, 1904, upon leave granted under sec. 44 (3) of the "Railway Act, 1903"(1).

The order directed that the appellants should at their own cost and expense, within forty-eight hours

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Idington JJ.

(1) 35 Can. S.C.R. 478.

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after service of the order, remove the rails, ties, etc., laid by them at the intersection of Ernest Street and Pius IX. Avenue in the Town of Maisonneuve, and restore the roadway as nearly as possible to its original condition, and that the costs of the application should be paid by the appellants to the respondents.

The circumstances under which the dispute arose are as follows:

The Montreal Terminal Railway was declared to be for the general advantage of Canada by the Act 57 & 58 Vict. ch. 83. It passed through the Town of Maisonneuve and, in virtue of its charter and an agreement with the town, the respondents obtained an order under sec. 175 of the "Railway Act, 1903," from the Board of Commissioners for Canada dated 8th June, 1904, approving of proposed branch lines upon Ernest Street among others. On 30th September, 1904, a further order was made by the Board under sec. 184 of the Railway Act, granting leave to carry and operate the said branch line along and upon said street upon obtaining the consent of the Town of Maisonneuve. The respondents proceeded with the construction of said branch line across the intersection of Ernest Street and a projected street, named Pius IX. Avenue, when the appellants, who operate a tramway which extends into the Town of Maisonneuve, on the 15th of October, 1904, laid a double set of tracks, sixty feet in length, across Ernest Street at said intersection, thus obstructing the work of the respondents, crossing their proposed line and preventing them from laying their rails. No other rails were laid on either side of the rails forming the obstruction to connect them with the appellants' tramway.

Upon application by the respondents the Board of

Railway Commissioners, under secs. 23 and 44 of the Railway Act, by the order appealed from ordered the appellants to remove the obstructing rails.

The appeal is taken under the first part of paragraph 3 of sec. 44 of the Railway Act, and involves the question merely of the jurisdiction of the Board to make the order complained of.

*Campbell K.C.* for the appellants. The order appealed from is beyond the jurisdiction or authority of the Board of Railway Commissioners, because the respondents had no power to enter into a contract with the town for the construction or operation of an electric street railway; they had no charter power to construct or operate any such railway. The appellants had power to construct the track on Pius IX. Avenue both from the Legislature of Quebec and the Town of Maisonneuve, and the line so constructed was its property. The order in question could not be carried out without the destruction of the appellants' property and interference with its civil rights, matters wholly under the jurisdiction of the Legislature of Quebec and the courts having civil jurisdiction in that province.

The Railway Act does not confer upon the Board of Railway Commissioners any authority to authorize the use by federal corporations of the streets of municipalities unless the company should first obtain the consent by by-law of the municipality validly passed, approved and sanctioned under the provisions of the existing municipal laws, in the present case, arts. 481 and 484 of the Quebec Municipal Code. It does not confer, and could not confer, any authority to order the destruction of property or to affect civil rights except in so far as sec. 101 of the British North America Act, 1867, permits.

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Section 7 of the "Railway Act, 1903," does not bring a provincial electric railway within the purview of the Act, so far as the removal or destruction of the railway of the provincial company is concerned, but only as to "connection" or "crossing," both of which words imply the continued existence of the provincial work.

If any provisions of the "Railway Act, 1903," can be construed so as to empower the Board to order the demolition of the works of a provincial company, it is *ultra vires* to that extent.

*Dandurand K.C.* and *Belcourt K.C.* for the respondents. It is too late now for the appellants to question the jurisdiction of the Board; besides this we contend that the Board had full jurisdiction to make the order.

The appellants were represented before the Board at the hearing and answered the application by counsel; they joined issue on the merits and accepted the jurisdiction and they are now estopped from questioning the jurisdiction of the Board. They accepted the tribunal, and there is nothing, in law, to prevent the Board from adjudicating in the matter. The question of jurisdiction, if any there was, could only arise on account of the personality of the appellants, *i.e.*, the fact of their incorporation by the provincial legislature. The jurisdiction *ratione personæ* is not a question of public order and a tribunal which on that ground would not have jurisdiction of right can validly adjudicate with the consent, even tacit, of the parties. Pothier, Traité de Procédure, ch. 2, sec. 4, sub-secs. 2 et 3; *L'Union St. Joseph de Montréal* v. *Lapierre*(1); *Oakes* v. *City of Halifax*(2); Beauchamp, Jurisprudence of the Privy Council, p. 611, No. 62; p. 624, Nos. 101, 104, 105, 108, 109, 111.

(1) 4 Can. S.C.R. 164. (2) 4 Can. S.C.R. 640.

Under any circumstances the Board had full jurisdiction in the matter under sec. 23 of the Railway Act, and the appellants had violated the orders, previously made by the Board in June and September, by laying tracks across the respondents' line without the previous authorization of the Board as required by sec. 177. They acted contrary to orders based on secs. 175 and 184 of the Railway Act by obstructing the construction and operation of the branch line authorized and sanctioned by said two orders. The Board, therefore, had complete jurisdiction in the matter, and appellants cannot as a provincial railway claim exemption from the operation of the "Railway Act, 1903." The words of sec. 23 are conclusive; every violation of the Act brings the offender under the jurisdiction of the Board. Section 7 of the "Railway Act, 1903," enacts that every steam or electric street railway or tramway authorized by special Act of the legislature of any province crossing the line of a railway subject to the legislative authority of the Parliament of Canada comes under the Act as regards such a crossing. Even supposing the terms of the Act did not make it specially applicable in the premises, under the rules governing the interpretation of statutes the Board would still have jurisdiction because the Act was passed with a certain object and a tribunal constituted to carry out that object; consequently, that tribunal is vested with all the powers necessary to that end, even though such powers are not specially mentioned. Beauchamp, Jurisprudence of the Privy Council, p. 765, No. 127. If the appellants can defy the Board the power given respondents, under authority delegated by Parliament, would be set at naught and the orders of the Board would be utterly valueless.

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Under sec. 92 of the British North America Act, 1867, railways declared to be for the general advantage of Canada are excluded from the classes of subjects in relation to which the legislatures may exclusively legislate and, by sec. 91, the Parliament of Canada may legislate upon any matter not exclusively assigned to the provinces. This has been done by special Acts concerning the company and by the Railway Act. It is true this legislation in its operation affects a purely local company, but it does so only incidentally and without taking the right of crossing under certain conditions from the appellants. In many instances Dominion legislation incidentally affects provincial subjects, but the principle now well determined by jurisprudence is that the incidental effects of a federal law over provincial matters does not affect its validity. See Lefroy, Legislative Power in Canada, prop. 36, p. 416, prop. 37, p. 425 (*f*). Under such circumstances the balance of power being with the federal authority (secs. 91 and 92 B. N. A. Act) and local interests being subservient to general interests, the federal law must govern. Lefroy, prop. 46, p. 52 (*f*). Railways are the arteries of trade and commerce and the principal factors therein and conflicts between railways of the character in question in this case are of a nature to interfere with trade and commerce. It is therefore natural that the law to govern in such a case should be the federal law, the regulation of trade and commerce being assigned exclusively to the federal authority.

As to civil rights, all the appellants can claim is the right of constructing lines and branch lines in localities determined by its charter for the purpose of carrying passengers, and, incidentally, laying tracks for the purpose of establishing said lines. They can-

not, however, shew any law or statute authorizing them to obstruct any other railway, and yet that is what they have done wilfully and maliciously. Their object was not the construction of a line to carry passengers, but merely a wilful obstruction. How, then, has the Railway Act or the Board interfered with its civil rights? See Masten, Company Law, p. 90, No. 11.

The orders of the Board in June and September, 1904, have not been attacked, they are still in full force and effect and manifestly within the powers of the Board. This court ought not to interfere with the order of the 27th December, 1904, as it is merely a consequence of the previous orders and for the purpose of enforcing them.

*A. G. Blair* for the Board of Railway Commissioners for Canada. The order appealed from was necessary to enforce the former orders. The jurisdiction of the Board to make the orders made in June and September is not and cannot be questioned. The Board, consequently, was vested with all the necessary authority for the enforcement of the former orders, validily made in June and September, when they judged it proper to do so in deciding upon the respective rights of the applicant company and the contestants. Both parties appeared before the Board, submitted to their jurisdiction as a special tribunal, presented their respective contentions, and the decision they arrived at ought to be binding upon both of them.

THE CHIEF JUSTICE (dissenting).—This case comes up under sec. 44, sub-sec. 3, of the "Railway Act, 1903," by special leave, on an appeal upon a question of jurisdiction from an order of the Board

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of Railway Commissioners. The order appealed from, dated the 27th day of December, 1904, reads substantially as follows:

IN THE MATTER OF

The application of the Montreal Terminal Railway, hereinafter called "The Applicant Company" under sec. 23 of the "Railway Act, 1903," to the Board for an order directing the Montreal Street Railway Company to remove the two sets of rails which the said company has placed across the line of the applicant company in course of construction, and across the width of Ernest Street in line with the projected street known under the name of Pius IX. in the town of Maisonneuve.

WHEREAS by an order of the Board, dated the 8th day of June, 1904, the plans, profiles and books of reference of proposed branch lines of the applicant company along and upon Adams Street, Ernest Street, Sherbrooke Street, Orleans Street, LaSalle Street, and Second Avenue, in the Town of Maisonneuve, were approved and sanctioned subject to the terms and conditions of an agreement bearing date the 30th day of April, A.D. 1904, made between the Corporation of the Town of Maisonneuve and the Montreal Terminal Railway Co., the applicant company being also authorized to construct, maintain and operate the said branch lines;

WHEREAS by a further order of the Board, dated the 30th day of September, A.D. 1904, leave was granted under sec. 184 of the "Railway Act, 1903," to the applicant company to establish and operate its line of railway on Ernest Street, Orleans Street, Sherbrooke Street, LaSalle Street, Adams Street, and Second Avenue, in the Town of Maisonneuve, in accordance with the terms of the said agreement of the 30th of April, 1904;

WHEREAS this application was heard in the presence of counsel for the applicant company and for the Montreal Street Railway Company; and it appearing from the evidence adduced for the applicant company, under and by virtue of the above recited orders of the 8th of June and the 30th of September, 1904, had proceeded to establish and operate its line of railway along said Ernest Street, in the Town of Maisonneuve; and

WHEREAS during the night of the 15th of October, 1904, the Montreal Street Railway Company did lay double rails across the line of the railway of the applicant company, at the intersection of said Ernest Street with Pius IX. Avenue, thereby obstructing and impeding the establishment of the applicant company's line of railway as authorized by the said orders of the Board of the 8th of June and the 30th of September, 1904, said obstruction being in violation of the said orders—therefore

IT IS ORDERED

That the Montreal Street Railway Company do, at its own cost

and expense, remove, within forty-eight hours after the service upon it of this order, the rails and other obstructions so laid down by the said Montreal Street Railway Company at the intersection of Ernest Street and Pius IX. Avenue, in the Town of Maisonneuve, and restore the roadway as nearly as possible to its original condition.

In answer to the respondents' application to the Board for that order, the appellant company had pleaded as one of the grounds for their opposition to the respondent's application that:

The Town of Maisonneuve had no power to grant to the Montreal Terminal Railway Company and the Montreal Terminal Railway Company had no power to acquire from the Town of Maisonneuve the right to construct or operate branch or circuit lines by electricity in the town and the contract referred to as passed before Ecrement, Notary, on the 30th day of April, 1904, was *ultra vires* of the town and, moreover, could not under the statutes of the Province of Quebec, bind the said town, except with the approval and sanction of the municipal electors of the said town and the approval of the Lieutenant-Governor-in-Council, neither of which approvals had been obtained.

The appellants, by that plea, based their opposition to the order of the 27th December, 1904, which they now appeal from on the ground of the illegality of the two previous orders of the Board, one of June, 1904, and the other of September, 1904, which are the foundation, in express terms, of the last order, of 27th December last, now appealed from.

By the said order of June, the Board had decreed:

That the branch lines of the applicant company (the present respondent) as shewn on and by the plans, profiles and books of reference on file with the Board under No. 12957, file No. 643, be and the same are hereby approved and sanctioned, subject to the terms and conditions of agreement bearing date the 30th day of April, 1904, and made between the Corporation of the Town of Maisonneuve and the Montreal Terminal Railway Company;

That the applicant company be and they are hereby authorized to construct, maintain and operate the said branch lines.

And by the order of September, the respondent

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company were granted leave to establish and operate their line of railway on Ernest, Orleans, Sherbrooke, LaSalle and Adam Streets and Second Avenue, in the Town of Maisonneuve, Province of Quebec, in accordance with the terms of agreement entered into between the said applicant company and the Corporation of the Town of Maisonneuve, under the date of 30th April, 1904.

I understand that the majority of the court are of opinion that this appeal from the order of December should be allowed upon the ground taken as above by the appellants in their plea that the two previous orders referred to are illegal because they are based, as appears on their face, upon the contract with the Town of Maisonneuve of the 30th of April, 1904, which, as pleaded by the appellants, was *ultra vires* of the said town.

I have to dissent from that conclusion upon the simple ground that the said contract cannot be impugned by the appellant company in such a collateral proceeding as this one is, especially in the absence of one of the parties to that contract, the Town of Maisonneuve.

The Board of Railway Commissioners had not the power to set it aside. They had to treat it as in full force and effect. They might have suspended their proceedings, had the appellants applied for it, so as to allow them to regularly impeach the said contract and the by-law which authorized it before the provincial tribunals having jurisdiction in the matter. But in the absence of any application to that effect they had to treat it as legal and valid and give effect, as they have done, to their two first orders.

The appellants would have this court substitute itself, as a court of first instance, for the provincial

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tribunals of original jurisdiction in the matter. This in my opinion, we should refuse to do.

Though unnecessary for the determination of this appeal, in the view taken by the majority of the court, I feel in duty bound to say that there is, in my opinion, no foundation whatever for the appellants' contention that the "Railway Act, 1903," in any of the sections in question in this case or referred to by the parties, is *ultra vires* and unconstitutional.

The Railway Board's action would be paralyzed in its most important functions were their powers curtailed as the appellants contend they should be.

Its powers are extensive no doubt, but they necessarily had to be, in the public interest, for the efficient control and administration of the railway system of the country.

GIROUARD J. (dissenting), concurred with the Chief Justice.

DAVIES J.—This is an appeal granted by leave of a judge of this court under sec. 44 of the "Railway Act, 1903," from an order of the Board of Railway Commissioners made on the 27th December, 1904, ordering the immediate demolition and removal of an obstruction laid down by the Montreal Street Railway Company upon the road-bed for a railway built by the Terminal Railway Co. (respondents) at the intersection of Ernest Street and Pius IX. Avenue in the Town of Maisonneuve, and to restore the road-bed as nearly as possible to its original condition.

The only question for us to determine is whether the Board of Railway Commissioners had jurisdiction to make the order appealed from.

The road-bed of the respondents at the intersection of the two streets in the Town of Maisonneuve

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had been made after the company had entered into a contract with the town for the construction of an electric road, of which the road-bed in question formed a part, through the limits and along and across certain streets of the town.

A by-law, or resolution on which to base one, had been introduced into the town council and passed by it, authorizing a contract to be entered into with the respondents for the construction of this road, but it was admitted that such by-law had never as a fact been submitted to the ratepayers or to the Lieutenant-Governor-in-Council for approval as prescribed by sec. 481 of the Municipal Code of Quebec.

The 23rd section of the "Railway Act, 1903," confers upon the Board of Commissioners full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested and (*inter alia*) sub-sec. (*b*).

> requesting the Board to make any order or give any direction, sanction or approval which by law it is authorized to make or give.

I cannot have any doubt that in making any order within its jurisdiction the Board has full and complete power to make it effective, and that, if in the case before us the Board was invested with power to make an order on the subject of this obstruction, the form it adopted would not be open to the objections taken to it as infringing upon the powers and charter rights of a provincial railway or to property and civil rights within the province. I have had occasion so very lately to discuss the plenary powers which Parliament possesses to legislate under the enumerated sub-sections of sec. 91 of the B. N. A. Act, 1867, that I need not repeat my arguments here(1).

(1) *In re Railway Act*, 36 Can. S.C.R. 136.

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Then, as to the authority of the Board in this case we are referred to the 184th section of the Railway Act. It reads:

> The railway may be carried upon, along or across an existing highway upon leave therefor having been first obtained from the Board as hereinafter provided, but the Board shall not grant leave to any company to carry any street railway or tramway, or any railway operated or to be operated as a street railway or tramway, along any highway which is within the limits of any city or incorporated town, until the company has first obtained consent therefor by a by-law of the municipal authority of such city or incorporated town.

Sub-section 3 of the above section reads:

> Nothing in this section shall deprive any such company of rights conferred upon it by any special Act of the Parliament of Canada, or amendment thereof, passed prior to the present session of Parliament.

Several questions were discussed at the bar arising out of this section.

Mr. Belcourt contended strongly that the section did not apply at all because the provincial charter gave the company power to build it with the consent of the municipality, and that the charter granted by the Dominion Parliament subsequently (57 & 58 Vict. ch. 83) in its second section preserved this right to it. A careful comparison of the two charters convinces me that this contention cannot be sustained.

The Dominion charter prescribing exactly through what municipalities the roads the company (thereby made a Dominion corporation) were authorized to build should run, applying to the company and its undertaking the Dominion Railway Act, and making complete provision for the construction and operation of the undertaking it authorized, necessarily repealed the general powers of the provincial charter, giving general powers to build anywhere in the Island

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of Montreal. The powers conferred by the two charters were inconsistent, and the later Dominion legislation having been applied for by the company itself repeals the provincial legislation with which it is inconsistent, excepting in so far as any of the latter powers are specifically retained.

Mr. Belcourt argued that the power to build was retained by the 2nd section of the Dominion charter as being a "right or privilege acquired," but I think Mr. Campbell's answer was irresistible that the true meaning of the words of that section is that they apply only to assets and liabilities of the company, and not to its charter powers.

Even if that was not so, and if the company retained, after obtaining its Dominion powers, the full powers originally granted by the local legislature, I would have no hesitation in holding that the consent of the municipality which by the local charter was made a condition precedent of the right to build, meant a legal consent, a consent in the way and manner prescribed by the Municipal Act, a consent by by-law approved of by the ratepayers and Lieutenant-Governor-in-Council.

Then sec. 184 of the Railway Act applying what does it mean? It says:

> The railway (which by the interpretation clause in this case means the railway authorized by the Dominion charter) may be carried upon, along or across an existing highway upon leave therefor having been first obtained from the Board as hereinafter provided.

And then it goes on to provide that the Board shall not grant the leave until the company *has first obtained the consent of the municipality, city or town,* as the case may be. This consent of the municipality, to be evidenced by a by-law, is made a condition precedent to the exercise by the Board of its powers.

The method of evidencing that consent is by by-law, and this must, of course, comply with the requirements of the provincial law in that regard, defining what is necessary to constitute a valid by-law. In Quebec such a by-law must be approved of by the majority in number and value of the electors, proprietors of taxable real estate, as well as by the Lieutenant Governor in Council.

Two *ex parte* applications were made to the Board of Railway Commissioners by the respondent company, one in June, 1904, under the 175th section of the Railway Act, authorizing the construction of branch lines of not more than six miles in length, asking for the approval of plans of the company shewing the proposed lines of which this line in question is one, and the other on the 30th September, 1904, under the 184th section of the Act for leave to carry and operate its line along certain streets of Maisonneuve the line in question being one. Both applications were granted.

As to the former it is perhaps not necessary for me to express an opinion whether the clauses authorizing six mile branches apply to such an undertaking as that authorized by the respondent company's charter. Reading that charter carefully, as comprised in the two statutes, 57 & 58 Vict. ch. 83, and 62 & 63 Vict. ch. 76, I have no personal doubt that they do not, because it is evident that Parliament defined with great care the places through which and the extent to which the company might build, and the extension of the branch line sections into the charter would be quite inconsistent with its specific and definite provisions, and, in fact, be quite incongruous.

With respect to the latter order of the 30th September authorizing the running of the railway on the

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streets of Maisonneuve, it was an *ex parte* order made on the application of the Montreal Terminal Railway Co., and expresses upon its face to have been made upon the consent of the Corporation of the Town of Maisonneuve filed with the Board.

The Board knowing well that it could only make its order conditionally on the existence of a consent of the municipality evidenced by a by-law assumed the existence of such by-law and gave the order.

The railway company which made the application took the order at its peril. The consent referred to in the order does not profess in any way to say that the by-law had been approved as required by law, nor is there anything in the record from which such approval could be inferred.

Such approval was, in my opinion, necessary to the validity of the by-law and to enable the Board to make the order it did.

We are asked to presume that the by-law was submitted to the ratepayers and approved, but I think we cannot do that in the face of a by-law which professed to dispense with such an essential. Everything necessary to give validity to the proceedings of the Board in a case in which it has jurisdiction may well be presumed, but not the existence of facts on which the jurisdiction itself depends. And more especially not the existence of two essential facts necessary to the validity of a third fact, the by-law, where the third fact, the by-law, is proved, but the two others antecedent and indispensable facts are absolutely without mention, and nothing is said from which their existence could be inferred.

When the application was made for the order to remove the obstruction now in immediate question, the appellant company pleaded in answer not only the

absence of any proof of the facts, but also their *non-existence*. The Board, therefore, made the order now before us in this appeal with full knowledge that certain facts necessary to give them jurisdiction were non-existent and not proved or without appreciating the importance of the objection. In my opinion it is fatal to the validity of the order impeached which, therefore, must be set aside.

I have purposely refrained from entering into any discussion of the supposed rights of the appellants as it did not appear to be necessary for a decision of the only point here involved, viz.: the jurisdiction of the Railway Board to make the order.

The appeal should be allowed with costs against the respondents in this court and before the Railway Board.

NESBITT J.—I have had the opportunity of reading the judgment of my brother Davies, and while agreeing in the result, desire to add a few words as to my reasons for so concurring.

I think the Board of Railway Commissioners have full power to enforce any order which they may make in any case where they have jurisdiction; and that the fullest possible effect should be given to the language contained in the latter part of sec. 23 of the "Railway Act, 1903." The very object of the Act would be otherwise defeated if it was necessary to apply to the courts of the various provinces to enforce orders made by the Board.

The order, however, made in this case must be justified under secs. 177 and 184 of the Act, and, in order to bring itself under the latter, I think the applicant company must shew it has obtained an effective by-law of the municipality according to the provincial

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law governing the making of such by-laws by municipalities; at least in the absence of express federal legislation empowering the building of the railway without such formalities being complied with. In this case Parliament merely authorizes the building of the railway upon obtaining the consent of the municipality, which must be interpreted to mean consent in legal form, and in this case consent as defined by sec. 481 of the Municipal Code. This authority was expressly denied, and the only evidence before us shews a lack of such authority, and sitting as we do in appeal we have a right to examine the evidence essential to jurisdiction required by the 184th section of the Railway Act.

I express no opinion as to the application of the 175th section of the Act to electric tramways chartered to run between certain defined termini. The section was originally applicable to steam railways, which required short branches for the development of traffic arising from industrial or mining enterprises coming into existence near the main line, but by sec. 118 it may be very plausibly argued that Parliament has enabled any tramway chartered by it and declared to be for the general advantage of Canada to take advantage of the very extensive powers originally intended to serve public needs in the case of trunk lines.

I agree with my brother Davies as to the meaning to be attached to the words "right or privilege acquired" used in the second section of the Dominion Act referred to.

I would allow the appeal with costs.

IDINGTON J.—This is an appeal from the Board of

the Railway Commissioners for Canada under sec. 44, sub-sec. 3, of the Railway Act, which provides that:

> An appeal shall lie from the Board to the Supreme Court of Canada upon a question of jurisdiction.

Section 23 of the said Act gives jurisdiction to the Board to inquire into, hear and determine any application by or on behalf of any party interested within sub-sections (*a*) and (*b*) of the said section. The latter sub-section provides as follows:

> And the Board may order and require any company or person to do forthwith or within or at any specified time and in any manner prescribed by the Board so far as is not inconsistent with this Act, any act, matter or thing which such company or person is or may be required to do under this Act or the special Act, and may forbid the doing or continuing of any act, matter or thing which is contrary to this Act or the special Act, and shall have full jurisdiction to hear and determine, etc., etc.

The question raised here is whether or not what was complained of before the Board comes within the part of the section I have quoted.

It seems that the appellants and respondents are rival companies, which I will assume for the present (but I am not expressing or to be held as here expressing any opinion upon the point), had each the power to build railways in the Town of Maisonneuve upon fulfilling the conditions of law enabling them to operate within the said town.

The appellants anticipating their future operations, in the way of construction within the said town, whilst the respondent company were building the road along Ernest Street, laid down at the intersection of that street with Pius IX. Avenue, transversely across Ernest Street, three lengths of rails, forming a double track, as if to become part of the railway when built along Pius IX. Avenue. The appellants had not at

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the time in question built any part of their road upon Pius IX. Avenue, but, avowedly, were laying down this small portion of track in the hope of getting some advantage as the senior road, when the questions would come to be determined of the two roads crossing each other at this junction, the mode of affecting the crossing, and the burthen to be borne by the respective companies in relation to the establishment and continuation of said crossing.

I look upon that proceeding as highly irregular and that in doing it the appellant company stand in the same light as any one else, other than the railway company, in placing such an obstruction on the public highway would be in. Those doing any such act might be proceeded against, by the municipal authorities or ratepayers specially interested, or by the respondent company if they had acquired the right to lay a track upon Ernest Street and were obstructed thereby, in the ordinary courts of justice having jurisdiction in that behalf, to have such obstruction removed, and the parties putting it there restrained from a continuation of such obstruction, or laying down or erecting any such at any other place on the street over which the respondent company had a right to lay their track.

I cannot understand, on the facts, that what was complained of was anything more than any other obstruction that evil disposed persons might be guilty of placing upon the street for the purpose of obstructing the respondent company or any other purpose.

To make this clear let us turn to the paragraph of sec. 23 that I have quoted and analyze it. It enables as follows: The Board to

(1) Order and require any company or person to do * * * any act, matter or thing which such company or person is or may be required to do under this Act or the special Act.

(2) Forbid the doing or continuing of any act, matter or thing which is contrary to this Act or the special Act.

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How can the specific act complained of here be said to have been forbidden? Under what section of the Railway Act or any special Act were the appellants forbidden to do such an act as is complained of here?

Such an act, wholly irregular, never was contemplated as having been likely to occur and come within this Act, or the powers given the Board by this Act; or when done by anybody as requiring a new remedy to be applied by this legislation.

The only section upon which reliance has been placed in argument here, to shew that what has been done had been forbidden by the Act, is sec. 177. That section forbids one railway company to cross or join the lines or tracks of another railway company without the leave of the Board.

There were no lines or tracks in existence here. It is clearly a misapprehension to apply this section to projected lines that may never be built.

What the section forbids is plainly, any company presuming to take to itself the right, for purposes of making a crossing, to meddle with the railway lines or tracks of any other company without permission. Thus far the public safety required some properly constituted authority to have the power of control. It is the public and the public interests alone that are to be looked to in every question coming up for interpretation under this legislation. The Board has been specially constituted for that protecting purpose. The conflicting powers that may exist only in theory and are not brought into operation as between two

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companies are something with which the Board has nothing to do.

It can still less be said that the removal that has been ordered of this obstruction was something contemplated by the Act. It seems to me that the plain ordinary meaning of either set of words I am referring to does not convey such a meaning as to clothe the Board of Railway Commissioners with power to enforce the civil rights of any company as against those who may have trespassed upon their property or, in any of the numerous ways one can conceive of, invaded their civil rights.

The whole scope and purpose of the legislation constituting the Board and assigning it certain powers is that the acts of the railway companies, as such, and the railway companies in their relation to each other, as such, shall be governed and controlled by the Board.

I am not desirous of laying down here any rule (as to what is the power of government or control incidental to the main purpose of this legislation, and incidental to the jurisdiction thus defined) that will apply to all cases.

I am clear, however, that the exercise of such powers as have been conferred upon the Board must be restricted within the literal meaning of the words I have quoted and what is necessarily implied or to be implied incidentally to giving that literal meaning full force and effect.

To permit of a wrong, such as I take it the appellant company were guilty of here, to be remedied by the action of the court of the Board of Railway Commissioners, would be but to open the door to the exercise of a wide jurisdiction over the railway companies, or any of them, in their relations to any or all of

His Majesty's subjects in their dealings with or in opposition to a railway company and be beyond the scope of the "Railway Act."

I would suggest that when any question arises out of any such relationship, whether of a contractual character or in the nature of a trespass or other wrong, which is brought before the Board, they should be careful to ask whether what has been complained of has been forbidden specifically by the "Railway Act" or a special Act or regulations duly made by the Board as such, or a something that has been required by the "Railway Act" or special Act or such regulations to be done by a railway company. And if not, then the parties should be remitted to the ordinary tribunals.

In speaking of regulations I mean general regulations not specific orders. As to such orders though the Act seems to give them binding authority till appealed from or rescinded, that is not to be stretched too far. *Primâ facie* they are valid and are declared by the Act to be valid.

But if they directed one railway company to amalgamate with another and be constituted one, or assigned the Parliament buildings to a railway company, I need not say such an order would be void. What may be intended by declaring such orders valid is to protect those who act under them, even if the orders turn out *ultra vires*.

The remarks of some members of the Board seem to indicate a different view taken in this case, and that may have lead to what I think is error in this order.

There is, however, another ground that I think is well taken if we are to assume that the evidence upon which it rests and the legal presumption arising from

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such evidence as is before us will permit us to say that the point is well taken. The point I refer to is this: The respondent company claimed to have entered into an agreement with the Corporation of the Town of Maisonneuve, giving the respondent the right to use the streets of the said town for the purpose of running their cars over them.

This agreement rests upon nothing but a resolution of the council of the town. It is said that there is no evidence of the absence of a by-law. The agreement upon its face purports only to be pursuant to a resolution of the council, and the contention was set up before the Board that there was no by-law sanctioned by the people (and it was not denied), and therefore I think the presumption relied on cannot apply. No by-law was ever passed giving the consent which the agreement shews. The Railway Act, sec. 184, provides as follows:

> The railway may be carried upon, along or across an existing highway upon leave therefor having been first obtained from the Board as hereinafter provided, but the Board shall not grant leave to any company to carry any street railway or tramway or any railway operated or to be operated as a street railway or tramway along any highway which is within the limits of any city or incorporated town until the company has first obtained consent therefor for a by-law of the municipal authority of such city or incorporated town.

The Board in this case upon an *ex parte* motion, in June last, made an order approving and sanctioning branch lines of the applicant company

> subject to the terms and conditions of agreement bearing date the 30th day of April, A.D. 1894, and made between the corporation of the Town of Maisonneuve and the Montreal Terminal Railway Company.

and authorized the applicants to construct, maintain and operate the said branch lines.

On the 30th of September last, another *ex parte* order was made granting leave to the respondent to

establish and operate its lines of railway on Ernest and other streets in Maisonneuve in accordance with the terms of the agreement already referred to.

It was urged before us that it must be presumed from these orders that the Board acted regularly, and that it follows therefrom, as a presumption, that the necessary by-law of the municipal authority required by sec. 184 already referred to had existence, and that such may not only be presumed, but must be presumed until this order has been set aside.

I am unable to take that view. I think when the Board of Railway Commissioners had before them the facts stated on the application now in question and not controverted, that they should have observed that they had been led into error by the applicants as to these orders of June and September.

Moreover, I think it may well be said that when the Board made such orders the presumption was that they did not intend them to operate until consent had been got in the proper manner from the proper municipal authority.

I do not think there can be any question as to the intention of the legislature in enacting, as it has, in the Municipal Code. It is elementary law that every municipal corporation has only such powers as the legislature chooses to grant it. And the legislature, by art. 464 and art. 479, sub-secs. 4, 5, 6, of the Municipal Code, enacts as to the passing of by-laws as follows:

Art. 464:—Every municipal council has a right to make, amend or repeal by-laws, which refer to itself, its officers, or the municipality, upon any of the subjects mentioned in this chapter.

Art. 479:—Sub-sec. (4)—By acquiring the right of way in the municipality for any railway company, either by mutual agreement, or by paying the price of the lands necessary for that purpose, as established by an expropriation made for that purpose under the provision of the Railway Act.

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(5) To provide for the establishment, construction or running, within the municipality, of lines of omnibuses, stages or tramways driven by steam or electricity, undertaken and built by incorporated companies or by any person or firm.

(6)—To grant to any company, person, or firm of persons who undertakes or has already undertaken to establish, construct or run such lines of omnibuses, stages or tramways driven by steam or electricity, a privilege for laying rails and running omnibuses, stages or electric or steam cars over its roads and streets, or within the limits of the said municipality, and to grant such persons an exclusive privilege for ten years.

We have not been referred to any other power than is thus conferred.

Article 481 provides that:

Every by-law passed in virtue of the two preceding articles shall before coming into force and effect, be approved by the majority in number and in value of the electors being proprietors of taxable real estate who have voted in the municipality, and by the Lieutenant-Governor-in-Council.

No other power has been given the municipal authorities to speak on this subject. It is idle, in face of this, to argue that because a statute such as the special Act relied upon in this case has used the word "consent" without adding in what way to consent we are to infer some other power rather than that the law has expressly given.

There is only one lawful way in which the municipal authorities can exercise such high authority in the Province of Quebec. Elsewhere the need of such a restriction upon municipal councils has been much felt.

It would be rather shocking to find and tell the people of Quebec province, who are thus far in advance of others, that such proper legislation was of no avail to protect the ratepayers' municipality in the way it was intended they should be protected by restricting the authority of the council in such cases

until the people had expressed their will in the usual way.

I am satisfied also that sec. 184 I have quoted is not any authority for the Board of Railway Commissioners to act in any other case than where the consent of the municipal authority has been given by by-law.

The saving clause, sub-sec. 3 of that section, which the respondent's counsel relied upon, does no more than preserve the rights conferred by any special Act of the Parliament of Canada.

If any such company should have, independently of the Board of Railway Commissioners, authority to run over the streets of any city or town that must stand. It is not affected by the will of the Commissioners or the authority given to the Commissioners.

To give effect to the presumptions alleged to exist in this case would be to permit the respondents to take advantage of their own wrong.

I think it may well be laid down as a principle of action for all who apply to the Board of Railway Commissioners in cases such as we have before us that the utmost good faith should be observed.

I do not wish it to be inferred that I think that in this case there was any intentional bad faith. I rather infer that it was a mistaken view of the law that led to the present position of matters.

I think the appeal should be allowed. I do not think there should be any costs to either party. Though the appellants have succeeded on the law their conduct was such as should not be encouraged

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in any way. They are entirely to blame, in attempting to do what they did, for all the expense and trouble that has ensued including this application.

*Appeal allowed with costs.*

Solicitors for the appellants: *Campbell, Meredith, Macpherson & Hague.*

Solicitors for the respondents: *Dandurand, Brodeur & Boyer.*

JAMES P. LANGLEY (PLAINTIFF) ....APPELLANT.

AND

WALDEMAR KAHNERT (DEFENDANT) ..... RESPONDENT.

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*June 8.

*June 13.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Title to goods—Sale or transfer—Retention of ownership—R.S.O.* [1897] *ch.* 148, *sec.* 41.

K., a manufacturing furrier, by agreement with a retail trading company, placed a quantity of his goods with the latter which could sell them as they pleased, paying on each sale, within 24 hours thereafter, the price mentioned in a list supplied by K. K. had the right to withdraw from the company any or all such goods at any time and all remaining unsold at the end of the season were to be returned. While still in possession of a quantity of K.'s goods the company made an assignment for benefit of creditors and they were claimed by the assignee.

*Held*, affirming the judgment of the Court of Appeal (9 Ont. L.R. 164), which maintained the verdict for defendant at the trial (7 Ont. L.R. 356) that the property in and ownership of the goods never passed out of K. and the transaction was not one within the terms of R.S.O. [1897] ch. 148, sec. 41.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment at the trial (2) in favour of the defendant.

The facts of this case are stated in the following admissions signed by counsel for the respective parties.

"The plaintiff and the defendant by their counsel for the purposes of this action mutually agree to admit the following to be facts, to be added to by such evidence as either party sees fit to offer at the trial:

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Idington JJ.

(1) 9 Ont. L.R. 164. (2) 7 Ont. L.R. 356.

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"The defendant was a manufacturing furrier, also engaged in the retail fur trade, during the time that the matters in question arose. The plaintiff is the assignee for creditors of the Richard Simpson Company, Limited, lately doing business on Yonge street, Toronto. The Richard Simpson Company became insolvent and assigned to the plaintiff on or about January 16th, 1903.

"Early in November of 1902, the Richard Simpson Company and the defendant entered into an arrangement by which the defendant agreed to place with the Richard Simpson Company to be exposed for sale, at their place of business, certain furriers' goods for which that company gave to the defendant, amongst others, the receipts produced. The goods so to be placed were manufactured by the defendant, but bore no mark or label containing the name or address of the manufacturer. The arrangement was verbal, no attempt being made to comply with the provisions of R.S.O. ch. 149 (if applicable, which is not admitted by the defendant), nor with the provisions of sec. 41, R.S.O. ch. 148 (if applicable, which likewise is not admitted by the defendant). The Richard Simpson Company were to have the right to sell any of such goods to whom they pleased, without reference to Kahnert, and for such prices as they saw fit, but the company undertook to pay to the defendant within twenty-four hours after any sales being made of such goods, the amounts of the net cash prices placed by the defendant upon such goods so sold, and the company had the right to retain for itself any sum realized on such sales over and above such fixed net prices. The defendant had the right to withdraw from the Richard Simpson Company any or all such goods at any time. During the season certain goods

so placed were at the defendant's request returned to him by the Richard Simpson Company. Any of the said goods unsold by the Richard Simpson Company, at the end of the season, were to be returned to the defendant. The goods were at first placed with the Richard Simpson Company only until the 1st of January, but later it was arranged that they might be kept for an indefinite further period. By agreement these goods, while with the Richard Simpson Company, were to be at their risk as to loss or destruction by burglary, fire, etc. When these goods were sent out by the defendant they were entered in a special account in his shipping book at pages 132 and 133. Whenever the Richard Simpson Company remitted proceeds of sales of such goods the defendant entered the same as part of his cash sales upon the date of receipt as "cash received from sales of merchandise."

"Certain other goods were sold by the defendant to the Richard Simpson Company during the same period on terms of credit, 7 per cent. off for payment within thirty days, and 10 per cent. off for payment within ten days. These goods were entered in a separate account in the shipping book of the defendant at page 250. Some of this latter class of goods, taken in the first place by the Simpson Company on approbation, were retained by them without payment and treated by both parties as part of the account first above mentioned.

"At the time of the assignment to the plaintiff the Richard Simpson Co. had a large quantity of the aforesaid goods in their possession, which the plaintiff went into possession of along with the general stock, but which, on demand of the defendant and under threat of action, the plaintiff handed over to the defendant, without prejudice to the rights of creditors

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of the Richard Simpson Co., and pursuant to the terms of four certain letters now produced which passed between Messrs. Anglin & Mallon, acting for the defendant, and the plaintiff and his solicitor. The goods so handed over are, with the exception of one article (a mink ruff, No. 533, $15.00), the articles contained in the list produced and market Exhibit 1 on the examination of the defendant for discovery. All the articles contained in the said list were articles placed with the Richard Simpson Co. under the agreement first above mentioned, except No. 16, a coon and Persian caperine, $15.50; No. 19, coon and Persian caperine, $15.50; No. 20, Isabella fox ruff (557) $30.00, and No. 29, mink ruff (533) $15.00, not returned. These four articles were sent to the Richard Simpson Co. upon sale account, but "on approbation," and were never returned by the Simpson Co. They remained in the hands of the company at the time of the assignment, either still on approbation or treated by the parties as part of the goods under the agreement first above mentioned.

FRANK A. ANGLIN,
*Counsel for defendant.*
W. R. SMYTH,
*Counsel for plaintiff.*"

The plaintiff contended that under these facts the arrangement was governed by sec. 41 of R.S.O. [1897] ch. 148, which is as follows:

41—(1) In case of an agreement for the sale or transfer of merchandise of any kind to a trader or other person ,for the purpose of resale by him in the course of business, the possession to pass to such trader or other person, but not the absolute ownership until certain payments are made or other considerations satisfied, any such provision as to ownership shall be against creditors, mortgagees, or purchasers be void and the sale or transfer shall be deemed to have been absolute, unless. * * * *

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*A. C. Macdonell* for the appellant cited *Ex parte White*(1); *Mason* v. *Lindsay*(2).

*Day* for the respondent referred to *Helby* v. *Matthews*(3); *Whitfield* v. *Brant*(4); *Ex parte Bright* (5).

THE CHIEF JUSTICE.—It seems to me clear that Simpson & Co. never bought the goods now in question from the defendant, and never were possessed of them *animo domini*. They were invested by the defendant with the *jus dispondendi*, but not exclusively.

The fact that the defendant had at any time, as long as they remained in the company's store, the right to have them returned to him, at his will, seems to me totally incompatible with any claim of ownership by the company. It was surely *his* goods that would be so returned, not the company's, and on the date of the assignment they had never ceased to be his property. And I fail to see how a sale can be implied where on the face of the agreement there was actually no sale.

As to those now in question the defendant never had an action against the company for goods sold and delivered. He never was as to those a creditor of the company. That he became their creditor by the assignment, as appellant would contend, seems to me untenable. I cannot see that this assignment cut out the defendant from the right he had under the agreement of ordering the goods back to his own store; nor how it would have the effect of forcing on the company a purchase which, under their agreement, they had a right to make but never made.

It is argued, however, by the appellant that by sec.

(1) 6 Ch. App. 397.
(2) 4 Ont. L.R. 365.
(3) [1895] A.C. 471.
(4) 16 M. & W. 282.
(5) 10 Ch.D. 566.

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41, ch. 148 R.S.O., the absolute ownership of the goods must, as against him, be deemed to have passed to the company. That section reads as follows:

> In case of an agreement for the sale or transfer of merchandise of any kind to a trader or other person, for the purpose of resale by him in the course of business, the possession to pass to such trader or other person, but not the absolute ownership until certain payments are made or other considerations satisfied, any such provision as to ownership shall as against creditors, mortgagees or purchasers be void and the sale or transfer shall be deemed to have been absolute * *

This case, in my opinion, is not governed by that section.

These goods cannot be said to have been intended for a *resale* by the company. The word resale would import, in this case, if appellant's contention prevailed, that the defendant had sold them, but he never did. Neither was there any agreement for a sale by the defendant to the company of goods to be resold by them. There was to be no sale at all by the defendant to the company at any time, where the company sold the goods to third parties in the course of their business. When the company sold it was not their title to the ownership of the goods that they passed to the purchasers; they never had it. Till then it had remained in the defendant. The statute contemplates a sale or transfer by which a conditional or qualified ownership passed, or an ownership with a resolutory clause on default of payment, such as was the case, for instance, in *Forristal* v. *McDonald*(1), or *Banque d'Hochelaga* v. *Waterous Engine Works Co.*(2). When it says that the *absolute* ownership shall only pass under certain subsequent conditions it assumes that a qualified ownership had previously passed.

(1) 9 Can. S.C.R. 12. (2) 27 Can. S.C.R. 406.

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The Chief Justice.

Now here, I repeat, none whatever had passed to the company as to the goods now in question.

Had Kahnert failed instead of the company and assigned to his creditors, these goods would have passed to his assignee. The company could not have refused to deliver them up on the ground that they were their property.

I would dismiss the appeal with costs.

SEDGEWICK, DAVIES and NESBITT JJ. concurred.

IDINGTON J.—The defendant delivered some goods to the Richard Simpson Company, and got them back, after the company had made an assignment, without prejudice to the rights of either party to this suit. The learned trial judge, Sir William Meredith, stated in his judgment the facts upon which the questions raised here are to be disposed of:

> The arrangement was that the Simpson Company might sell the whole or any part of the goods to whomsoever they chose, and for such price, and on such terms as they might see fit; but they were, whenever a sale was made, to pay in cash to the defendant the price of the article sold, according to a price list which was furnished to them by the defendant when the goods were from time to time delivered to the Simpson Company. The company had also the right, according to the testimony of the defendant himself, whether they had made a sale or not, to become the owners of the whole or any part of the goods at the prices named in the list, and they had also the right at any time to return the whole or any of the goods which remained unsold.

Upon this concise statement of facts, which the appellant admits to be correct, it is contended that the Simpson Company having made an assignment to the appellant under and pursuant to R.S.O. 1897, ch. 147, and amending Acts, the title to the goods in question passed to him as such assignee. The company never

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Idington J.

did anything in the way of asserting the right to become purchasers of these goods.

As between the parties the respondent was entitled at the time of the assignment to a re-delivery of the goods by the Simpson Company.

It is claimed, however, that the provisions of sec. 41 of the Bills of Sale and Chattel Mortgages Act, R.S.O. ch. 148, had the effect upon and by virtue of this assignment of defeating this right and vesting the title to the goods in the assignee. The section reads as follows:

> 41.—(1) In case of an agreement for the sale or transfer of merchandise of any kind to a trader or other person for the purpose of resale by him in the course of business, the possession to pass to such trader or other person, but not the absolute ownership until certain payments are made, or other considerations satisfied, any such provision as to ownership shall as against creditors, mortgagees or purchasers be void, and the sale or transfer shall be deemed to have been absolute, unless * * in writing, etc.

The transaction not being in writing is not within the exception in the section, and, therefore, the questions raised must turn upon the interpretation of these words I have quoted.

It is not possible to call what took place a sale. It is urged that it was a transfer, and that as such it is within this section.

I am unable to understand how this helps the appellant unless the word "transfer" is given an unusual meaning and one that does not truly and correctly represent the transaction here.

There was nothing in the transaction in the way of the conveyance of right, title or property.

The company became merely the bailees of the property; and their right to it or dominion over it never extended beyond that, and never was intended to ex-

tend beyond that, until something should be done that never was done.

The section presupposes, by its very words, that there is some provision made between the parties; by the agreement it strikes at, that relates to such a conditional or suspensive ownership as if got out of the way would leave the property vested in the debtor. It makes or purports to make "such provision as to ownership" as against creditors void.

There was only one possible thing here that had or could have had any relation to ownership, and that was the option of the bailee to purchase. If that is made void what remains?

Having regard to the long past history by which the common law rights governing dealing with personal property have been invaded by one restriction after another for the purpose of protecting innocent purchasers and creditors, or one or other of them, and the principles of interpretation applicable to such legislation, I think it would be manifestly erroneous to give this latest attempt a wider meaning than the learned trial judge and the Court of Appeal have given it.

One can imagine many cases in every day's transactions in which, by giving to this section the meaning we are urged to give it here, the property of innocent men would be exposed to seizure under execution for debts they knew not of.

It is only the same right as an execution creditor would have that this kind of assignee has.

I think the appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *W. R. Smyth.*

Solicitors for the respondent: *Day & Ferguson.*

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*May 8, 9.
*June 14.

FRANCOIS GOSSELIN (PLAINTIFF) APPELLANT.

AND

THE ONTARIO BANK (DEFENDANT) RESPONDENT.

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

*Sale of goods—Suspensive condition—Term of credit—Delivery—Pledge—Shipping bills—Bills of lading—Indorsement of bills—Notice—Fraudulent transfer—Insolvency—Banking—Bailee receipt—Brokers and factors—Principal and agent—Resiliation of contract — Revendication—Damages—Practice—Pleading* — 52 *Vict. ch.* 30, *secs.* 64, 73.

The absence of the indorsement on bills of lading by the consignee therein named is notice of an outstanding interest in the goods represented by the bills and places persons proposing to make advances upon the security of those bills upon inquiry in respect to the circumstances affecting them. On failure to take proper measures in order to ascertain these facts and obtain a clear title to the bills and goods, any pledge thereof must be assumed to have been made subject to all rights of such consignee. The Chief Justice dissenting.

*Held, per* Taschereau C.J. dissenting:—Where a sale of goods has been completed by actual tradition and delivery the mere absence of the consignee's indorsement upon shipping bills representing the goods made in the name of the vendor cannot have the effect of reserving any right of property in the vendor. If the goods have been sold upon terms of credit, the unpaid vendor has no right to revendicate such goods after they have passed into the possession of a third person in the ordinary course of business, and, in the present case, on failure of the conservatory seizure and in the absence of any right of the plaintiff to revendicate the goods, the alternative relief prayed for by his action should not be granted.

APPEAL AND CROSS-APPEAL from the judgment of the Court of King's Bench, appeal side, by which the judgment of the Superior Court, District of Mon-

*PRESENT:—Sir Elzéar Taschereau, C.J., and Girouard, Davies, Nesbitt and Idington, JJ.

treal (Pagnuelo J.) (1) in favour of the plaintiff was reduced to $2,667.10 and modified accordingly.

The following statement of the circumstances of the case is taken from the notes of reasons for the judgment of His Lordship, Mr. Justice Pagnuelo, at the trial.

"The plaintiff sued for the recovery of 5,324 bales of hay and 54 bills of lading granted by several railway companies to the plaintiff in May, 1894, and prayed that the defendants should be ordered to return the hay and the bills of lading, and in default, condemned to pay him $5,244.50. He alleged that he agreed to sell hay to the firm of Marsan & Brosseau at $8.50 per ton; that he loaded the hay on cars at various railway stations and took said bills of lading, from the railway companies, in his own name, consigned to himself at New London, Conn., New York and Boston; that he forwarded the bills to Marsan & Brosseau as evidence of the shipments, without being indorsed by him, thereby retaining the ownership in the hay represented by the bills of lading; that there were in all 54 cars of a value of $5,244.50; that Marsan & Brosseau illegally transferred the bills of lading to the Ontario Bank, without the plaintiff's indorsement and without paying for the hay; that Marsan & Brosseau are notoriously insolvent, and were insolvent at the time of the transfer by them of said bills of lading to the bank, to the knowledge of said bank; that Marsan & Brosseau had no right to transfer the bills of lading to the bank and the bank acquired no right in them, gave no value and received them in fraud of the rights of the plaintiff, and for the purpose of obtaining an undue preference over the creditors of Marsan & Brosseau; and the plaintiff also

(1) Q.R. 26 S.C. 430.

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prayed for the resiliation of the sale by him to Marsan & Brosseau and to be acknowledged as the owner of the hay and of the bills of lading;

"The bank, after a general denial, pleaded that Marsan & Brosseau became the owners of the hay sold by plaintiff to them; that the bills of lading were not made with the object of enabling plaintiff to retain the ownership of the hay until paid for; that plaintiff well knew that Marsan & Brosseau had no means to pay for the hay except either by delivering the hay and obtaining the money from the purchaser, or by pledging the bills of lading with a bank for the purpose of obtaining advances thereon; that the hay in question was intended to be shipped to foreign parts, and the bills of lading were delivered to Marsan & Brosseau to enable them to finance the adventure; that at the time of the institution of the action the bills of lading were not in the possession of the bank, nor the hay represented thereby; that at the time of the transactions Marsan & Brosseau were believed to be merchants in good standing and solvent, and the bank dealt with them and made advances in good faith, in the usual course of business and for valuable consideration; it denied having received the bills of lading in fraud of the rights of the plaintiff or of the creditors, or for the purpose of obtaining an undue preference over them; that neither the hay nor the bills of lading were found nor seized in the possession of the bank, which is not liable to return the same nor to pay the value of the hay.

"There was no allegation or pretension that the bills of lading were ever indorsed by anybody, and there is the allegation that the hay and bills of lading were no longer in the bank's possession. This last allegation, as a matter of fact, was not true, because

the bills of lading were under its control and the hay was under its control, in fact being on the way at the time and still on this continent.

"It appears from the evidence that the hay in question was to be shipped to England to be sold there, and that the railway receipts or inland bills of lading were to be exchanged for ocean bills of lading through Marsan & Brosseau or their agents, and sold in England also through the same agents; that plaintiff's name was entered on said railway receipts as shipper and consignee for the purpose of retaining the control over said hay and of retaining the ownership thereof until paid, the plaintiff expecting the ocean bills to be made to his order as shipper and consignee; that Marsan & Brosseau on receiving said railway receipts from plaintiff forwarded to him bills of exchange at 30 days, some of which bills of exchange the plaintiff discounted at his own bank and retired when due; the others he returned to Marsan & Brosseau after they became bankrupt on the 28th of May, 1894; that the bank made advances to Marsan & Brosseau upon these railway receipts, without the personal indorsement of the plaintiff and upon the sole indorsement of Marsan. I have come to the conclusion that all the advances made on that hay were made on the shipping bills or railway receipts, although the manager of the bank declared that 26 cars had been pledged to the bank by Marsan & Brosseau upon ocean bills obtained by them, in their favour, and indorsed by them. * * I find, also, in his evidence, statements which enable me to say that all the advances made on this hay were made on railway receipts.

"When the railway companies were presented with those railway receipts with the name of Gosselin and then the name of Marsan & Brosseau on, they would

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make no objection and take the signature of Gosselin as being genuine; therefore they made no objection to giving in their stead ocean bills to the order of Marsan & Brosseau. That was done to the knowledge of Mr. King all the time. * * He explains that at the time of the suspension of business by Marsan & Brosseau the bank had on hand 20 shipping bills, and these shipping bills were transferred by the bank to their own agents without any indorsement at all, and * * ocean bills were obtained * * without indorsement, so the bank had to give a guarantee to the railway companies on account of a large number of cars for which ocean bills were asked to be made in the name of the bank without indorsement by Gosselin. The witness continues 'but in the ordinary course of business Marsan & Brosseau would take those from me on a bailee receipt and exchange them for the ocean bills payable to their order, which I would negotiate in the regular way.'

"It is evident then from this that the advances were made to Marsan & Brosseau on those railway receipts because Mr. King would not part with them afterwards and deliver them over to Marsan & Brosseau to be exchanged for ocean bills without taking a bailee receipt for them, thereby constituting Marsan & Brosseau the bank's agent to exchange those bills of lading. It was then their property. If it had not been their property, they would have had no business to take a bailee receipt and constitute Marsan & Brosseau the bank's agents for that purpose. * *

"So long as Marsan & Brosseau carried on their business, and until they stopped carrying on their business on the 28th May, the bank always used Marsan & Brosseau as their agents to exchange the bills of lading. After that they had no more use for Mar-

san & Brosseau, and they transmitted these railway receipts to their agent, to make the exchange for ocean bills, and then it was that the bank gave their letter of guarantee to the railway company. * *

"Mr. King was sure that the railway receipts were indorsed by Marsan & Brosseau by putting on the name of Gosselin, and so he was aware of the transaction all the time. The evidence goes on; 'Q. You are sure they were indorsed? A. Yes. Q. Then you remember of having these bills of lading in your hands —the original bills? A. No, I do not remember.' How is that if he made all the advances on the railway receipts which he handed back to Marsan & Brosseau as their trustee, and bailee receipts, to be exchanged for ocean bills? He repeats that in so clear a manner that I must take his words, especially when they are against the bank, as I must say he has been a very reluctant witness in the case. He first started by saying that he could give no information, that all the books of the bank relating to this transaction were burnt years ago, when they moved into new offices, and they burned all their old books, and he forgot to tell his assistant not to burn the books relating to this matter. I must say he was very reluctant to give us the facts in this case, but one by one the facts came out and now we have his evidence before us which settles that matter so far as I am concerned.

"Marsan & Brosseau would therefore by authority from plaintiff indorse plaintiff's name on said receipts, and the bank knew that Marsan & Brosseau signed plaintiff's name, and never objected; and Marsan & Brosseau acted only as agents and bailees for the bank in exchanging said bills. * *

"I now come to that part of the case which has

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been brought out in the evidence, but was not pleaded specially,—that every time a car was sent to Marsan & Brosseau by the plaintiff, along with the railway receipt, Marsan & Brosseau would at once make a bill of exchange upon themselves for the amount of the car, accept it and send it over to the shipper. Gosselin says that he made this agreement with Marsan & Brosseau. He had already sold them a large quantity of hay for years, and at the time when these cars were loaded they were his debtors for over $3,000. He would not advance them any more and he made a special bargain with Marsan that he would put the railway receipts to his own order. * *

"At the time of the action plaintiff's hay was in the possession of the bank under the bills illegally and wrongfully transferred to it by Marsan & Brosseau; the plaintiff never agreed to part with the hay in question until he was paid for the same, and he retained the legal possession and control of the same by shipping on railway receipts to his own order as shipper and consignee; the plaintiff, by taking Marsan & Brosseau's drafts and discounting some of them for his own accommodation, did not thereby release his control of the hay; if Marsan & Brosseau had no means to pay for the hay except by pledging it, such pledge could not legally be made without the plaintiff's consent and signature when he would see to the payment of his claim, while, by ignoring plaintiff's rights under said railway receipts, Marsan & Brosseau have used the advances made by the bank upon the railway receipts, for the satisfaction of other and previous claims of the bank against Marsan & Brosseau, or of other creditors of Marsan & Brosseau;

"The evidence shews that the money received was

put to the credit of Marsan & Brosseau, in their bank account, who drew thereon their own cheques to pay previous debts they had at the time, and even that part of the money was used for paying over $5,000 to the bank upon a previous shipment of hay. * * The hay had to be unloaded from the ship, to be stored and other expenses had to be incurred. The bank became nervous, and when they received from Marsan & Brosseau 32 railway receipts, including some of Gosselin's and some from other traders, upon which they wanted advances to be remitted to England, on bills of lading, as I have just stated, Mr. King sent a letter to Marsan & Brosseau returning the bills of exchange, but retaining bills of lading, and saying that he would agree to open to them an overdraft account to the amount of $1,900 upon the 32 cars covered by so many bills of lading that he had in hand; he would not credit them in the bank account for the amount, but he would allow them to overdraw their account to the extent of $1,900, and, if they sent other railway receipts to make 75 altogether, he would raise the overdraft to the amount of $4,000.

"Marsan & Brosseau had to submit to this and say nothing. They sent other railway receipts, altogether to the amount of 75, and the power to over-draw was raised to the amount of $4,000; but two days afterwards the bank obtained from Marsan & Brosseau two cheques to the amount of $5,000 to cover the bank against probable loss in England on the hay which had already been shipped; that is, they used the 75 cars to cover previous advances. That was against the law as it stood then, * * at that time it could not be done; that transaction was evidently for the object of covering past advances. Marsan & Brosseau were to overdraw $4,000, but they were asked to give

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two cheques of over $5,000 to pay drafts sent to England with hay previously shipped to England. There are statements in the record to shew that those $5,000 were paid for a certain number of drafts discounted, so that the money which Marsan & Brosseau obtained on that occasion from the bank * * was used to pay a previous debt of the bank.

"It is true that plaintiff intrusted Marsan & Brosseau with the railway receipts for the purpose of exchanging them for ocean bills of lading, as the hay was intended to be shipped to England, but he had reason to expect that the ocean bills would be made to his order, or his consent for the substitution of another consignee on the ocean bills of lading would be asked.

"As the transaction took place those railway receipts indorsed by Marsan with Gosselin's name and his own name, were replaced by ocean bills to the order of Marsan & Brosseau, who handed them over to the bank, and so Gosselin lost all his rights. * *

"I consider, therefore, that the plaintiff never parted with the legal possession of his hay, that he never indorsed and never authorized Marsan & Brosseau to indorse for him his name on the said railway receipts." * *

The following exhibits, filed of record, shew the conditions of the shipping bills which have been referred to:

"EXHIBIT D 1. Shipping Receipt Central Vermont Railway, representing 19 others in the same form.

St. Alexander, P.Q., May 8, 1894.

"RECEIVED FROM FRS. GOSSELIN,

BY CENTRAL VERMONT RAILROAD.

"The property described below, in apparent good

order, except as noted (contents and conditions of contents of packages unknown), marked, consigned, and destined as indicated below, which said company agrees to carry to the said destination, if on its road, otherwise to deliver to another carrier on the route to said destination.

"It is mutually agreed, in consideration of the freight charged for this service, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, shewn or indorsed hereon, and which are hereby agreed to by shipper and by him accepted for himself and his assigns as just and reasonable.

| MARKS, CONSIGNEES AND DESTINATION. | DESCRIPTION OF ARTICLES. | WEIGHT, SUBJECT TO CORRECTION. |
|---|---|---|
| C. V. 4623<br>N. D. 2797<br>Frs. Gosselin<br>New London, Ct.<br>to London, England<br>New York, N.Y.<br>Via for Central Vermont Railroad. | One car hay, 104<br>One car hay, 99 Bales<br><br>For export O. R. of<br>F. & W. | |

W. SMITH,
*Freight Agent.*

90 GEO. H. JANEWAY,
New York, N.Y.

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"EXHIBIT NO. 21.—Shipping Receipt Canadian Pacific Railway representing two others in the same form.

"CANADIAN PACIFIC RAILWAY COMPANY.

"This company will not be responsible for any goods mis-sent, unless they are consigned to a Station on their Railway. Rates, Weights and Quantities entered on receipt of Shipping Notes by shippers or their agents are not binding on the Company, and will not be acknowledged. All goods going to or coming from the United States will be subject to Customs' Charges, etc.

St. John's, Que., May 16, 1894.

"*RECEIVED from* FRS. GOSSELIN *the undermentioned Property, in apparent good order, addressed to*

FRS. GOSSELIN,

New York.

*to be sent by the said Company, subject to the terms and conditions stated above and upon the other side, and agreed to by the Shipping Note delivered to the Company at the time of giving this Receipt therefor for export to London, Eng.*

| No. OF PACKAGES AND SPECIES OF GOODS. | MARKS. | WEIGHT, LBS. | BACK CHARGES. |
|---|---|---|---|
| One car Hay. | | 20,000 More or less | |

96 bales shipper's count

Owner's risk of fire and water.

Soo Line car 6622.

Via St. Polycarpe Malone & Adirondack div. of N. Y. C. & H. R. Ry.

care of WM. JAMES, New York.

(Signed) L. P. TIMMONS, *Agent C.P.R.*"

"EXHIBIT NO. 24.—Shipping Receipt Grand Trunk Railway representing three others in the same form.

"GRAND TRUNK RAILWAY COMPANY OF CANADA.

"This Company will not be responsible for any Goods mis-sent, if they are consigned elsewhere than to a Station on its Railway. Rates, Weights and quantities entered on Receipts or Shipping Notes are not binding on the Company, and will not be acknowledged. All goods going to or coming from any place out of Canada will be subject to Customs' charges, etc.

Coaticooke, Date, May 16th, 1894.

*"RECEIVED from* FRS. GOSSELIN *the undermentioned Property, in apparent good order, addressed to*

FRANCOIS GOSSELIN,
New York for export to
London, England.

*to be sent by the said Company, subject to the terms and conditions stated above, and to those upon the other side of this shipping receipt, and to the terms and conditions of the current classification of freight and tariff, all of which are agreed to by the shipping note delivered to the Company at the time of giving this receipt therefor, as a special contract in respect of said property.*

"A charge of not less than $1.00 per car per day, or fraction thereof, will be made when cars are delayed beyond 48 hours in loading or unloading.

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| No. of Packages, Species of Goods, said to be | Marks. | Quantity or Weight, Lbs., said to be | Back Charges. |
|---|---|---|---|

One car Hay
(95 Bales more or less)
at owner's risk of fire and water.
G.T.R. Car 8554.
Via Coteau, Malone and Adirondack Div. N. Y. C. & H. R. R. R.
care WM. JAMES, New York.
(Signed) GEO. PINKHAM, *Agent G.T.R.*"

Finally, the learned judge concludes: "The transfer of said hay by Marsan & Gosselin to the Ontario Bank being illegal, and having transferred to the bank no right to the possession or ownership of said hay, the bank was the wrongful possessor thereof, and therefore the plaintiff was entitled to seize the hay and the bills of lading in their hands; the bank has disposed of the hay and is responsible to the plaintiff for its value; whereas 53 cars of hay have been so transferred to the bank, containing hay to the value of $3,190.90, according to exhibits p. 28 and p. 29, for which the sum of $256.46, dividend received from Marsan & Brosseau's estate, must be deducted, leaving a balance of $4,934.44.

"The sale by plaintiff to Marsan & Brosseau of the hay in question is cancelled, the plaintiff is declared to have been and to be owner of said hay and bills of lading, and I condemn the Ontario Bank to deliver over to the plaintiff the said hay, and bills of lading within fifteen days, and on default thereof, to pay the plaintiff the sum of $4,934.44 with interest from the service of this action on the 7th of June, 1894, and costs."

On appeal, the Court of King's Bench, appeal side,

by the judgment now appealed from, considered that the proof of record did not justify so large a condemnation against the bank, but that Gosselin had a right to recover the value of the hay contained in 27 of the cars only, and reduced the amount of the judgment accordingly.

The plaintiff now appeals, seeking to have the judgment of the trial court restored, while the bank asserts the cross-appeal to be entirely relieved from liability. The questions at issue on this appeal are discussed in the judgments now reported.

*Brodeur K.C., Aimé Geoffrion K.C.* and *Gosselin* for the appellant and cross-respondent, cited *McGillevray* v. *Watt*(1); *Baile* v. *Whyte*(2); McLaren on Banks and Banking, pp. 149, *et seq.;* arts. 1065, 1492, 1497, 1745, 1902, 2421 C.C.; Benjamin on Sales (7 ed.) p. 372—3rd, 4th, 5th, and 6th principles—p. 373—reservation of the *"jus dispondendi"*—p. 356 and secs. 386-387, "jurisprudence"—p. 715, sec. 697—"transfer by indorsement and delivery of bills of lading; 3 R.L.N.S. p. 441; *Gilmour* v. *Letourneux*(3); *Canadian Bank of Commerce* v. *Stevenson*(4); *Bank of Hamilton* v. *Halstead*(5).

*Lafleur K.C.* and *Kenneth P. Macpherson* for the respondent and cross-appellant, referred to arts. 1488, 1499, 1543, 1739, 1740, 1745, 1746, 2420-2422, 1978, 2268, C.C.; arts. 5643-1546 R.S.Q.; "The Banking Act, 1890," 53 Vict. ch. 31, sec. 73; 42 & 43 Vict. ch. 19 (Que.); 4 Am. & Eng. Encycl. of Law, 547; 2 Encycl. of Laws of England, 123; Benjamin on Sales (7 ed.) pp. 372, 373, 856; Campbell on Sales of Goods and Commercial Agency, p. 265; and cited the decisions

(1) 31 L.C. Jur. 49, 278.
(2) 13 L.C. Jur. 130.
(3) Q.R. 1 Q.B. 294.
(4) Q.R. 1 Q.B. 371.
(5) 28 Can. S.C.R. 235.

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in *Crowell* v. *Van Bibber*(1); *Merchants Bank of Canada* v. *Union Railroad and Transportation Co.*(2); *Emery's Sons* v. *Irving National Bank*(3); *Fowler* v. *Meikleham*(4); *Fowler* v. *Stirling*(5); *Molsons Bank* v. *Janes*(6); *Johnson* v. *Lomer*(7); *Moss* v. *Banque de St. Jean*(8); *McGillevray* v. *Watt*(9); *City Bank* v. *Barrow*(10); *Coxe* v. *Harden*(11); *Browne* v. *Hare* (12); *Joyce* v. *Swann*(13); *Van Casteel* v. *Booker* (14); *Key* v. *Cotesworth*(15); *Ex parte Banner; re Tappenbeck*(16); *Exchange Bank* v. *City and District Savings Bank*(17); *Brandao* v. *Barnett*(18); *London Chartered Bank of Australia* v. *White*(19); *Thompson* v. *The Molsons Bank*(20); *Insky* v. *The Hochelaga Bank*(21).

THE CHIEF JUSTICE (dissenting).—J'opinerais pour le maintien de l'appel de la banque, et le renvoi de l'action de Gosselin et de son appel. Il n'a pas crû, et avec raison en face de la preuve, pouvoir soutenir devant nous l'allégué de sa déclaration qu'il n'avait pas fait une vente complète du foin à Marsan *et al.* mais qu'il s'en était réservé la propriété jusqu'à paiement, et a entièrement abandonné cette prétention. Il n'a pas même cité les décisions sur lesquelles il aurait pu en loi l'étayer, la preuve le lui eusse-t-elle permis. *Forristal* v. *McDonald*(22); *La Banque d'Hochelaga* v. *Waterous Engine Works Co.*(23). Et la cour dont est appel a fait une juste appréciation des

(1) 18 La. Ann. 637.
(2) 69 N.Y. 373.
(3) 18 Am. Rep. 299, at p. 303.
(4) 7 L.C.R. 367.
(5) 3 L.C. Jur. 103.
(6) 9 L. C. Jur. 81.
(7) 6 L.C. Jur. 77.
(8) 15 R.L. 353.
(9) 31 L.C. Jur. 49, 278.
(10) 5 App. Cas. 664.
(11) 4 East 211.
(12) 4 H. & N. 822.
(13) 17 C.B.N.S. 84.
(14) 2 Ex. 691.
(15) 7 Ex. 595.
(16) 2 Ch. D. 278; 24 W.R. 476.
(17) 14 R.L. 8.
(18) 12 Cl. & F. 787.
(19) 4 App. Cas. 413.
(20) 16 Can. S.C.R. 664.
(21) Q.R. 10 S.C. 510.
(22) 9 Can. S.C.R. 12.
(23) 27 Can. S.C.R. 406.

faits, quoique je ne puisse adopter les conclusions qu'elle en a tirées, en basant son jugement, non pas sur une promesse de vente ou une vente sous condition suspensive ou résolutoire mais bien sur une vente actuelle et effective. "La vente était parfaite," dit justement le savant juge en chef Lacoste au nom de la cour. Et le demandeur, Gosselin, ne le conteste pas dans son factum, pas plus qu'il ne l'a fait à l'audition.

Il l'a d'ailleurs admis sous serment dans son affidavit pour jugement contre Marsan *et al.* La cour de première instance avait aussi en termes précis annulé la vente; c'était, en termes non équivoques, admettre qu'il y en avait eu une; on n'annule pas ce qui n'a jamais existé.

Or, il en étant ainsi comme question de fait, il en ressort nécessairement qu'en loi Marsan *et al.* sont devenus *instanter* propriétaires absolus de ce foin. Et la présomption, qu'en mettant les connaissements ou lettres de voiture en son nom le demandeur s'en était réservé la propriété, est complètement écartée.

La vente est parfaite (décrète l'art. 1472 C.C.), par le seul consentment des parties quoique la chose ne soit pas encore livrée,

et le contrat d'aliénation d'une chose certaine et déterminée rend l'acquéreur propriétaire de la chose par le seul consentement des parties, quoique la tradition actuelle n'en ait pas eu lieu, dit l'art. 1025; et ceci s'applique aussi bien aux tiers qu'aux parties contractantes, dit l'art. 1027; de Folleville, de la Possession des Meubles, page 161; Demolombe, Oblig. vol. 1er. No. 409. Ainsi les créanciers du demandeur n'auraient plus eu le droit de saisir entre ses mains le foin ainsi vendu à Marsan *et al.;* Demolombe, Oblig. vol. 1er, No. 472; Larombière, Oblig. sous art. 1141, No. 18; *Young* v. *Lambert*(1).

(1) 6 Moo. P.C. (N.S.) 406.

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Et pourquoi? Parceque tant vis-à-vis les tiers que vis-à-vis le demandeur, Marsan *et al.* étaient devenus les propriétaires actuels du foin, même en supposant qu'ils n'en auraient pas été mis de suite en possession. Le demandeur n'avait certainement plus le droit, lui, de le vendre ou donner en nantissement à la banque ou à qui que ce fût. Quelqu'un cependant devait avoir ce droit. On ne peut, comme le prétendrait le demandeur, concevoir, sous les circonstances, l'idée d'un article de commerce frappé d'indisponibilité. Et, si le demandeur n'avait plus le *jus disponendi* c'est parce qu'à Marsan *et al.* seuls il était passé. Il est impossible pour le demandeur de prétendre qu'il était convenu entre ses acheteurs et lui qu'ils n'auraient pas le droit de revendre. C'était pour revendre, et uniquement pour revendre, et revendre avec toute la diligence possible, et il le savait, qu'ils achetaient. Et de plus, il n'ignorait pas qu'ils étaient, dans l'intervalle, dans l'impossibilité de le payer aux termes convenus sans obtenir sur nantissement du foin les fonds nécessaires pour ce faire. Si le demandeur eût insisté sur la condition que ses acheteurs n'auraient pas, quoique propriétaires, le droit de revendre ou mettre en gage, ces derniers lui auraient tout simplement dit qu'il devait bien savoir qu'avec cette condition toute transaction entre eux était impossible.

Maintenant, si Marsan *et al.* sont devenus propriétaires du foin, ils ont pu transférer leurs droit à la banque qui, en vertu des articles sus-cités, est devenue propriétaire absolue même avant tradition; 2 Aubry & Rau, par. 183, No. 6. Sa bonne foi n'a pas été mise en doute ni par l'une ni par l'autre des cours provinciales et ne pouvait l'être.

Le demandeur repose toute sa cause contre la banque sur ce prétendu manque de tradition. Mais, en

fait et en loi, sa position n'est pas tenable. Marsan *et al.*, dès leur achat, laissant de côté pour le moment le fait de la tradition manuelle des connaissements, sont devenus par leurs agents et voituriers, les seuls possesseurs actuels, *manû*, de ce foin, possesseurs *pro emptore*. Ils en ont dès lors eu en fait le contrôle exclusif, *corpore et animo dominantis*, engagé les voituriers, payé le fret, et auraient été les seules victimes, avenant le cas de perte *in transitû*. A eux seuls auraient été payables les dommages qu'auraient pu causer les fautes des voituriers dans le transport. Les faits de la cause repoussent complètement la proposition du demandeur, qu'en mettant les connaissements en son nom, il se soit réservé la possession légale. Ces connaissements ne sont pas même à ordre, mais en son seul nom comme personne dénommée. Lyon Caen & Renault, 5 Dr. Comm. No. 701, 713, *et seq.*; Buchère, Valeurs Mobilières, No. 451. Et d'ailleurs, ce n'est pas la possession légale des connaissements dont il s'agit, c'est la possession de fait, la possession matérielle du foin même.

Or cette possession de fait, le demandeur s'en était complètement dessaisi. Sa propre déclaration l'allègue spécialement. Son jugement contre Marsan *et al.* en est, d'ailleurs, une admission non équivoque. Il a cessé de posséder *animo dominantis* ce qu'il avait vendu. Et c'était dans l'unique but de permettre à ses acheteurs de revendre aussitôt possible ou d'obtenir de la banque, si nécessaire, les avances pour le payer lui-même, qu'il les avait constitués les porteurs des connaissements et les possesseurs du foin. *Molsons Bank* v. *Janes* (1) ; *Fowler* v. *Meikleham* (2). Il n'avait aucune intention d'aller lui-même à New York ou à Boston, et savait parfaitement qu'il lui

(1) 9 L.C. Jur. 81. (2) 7 L.C.R. 367.

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aurait été impossible d'exiger que les connaissements lui fussent retournés pour son endossement avant que la revente fût possible. Il doit être présumé, sous les circonstances, avoir autorisé Marsan *et al.* à transférer les connaissements et à signer son nom au dos d'iceux, si nécessaire. Il n'a obtenu leur consentement à acheter qu'à la condition qu'ils pourraient revendre ou mettre en gage à leur gré. Il espérait, sans doute, qu'ils le considéraient comme créancier privilégié, et verraient à ce qu'il fût le premier payé sur le produit de leur revente, et c'est dans ce seul but qu'il a mis les connaissements en son nom tout en les mettant en possession actuelle du foin comme propriétaires. Il a été deçu en cela; ses acheteurs l'ont trompé, mais la banque ne doit pas être la victime. Sur lui seul doivent peser les conséquences de l'abus par ses acheteurs de la confiance qu'il avait reposée en eux.

Je retourne à la prétention du demandeur qu'en mettant les connaissements à son nom seul, il n'est pas censé avoir livré le foin à Marsan *et al.,* en supposant que ce moyen lui compète malgré l'admission contraire que comporte le jugement qu'il a pris contre eux. Lui est-il possible de soutenir que les tiers dans le commerce, et surtout la banque vis-à-vis qui depuis longtemps il avait montré la plus grande confiance dans Marsan, étaient tenus de traiter la tradition manuelle à eux des connaissements comme illusoire, sans but, et sans aucune conséquence? Mais pourquoi les leur remettre, pourquoi les en faire les porteurs? N'était-ce pas pour qu'ils s'en servent, pour qu'ils en retirent le bénéfice? Ces connaissements constituaient des droits incorporels, des titres à des droits contre les voituriers, des *indicia* de la propriété.

*Pickering* v. *Busk* (1); *Cole* v. *North Western Bank* (2). Or ces titres, quoique non à ordre ou au porteur, pouvaient être vendus ou cédés. Ils n'étaient pas frappés d'inaliénabilité. Or comment pouvaient-ils être vendus ou cédés? Par la délivrance manuelle, dit la loi, ou par un transport formel. La délivrance à Marsan *et al.* les en constituait vis-à-vis les tiers les acquéreurs par le fait même. La vente des créances et droits d'action contre des tiers est parfaite entre le vendeur et l'acheteur par la délivrance du titre, s'il est sous seing privé, et, vis-à-vis le vendeur ou cédant, l'acquéreur ou cessionnaire en est de suite saisi. L'article 1570 C.C. le dit expressément.

Et, dit l'art. 1494, la délivrance des choses incorporelles se fait par la remise des titres. Même eussent-ils été à ordre l'endossement de ces connaissements par Gosselin n'était pas nécessaire pour les transmettre; leur négociation aurait pu se faire au moyen d'une cession ordinaire et dans les termes du droit commun. C'est ce que la cour de cassation a expressément décidé dans plusieurs causes, entre autres celles citées au No. 35 de Sirey, Code Annoté, sous l'art. 1690, C.N.; voir 4 Bravard, Dr. Comm. page 382; Lyon Caen & Renault, vol. 5, Dr. Comm. No. 701. Et par l'art. 1573, il n'y a que les billets pour la livraison de grains ou autres choses payables à ordre qui peuvent être transportés par endossement. Les titres nominatifs à une personne dénommée, comme ceux au porteur, sont donc transportés par la simple délivrance. Et l'art. 2421 qui ne donne le droit de transporter un connaissement par endossement que pour un connaissement à ordre laisse à douter si un endossement par Gosselin de titres payables à lui seul comme ceux-ci l'étaient, aurait conféré à ses acheteurs

(1) 15 East 38. (2) L.R. 10 C.P. 354.

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plus ou même autant de droits que la délivrance manuelle l'a fait. Ils sont devenus à toutes fins que de droit investis du *jus disponendi* et des connaissements et du foin.

Laissant ces considérations de côté, à tous points de vue de la cause, le demandeur eût-il quelques droits contre la banque, son action en revendication et en demande de résolution de la vente à Marsan *et al.* faute de paiement du prix ne peut-être maintenue.

D'abord par l'art. 2268 du Code Civil, la possession actuelle par la banque à titre de propriétaire, tant des connaissements que du foin en question même, empêche la revendication, la banque étant aux droits de commerçants en pareilles matières et les ayant acquis dans le cours ordinaire de leur commerce. Beauchamp, Code Civil, sous art. 2268, No. 14. Cet article (il est bon de noter) s'applique maintenant expressément au contrat de nantissement par le statut 42 & 43 Vict. ch. 18, sec. 1, passé depuis la décision de la chambre des lords dans le cause de *City Bank* v. *Barrow*(1).

Puis par l'art. 1999, le vendeur non payé n'a pas d'action en revendication de la chose vendue si la vente a été faite à terme ou si la chose vendue est passée entre les mains d'un tiers qui en a payé le prix. *Moss* v. *Banque de St. Jean*(2); Troplong, Priv. & Hyp. 185 à 200. Et par l'art. 1543, le droit de résolution d'une vente de meubles faute de paiement du prix ne peut-être exercé qu'autant que la chose reste en la possession de l'acheteur, en sa possession physique et ostensible.

Or. ici, le demandeur l'admet, la vente à Marsan était à terme; de plus, il l'allègue lui-même, la banque était, lors de l'institution de l'action, en possession

(1) 5 App. Cas. 664. (2) 15 R.L. 353.

actuelle et du foin et des connaissements, et elle en avait payé le prix. Bédarride, Achats et Ventes, No. 328. En ne saisissant pas le foin *in transitû* entre les mains du voiturier, le demandeur a admis que Marsan *et al.* et la banque en avaient été mis en possession actuelle. *Rogers* v. *Mississippi and Dominion S.S. Co.* (1) et causes y citées. Le demandeur, sentant la force de cette objection à son action telle que formée, a tenté d'y répondre en invoquant l'équité contre le texte même de la loi. "Si je n'ai pas droit de revendiquer, dit-il, j'ai un droit d'action contre la banque, soit en dommages, soit parcequ'elle s'est approprié sans droit ce qui m'appartenait,—ou un privilège ou droit de préférence sur ce foin, ou enfin un droit quelconque, et mon action ne peut-être déboutée." C'est là une proposition qui n'est pas soutenable. S'il n'a pas droit à l'action telle qu'il l'a prise, elle doit être renvoyée purement et simplement, sauf à juger du mérite de toute nouvelle action qu'il peut juger à propos d'intenter quand elle viendra devant nous. De son action en revendication, qui est une action réelle, il ne peut faire une action personnelle. Il est loisible sur une telle demande sans doute, de prendre alternativement des conclusions personnelles. Mais ces conclusions subsidiaires doivent nécessairement tomber avec l'action principale, si elle n'est pas fondée. Il n'y a lieu à les accorder que dans le cas où le droit à la demande en revendication étant fondé, les meubles en litige ne peuvent pas être remis au demandeur parcequ'ils ne sont plus en la possession du défendeur. Il va de soi que si la demande en revendication est non fondée parceque le défendeur était légalement propriétaire en possession, l'action en son entier doit être déboutée. Le fait que la demandeur n'a pu saisir ne peut sup-

(1) 14 Q.L.R. 99.

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pléer la base légale qui a manqué à l'action dès son origine.

On nous a cité un grand nombre de causes. J'y applique en bloc le *dictum* si rationel de Lord Halsbury dans la cause de *London Joint Stock Bank* v. *Simmons*(1) :

> No one case can be an authority for another when the solution rests upon the evidence.

Tant qu'à la loi qui régit le litige, il ne peut y avoir de doute, et les parties n'en ont point soulevé. La loi commerciale anglaise n'a de force dans la province de Québec que dans des cas exceptionels sous aucun desquels la présente cause tombe.

GIROUARD J.—The whole difficulty, as I understand it, arises from a misconception of the true nature of the contract of sale agreed to by the parties, although I believe the case is a very plain one. The original bills of lading were issued in favour of the appellant, who did nothing to deprive him of the rights he acquired under the same and the agreement; that is the whole case. He should succeed.

The contract of sale was perfect and binding by their mere consent as held by the courts below, although the thing sold was not delivered; arts. 1025, 1472, C.C.; but it was subject to a suspensive condition or condition precedent that the property and its legal possession were not to pass till the price was paid; arts. 1087, 1473, 1475, C.C.; and that was the reason why all the railway bills were issued consigned to the appellant, who also appeared as the shipper. Thus both parties had their respective rights secured, the purchaser by getting manual possession of the bills of lading, and the vendor by announcing to

(1) [1892] A.C. 201.

the world that the property was not to pass without his order. Neither could sell or pledge without the consent of the other as long as the contract was in force. This is found by the two courts below and proved beyond doubt, in my opinion.

The appellant alleges in his declaration that he "agreed to sell," etc. As I understand the meaning of these words they are synonymous to "did sell," for a sale is not possible without an agreement; it is a contract. All the judges seem to have thus considered the transaction. It is suggested that as plaintiff admits in his affidavit for judgment by default against Marsan & Brosseau that they bought from him (*achetaient de moi*) the hay in question, it was a simple and ordinary sale, and not one suspended by a condition precendent. But this is not the full statement of the plaintiff, for he commences his affidavit by declaring *"Les faits relatés dans la déclaration sont vrais."* The declaration fully sets up the suspensive condition, and when a few lines lower down he says that Marsan & Brosseau bought the hay, he evidently meant and said that they did so in the manner and form alleged in his declaration.

He alleges in his declaration:

> That the said bills of lading for the said hay were forwarded to the said defendants Marsan and Brosseau as evidence to them of each of the said shipments, but the said bills were not indorsed by the said plaintiff and the said plaintiff retained, until paid and settled for, the ownership and proprietorship of the said hay as represented by the said bills of lading.

This appeal involves no difficult legal question; the law applicable to a case like the present one has been laid down in very clear terms by this court.

First, we have the decision rendered in 1883 in

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*Forristal* v. *McDonald*(1), where the plaintiff had assigned crude oil to A., who was a refiner, on the express agreement that no property in the oil should pass until he made up certain payments, and he, without making such payments, had sold the oil to the defendants for value. The court held that the plaintiff, having retained the property in the oil and not having done anything to estop him from maintaining his right of ownership, was entitled to recover from the purchaser the price of the oil.

In a more recent case of *Banque d'Hochelaga* v. *Waterous Engine Works Co.*(2), in 1897, this court held that a sale, made subject to a suspensive condition that the property should not pass until the price be paid, is valid, and that no property passes till the payment is made. This court, by a majority judgment confirming the Court of Appeal, went so far as to hold that in such a case the thing sold, in that instance machinery incorporated with an immoveable, can be claimed by the vendor even against an hypothecary creditor in good faith and for value, although the sale had not been recorded in any public office, or published anywhere, and the incorporation had been done with the consent of the vendor or owner of the machinery. The present case is not similar except as to the effect of a suspensive condition. Chief Justice Strong apparently speaking for the court said, at page 413:

> The contract of sale may by English law be modified in any way the parties may agree, and in particular it is open to them to suspend the operation of the general effect of the contract in respect of the vesting of the property in the vendee, and to provide that it shall not pass until the price is fully paid. It has, however, been assumed, and I accept it as a settled point in the case, that the law of the province of Quebec is to furnish the rule of decision in the present case. No proof of the law of Ontario was made and the court had a right, therefore, to assume that it

(1) 9 Can. S.C.R. 12. (2) 27 Can. S.C.R. 406.

was identical with the law of Quebec upon the point involved, as indeed it is. Then it cannot for a moment be pretended that there was anything illegal in this stipulation that the vendor should retain the property. Mr. Justice Würtele fully explains the principles of the French law on this head, and the authorities he refers to and the extracts he has given from Laurent and Aubry & Rau, beyond all question state the law correctly. To these authorities, that of many other authors might be added.

The judges of the two courts below have not referred to the above cases, especially the latter one. As it is a Quebec case they thought that the rule was hardly open to any doubt or discussion. Mr. Justice Pagnuelo, the trial judge, says so in express terms and finds only the facts to be somewhat complicated. They all agree that under the railway bills no property and no legal possession passed to Marsan, Brosseau or any one else.

They only differ upon the appreciation of the facts. Both courts have found, as a matter of fact, that 27 cars of the hay had been pledged to the bank by Marsan & Brosseau under the railway bills of lading, and as to these cars both courts condemned the bank to pay the value of the hay. But as to the balance of the hay contained in the 26 cars, the Court of Appeal would not adopt the conclusion of the trial judge, as, in their opinion, the plaintiff had not sufficiently proved that the hay in these 26 cars had been pledged to the bank, under the railway bills of lading, although no comment is made upon the evidence. As to those cars, simply remarks Chief Justice Lacoste, plaintiff's remedy is against the railway companies.

There is no doubt that as to the 27 cars, ocean bills of lading were obtained and delivered to the bank after the advances had been made on the railway bills.

Mr. King, the manager of the bank, admits this in his first deposition. He was, however, "a very reluctant witness," observes Mr. Justice Pagnuelo. The

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learned judge, in a long opinion where he fully reviews the evidence, finds that all the fifty-three cars had been pledged to the bank under the original railway bills. I am inclined to agree with him in this finding of fact. The bank knew that there were original railway bills for the 26 cars as well as for all the other cars, which had all been held by the bank and were given up only to obtain ocean bills. As much is also admitted by Mr. King:

Q.—Will you please look at these shipping bills. I see the name of the consignee there is the plaintiff, not Marsan & Brosseau; how could Marsan & Brosseau negotiate these bills of lading with you without indorsement?

A.—I understand they were in the habit of negotiating them in that way continuously: I was informed so at the time, and I was informed by the agent of the Central Vermont Railway, that he would issue through bills of lading for any documents of that kind.

Q.—Would not the other shipping bills be made to the same order, that is the ocean shipping bills?

A.—No, the ocean shipping bills would be to Marsan & Brosseau.

By the court:

Q.—To Marsan & Brosseau?

A.—Yes.

By plaintiff's counsel:

Q.—And you were having these ocean bills made to replace these?

A.—Yes, because Marsan & Brosseau had stopped business at that time, but in the ordinary course of business, Messrs. Marsan & Brosseau would take those from me on a bailee receipt, and get them exchanged for the ocean bills, payable to their order, which I would negotiate in the regular way.

Q.—Were you negotiating the transfer of these shipping bills for ocean bills yourself?

A.—After Messrs. Marsan & Brosseau stopped business, yes—not before.

Q.—And you were asking the railway companies to make the ocean bills in the name of Marsan & Brosseau, for bills of lading that were consigned to other parties?

A.—No, not after they stopped business.

By the court:

Q.—Before they stopped business?

A.—Before they stopped business the exchange was made by Marsan & Brosseau, not by the bank.

By plaintiff's counsel:

Q.—But at the time the exchange was made you had advanced upon the bills of lading?

A.—Yes.

Q.—You had made your advances upon the bills of lading before the bills of lading were exchanged for ocean bills?

A.—Yes.

Q.—And it was Marsan & Brosseau who were obtaining this transfer after the bills of lading had been negotiated with you, by advances made by you?

A.—Yes.

Q.—How was that?

A.—They would arrange for shipment of the stuff from Boston or New York, or wherever it might be, and I would hand them such receipts as these in trust.

Q.—Who to?

A.—To Marsan & Brosseau.

Q.—You would return the bills of lading in trust to Marsan & Brosseau.

A.—Yes, on what we call a bailee receipt, and Mr. Marsan or his agent or whoever it might be, would take them to the railway office and bring back to me the ocean bills of lading payable to their order which would be attached and dispatched to the parties to whom they might be selling the stuff on the other side.

This language is plain enough. Mr. King has not corrected it in any way, although he was examined twice at great length, first in January, 1903, when he appeared as the first witness for the plaintiff, and the second time a year after when he was the last witness for the bank. The fact that he was the general manager of the bank and the very man who had personally attended to the banking operations of Marsan & Brosseau is of considerable importance. Under arts. 315 and 316 of the Code of Civil Procedure, it is the testimony of the party. The trial judge relies upon that given in the first place when the mind of the witness, interested as he was, was free from the influ-

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ence of the developments and discoveries of a long *enquête* and trial, and I cannot for a moment suppose that an appellate court is in just as good a position as he was to appreciate that testimony. It is indeed very remarkable that it agrees entirely with the issue as then joined between the parties, as we will see in a few moments.

It is said that witness Sutton, the bookkeeper of Marsan & Brosseau, throws a different light upon the transactions. As I read his long deposition he does not; and, moreover, he cannot speak with accuracy on this matter. He speaks from the books of Marsan & Brosseau, kept by him nine years before, which are not complete, the car book and others having been accidentally burnt, and even if complete cannot make evidence against the plaintiff. He declares several times that he had nothing to do with the banking business of the firm, nor the papers necessary to carry it out; all this was always attended to by Mr. Wilfrid Marsan personally; he is sure he never spoke once to Mr. King about it. He says:

> Je n'ai jamais eu de pourparlers avec Monsieur King pour le compte de la banque. * * *
>
> Q.—Est-ce que vous ne prépariez pas les papiers pour la banque?
>
> R.—C'est lui même, Marsan, qui voyait à cela. Il avait cela sous sa charge.

And he repeats several times:

> Ce n'est pas moi qui faisais les affaires de banque. C'est Monsieur Marsan qui escomptait cela et puis il m'apportait le resultat.

He knows so little of the transactions with the bank and how they were conducted that he never mentions the "bailee receipts" referred to by Mr. King. It is not upon testimony of this kind that the evidence of the manager of the bank can be ignored. The trial

judge did not do so, and I think no appellate court ought to disturb his finding. This finding is so true that, before the bank got the last ocean bills of lading through W. P. Holland & Co., its agents, after the insolvency of Marsan & Brosseau, it granted to the railway company on the cars on which the hay was being carried, a letter of guarantee that the railway company will not suffer by reason of issuing ocean or through bills without the indorsement by the shippers of the railway bills.

The railway companies evidently thought that Marsan & Brosseau, as in previous years, could obtain ocean bills without the order of Gosselin, but that the bank could not after their insolvency. They all could do so validly, by making ocean bills consigned to Gosselin. This might not have been practical, but we have nothing to do with inconveniences. The clear way to get over this difficulty was to disinterest Gosselin and pay what was due to him. By issuing these ocean bills to the order of Marsan & Brosseau or W. P. Holland & Co., the railway companies misunderstood their obligation or duty; possibly they may be responsible to Gosselin for the loss, as suggested by the Court of Appeal, but their mistake did not give a title to the bank, because it knew that these ocean bills were substitutes for the railway bills issued in favour of appellant; in fact this substitution was done at the request of the bank. The Court of Appeal so held as to 27 cars and I cannot see how, on the evidence, a distinction can be made as to the other cars.

In neither the declaration nor the pleas is a word said of the ocean bills of lading. Issues are raised between the parties as to the original railway bills only, and the bank claims as holder of the said bills

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and not as holder of ocean bills. When examined *sur faits et articles,* a short time after joining the issue before the trial, the bank was asked:

Q.—28. N'est-il pas vrai que vous avez vendu le foin représenté par les connaissements (bills of lading) dont il est question en cette action et que vous en avez perçu le produit?

R.—Oui.

This answer, which has been overlooked by the court of appeal, according to the express enactments of our codes, constitutes what is termed a judicial admission, *un aveu judiciare,* and the bank cannot afterwards be allowed to contradict it, unless error or mistake be alleged and proved. Arts. 364 to 363, C.P.Q.; art. 1245, C.C.

I, therefore, agree with Mr. Justice Pagnuelo that the bank should pay the price of the 53 cars, namely, the sum of $4,934.44, less the sum of $125, admitted by both parties to be a final dividend received by Gosselin out of the insolvent estate of Marsan & Brosseau, the whole with interest and costs in all the courts.

I have said nothing of six cars which, as argued by the appellant, with 20 cars, were deducted by the Court of Appeal, because it is conceded that, as to these six cars, no ocean bills were issued at the time any advance was made, and therefore the bank must have obtained the hay upon the original railway bills.

I might content myself with these few remarks, but as the case is one of considerable commercial importance I will endeavour to review all the objections presented at the argument.

It is contended by the bank that the sale was not one for cash, and that consequently under art. 1888, C.C. the vendor could not proceed by revendication, and his action must be dismissed *in toto.* I am not prepared to concede that it was a credit sale.

True, Marsan & Brosseau subsequently sent Gosselin drafts for the full amount of the purchase money to help him to pay the farmers who had supplied the hay; not one draft was met at maturity and many were returned when they assigned a few days after. This course was adopted only to accommodate Gosselin and not to change the character of the sale. The paper was not accepted in payment or settlement of the price. The bills of lading remain in the same position as before; there was no indorsement, no order of delivery, no receipt or discharge, and Gosselin had past experience for not doing so as Marsan & Brosseau were his debtors for over $3,000 upon transactions of the preceding year, which were all closed by railway bills consigned to them. And finally, how can it be said that a sale which is suspended and can take effect only when the price is paid is not a cash sale in law?

Perhaps it was, in fact, a credit sale, but a credit sale is capable of a suspensive condition and it is especially to protect the vendor in such a case that the condition stipulated by him becomes effective and beneficial.

But suppose it was a credit sale in law and in fact, and granting that a writ of revendication could not be resorted to, can we not maintain the main prayer of the declaration that the sale be rescinded and that a personal condemnation be made for the payment of the price against both the parties who appropriated and converted to their own use and benefit both the railway bills and the proceeds of the hay? The revendication was a mere accessory process in the cause which might succeed or not, and finally was not granted by the courts below, as nothing was found to seize, but its defeat cannot be, and in the opinion of

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the two courts below was not, fatal to the demand, which was entirely independent of the right to revendicate. They maintained the conclusions of appellant's demand, which were as follows:

> That by the judgment to be rendered herein the said agreement or promise to sell said hay to the said defendants Marsan & Brousseau be resiliated and cancelled and the said hay declared to be the property of and returned to the said plaintiff and the said bills of lading as representing the same, and the said defendants, Marsan & Brousseau, and the said other defendants the Ontario Bank, ordered to return to said plaintiff the said above mentioned hay and the said bills of lading as representing the same within such delay as this honourable court shall fix, and in default of which that the said defendants may be jointly and severally adjudged and condemned to pay and satisfy to the said plaintiff the said sum of five thousand two hundred and forty-four dollars and fifty cents with interest.

In the face of arts. 1065, 1087, 1473, 1497, and 1543, of the Civil Code, it cannot be seriously contended that they have erred in doing so. Chief Justice Lacoste correctly, it seems to me, lays down the true rule of law in these few words:

> C'est en vertu d'une règle commune aux contrats en général reproduite dans l'article 1065 que Gosselin exerce son droit. "Dans le cas de contravention du débiteur (dit cet article) le créancier peut demander la résiliation du contract d'ou naît l'obligation!" Ici l'obligation de payer le prix n'a pas été remplie, le vendeur peut demander la résolution du contrat de vente. Cette régle est confirmée par l'article 1545 C.C. au titre de la vente. S'il n'en était pas ainsi, le vendeur serait dans une situation absurde. Marsan & Brousseau étant en faillite, l'article 1497 le dispensait d'effectuer la livraison et il serait toujours resté en possession du foin qui n'aurait pas été sa propriété. Telle n'a pu être la volonté du législateur.

The respondent insisted strongly upon arts. 1488, 1489 and 2268, of the Civil Code, as permitting a pledge consented to as security for advances made or to be made under the Quebec statute passed in 1879, 42 & 45 Vict. ch. 19. But there are in those articles, as

well as in that statute, several conditions required for the validity of the sale or pledge. It is not sufficient that the goods be obtained from "a trader dealing in similar articles." The pledgee must be in possession (arts. 1966, 1970 C.C.) and in good faith, and finally, under art. 1966 of the Civil Code, no pledge can take place except "with the owner's consent," expressed or implied. The French version, having a comma before the word "with," shews plainly that these words apply to the whole article. This disposes of the proposition that the bank acquired under ocean bills issued in favour of Marsan & Brosseau, and indorsed by them to the bank. They were not owners.

The bank cannot claim to have acted in good faith in this matter in a legal sense at least. It was informed from the beginning and knew, and the whole world was informed by the appellant in the railway bills, that he remained the proprietor and in legal possession of the hay represented by the railway bills. If any one was willing to make advances on the security of these bills, knowing that he was not dealing with the legal possessor and owner, he should have made inquiry and ascertained the facts, and either obtained the consent of the consignee or at least provided for the price agreed to be paid to Gosselin; and if he failed to do so, it was at his own risk and peril. Whether the bills of lading are to be considered to be negotiable or not, a delivery order from the consignee or his receipt for the price, or at least a tender of the same, was necessary to relieve and free the bills of the condition which was attached to the same. I think the regular course would have been an indorsement by him, for bills of lading, whether payable to order or not, are negotiable by the law mer-

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chant, subject to certain limitations, as provided for in arts. 1745, 2421, C.C., and 52 Vict. ch. 30 (D.).

The appellant relied upon the Bank Act of 1890 in force at the time these transactions took place. He holds that this Act amends the common law, the Civil Code, as far as banks are concerned, and I agree with him in that contention. Section 64 so declares in express terms. Then comes section 73, which enacts that a bill of lading acquired by a bank

> shall vest in the bank, from the day of the acquisition thereof, all the right and title of the previous holder or owner thereof.

Marsan & Brosseau had no right or title whatever except on the payment of the price agreed to and, therefore, had nothing to transfer except on the fulfilment of that condition.

The trial judge has dealt at great length with the alleged money advances made by the bank for the bills of lading. He expresses the view that no extemporaneous advances were made as required by the Bank Act, sec. 75. The evidence shews that Marsan & Brosseau had been insolvent for many months previously, and that when they failed they had liabilities exceeding $100,000 and a very small estate; it paid only five cents on the dollar. When they got plaintiff's hay in May, 1894, they had their bank account largely overdrawn all the time, to which new overdrafts were allowed when plaintiff's railway bills came in. It may be that these overdrafts do not meet the requirements of sec. 75 of the Bank Act (changed since) as to contemporaneous negotiation. However, I do not propose to pronounce upon this branch of the case. It involves the examination of a complicated and difficult account mixed up with other accounts, and I must confess that I do not feel equal to

the task, especially as there is no necessity for the undertaking.

Before closing I wish to refer specially to a recent decision of the House of Lords, *Farquharson Bros. & Co.* v. *King & Co.*(1). The appellants, who, according to the head-note,

were timber merchants, warehoused with a dock company the timber they imported, and instructed the dock company to accept all transfer or delivery orders signed by their clerk. The clerk had their authority to make limited sales to their known customers. The clerk, under an assumed name, fraudulently sold timber of the appellants to the respondents, who knew nothing of the appellants or of the clerk under his real name, and who bought and paid the clerk for the timber in good faith. The clerk carried out the sales by giving the dock company orders for the transfer of timber into his assumed name, and then in that name giving delivery orders to the respondents:

*Held*, that the appellants, not having held out the clerk to the respondents as their agent to sell to the respondents, were not estopped from denying the clerk's authority to sell; that the clerk, having no title or apparent authority himself, could not give the respondents any title; and that the appellants were entitled to recover from the respondents the value of the timber.

Referring to the language that His Lordship had used in a previous case, with reference to the maxim invoked also by the present respondents, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer who has enabled such third person to commit the fraud, the Lord Chancellor said, at page 332:

The language of the learned judge (Savage C.J.) quoted by me is this: Speaking of a *bonâ fide* purchaser, who has purchased property from a fraudulent vendee and given value for it, he says: "He is protected in doing so upon the principle just stated, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer who, by his indiscretion, has enabled such third person to commit the fraud." Those words "who by his indiscretion" appear not to have made much impression upon those who were

(1) [1902] A.C. 325.

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commenting upon this matter. What indiscretion did the appellants here commit? They entrusted their clerk with the delivery orders. It is said that in some exceptional cases he was allowed to make a contract; but what has that got to do with it? No one knew that outside the firm themselves; and you might just as well say in the case of a shopman in a furniture broker's shop, that because he is there, because he habitually delivers goods to the orders which his master receives, that gives him to all the world the power of giving a title if he steals his master's tables and chairs and delivers them to somebody else.

The present case is much stronger. Here the public is warned that the apparent possessor of the bills is not owner or real holder. The plaintiff, who is publicly and privately the true and only owner and holder in legal possession, has done nothing to enable Marsan & Brosseau or any one else to dispose of his property in fraud of his rights. He is not guilty of any indiscretion or imprudence. He has given no authority, even in a limited sense, to sell or pledge. He remained within the limits of his rights. On the contrary the bank, knowingly or innocently it matters very little which, illegally in any event, trespassed upon them. The bank knew that all the railway bills were issued in favour of the appellant; it had received every one of them from Marsan & Brosseau. It knew that they never had the legal possession of and had no title whatever in the hay in question and, therefore, had nothing to transfer except on the fulfilment of the condition as to the payment of the price. Unfortunately it relied upon the wrong willingness of the railway companies to issue ocean bills, without the order or consent of the true owner and possessor, and without providing for the payment of what was due to him under the contract. It cannot be allowed to invoke ignorance of law to advance good faith and avoid responsibility; it got the proceeds of the hay and must

pay the price agreed to, although the railway companies may also be liable. Banks when dealing with this kind of security must ascertain that they are contracting with the owner or holder or his agent or assignee before they can get a title. Bills of lading are not like bills of exchange and promissory notes, where actual honesty goes very far to protect the holder. But if a bill or note payable to the order of a payee be taken by a bank or any one else without the indorsement of the payee, or with a forged indorsement, honesty or honest blundering will not be sufficient to give a title to the bank. Likewise in cases of restrictive indorsements which prohibit or merely restrict the transfer of the ownership of a bill of exchange, the holder is bound to notice the restriction and comply with their requirements; his honesty will not save him from the consequences of his failure in this respect. See sec. 35 of the Bills of Exchange Act, 1890, which reproduces the common law. Surely the holder of a bill of lading cannot be in a better position.

To sum up:

1. The effect of the sale of the hay was suspended till the payment of the price.

2. The price never having been paid, appellant was entitled to a resiliation of the sale and to demand from the purchasers and the bank the hay in question, and in default the price agreed to.

3. The manual possession by Marsan & Brosseau or the bank of the bills of lading consigned to the vendor himself and not indorsed by him did not vest them with the legal possession, nor the title to the hay which remained in the appellant.

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4. The bank cannot be considered in law to be in good faith.

5. Even if in good faith, the bank did not obtain legal possession or acquire from the true owner or holder of the hay, and no pledge is valid under the Code or the Bank Act without possession by the pledgee and consent of the owner of the thing pledged.

6. The bank only acquired the rights of Marsan & Brosseau subject to the same suspensive condition as to the payment of the price. If the hay realized more than this price the bank may keep the excess; if less it must, however, pay the full price as Marsan & Brosseau were bound to do.

7. The right of the appellant to resiliation of the sale, and a personal condemnation against both Marsan & Brosseau and the bank, exist notwithstanding the failure of revendication.

For these reasons I am of opinion that the appeal of the appellant should be allowed and the judgment of the Superior Court restored, less a sum of $125, with costs in all the courts and that the cross-appeal of the respondent be dismissed with costs. However, I am alone of that opinion with my brother Idington.

We agree that the sale was conditional and that the judgment of the court of appeal should be confirmed, the Chief Justice dissenting. Mr. Justice Davies, moreover, is for allowing the principal appeal as to six cars. As this conclusion is better than that of the court of appeal and meets my views in part, and without withdrawing anything from the above opinion, Justice Idington and I accept the result arrived at by Mr. Justice Davies.

The cross-appeal is therefore dismissed with costs

and the principal appeal of appellant is allowed in part, and the judgment of the Court of Appeal is modified by adding the price of the six cars, namely, $562.33, less a sum of $125, with interest and costs in all the courts.

DAVIES J.—In this case so far as the 27 cars of hay are concerned on which the bank made the advances to Marsan & Brosseau on the inland bills of lading deliverable to Gosselin and not indorsed by him, I am of the opinion that the judgment of the Superior Court, confirmed by the Court of Appeal, was right.

On this branch of the case I do not desire to add a word to what has been said by the courts below and by my brother Girouard in his judgment, which I have had the privilege of reading.

With respect to the 20 car loads of hay as to which the Court of King's Bench reversed the judgment of the Superior Court and held the bank not to be liable to Gosselin, I concur in the judgment of the Court of King's Bench.

The question with regard to these 20 cars is whether the advances made by the bank to Marsan & Brosseau were made originally upon the inland bills of lading, which were deliverable to the plaintiff Gosselin, or were made *bonâ fide* and in good faith in the ordinary course of business to Marsan & Brosseau upon ocean bills of lading deliverable to themselves and indorsed to the bank by them. I am of the opinion that the advances were made in good faith upon the ocean bills of lading, as found by the court of appeal, and that, therefore, the bank is not liable, under the Code, for these 20 cars to the plaintiff in this action.

The question is largely, if not entirely, one of fact,

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and while I admit that the evidence of King, the bank manager, when first given would justify the conclusion that the bank might have made the advances originally on inland bills of lading deliverable to Gosselin, his subsequent explanations when he was recalled, after Sutton, the bookkeeper of Marsan & Brosseau, had been examined, read together with Sutton's positive testimony, place the matter beyond reasonable doubt.

As I have the misfortune to differ on this one point of fact only from by brother Girouard, I cite the evidence on which I rely as follows :

The witness Sutton, the accountant of Marsan & Brosseau, speaking of the 26 cars of hay, says, at page 72

There were 20 cars discounted by drafts attached to through bills of lading.

and again at pages 187-188:

Q.—At what date were these cars transferred to the bank, the first 26 or 27 which you have traced in p. 26?

A.—The first six cars in p. 26 were transferred to the bank on the 21st of May as collateral security to my knowledge; it was upon them that there were advances; that is to say they were given as collateral security and the 20 other cars were discounted on the 17th of May according to our books.

Q.—Why?

A.—For discount. There were through bills of lading and drafts on the bank and the bank advanced us upon them. It advanced the amount specified in the margin.

Q.—Were any cars mentioned in Exhibit p. 26 transferred to the bank in the form of shipping receipts inland bills?

A.—No.

Q.—None at all?

A.—None at all.

Q.—Not one?

A.—No; there were ocean bills of lading made for that day on which we transferred to the bank.

Q.—Were they all in the name of Marsan & Brousseau?

A.—The through bills of lading.

Q.—Is it mentioned in Exhibit p. 26?

A.—I believe so; they were always made in the name of Marsan & Brousseau.

Q.—The entries in your books indicate that all your cars enumerated here were transferred in the form of ocean bills of lading obtained from the agents of Marsan & Brousseau?

A.—Obtained from the railway agents.

Q.—Marsan & Brousseau were exchanging the shipping receipts for ocean bills?

A.—Yes.

Q.—Have you the date of the discounts?

A.—Yes, it is on these 26 cars.

And again, at page 190, the same witness Sutton repeats emphatically that there were 27 cars in the form of inland bills, and 20 cars and 6 cars (26 in all) in the form of ocean bills of lading.

The evidence of King is as follows:

Q.—Now, will you take communication of the Exhibit D 2 now filed, and state what that is?

A.—Mr. Sutton in his evidence stated that some twenty cars had been transferred to the bank which I had been unable to identify when first examined, but on the numbers given by Mr. Sutton, who stated that these cars had been exchanged by the firm of Marsan & Brousseau for ocean bills of lading at their order, and lodged with the bank attached to sterling drafts on London, then I was able to locate them by the sterling drafts and the ocean bills of lading; and I find that these several sterling drafts were discounted in the regular way for the firm of Marsan & Brousseau and put to their credit on the seventeenth of May $2,763.18, and the other on the eighteenth day of May, $3,227.71. These deposit slips correspond with entries in Exhibit p. 24. I file the deposit slips as D 4 and D 5.

Q.—As in your possession originally, when you were first examined these drafts afforded no information as to the identity of the hay?

A.—No, there was no possibility of my telling whose draft it was.

Q.—This was just an ordinary transaction of discount in the regular way of business?

A.—Yes, the ordinary purchase of a sterling draft with the document attached, and it went to the firm's credit in the usual way of business.

On this evidence the Court of Appeal found as a fact, and I fully concur with them, that these 26 cars

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of hay came to the bank in the form of ocean bills of lading, deliverable to Marsan & Brosseau, and that the advances were made by the bank on these ocean bills in good faith, and so far as 20 cars are concerned that the advances were contemporaneous with the receipt of the bills.

The only point on which I differ from the court of appeal is with respect to the advances made upon the last six cars of hay on the 21st May, and just before Marsan & Brosseau assigned.

In fact it cannot properly be said to be a difference of opinion, but a finding on a question of fact apparently overlooked by the court of appeal.

The trial judge had found that the advances made upon these 6 cars were not contemporaneous advances with the handing over of the bill of lading, but were really "advances to pay a previous debt due by Marsan & Brosseau to the bank."

If so it would be in violation of the 75th section of the Bank Act of 1890, which was in force at the time the transaction occurred, and the plaintiff could recover for the value of this hay.

The court of appeal appear, as I have said, to have overlooked the point. I followed the argument very closely and also the additional memoranda or supplementary factums which counsel on both sides were asked to give on the special point, and I reached the conclusion after carefully going over the extracts from the bank books produced as exhibits and the evidence, that so far as these 6 cars were concerned 66 tons and 312 lbs. of hay of a value of $8.50 per ton amounting to $562.33, the appeal must be allowed, and that amount added to the judgment in plaintiff's favour, because the debt or advance of the bank was not "negotiated or contracted at the time of the acqui-

sition by the bank" of the bill of lading on which it was making the advances, as provided by the 75th section of the Bank Act of 1890.

Then there was an amount of $125 recovered by the plaintiff Gosselin from the estate of Marsan & Brosseau, which, it was agreed at the argument, should be deducted from the amount awarded him as against the bank.

I would, therefore, allow the appeal for the $562.33 and costs, and deduct from the amount of the judgment so increased the said sum of $125.00.

NESBITT J.—I concur with the judgment of the Court of King's Bench.

IDINGTON J.—It was attempted to rest the appellant's claim on the provisions of the Civil Code, and especially upon arts. 1489 and 2268, coupled with the enabling provisions of the Bank Act.

In the light of the case of *The City Bank* v. *Barrow*(1), which turned upon the same and other provisions, I do not think the Ontario Bank can rely here upon such and other provisions of the Code as may be read with those specially referred to.

It is said *City Bank* v. *Barrow*(1) no longer applies because of the amendment by 42 & 43 Vict. ch. 18, sec. 1, which reads:

> Articles 1488, 1489 and 2268 of the Civil Code apply to the contract of pledge.

But what is the "contract of pledge?"

Art. 1966 of the Code says:

> Pledge is a contract by which a thing is placed in the hands of a creditor, or being already in his possession is retained by him with the owner's consent in security for his debt.

(1) 5 App. Cas. 664.

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The owner cannot be said, on the facts here, to have pledged thus the goods in question.

Art. 1489, C.C., will not operate so as to constitute Marsan the owner.

Nor will this article apply in any way inasmuch as it is intended to have effect only in the cases of goods lost or stolen.

See *Canada Paper Co.* v. *The British American Land Co.*(1), where it was held in appeal by the Court of Queen's Bench for Quebec to have such limited meaning.

It is said by Beauchamp, in his notes on art. 1488, C.C., that neither that article nor art. 2268 C.C., can have the effect of enabling a valid sale to be made and title acquired by the purchaser of stolen goods.

Does art. 1488 C.C., apply to this as a commercial matter?

It is impossible here to give the bank a title unless within the provisions of the Bank Act.

And I think, therefore, that art. 1488 C.C., must be read, whatever it means, as impliedly excepting such transactions as get vitality only by and through the Bank Act.

It must be confined to those cases where complete operation can be had by virtue of the local law of Quebec quite independently of reliance on anything beyond.

Can what transpired give the bank any title under the Bank Act?

The bank is limited by sec. 64 of that Act to such buying and taking of pledge as authorized by the Act.

Section 73 enables a bank to acquire:

> All the right and title of the previous holder or owner thereof, or of the person from whom such goods, wares and merchandise

(1) 5 Legal News 310.

were received and acquired by the bank if the warehouse receipt or bill of lading is made directly in favour of the bank, instead of to the previous holder or owner of such goods, wares and merchandise.

Under this section the bank can only receive such title as the owner or person from whom it received the goods.

In this case the bank did not acquire any title from the appellant, Gosselin, who held the shipping receipts.

The unauthorized act of Marsan & Brosseau in procuring ocean bills of lading to be issued in their names and in fraud of Gosselin did not transfer any title to them, and, therefore, their indorsement of such ocean bills of lading to the bank did not pass any title to the bank.

Marsan & Brosseau were not the agents of Gosselin for the purpose of having issued any such bills of lading to themselves.

All they had any right to do was possibly to see that the ocean bills of lading were issued to Gosselin in exchange for the shipping receipts which were in his name.

The interpretation of the expression "agent" by sub-sec. 3 of sec. 73 does not in any way extend such limited authority as to give any force or effect to his fraud.

Marsan & Brosseau were not intrusted with the possession of the goods, nor were the goods consigned to them, nor could the possession of the shipping receipts in Gosselin's name be said to be proof of the possession or control of the goods or authorizing, or purporting to authorize, either by indorsement or by delivery of them, to transfer or receive the goods thereby represented.

If the possession of such a shipping receipt could

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enable one entrusted with it, only for a specified purpose, to pledge the goods it covered, no shipper would be safe in doing anything by an agent.

If authority be needed, for elementary propositions such as most of these are, the cases of *Cole* v. *North-Western Bank*, [1875](1); and *Johnson* v. *Credit Lyonnais Co.*(2); upon the Factor's Act, which rests upon and gives expression to the same principle as the provisions of the Bank Act, are ample.

The Court of King's Bench in the judgment appealed from recognize that Marsan & Brosseau were not brokers, factors or commission merchants within the provisions of the Civil Code relied upon.

Obviously this is so, and even if they were they were not employed by Gosselin as such and, therefore, derived no authority from such provisions.

The court recognizes not only this, but also that the documents in question did not give authority to assign the goods or receive them.

I am unable to see how giving such documents into the hands of any one could deceive a third party or lead him to believe that the agent receiving them got the right of contracting.

No evidence is pointed out in support of this, beyond the document, and the evidence of Gosselin is all the other way.

The evidence of Mr. King as he first gave it clearly supports Gosselin and, when his amended statement is fully considered, it reduces the question to this—that he had no knowledge but the presentation of the ocean bills of lading in Marsan & Brosseau's names.

That being the result of fraud could give the bank no better title than Marsan & Brosseau had.

(1) L.R. 10 C.P. 354. (2) 3 C.P.D. 32.

Mr. King gives no evidence that he relied on a single thing that Gosselin had done to mislead him.

The former dealings between Gosselin and Marsan & Brosseau, as independent seller and buyers respectively, could not furnish such evidence.

This is not the case of agents who had long, or in a single case, acted for a principal and had been held out by him as such, where the persons dealing through such agents might claim to throw the loss on the principal.

I think the appeal should be allowed with costs and the judgment of the trial judge restored.

Since writing the foregoing I have had the pleasure of reading the judgment of my brother Girouard and what he points out as to the evidence, the procedure and form of action, confirms my previous impressions.

The formal judgment of the majority of the court was pronounced, as follows, by His Lordship Mr. Justice Girouard:

The cross-appeal of the bank is dismissed with costs, the Chief Justice dissenting, and the principal appeal of Gosselin is allowed in part with costs, the Chief Justice and Nesbitt J. dissenting, by adding $562.33 to the amount of the judgment of the Court of Appeal, less $125, and the bank is, therefore, condemned to pay to appellant $3,104.43 with interest

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thereon from the 7th June, 1894, and costs in all the courts.

*Appeal allowed, in part, with costs; cross-appeal dismissed with costs.*

Solicitor for the appellant: *L. A. Gosselin.*

Solicitors for the respondent: *Campbell, Meredith, Macpherson & Hague.*

GEORGE H. G. McVITY AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

RACHEL TRANOUTH AND WILLIAM TRANOUTH (DEFENDANTS) } RESPONDENTS.

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*June 5.
*June 26.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Limitation of actions — Unregistered deed — Subsequent registered mortgage—Possession—Right of entry.*

R. T. in 1891, being about to marry W. T. and wishing to convey to him an interest in her land, executed a deed of the same to a solicitor who then conveyed it to her and W. T. in fee. The solicitor registered the deed to himself but not the other, forging on the same a certificate of registry, and he, in 1895, mortgaged the land and the mortgage was duly registered. R. T. and W. T. were in possession of the land all the time from 1891, and only discovered the fraud practised against them in 1902. In 1903 the mortgagee brought action to enforce his mortgage.

*Held,* affirming the judgment of the Court of Appeal (9 Ont. L.R. 105), Davies and Nesbitt JJ. dissenting, that the legal title being in the solicitor from the time of the execution of the deed to him the Statute of Limitations began to run against him then and the right of action against the parties in possession was barred in 1901.

APPEAL from a decision of the Court of Appeal for Ontario(1) reversing the judgment at the trial in favour of the plaintiffs.

On the 19th of June, 1891, the defendant Rachel Tranouth, then Rachel Maxfield, was the owner in fee simple and in possession of 100 acres of land in the Township of Cavan, and on that day, being about to

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Idington JJ.

(1) 9 Ont. L.R. 105.

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marry her co-defendant, desired to convey to him an undivided one-half share thereof, so that they might become tenants in common in fee.

She therefore requested one George Sootheran, a conveyancer, to prepare the necessary instruments for that purpose, which he undertook to do.

The instruments which he prepared, and which were duly executed in duplicate, were a conveyance from the lady to himself, Sootheran, and a re-conveyance to the two defendants as tenants in common in fee.

The deeds were left with Sootheran for registration and safe keeping, and on the 29th of September afterwards, he duly registered the conveyance to himself, but fraudulently omitted to register the re-conveyance, and indorsed upon one of the parts a certificate of registration, to which he forged the signature of the registrar.

Afterwards, on one or more occasions, Sootheran, without the knowledge of the defendants, fraudulently borrowed money for his own use, by mortgage of the land thus appearing to stand in his name in the registry office; and on the 30th day of August, 1895, he applied to Mr. Seth S. Smith, a solicitor, for another loan wherewith to pay off the mortgage or mortgages which he had previously made. Mr. Smith, acting for the plaintiffs, agreed to advance the money, $2,000, out of the funds of the plaintiffs in his hands upon receiving a certificate of the sufficiency of the security. For this purpose Sootheran forged a certificate purporting to be signed by the assessor of the township, expressing that the land was worth $4,000, and that the defendants were in possession thereof under a lease for seven years, of which only three years had expired. Upon the faith of this certificate the loan

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was completed upon a mortgage of the defendants' lands, dated the 30th day of August, 1895, executed by Sootheran to the plaintiffs, and which was duly registered on the following day.

Some time in the year 1902 the defendants learned accidentally of the registration against their land of the mortgage or mortgages thus made by Sootheran, and began to make inquiries, upon hearing of which Sootheran absconded.

The present action was commenced on the 12th of May, 1903, against the defendants, who had been in continuous possession and occupation of the land from and after the 19th of June, 1891, and is for possession and sale of the land, in default of payment of the mortgage made to them by Sootheran under the circumstances above related.

Two defences were set up to the action, first, notice of the fraud which had been committed by Sootheran, or such absence of inquiry as was equivalent to notice, and secondly, the Real Property Limitation Act.

The learned Chancellor held against the defendants on both grounds of defence, and granted a judgment for redemption and sale and for immediate possession which the Court of Appeal reversed.

*H. J. Scott K.C.* for the appellants cited *Murray* v. *East India Co.*(1).

*Watson K.C.* and *Ruddy* for the respondents referred to *Ross* v. *Hunter*(2); *Stephens* v. *Simpson*(3).

THE CHIEF JUSTICE.—This case has given me much trouble. The fact that the Court of Appeal reversed the judgment of the Chancellor and that my

(1) 5 B. & Ald. 204. (2) 7 Can. S.C.R. 289.
(3) 12 Gr. 493.

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brothers Sedgewick and Idington are unhesitatingly of opinion that the Court of Appeal was clearly right, whilst my brothers Davies and Nesbitt, with no less hesitation, say that it was clearly wrong, is, by itself, cogent evidence that the point in controversy, though reduced to a narrow compass, is not of an easy solution.

After great hesitation I have come to the conclusion, with my brothers Sedgewick and Idington, that the appeal should be dismissed. In doing so, I am forced to confess that my best reason for it is that to doubt is to confirm.

SEDGEWICK J. concurred with Idington J.

DAVIES J. (dissenting).—I am of opinion that the true construction of the Registry Act of Ontario, 87th section of chapter 136, Revised Statutes, is simply to give a registered conveyance affecting lands priority over an unregistered conveyance of the same lands, although the latter was first executed. The section does not avoid previous unregistered instruments absolutely, but only as against subsequent purchasers or incumbrancees for value without actual notice, whose conveyances are registered. For all other intents and purposes the unregistered conveyance is good.

In this case the parties, plaintiffs and defendants, were the innocent victims of the wilful fraud of one Sootheran.

The plaintiffs claimed the land in question as the registered mortgagees of the same under a conveyance from Sootheran.

Sootheran had previously conveyed to the defendants. The deed was not registered, the defendants being deceived into the belief that it was by a certificate of registry forged upon it by Sootheran.

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The single question for us to determine is whether the defendants had acquired a title by possession under the Statute of Limitations. The Court of Appeal held that as the unregistered prior deed to the defendants from Sootheran was, by the Registry Act, made void, it could not be invoked by the subsequent registered mortgagees to shew that Sootheran, after its execution, had no right of entry to the lands in question. They held that the Statute of Limitations did, consequently, apply to him. Being void they held that it was void under the statute *ab initio,* and that the defendants being in possession the Statute of Limitations began to run the day after Sootheran got his deed and became owner in fee of the lands, and that their possession had ripened into a statutory title before this action was begun.

The fallacy underlying this reasoning lies in the ignoring of the words of the section making the unregistered prior conveyance void only as against the subsequent conveyance registered. The unregistered deed to the defendants conveyed to them all Sootheran's title and interest. Such title and interest still remains, but it is made by the statute to rank after the mortgage subsequently executed but first registered. Sootheran had, after the execution of the deed to the defendants, no right of entry which any possession under the Statute of Limitations could bar. In fact the statute did not, and under the construction I place upon the Registry Act could not, apply to him. It follows, therefore, that, as against the plaintiffs, the defendants have not acquired any statutory title, and the appeal should be allowed and the judgment of the Chancellor restored.

NESBITT J. (dissenting).—I concur. The authorities seem to me to clearly establish that the only effect

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of the Registry Act is to give priority to the registered over the unregistered instruments, leaving the interests of the parties otherwise unaffected. *New Brunswick Railway Co.* v. *Kelly*(1).

If, as suggested, no legal title ever passed from Sootheran to the mortgagee, as he had already conveyed the legal title to the defendants and, therefore, no right of entry ever accrued to the mortgagees, the Statute of Limitations never became applicable between the parties, and the Registry Act gives the mortgagees the priority they claim.

The result of the judgment of the Court of Appeal and the majority of this court is that a person who is the legal and equitable owner in possession of land, and as to whom the Statute of Limitations cannot have any application (who has, by his own act, in executing a conveyance which has been registered enabled an innocent party to bring into play the Registry Act), can defeat the plain language of that Act creating priority against him by invoking a statute which had admittedly no application prior to the registration, and add a term of years as running which, in fact, was not running. 0 plus 5 = 10 is an arithmetical calculation I fail to appreciate. I would restore the judgment of the Chancellor.

IDINGTON J.—It is asked by the appellants: When did the right of entry accrue? They set up the outstanding estate vested in the respondents by Sootheran's deed to them to shew that it stood in the way of making entry until the mortgage to the appellants was registered.

This deed is, by virtue of the Registry Act, made void as against the appellants. It is not made, it is

(1) 26 Can. S.C.R. 341.

said, absolutely void, but only as against the subsequent mortgage. I grant that. But how far is it necessary to make it void to enable the mortgagee to assert a good title to the legal estate?

It must make it void back far enough to enable the mortgagee to shew a good paper title—and that means beyond the time when the unregistered title began.

Then, when it runs to that point, there is presupposed an absence of any other legal estate. There cannot be two at the same time.

There seems, therefore, no escape from the result that, in this case, by the assertion of their title, the appellants, of necessity, obliterate, by force of the Act that they invoke for their protection, any title that the court can, in this case, consider. The appellants cannot claim at one and the same moment a legal estate vested in them and also in their adversaries.

This is, after all, only another way of saying and illustrating what the late Chief Justice Draper and others said in correct legal phraseology as to the unregistered deed being void *ab initio*.

I think the appeal should, for these and for the reasons assigned by the Court of Appeal, be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellants: *Seth S. Smith.*
Solicitor for the respondents: *Robert Ruddy.*

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*June 26.

EMMA RYDER (SUPPLIANT) ..... APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Negligence—Common employment—Defence by Crown—Workmen's Compensation Act.*

The Manitoba Workmen's Compensation Act does not apply to the Crown. Idington J. dissenting.

In Manitoba the Crown as represented by the Government of Canada may, in an action for damages for injuries to an employee, rely on the defence of common employment. Idington J. dissenting.

APPEAL from a judgment of the Exchequer Court of Canada (1), dismissing the petition of the suppliant.

The suppliant sued as administratrix of the estate and effects of her son, one William Edward Ryder, deceased, and for the benefit of the brothers and sisters of the said deceased as well as of herself, claiming the sum of $5,000 damages for the loss and damage which she and various brothers and sisters of the deceased had sustained by reason of his death.

The deceased, William Edward Ryder, met his death on the 20th April, 1903, while in the employment of the Department of Public Works of Canada by an accident which occurred at the launching of a tug named "Sir Hector," the property of the Government of Canada.

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*PRESENT:—Sedgewick, Girouard, Davies, Nesbitt and Idington JJ.

(1) 9 Ex. C.R. 330.

The said tug was used in connection with certain dredging operations carried on by the Department of Public Works at the mouth of the Red River in the Province of Manitoba, and had been hauled out of the water for repairs on to the bank of a slough, part of the Red River.

On the said 20th of April, 1903, preparations were being made for launching the "Sir Hector" under the direction of Robert Francis Sweet, a dredge master in the employ of the Dominion Government, who was entrusted with the operation by Zepherin Malhoit, the resident engineer of the Department of Public Works in charge of the dredging operations.

Mr. Sweet had under him a foreman named John Davis, who was the foreman in charge of the launching, and about ten other men, including the deceased William Edward Ryder, were engaged under the foreman John Davis in the launching.

While the preparations were still going on the vessel, by some accident, was prematurely launched, and John Davis, the foreman, and William Edward Ryder, were caught and crushed to death under her side as she moved down to the water.

The court gave judgment that the suppliant was not entitled to the releif sought by her petition of right.

*Fred. Hope* for the appellant. The Crown cannot rely on the defence of common employment, as the accident was due to a defective system. *Webster* v. *Foley*(1); *Brown* v. *Leclerc*(2).

Under the Exchequer Court Act a provincial statute may apply to the Crown, though the latter is not named therein. The Workmen's Compensation Act

(1) 21 Can. S.C.R. 580. (2) 22 Can. S.C.R. 53.

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of Manitoba so applies. *Letourneux* v. *The King*(1); *The Queen* v. *Martin*(2); *Penny* v. *The Queen*(3); *McDonald* v. *The King*(4).

*Newcombe K.C.*, Deputy Minister of Justice, for the respondent.

The judgment of the majority of the court was delivered by:

NESBITT J.—This action was brought for the death of a servant of the Crown while engaged in the work of launching the Dominion steam tug "Sir Hector," at or near Selkirk, in the Province of Manitoba. The judge of the Exchequer Court stated the defences as follows:

1. That the accident did not occur on a public work.
2. That it was not caused by negligence.
3. That the negligence complained of (if any) was that of a fellow servant of the deceased, and the Crown is not liable therefor.
4. That the Workmen's Compensation for Injuries Act (Manitoba) sec. 1, ch. 178, does not apply to this case.

The learned judge dealt only with the third and fourth defences, and I understood in the argument it was agreed that if we were against the conclusions he arrived at in reference to the third and fourth defences we should express no opinion on the very debatable questions involved in the first two defences referred to, but should remit the case for determination to the trial court.

In my view the cases of *City of Quebec* v. *The Queen*(5); *The Queen* v. *Filion*(6); *The Queen* v. *Grenier*(7); and *Letourneux* v. *The King*(1); establish the doctrine that the Crown is liable to any person

(1) 33 Can. S.C.R. 335.
(2) 20 Can. S.C.R. 240.
(3) 4 Ex. C.R. 428.
(4) 7 Ex. C.R. 216.
(5) 24 Can. S.C.R. 420.
(6) 24 Can. S.C.R. 482.
(7) 30 Can. S.C.R. 42.

suffering injury in person or property or any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, such redress being sought for in the Court of Exchequer.

The liability is created according to those cases by the statute itself, and evidence that such injury resulted on a public work from the negligence of an officer or servant while acting within the scope of his duties, etc., is all that is necessary for the proof of the plaintiff's case. The action lies in law by force of the statute. It assumes, according to the reasoning contained in those cases, that the Crown can be guilty of negligence creating liability if such negligence is that of an officer or servant. It does not, however, deprive the Crown of the defences open; see *The Queen* v. *Martin* (1).

What defences (at the date of the statute) would then have been open to an employer guilty of negligence? Since the decision of *Priestley* v. *Fowler* (2), it has been the established law of England that the employer could answer to his servants' negligence that such negligence was a risk assumed by the employed and so arose the doctrine known as "common employment." I have dealt so fully with the authorities in the recent case of *Canada Woollen Mills* v. *Traplin* (3), that I need not reiterate. The statute does not take away this defence from the Crown. The Workmen's Compensation Act was passed not to create any new right of action, but to take away certain defences which were open under the authorities to the employer. The Manitoba statute does not purport to apply to the

(1) 20 Can. S.C.R. 240. (2) 3 M. & W. 1.
(3) 35 Can. S.C.R. 424.

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Crown even as represented in Manitoba, and in my view until the Crown is deprived by competent authority of such defence it is still open to it. I think this must have been the view of the Chief Justice of this court in the *Filion Case*(1), else the latter part of his judgment in that case is unexplainable, also his language in the *Grenier Case*(2), at p. 51. Appellant's counsel argued that this defence was not open, as he claimed the Crown would be liable in the cases where an employer would be, namely, for defective system or non-supply of adequate materials or proper machinery. I express no opinion as to what might be held in a proper case. Many considerations arise *pro* and *con*. This is not defective system. At the highest it is a negligent isolated act of the superintendent in not properly staying the boat, so that it slipped when the blocks were removed. I would dismiss the appeal.

IDINGTON J.—The question raised by this appeal is whether or not the Exchequer Court Act, 50 & 51 Vict. ch. 16, sec. 16, created a liability or merely constituted a jurisdiction in the Exchequer Court to determine in regard to claims for or in respect to which liability existed already or might thereafter be created. It is as follows:

> The Exchequer Court shall also have original jurisdiction to hear and determine the following matters:—
>
> (a) Every claim against the Crown for property taken for any public purpose; (R.S.C. ch. 40, sec. 5).
>
> (b) Every claim against the Crown for damages to property injuriously affected by the construction of any public work; (R.S.C. ch. 40, sec. 6).
>
> (c) Every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment; (R.S.C. ch. 40, sec. 6).

(1) 24 Can. S.C.R. 482. (2) 30 Can. S.C.R. 42.

(d) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council; (R.S.U.S. sec. 1059(1)).

(e) Every set-off, counterclaim, claim for damages, whether liquidated or unliquidated, or other demand whatsoever, on the part of the Crown, against any person making claim against the Crown. (R.S.U.S. sec. 1059(2).)

Shortly after this enactment came into force Sir Henry Strong, then Chief Justice of this court, in a most luminous and comprehensive judgment, if I might be permitted to say so, in *The City of Quebec* v. *The Queen*(1), dealt with this question.

I cannot do better than adopt the exposition of the law as given in that judgment from pp. 426 to 430 of 24 Can. S.C.R., as applicable to the case now in hand. It reads as follows:

This subsection (d) which gives jurisdiction to the Exchequer Court to hear and determine "every claim against the Crown arising under any law of Canada" would indubitably and upon the direct authority of two recent decisions of the Privy Council, if the words "under any law in Canada" were eliminated, have the effect of giving a remedy to the subject against the Crown in all claims for damages for *torts* or *delicts*. In the case of *Farnell* v. *Bowman*(2), an appeal from New South Wales, it was held that the Government of that colony was liable to be sued in an action *ex delicto* under a statute providing "that any person having or deeming himself to have any just claim or demand whatever against the Government" might set forth the same in a petition to the governor, upon which petition a certain prescribed procedure being followed judicial relief might be obtained as in the case of an ordinary action between subject and subject. In this judgment it is said with reference to the proper construction of the statute: "Thus unless the plain words are to be restricted, for any good reason, a complete remedy is given to any person having or deeming himself to have any just claim or demand whatsoever against the Government. These words are amply sufficient to include a claim for damages for a tort committed by the local Government by their servants."

In the case of the *Attorney-General of the Straits Settlement* v.

(1) 24 Can. S.C.R. 420. (2) 12 App. Cas. 643.

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*Wemyss*(1), the words of an ordinance authorizing a remedy by petition of right against the Crown for tortious acts were in words even more opposite to the case before us; these words were: "Any claim against the Crown for damages or compensation arising in the colony shall be a claim cognizable under this ordinance."

The Judical Committee in their judgment make the following observations upon the meaning of this provision:—"Their Lordships are of opinion that the expression "claims against the Crown for damages or compensation" is an apt expression to include claims arising out of *torts*, and that as claims arising out of contracts and other classes of claims are expressly mentioned, the words ought to receive their full meaning. In the case of *Farnell* v. *Bowman*(2), attention was directed by this committee to the fact that in many colonies the Crown was in the habit of undertaking works which in England are usually performed by private persons, and to the consequent expediency of providing remedies for injuries committed in the course of these works. The present case is an illustration of that remark. And there is no improbability, but the reverse, that when the legislature of a colony in such circumstances allows claims against the Crown in words applicable to claims upon *torts*, it should mean exactly what it expresses."

These two cases have a two-fold application here, first as shewing that the words "any claim against the Crown" are sufficiently comprehensive to include *torts*, more especially as the 15th section makes express provision for the case of claims arising from contracts; secondly, these judgments of the Privy Council lay down a rule or canon for the construction of colonial enactments by which the remedy of the subject against the Crown is enlarged, which it is the duty of this court to apply, as far as possible, to the Acts of Parliament now under consideration.

It being then established by the cases cited that the language of section 16, sub-section(d) "every claim against the Crown" is to have the wide construction before stated applied to it, which would include claims for damages arising *ex delicto*, we are next to inquire whether any and what restriction on the meaning which would be thus attributable to the expression in question, if it had stood alone, is imposed by the words "arising under any law of Canada," which immediately follow.

It may be said that these are words of limitation which confine the clause to claims in respect of which some pre-existing law had imposed a liability on the part of the Crown. Again, it may be said that a "law of Canada" necessarily means not only some prior law of Canada, but must also exclusively refer to statute law. In support of this last proposition it might be said that there is no general common law prevailing throughout the Dominion of Canada,

(1) 13 App. Cas. 192. (2) 12 App. Cas. 643.

that each of the several provinces possesses its own private common law, and that the common law of the territories not included within any of the provinces depends on the enactments of the Dominion Parliament. This may be true, and is a necessary incident and result under every system of federal government where the several provinces or states forming the confederation have each its own separate and different system of private law. This has been recognized as a necessary consequence under the federal constitution of the United States, and that for a reason which would be equally applicable to Canada. It can make no difference that all the provinces, save one, derive their common law from that of England; the circumstance that the private law of one province, that of Quebec, is derived from a different source, makes it impossible to say that there is any system of law, apart from statute, generally prevalent throughout the Dominion. No inconvenience can result from this, since every case which could arise would be provided for by the law of some one or other of the provinces.

Were I obliged to determine this question of construction as one on which the decision of this appeal depended I should probably come to the conclusion that the clause in question ought not to be so interpreted as to exclude claims in respect of *torts* and *delicts*, not referable to any prior statute of the Dominion, but being such as would, under the law of any of the provinces of Canada, have entitled parties to relief as between subject and subject. Taking the rule so clearly and emphatically laid down by the Privy Council in the cases before cited as a guide which we are bound to follow, it would appear to be proper that a wide and liberal construction, what is called a beneficial construction, should be placed upon the language of the legislature; a construction calculated to advance the rights of the subject by giving him an extended remedy. Proceeding upon this principle, we should, I think, be required to say that it was not intended merely to give a new remedy in respect of some pre-existing liability of the Crown, but that it was intended to impose a liability and confer a jurisdiction by which a remedy for such new liability might be administered in every case in which a claim was made against the Crown which, according to the existing general law, applicable as between subject and subject, would be cognizable by the courts. Further, I am of opinion that it would be right to hold that the words "law of Canada" did not mean exclusively a statute of the Dominion of Canada, but might be interpreted as meaning the law of any province of Canada which would have been appropriate for the decision of a particular claim in respect of a *tort* or *delict* if it had arisen between subjects of the Crown. It would not, I think, be taking any unwarrantable liberty with the language of the legislature so to interpret the words "any law of Canada," for in a non-technical and popular sense the laws of the several provinces of Canada are laws

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of Canada, and the rule laid down by the cases before cited requires us to give the terms used the most favorable and comprehensive construction possible.

Mr. Justice Gwynne, in the same case, recognized almost as distinctly, though not using express words to that effect, that this legislation created a liability as well as established a jurisdiction. The judgment of the court in that case, by reason of the facts in the opinion of the court falling short of bringing the case within the Act, even if it were to be assumed capable of the construction that it created a liability, left no binding decision in accord with the opinions thus expressed. The head-note in the report is in accord with the opinions expressed, but obviously is misleading in this regard if taken as the decision.

A few months later, in *The Queen* v. *Filion*(1), the majority of this court decided that the Crown, at all events as to the Province of Quebec, had become liable for the negligence of its officers in a case within the Act. Chief Justice Strong and the late Mr. Justice Gwynne clearly treated the case as if liability had been created as well as jurisdiction given by this Act.

The Chief Justice and Mr. Justice Sedgewick assumed that that had been decided in the former case. Mr. Justice Gwynne does not refer to the former case, but is most explicit in his language in expressing the opinion that the Act created a new liability and that thereby the Crown had become responsible, for he says:

> I am of opinion that the language of the above Dominion statute is sufficient to give the persons suffering injury in person or property or any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, a right to redress, even though they may have had none before, such redress being sought for in the Court of Exchequer.

(1) 24 Can. S.C.R. 482.

Mr. Justice Sedgewick, whilst adopting the opinion of Mr. Justice Gwynne in the former case, incidentally points out that in Quebec the doctrine of *collaborateur* did not obtain as it had in England.

This adoption of the principle thus reached and acted upon, I think, binds us now. It has been recognized in many cases since, needless to refer to, except in the case of *Letourneux* v. *The King*(1), where the present Chief Justice of the court delivering the judgment of the court (from which only Mr. Justice Davies dissented, although, I take it, not on the ground of the principle I have referred to being wrong, but on other grounds) expressly says:

> By section 23 it was enacted that any claim against the Crown may be prosecuted by Petition of Right, and sections 15 and 16 give exclusive original jurisdiction to the Exchequer Court so that this action lies in law. Such is the jurisprudence of this court as finally settled by *The Queen* v. *Filion*(2).

And again he says:

> And upon the authority of *The Queen* v. *Filion*(2), under sections 16, 23 and 58 of the Exchequer Court Act, this right of action cannot be controverted.

This is important not only as the deliverance of the majority of the court, but as coming from the present Chief Justice, who had originally dissented from the rest of the Court in the case of *The Queen* v. *Filion* (2).

Because of the result having been reached in this indirect way, I have set forth at length the process of reasoning and facts so that what was meant, and what follows, may be better understood.

The way in which Sir Henry Strong puts the matter when he implies, rather than says, that the whole of the sub-sections must be read as parts, of which

(1) 33 Can. S.C.R. 335. (2) 24 Can. S.C.R. 482.

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each depends for its operative force upon the reference by the sub-section (d), to the "law of Canada," may lead to different results from following that on which the late Mr. Justice Gwynne apparently puts it as resting, for each class of injury or compensation, upon each independent sub-section respectively giving a right and a remedy appropriate thereto.

The case of *Attorney-General of the Straits Settlement* v. *Wemyss*(1) seems expressly in point as upholding the latter view, and applicable here, and the necessity for relying upon the Manitoba Workmen's Compensation for Injuries Act need not in that way be resorted to.

The Crown is, by the other way, made liable whensoever and wheresoever the negligence of a servant would have rendered a private individual master liable therefor.

I think it must be taken in either case as the result of this history that it has been deliberately determined after full consideration that, in the words of Sir Henry Strong already quoted:

> The act was intended to impose a liability and confer a jurisdiction by which a remedy for such liability might be administered.

If the question should be again agitated and be determined differently from the result about to be declared in this case, the final consideration may call for a determination of the exact legal results that I am not called upon to decide.

The Workmen's Compensation Acts in Manitoba and in Ontario and elsewhere have restrictions upon the amount to be recovered, and otherwise. These restrictions would probably be inoperative if the liability as well as remedy is created independently of any

(1) 13 App. Cas. 192.

provincial legislation and merely by force of sub-section (*c*) itself.

It may be that by a consideration of the whole legislation under review and having regard to the object aimed at, of removing the historical distinction in favour of the Crown and the desirability of removing a distinction in results derivable from intrinsically the same relations under another or different form the way may be found to interpret so as to effect these objects.

The policy of this section 16 (as a group or as independent sub-sections) of the Exchequer Act is, clearly, to put the relation between the Crown and its subjects, and all issues springing therefrom, in regard to the several matters dealt with by such legislation, upon the same footing as between subject and subject.

This result may not be exactly obtained by adopting either of such interpretations as I have adverted to.

No canon of construction is violated, however, in adopting either. The modern trend of legislation seems in accord with some such construction.

I do not understand that the opinion of the majority of the court now denies this principle of liability as having been created by the Act and as still existing.

It would seem rather as if they found such limitations of the liability as to exclude servants, suffering from the negligence of fellow-servants, from the benefits of the Act, unless where brought within its beneficial operations by reason of special legislation or the state of the law at the time of the enactment under consideration.

I am unable to concur in this.

I cannot think that the suggestion to look upon the

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doctrine of common employment simply as a defence is a sound one.

With great respect I am bound to say that the suggestion seems to me to spring from a misconception of and misapplication of the legal principles involved.

At least ever since *Priestley* v. *Fowler*(1), it had been, until remedied by legislation, English law that no action would lie against the master for injuries arising from the negligence of a competent fellow-servant.

There was by that case, if not before, held to be an implied contract that the suffering servant had assumed that responsibility and risk and that the master had not to answer for the others of his servants in that regard.

It is not a matter of defence such a payment; as accord and satisfaction; as release; or as the Statute of Limitations, which had to be pleaded in bar.

If sued by a servant for negligence of a competent fellow-servant, the master could plead "not guilty," but required no other defence. Sometimes, even before the modern loose system of pleading, pleas can be found (where the declaration had not truly and explicitly set the facts forth), in answer to such a declaration alleging that the accident arose from the neglect of such a fellow-servant, but in cases where the facts and cause of action had been properly set out in the declaration and were not complicated with other considerations such as the incompetence of the fellow-servant or like consideration, a demurrer or the simple plea of "not guilty," would have been all that was required. See *Deverill* v. *The Grand Trunk Railway Co.*(2), and *Degg* v. *Midland Railway Co.*(3).

(1) 3 M. & W. 1.
(2) 25 U.C.Q.B. 517.
(3) 1 H. & N. 773.

Hence when the Employers' Liability Act in England and the Workmen's Compensation Acts of Ontario, Manitoba and elsewhere came to be enacted, each of them proceeded not by removing a defence, but by creating a liability.

So far as the cases covered by sub-sec. (c), sec. 16, now in question, are concerned, the liability of the Crown was created thereby and unlimited if no other legislation, local or general, imposed a barrier.

I think the appeal should be allowed and the matter referred back to the Exchequer Court for trial or completion of trial.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Heap & Heap.*
Solicitor for the respondent: *E. L. Newcombe.*

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*June 12, 13.
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CHARLES HOOD AND ANDREW J. SNOW..... } APPELLANTS;

AND

JOHN R. EDEN, LIQUIDATOR..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Winding-up Act—Joint stock company—Contributories—Consideration for shares.*

H. and others, interested as creditors and otherwise in a struggling firm, agreed to purchase the latter's assets and form a company to carry on its business and they severally subscribed for stock in the proposed company to an amount representing the value of the business after receiving financial aid which they undertook to furnish. A power of attorney was given to one of the parties to purchase said assets, which was done, payment being made by the discount of a note for $2,000 made by H. and indorsed by another of the parties. The company having been formed the said assets were transferred and the said note was retired by a note of the company for $4,000 indorsed by H., which he afterwards had to pay. H. also, or the company in Buffalo of which he was manager, advanced money to a considerable amount for the company which eventually went into liquidation. After the company was formed, in pursuance of the original agreement between the parties, stock was issued to each of them as fully paid up according to the amounts for which they respectively subscribed, and in the winding-up proceedings they were respectively placed on the list of contributories for the total amount of said stock. The ruling of the local master in this respect was affirmed by a judge of the High Court and by the Court of Appeal.

*Held*, reversing the judgment of the Court of Appeal, Davies and Nesbitt JJ. dissenting, that as all the proceedings were in good faith and there was no misrepresentation of material facts, and as H. and S. had paid full value for their shares, the agreement by which they received them as fully paid up was valid and the order making them contributories should be rescinded.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

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*Held, per* Davies and Nesbitt JJ. that as they did not pay cash or its equivalent for any portion of the shares as such the order should stand.

*Held,* also, that it is the duty of the Supreme Court, if satisfied that the judgment in appeal is erroneous, to reverse it even when it represents the concurring view of three, or any number of, successive courts before which the case has been heard.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of Mr. Justice Ferguson, who upheld the ruling of the local master placing the appellants on the list of contributories of the Baden Manufacturing Co., in process of being wound up under R.S.C. ch. 129.

The material facts are stated in the above headnote and in the judgments given on this appeal.

*Aylesworth K.C.* and *Robertson* (*Segsworth* with them) for the appellants referred to *Kelner* v. *Baxter* (1); *Natal Land & Colonization Co.* v. *Pauline Colliery Syndicate* (2).

*Haight* for the respondent cited *North-West Electric Co.* v. *Walsh* (3); *In re Hess Mfg. Co.* (4).

THE CHIEF JUSTICE.—The appellants were each subscribers for twenty-five shares of the stock of the Baden Machinery Manufacturing Company, Limited, a company incorporated under The Ontario Companies Act by letters patent, dated August 27th, 1902. The stock is of the par value of $100 per share, and the appellants claim that their stock is paid up, as their stock certificates state. In winding up proceedings before the local master at Berlin under the Winding Up Act, R.S.C. ch. 129, an order was made placing the appellants on the list of contributories for the sum of $2,500 each, being the full par value of

(1) L.R. 2 C.P. 174.
(2) [1904] A.C. 120.
(3) 29 Can. S.C.R. 33.
(4) 23 Can. S.C.R. 644.

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their stock. That order was confirmed by Mr. Justice Ferguson, and the Court of Appeal for Ontario have dismissed an appeal taken by the appellants from his order. The present appeal is from the judgment of the Court of Appeal.

The facts of the case are rather complicated. They are substantially as follows:

For some time prior to the formation of the Baden Machinery Manufacturing Company a firm of Oelschlager Brothers had carried on business as manufacturers of wood-working machinery at Baden, where they had a large plant and a factory, subject to encumbrances. Their interest in the property, valued as a going concern, was worth from $17,000 to $25,000. The firm had, however, heavy debts to banks and others. They had no cash capital, one of the brothers was intemperate, and both were poor business men. They had, in consequence, lost their credit and were on the eve of failure.

The appellants were officers of the Buffalo Tool and Machine Company, doing business at Buffalo, N. Y., and having a branch place of business at Toronto. Their company had given orders for machines to Oelschlager Brothers, and had trouble in getting their orders filled. Inquiry by Hood as to the cause led to his discovery of the financial difficulties of Oelschlager Bros. On his suggesting assistance he was visited in Buffalo by Oelschlager Brothers and by one Oliver Master, a broker from Berlin, who was then liable to the banks for about $2,600 upon paper he had indorsed for the accommodation of Oelschlager Brothers, and which he would have to pay unless he could get some one else to come to the rescue. Master called over to Buffalo one W. M. Cram, a solicitor practising at

Berlin, who was in the same position as Master with respect to Oelschlager Brothers.

Master and Cram having suggested to Hood, as a solution of all their difficulties, the formation of a joint stock company, it was agreed among them that Cram should acquire the property of Oelschlager Brothers on the best terms he could as trustee for Hood, Snow and Master, and undertake on their behalf to pay the debts of Oelschlager Brothers, and that thereupon a company should be formed, to which the property with its encumbrances might be transferred, Hood undertaking for himself and Snow to give such financial assistance from time to time as might be required to carry on the undertaking, and that in consideration Hood, Snow and Master should receive paid-up stock in the company to the amount of $10,000, that being the value placed by them on their interest in the property (valued as a going concern) after it had the financial assistance promised by Hood and Snow. Hood represented Snow as well as himself in these transactions.

To carry out their plan, on the 29th July, 1902, Hood, Snow and Master signed a document appointing Cram their attorney and trustee to acquire and hold for their use and benefit the property of Oelschlager Brothers. Cram, in exercise of that authority, acquired the property, consisting of the plant and factory before mentioned, in consideration of the payment of $1,155 and the assumption of the encumbrances upon the property and of certain debts of Oelschlager Brothers to banks and others.

The transfer from Oelschlager Brothers was not completed until the 9th August, 1902, as appears by the affidavit of execution of the bill of sale. In the meantime, Hood, in pursuance of the agreement to aid

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financially, had given his promissory note for $2,000 to Master on the 6th August, 1902. The proceeds of this note were to be used to pay off certain encumbrances and to carry on the concern, but $1,155 of the proceeds was actually used by Cram to pay to Oelschlager Brothers the cash consideration on the purchase of their property.

Pending the completion of arrangements, Cram continued the factory as a going concern, and for that purpose requiring the sum of $700, applied to Hood, and he procured the acceptance by the Buffalo Tool and Machine Company of a draft, dated 8th August, 1902, for $700, in Cram's favour, and the proceeds were used in the Baden business. Again, on the 13th September, 1902, Cram required $1,200 to pay off the lien and mortgage of one Petrie, covering portions of the plant, and again Hood procured the acceptance by the Buffalo Tool and Machine Company of a draft for that amount in Cram's favour, and the Petrie claims were paid out of the proceeds.

On the 27th of August, 1902, letters patent were issued incorporating the Baden Machinery Manufacturing Company, Limited, the objects of the corporation being "to manufacture and dispose of engines and boilers and wood-working and other machinery, and to repair machinery." Hood, Snow and Master were the provisional directors, and they called the first general meeting of shareholders for the 17th day of October, 1902.

At the shareholders' meeting on October 17th, 1902, the agreement or arrangement proposed to be made by Hood, Snow and Master with the company as before set forth was put before the meeting.

There were present at this meeting all the shareholders except Snow and Carter. Snow was repre-

sented by his proxy, Hood. Carter, who was an employee of the Buffalo Tool and Machine Company, and whose $1,000 of stock was to form part of the $10,000 paid-up stock, had had the proposed arrangement submitted to him when he was asked to subscribe, and had assented to it, and in fact it was a proposal entirely for his benefit, and it was only upon that understanding he had subscribed. All the shareholders present assented to the arrangement, and in pursuance thereof certificates were, on the same day, issued to Hood, Snow and Master for the stock they had subscribed for, as fully paid-up stock.

The company forthwith took over the plant and factory and continued the business theretofore carried on. On the 1st November, 1902, the company took up Hood's $2,000 note by giving the company's own note for $4,000, dated November 1st, 1902, which, however, it was necessary to have indorsed by both Hood and Snow before discounting it. This $4,000 note was eventually paid up by Hood out of moneys obtained by him for the purpose from the Buffalo Tool and Machine Company. The company also, from time to time, made provision for the debts of Oelschlager Brothers at the banks as well as for some of their own debts.

For these and other purposes of the company, such as payment of wages, frequent application was made to Hood for financial assistance, which Hood obtained for the company from his own company, the Buffalo Tool and Machine Company. These applications were in pursuance of the agreement, before stated, which provided, among its other terms, that the stock of Hood and Snow should be paid-up stock, and no other agreement was ever made in reference thereto. The

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total amount obtained by the Baden Company from Hood for the enterprise from the time of taking over the Oelschlager property exceeded $13,000, not one dollar of which was ever returned. Certain machinery, amounting in value, at the outside price, to $2,675, was delivered to the Buffalo Tool and Machine Company, by the Baden Company, but it had no connection with the advances made, and, in fact, none of the machinery was shipped until after advances aggregating between $5,000 and $6,000 had been made.

The net result, as appears by the liquidator's report, so far as creditors are concerned, has been that the $6,000 indebtedness of Oelschlager Brothers has been reduced to an indebtedness of less than $2,000, leaving aside the claim of Hood and Snow and the Buffalo Tool and Machine Company, in respect of advances made.

On the 18th day of May, 1903, an order was made to wind up the company, and the respondent was appointed liquidator. The plant at Baden had prior thereto been seized under execution and sold by the sheriff. The liquidator obtained an order for payment over to him of the proceeds of the sale of the plant, and still claims to hold such proceeds as the property of the company, and has not in any manner offered to hand over such proceeds to those from whom the company obtained such property, nor has he in any way applied to set aside, or to have the company relieved from, the agreement under which the property was obtained.

Under these circumstances the appellants claim that they are entitled to hold their stock as fully paid under the terms of the agreement made on the 17th October, 1902, as if paid in cash; that the company has, by receiving all the benefits provided for it by

such agreement in taking over the property purchased from Oelschlager Brothers and in receiving to a much larger amount than the value of the stock the financial assistance promised by Hood on behalf of himself and Snow, and by issuing certificates for paid-up stock, and by assuming as between the company and Hood, Snow and Master, the debts of Oelschlager Brothers and Hood's note for $2,000, affirmed that agreement; that the liquidator has re-affirmed it by claiming from the sheriff the proceeds of the sale of the plant; and that he cannot in this proceeding repudiate that part of the agreement which is for the appellants' benefit.

The appellants further say that even if what took place on the 17th October, 1902, did not amount to a formal agreement binding upon the company as such, an implied agreement to the same effect arose by reason of what was done on the faith of the understanding between the parties.

The case as I view it is entirely one of inferences of fact from the facts proved and the application to it of incontrovertible law. It seems to me clear upon the evidence that the appellants have given real and valid consideration for their stock.

Mr. Justice Sedgewick has put in writing the reasons upon which the majority of the court have come to the conclusion that the appeal should be allowed. I have only a few words to add. The respondent has not failed to resort to the stock argument on appeals of this class of cases, that upon a question of fact he has the concurrent finding of three courts below in his favour. Now, in the first place, there are no controverted facts of any importance here. The case rests principally upon inferences of law and facts from admitted or uncontradicted facts. And, sec-

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ondly, it must not be forgotten that, when the statute allows of an appeal on facts, even if concurred in by three courts, as here, it is on the assumption, as in all cases, that there may be error in all these judgments, and the respondent is not entitled to invoke as an argument in his favour the very judgment that the appellant complains of.

It is our duty, in every case, to give the judgment that the Court of Appeal should, in our opinion, have given. The fact that two or three courts have passed upon a question of fact does not relieve us from the responsibility of judging of the evidence as we view it. If, in this case, we think that the local master came to a wrong conclusion, it is not simply because two successive appeals from his findings have failed that the appeal to us must also fail. When the statute gives an appeal to any court it never imposes the condition that the judgment must not be reversed. We have repeatedly had to reverse on questions of fact; *Russell* v. *Lefrançois*(1); *The North British & Mercantile Ins. Co.* v. *Tourville*(2); *Dempster* v. *Lewis*(3); and, as long as the right to appeal as to findings of fact exists, we have to continue to do so every time that we are convinced that there is error in the judgment complained of, whatever may be the number of courts or of judges that the respondent has previously succeeded in leading into error.

SEDGEWICK J.—There is nothing at common law to prevent two mercantile establishments carrying on two separate businesses uniting for the purpose of forming a new partnership, each association contributing as its share of the capital of the new partnership

(1) 8 Can. S.C.R. 335, at p. 366. (2) 25 Can. S.C.R. 177.
(3) 33 Can. S.C.R. 292 and the cases there cited.

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whatever property it may possess. And in the absence of bad faith or fraud there is nothing to prevent the members of the new partnership from allotting as among themselves the share of the capital with which each member of the partnership may afterwards be credited, even although the amount so allotted to him may be from a purely monetary point of view largely in excess of its market value. In other words, members of a partnership for mutual convenience may agree among themselves that the nominal capital may exceed, without reference whatever to amount, what from one point of view may be deemed to be the real capital. And if afterwards the original members, or other members coming in after the original members choose to form themselves and do form themselves into a joint stock company under the Ontario Companies Act, it being agreed that the whole assets of the partnership shall become the capital and the only capital of the company, the same results follow. The members of the new company in such a case would have just as much right as the former partnership to agree among themselves as to the figure at which the capital stock of the company shall be put down, whether that figure is actually in accordance with the fact, or is more or less fictitious. Admitting that in such proceeding there was no fraud, accident or mistake, no failure on the part of any one to disclose material facts, the complete and adequate knowledge on the part of every member as to the exact condition of affairs, all parties being *sui juris* and of disposing mind and understanding, no court of justice would or could entertain an action to set aside such an agreement, whether such action is brought by a shareholder or by any subsequent member of the company. It would be otherwise were it necessary in

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order to the raising of additional capital that the prospectus should be issued, and after the formation and complete organization of the company there had been left in the treasury or unallotted stock for the purpose of inducing the public to purchase these shares so undisposed of. In that case the original members of the company or its executive would be under certain legal and equitable obligations to the owners of the new stock company in regard to the actual accuracy and the utmost fidelity to proof as between them and the new members.

The company now being wound up was not a company of the latter, but of the former kind. Upon its organization a meeting was held at which every shareholder or the representative of every shareholder was present. Whatever negotiations may have taken place prior to the 17th October, 1902, to my mind it is clearly established by evidence, the evidence, too, of the respondent's witnesses (see the evidence of Oliver Master) that on that day, before the stock had been divided, there was a meeting of all of the shareholders of the company, every one of whom was either present or his representatives were present, and it was unanimously agreed that the stock in the company, as mentioned in the charter of incorporation, should be wholly divided up amongst the then existing shareholders in certain proportions, and that this verbal understanding was on the same day carried out by the secretary and president of the company issuing under the seal of the company certificates for fully paid-up shares to the amount just agreed upon, and the two appellants now hold these certificates as evidence of their immunity from further liability in respect to the shares so transferred to them. The evidence shews that the whole transaction was one of the most perfect

good faith; that the property brought into the business by the corporators was in the view of every one approximate, at least, to the stated amount of the company's capital. There was no suggestion of any fraud, imposition, mistake, failure to disclose material facts or anything to suggest any desire on the part of the company or any officer or member of it to defraud anybody, whether as between themselves or any future creditors.

Some time afterwards, the company having become financially embarrassed, a winding-up order was made and the two appellants were placed upon the list of contributories in order to pay the full amount of the capital stock held by them, as if nothing had been paid at all. I am of opinion that this transaction cannot now be impeached by the company's liquidator.

Some point was made in the court below that the agreement come to at the meeting of the 17th September not having been made a matter of record in the minutes of the company, no evidence could be given by oral testimony shewing that the agreement was. I have never found, apart from statutory enactment, where evidence of that kind was held properly rejected. The company may bind itself in many cases by simple silence; it may as effectively bind itself by verbal communication made by its responsible executive officers. *A fortiori,* when not only its executive, but every possible shareholder comes to an agreement as to a certain proceeding, and that agreement is followed up by a legal transfer under sale of the property, the subject matter of the discussion, the agreement in question, in absence of evidence to the contrary, must be held to be valid and binding, not only as between the shareholders but as between themselves and the whole world.

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I am of opinion the appeal should be allowed and the appellants' names struck off the list of contributories. The appellants will have their costs in all the courts below.

GIROUARD J.—I concur in the judgment allowing the appeal with costs and striking the appellants' names off the list of contributories, for the reasons stated by my brother Sedgewick.

DAVIES J. (dissenting).—I am of opinion that this appeal should be dismissed, and will add very few words to the reasons given for the judgment of the Court of Appeal by the Chief Justice of that court.

The appeal turns largely, if not entirely, upon questions of fact. The three courts below have found these facts against the appellant and the question for us to determine is whether they have properly appreciated the evidence.

The main question is whether the appellants as promoters of the company being wound up occupied such a fiduciary position towards the company at the time of its formation as prevented them from making any secret profit out of the sale to the company of the Oelschlager business and property which they had previously acquired.

I am clearly of the opinion that they, together with Master, did occupy such fiduciary position and that on the formation of the company which they had promoted, and of which they and Master became the directors, it was not legal for them to issue to themselves as paid-up shares of the company shares which as a fact were unpaid, and the alleged payment for which alone consisted in the profit which they charged the company in the sale to it of the Oelschlager business.

The facts in the case are as conclusive as the law. On the 26th July the appellants Hood and Snow, together with Master, Cram and Oelschlager, signed a memo. of agreement to become incorporated as a company under the provisions of the Ontario Companies Act under the name of the Baden Machinery Manufacturing Company, Limited, with a capital of $40,000, divided into 400 shares of $100 each, and severally agreeing to

take the respective amount of the capital stock of the company set opposite their respective names as hereunder and hereafter written and to become shareholders in such company to the said amounts.

This was signed on the 26th July by Hood for $2,500, by Master for $2,500, by Cram for $100, and Oelschlager for $1,000. On the 29th July Snow signed for $2,500, and in August two other shareholders signed.

The three promoters of the company about to be formed, namely, Hood, Master and Snow, on the latter date of 29th July—and after the execution of the above memorandum—executed a power of attorney to one of the other promoters, Cram, in the following words:

We and each of us hereby nominate and appoint William Moffatt Cram our attorney and trustee, to acquire and hold for our and each of our use and benefit, the property owned by William Oelschlager, and the property owned by Henry Oelschlager, of Baden, and any other property owned by Oelschlager Brothers, of Baden, the said property to be acquired and held as aforesaid, for the purpose of a joint stock company, proposed to be formed with us as provisional directors, and this is the said Cram's authority for so doing, and we hereby authorize him to do whatsoever may be necessary in the premises.

The Oelschlager property was then almost immediately purchased by Cram under this power of attorney, namely, on the 4th August following, who, after letters incorporating the company had been issued, assigned and handed over the property to it.

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Letters patent constituting Hood, Snow, Master and Cram a body incorporate under the name of the Baden Machinery Manufacturing Company were issued 27th August, 1902, and Hood, Snow and Master were named provisional directors of the company.

The first meeting of these provisional directors was held 4th October, when it was decided to call a general meeting of the company on the 17th day of October for "the purpose of organization," and to demand a transfer to the company of the property from Cram.

This transfer was promptly executed by Cram and at the organization meeting held 17th October, Hood was elected President, Snow one of the directors and Master Secretary-Treasurer and director.

On the same day twenty-five shares of stock each were issued to Hood and Snow, but the local judge held as the evidence shewed that although the stock was issued as fully paid-up stock, nothing, in fact, had been paid by either of these parties. They were consequently held liable on the subsequent winding up of the company to pay the amount of this stock so issued to them, and from this decision successive appeals up to this present one have been taken.

The facts are complicated by a $2,000 note which at the time of the purchase of the Oelschlager property Hood signed in favour of Master, which was discounted and the proceeds applied, $1,155 in paying Oelschlager and the balance in carrying on the business after the purchase. It was, however, stipulated by Hood from the first that this $2,000 should be assumed with other liabilities by the new company, and this was afterwards done by the company issuing its note for $4,000, and Hood got back his $2,000 note.

This $2,000 note may therefore be eliminated from the transaction, and when that is done there would not be a dollar paid by Hood either actually or ostensibly towards the purchase of the property.

It was properly admitted by Mr. Aylesworth that this $2,000 did not in any way constitute a payment for the shares issued to Hood, or have anything to do as consideration for these shares.

What was contended was that the purchase of the Oelschlager property by their attorney, Cram, was entirely a personal one by Hood, Snow and Master for themselves, and not for the company, and that they were under no personal fiduciary relationships with regard to the sale of that property to the company, but could do with it as they liked after its purchase, and, having sold it to the company they were justified in taking as and for their own profit the paid-up shares for which they had subscribed, and that the absence of any record in the minutes of the company authorizing the issue of such shares as paid-up shares made no difference if the fact was as they alleged that it was understood and agreed that they should be so issued.

I am quite unable to put this construction upon the Cram power of attorney, or to accept the reasoning of Mr. Aylesworth upon this point.

At the time this power of attorney was given these parties, Hood and Master, had, together with Cram, executed the agreement subscribing for their stock in the proposed company. They were promoters of that company in every sense of the word within the definition of that term as given by Lord Cairns L.C., in *Erlanger* v. *New Sombrero Phosphate Company*(1), at p. 1236. They authorize Cram to purchase the pro-

(1) 3 App. Cas. 1218.

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perty "for the purpose of a joint stock company proposed to be formed by us as provisional directors." They afterwards complete the formation of the company and as provisional directors call upon Cram to assign the property to the company, which he at once does, and which assignment they as provisional directors of the company accept.

I am of opinion that on these facts the appellants under the authorities clearly occupied as promoters a fiduciary position towards the company, and as such could not be permitted to issue to themselves as secret profit paid-up shares of the company, and where they have done so the shares can, in a winding-up proceeding such as this, be treated as unpaid shares. See Chief Justice Strong's judgment *In re Hess Manufacturing Company*(1). See also *In re Olympia Limited*(2), and on appeal to the House of Lords under the title of *Gluckstein* v. *Barnes*(3), especially the observations of Lord Robertson at p. 256.

The law is clear that the consideration which must be paid or given for shares in order that they may be considered paid up and that the holders may not be held liable as contributories in a winding up must be a real, valid and *bonâ fide* consideration in cash or its equivalent actually paid or transferred and that nothing less will suffice. *North-West Electric Co* v. *Walsh*(4); *Ooregum Gold Mining Co.* v. *Roper*(5).

This is sufficient to dispose of the appeal, and if it were not, I desire to say that I fully share the opinion expressed by the Court of Appeal that the oral evidence given to establish an agreement for these shares as paid-up shares in the face of the record of the min-

(1) 23 Can. S.C.R. at p. 659
(2) (1898) 2 Ch. 153.
(3) [1900] A.C. 240.
(4) 29 Can. S.C.R. 33.
(5) (1892) A.C. 125.

utes of the company, which is absolutely silent on the subject, is altogether too vague and unsatisfactory to justify any affirmative holding, even if admissible at all to supplement such minutes.

NESBITT J. (dissenting).—I confess I have been greatly troubled in this case. The question is one solely of fact, and were it not that three courts have found the facts against the appellants, I should have thought the view so ably argued for by Mr. Aylesworth entitled to prevail. At one time I thought the Chief Justice in the court below had taken a wrong view of the effect of the statement that the goods were purchased for the company to be formed, and so gone wrong in the result, but I am satisfied he only viewed it as a circumstance shewing there was no intention to have the stock issued for the consideration of the transfer of the goods, and that the company, as it was originally intended, paid for the goods by note (which subsequently was left unpaid) and assumed the liabilities of Oelschlager Brothers, and that the stock was issued as paid up when in fact no legal consideration was given to the company. Had the company paid the $4,000 note it would have paid for the goods, etc., for which it is now claimed the stock was issued. I concur in the judgment of the Chief Justice of the court below.

*Appeal allowed with costs.*

Solicitor for the appellants: *R. F. Segsworth.*
Solicitor for the respondent: *James C. Haight.*

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*Sept. 26.
*Sept. 27.

# IN THE MATTER OF THE CUSHING SULPHITE FIBRE CO.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

*Appeal per saltum—Winding-up Act—Application under sec. 76—Defective proceedings.*

Leave to appeal *per saltum*, under sec. 26 of the Supreme Court Act, cannot be granted in a case under the Dominion Winding-up Act.

An application under sec. 76 of the Winding-up Act, for leave to appeal from a judgment of the Supreme Court of New Brunswick was refused where the judge had made no formal order on the petition for a winding-up order and the proceedings before the full court were in the nature of a reference rather than of an appeal from his decision.

APPLICATION for leave to appeal from the judgment of the Supreme Court of New Brunswick under the Winding-up Act or in the alternative from the judgment of Mr. Justice McLeod, ordering the appellant company to be wound up and appointing a liquidator, without an appeal being first had to the Supreme Court of New Brunswick *en banc*.

*Teed K.C.* for the application.

*Pugsley K.C.* contra.

DAVIES J.—This was an application to me under the 76th section of the Winding-up Act of the Dominion for leave to appeal from a judgment of the Supreme Court of New Brunswick dismissing an appeal to that court from an assumed judgment or order made by Mr. Justice McLeod relating to the winding-

PRESENT:—Mr. Justice Davies, in Chambers.

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IN RE CUSHING SULPHITE FIBRE CO.

Davies J.

up of this company. The motion was, in the alternative, for leave to appeal *per saltum* from the order of Mr. Justice McLeod dated the 15th day of September, ordering and directing the winding up of the company, or for leave to appeal from the previous judgment of the Supreme Court of the 12th September.

As a matter of fact Mr. Justice McLeod made no formal order in the matter of the winding-up proceedings until after the appeal court of New Brunswick had given their judgment. In fact he declined to do so, stating at the close of his opinion that:

> As the matter is a very important one I will not make an order now, but I will order it to go by way of appeal to the Supreme Court, and I will order it to be entered on the motion paper to-morrow morning, and if there is any difficulty then, it may be treated as a reference from me and I will act on the order of the court.

When the matter, therefore, came before the Supreme Court of New Brunswick, it was more in the nature of a reference than in the nature of an appeal.

If I granted an appeal from their judgment it would seem to me to be a purely academic one. I am of opinion, under the 76th section of the Act, that leave to appeal *per saltum* cannot be allowed, and as there was no formal judgment given by Mr. Justice McLeod before the 15th September, from which an appeal could be taken to the Supreme Court of New Brunswick, I do not think I can grant leave to appeal from the judgment or order made by the latter court on the 12th September. As a matter of fact, the judges in the Supreme Court of New Brunswick were equally divided, and the order made was "that this appeal drop and be dismissed, the court being equally divided."

In my opinion the proper course is for the parties desiring to appeal to take an appeal out from the

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formal order for winding up, signed by Mr. Justice McLeod, of the 15th September, to the Supreme Court of New Brunswick, and apply subsequently to a judge of this court for leave to appeal from the disposition that court may make on the appeal to it.

The application, therefore, will be dismissed with costs, and as the case presents very special features which, in my judgment, justify special counsel in attending, I fix the costs at $50.

On the merits of the case I desire to be understood as expressing no opinion whatever.

*Application dismissed with costs.*

# CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF WENTWORTH.

1905
*June 2.
*Oct. 3.

W. O. SEALEY (PETITIONER).....APPELLANT;

AND

E. D. SMITH (RESPONDENT).....RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF MEREDITH C.J. AND MR. JUSTICE TEETZEL.

*Controverted election—Secrecy of ballot—Act of D.R.O.—Numbering ballot.*

Under the Dominion Controverted Elections Act a ballot cast at an election is avoided if there are any marks thereon by which the voter may be identified whether made by him or not. Hence, when the deputy returning officer in a polling district placed on each ballot the number corresponding to that opposite the elector's name on the voters' list the ballots were properly rejected. Judgment appealed from (9 Ont. L.R. 201) affirmed, Sedgewick and Idington JJ. dissenting.

APPEAL from the judgment of Chief Justice Sir William R. Meredith and Mr. Justice Teetzel (1), avoiding the election of the respondent Smith for the Electoral District of Wentworth, Ont.

The following case was stated for the opinion of the judges assigned to try the election petition:

"1. The election above referred to was holden on the 27th day of October and the 3rd day of November, A.D., 1904, when the petitioner William Oscar Sealey and Ernest Disraeli Smith were the candidates.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Nesbitt and Idington JJ.

(1) 9 Ont. L.R. 201.

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"2. Pursuant to the provisions of the Dominion Elections Act, the returning officer for the said election did by proclamation indicate and name the time when and the place where he would add up the number of votes given to each of the candidates at said election, namely: Thursday, the 10th day of November, A.D. 1904, at the hour of 10 a.m., at the Town of Dundas, in the said electoral district, and at the said time and place the said returning officer did add up the number of votes given to each of the said candidates, and did declare the petitioner William Oscar Sealey to have received 2,938 votes, and did declare the respondent to have received 2,918 votes, and did declare the petitioner duly elected.

"3. Pursuant to the provisions of the Dominion Elections Act a recount was held before the senior judge of the county court of the County of Wentworth at Hamilton on the 18th day of November, 1904, and on the 21st day of November, 1904.

"4. The said judge after the conclusion of the said recount and final addition certified to the returning officer that the petitioner, William Oscar Sealey, had received 2,889 votes, and that the respondent, Ernest Disraeli Smith, had received 2,899 votes, and the said returning officer thereupon declared the respondent duly elected.

"5. At the poll in polling sub-division No. 23 of the said electoral district the deputy returning officer on each ballot, before handing the ballot to a voter to mark, put the same number on the back of the ballot as was put opposite such voter's name in the poll book used at said poll, and such numbers still remain on the back of the said ballots and in the said poll book.

"6. At the poll mentioned in the preceding para-

graph 47 ballots were marked for the petitioner and 22 for the respondent.

"7. On the said recount the judge disallowed and declined to count for either candidate any of the ballots cast at said polling sub-division No. 23, on the grounds that in his opinion the numbers on the back of each ballot was a mark by which the voter could be identified.

"8. Pursuant to the provisions of the Dominion Controverted Elections Act, on the 25th day of November, 1904, the petitioner filed his petition herein, and on the 10th day of December, 1904, the respondent herein filed his cross-petition against the said William Oscar Sealey.

"9. The time for the trial of said petitions has been fixed for Wednesday, the 1st day of February next, at the court house in the City of Hamilton, at which time and place it is agreed it shall proceed.

"10. On the trial of said petition and cross-petition no witnesses shall be called and no evidence shall be given except the above stated case, and the facts herein set forth and the inspection by the court of the poll book and ballots used at said election at said polling sub-division No. 23, and the deductions to be drawn therefrom and all the other charges contained in said petition shall be dismissed without costs and the said cross-petition shall be dismissed without costs.

"The questions for the opinion of the court are:

"First: Is the respondent, E. D. Smith, the duly elected member for the Electoral District of Wentworth?

Secondly: If not, is the petitioner, W. O. Sealey, the duly elected member for the said Electoral District of Wentworth?

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"Thirdly: Or is the said election for the Electoral District of Wentworth null and void?"

On said case the trial judges reported as follows:

"The undersigned two of the justices of the High Court of Justice for Ontario assigned to try the above petition and cross-petition do hereby certify that on the first and second days of February, A.D. 1905, at the City of Hamilton, in the above electoral district, we held a court for the trial of and there tried the petition and cross-petition between the said parties respecting the above election.

"By agreement between the parties all matters in dispute in the said petition were comprised in a case stated for the opinion of the court pursuant to section 49 of the Dominion Controverted Elections Act, and all charges of corrupt practices were abandoned and no witnesses were examined at the trial.

"After hearing what was alleged by counsel on both sides:

"We find and report that neither of the parties to the said petition and cross-petition of the candidates at the said election was duly elected and that the said election was and is void.

"In the said petition and cross-petition of the respondent charges were made that corrupt practices had been committed at the said election, but all the said charges were abandoned and no evidence was given in support thereof. We repeat, therefore, that no corrupt practice was proven before us to have been committed by or with the knowledge or consent of either of the candidates at the said election.

"We have no means of forming a belief whether corrupt practices have or have not extensively prevailed at the said election.

"We have no reason to believe that the inquiry in-

to the circumstances of the election has been rendered incomplete by the action of any of the parties to the said petition or that further inquiry as to whether corrupt practices have extensively prevailed is desirable."

*Aylesworth K.C.* for the appellant referred to the *East Hastings Election Case*(1); *Russell Election Case*(2); *Bothwell Election Case*(3); *Digby Election Case*(4); under the Acts in force prior to 1900, and to the *North Simcoe Election Case*(5); and the *London Election Case*(6); decided after the Election Act of 1901.

*Lynch Staunton K.C.* and *Duff* for the respondent. The Election Acts call for absolute secrecy of the ballot, which should be held in view in construing their provisions. Veale on Statutes, p. 140; *Washington* v. *Grand Trunk Railway Co.*(7).

The ballots were clearly invalid and properly rejected. *Pritchard* v. *Mayor of Bangor*(8); *Bridport Election Petition*(9).

THE CHIEF JUSTICE.—This is a plain case, as I view it, and, notwithstanding the able argument at bar by appellant's counsel, I unhesitatingly think that his appeal must be dismissed. His contentions are, virtually, that the statute does not mean what it says. When it decrees in so many words that all the ballots upon which there is any writing or marks by which the voter could be identified must be rejected it

(1) Hodg. El. Cas. 764.
(2) Hodg. El. Cas. 519.
(3) 8 Can. S.C.R. 676.
(4) 23 Can. L.J. 171.
(5) 41 Can. L.J. 29.
(6) 41 Can. L.J. 39.
(7) 28 Can. S.C.R. 184.
(8) 13 App. Cas. 241.
(9) 19 Q.B.D. 498.

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does not say, as the appellant would contend, that the deputy returning officer is authorized to count a ballot so marked simply because it is himself who has marked it. The principle of the Act, it must be conceded, requires absolute secrecy of the ballot for the protection of the voter; and that, in the public interest, as well against the deputy returning officer as against every one else.

It must be because, as a general rule, all ballots marked by a deputy returning officer are not to be counted, that it was enacted by the amendment of 1886 (as declaratory law 49 Vict. ch. 4, sec. 8) that, by exception, those the marking whereof by himself is specially provided for by the Act have to be counted.

Le sous-officier-rapporteur (says the French version in clear terms) écartera tous les bulletins qui porteront quelques mots écrits ou quelque marque ou indication autre que le numero écrit inscrit par le sous-officier-rapporteur dans les cas ci-dessus prévus qui pourraient faire reconnaître le votant.

Why would the statute enact by way of exception that those ballots falling within the class of cases specially provided for as to marking by the deputy returning officer shall not be rejected if all those marked by him not falling within that same class of cases were likewise not to be rejected. To enact that those the marking of which is authorized shall be counted was to enact, or taking it to be the law, that those the marking of which is not authorized shall not be counted.

That amendment of 1886 declaring, *ex abundanti cautelâ,* that votes legally marked by a deputy returning officer under the Act are not to be rejected cannot be construed as meaning that those he illegally marks are also not to be rejected.

Then Parliament, by allowing the statute to remain as it is since 1886, must be taken to have tacitly acquiesced in the construction that has generally been put upon it by the courts, that any mark upon the ballot paper by which the voter could be identified, never mind by whom made, voids the vote.

The appeal is dismissed with costs.

SEDGEWICK J. (dissenting).—I am of opinion that the appeal should be allowed.

GIROUARD J.—If any doubt could be entertained as to the meaning of the former statute, that doubt has been removed by the Dominion Controverted Elections Act of 1900, adding the two last lines to section 80. Section 96 cannot help the appellant; quite the reverse, for it evidently refers to the exceptional cases mentioned in section 80. Mr. Aylesworth has admitted that possibly, by means of the numbers on the back of the ballot, the voter could be identified, and that the end which Parliament intended to achieve, namely, the perfect secrecy of the ballot, would be defeated. It is perhaps to be deplored that the fate of an election should thus be left in the hands of dishonest or ignorant deputy returning officers, unfortunately too numerous. Parliament alone can remedy such a serious result, so contrary to the popular government of a free country.

The appeal should be dismissed with costs.

NESBITT J.—I concur with the Chief Justice.

IDINGTON J. (dissenting).—This case turns upon the interpretation to be given to sub-sec. 2 of sec. 80 of the Dominion Elections Act, 1900.

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The end of sub-section 1 and the whole of section 2, are as follows:

* * * he shall open the ballot box and proceed to count the number of votes given for each candidate, giving full opportunity to those present to examine each ballot.

2. In counting the votes he shall reject all ballot papers which have not been supplied by the deputy returning officer, all those by which votes have been given for more candidates than are to be elected, and all those upon which there is any writing or mark by which the voter could be identified, other than the numbering by the deputy returning officer in the cases hereinbefore provided for.

Has Parliament by this directed the deputy returning officer to count only such ballots as he may choose?

That seems to be the issue. For if we follow the respondent's reading of the golden rule of construction he invokes, then the officer can, before counting, destroy such ballots as he may desire should not be counted.

The court, it is said, in such an event can do nothing to relieve from what may have been an accident, or to defeat what may have been a fraud.

The election may be set aside. That is no efficient remedy. It may be exactly what the officer designed to bring about.

The innocent blunder here may find its counterpart in fraud hereafter. Either may happen. Either must defeat the purpose of the Act, if we listen to the pretention put forward that secrecy is the sole thing to be considered.

To maintain seriously the proposition that the main purpose and policy of the Act is to secure the secrecy of the ballot is to overlook what the Act is for.

The purpose of the Act is to give effect to the will of the people.

The signification thereof by ballot is but a means to that end.

The interpretation we are asked here to adopt, must be adopted alike in the cases of fraud and accident as respondent's counsel properly conceded. That interpretation would sacrifice the object of the Act for the conservation of the manner of effecting its purpose.

Is it possible that Parliament can ever have intended that?

It has been said for ages that a statute is to be expounded "according to the intent of them that made it."

Rules of construction are but means to realize that intent.

The rule appealed to is as follows:

> In construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, and no further.

It would be hard to recognize the observance of this rule in the results that the respondent's contention leads to.

It would be observing the first part of the rule and discarding the rest.

Could there be a greater absurdity than that the will of the people must be defeated by means of the machinery designed to give effect to it and a continuation of such results be rendered possible?

Is not this sub-section just one of the cases within the exception in the rule? May not the grammatical and ordinary sense of the words be so modified as to avoid the absurdity and repugnance?

Does the rule not clearly indicate in the light of

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the facts we are to pass upon that such is the proper view to take?

The intention of Parliament would then be found rather than in any view that renders it necessary to make a travesty of such intention and declare the election void.

Drastic measures may be needed to preserve the secrecy of the ballot, but that would not do it. The harm, if any, has been done, the possibility of betrayal by the officers and agents of the secrets they are bound by law (see sec. 96, sub-secs. 5, 6) to keep sacred still exists.

Why should we adopt any other remedy than that expressly given?

A prosecution for breach of this statute is what Parliament has plainly indicated as all that it is intended should in this regard be given for such a purpose as the preservation of secrecy. Why above all should we adopt such a futile remedy as setting aside this election? Why should we confuse the two things? The secrecy of the ballot and the selecting power of the people as shewn by their votes that this enactment was intended to procure are quite distinct and, as I have said, are respectively means and purpose; and each has separate and distinct enactments for safeguarding it.

Is it not much more consonant with reason to read the whole of this sub-section 2 as directory? Reading it so accords with these considerations I have pointed out.

That would give it such elasticity as would enable the court to set aside the election when the facts seemed to demand it so that justice might be done, and refrain from such a course when unnecessary within the provisions of section 152, the predecessor of

which in identical words was relied upon in the *Bothwell Election Case*(1).

But whether the section is directory or mandatory and imperative its primary purpose is to guide this officer in counting ballots. Can it be conceived possible that it was ever meant to guide him to reject in regard to marks accidentally or improperly made by himself?

He was bound by every principle of law and ethics not to use the fruits of his own wrong to the detriment of others.

Was it not only his duty to discard his own wrong, but also obliterate it as soon as seen, so that others should not be misled?

He has discarded it. He failed to obliterate it. He fell short thus in the discharge of his duty as declared by this court in the *Bothwell Election Case*(1).

In this way of looking at the case it is one that comes within the curative provision I have referred to.

But when we consider the purview of the Act is there any need of thus refining; perhaps over-refining?

The ballot was to protect the man from the master and defeat the briber's arts.

It was clear that if there could be a means of the man assuring the master or the purchased voter assuring his corrupter how the vote has been cast then the Act might be defeated. The purpose of the Act, as I have said, was to give effect to the will of the people and to limit the expression of such will to worthy freemen and reject that of the confessedly unworthy.

(1) 8 Can. S.C.R. 676.

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To prevent this a direction was adopted by section 41 and schedule L., declaring that if the voter

placed any marks on the ballot paper by which he can afterwards be identified his vote will be void.

It is abundantly clear to my mind that this and this only was the kind of marking and the only marking that within the sub-section now under consideration was expected to occur, and which it was intended to prevent or deprive of success.

It is almost impossible to imagine that it was ever supposed by any one, that a sworn officer of the law, having accidentally or innocently made a mark, was a something likely to happen and needing such an absurd method of rectification or remedy.

It is surely repugnant, therefore, to the general purview of the statute to read this sub-section 2 in an absolute and narrow literal sense.

Moreover, there are presumptions of law that have uniformly been held to be implied in the legislative use of general words to restrict their ordinary meaning so that manifest wrong and injustice will not result from giving them their widest sense.

For example, when a statute authorized in express words "any or the nearest justice of the peace" to try certain cases, it was held that such general words would not authorize a judge to try any such case out of the territorial limits of his own jurisdiction: See 1 Hawke P.C.C. 65, sec. 45; *Re Peerless* (1); *The King* v. *Inhabitants of Fylingdales* (2).

It was also held that giving power to grant an injunction, in all cases in which the judge or court should consider it "just and convenient" did not extend the authority of the court beyond cases where

(1) 1 Q.B. 143, at p. 153. (2) 7 B. & C. 438.

there was an invasion of recognized and legal or equitable rights.

In *Reg.* v. *Coaks*(1) it was held that the law declaring that he having the majority of votes should be declared elected, was not to override the general law that those who knowingly should vote for one ineligible throw away their votes. This case has been criticized in some points but not in this, or overruled as far as I can see.

The statute which enacted that "every conveyance" in a particular form should be valid would not cure a defective title; *Ward* v. *Scott*(2); *Whidborne* v. *Ecclesiastical Commissioners*(3); *Forbes* v. *Ecclesiastical Commissioners for England*(4).

The 12 Car. II. ch. 17, which enacted that all persons presented to benefices in the time of the Commonwealth, and who should conform, as directed by the Act, should be confirmed therein "notwithstanding any act or thing whatsoever," was held obviously not intended to apply to a person who had been simoniacally presented.

The Factors Act which enacts that *any agent* "entrusted with the possession of goods" shall be deemed their owner is confined by the general scope and object of the enactment to mercantile agents and transactions.

*Ruther* v. *Harris*(5) decided that a provision of forfeiture of "fish taken by him and any net or moveable instrument used by him in taking the same" operated even where *no fish had been caught* and that the net *ineffectively used for the purpose was forfeited.*

(1) 3 E. & B. 249.
(2) 3 Camp. 284.
(3) 7 Ch. D. 375.
(4) L.R. 15 Eq. 51.
(5) 1 Ex. D. 97.

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The provision in the Railway and Canals Traffic Act imposing liability for loss "occasioned by the neglect or default of such company or its servants" was held in *Shaw* v. *Great Western Railway Co.*(1) not to cover theft by a servant of the company.

In *The Queen* v. *Harrald*(2), an Act declaring that wherever

> words occur which import the masculine gender the same shall be held to include females for all purposes connected with and having reference to the right to vote in the election of councillors, etc.,

was held not to apply to married women.

And when Baron Parke in *Miller* v. *Salomons*(3) had to interpret an Act requiring one to take and subscribe the oath of adjuration "according to the form therein set down and prescribed" he stated the rule of interpretation now appealed to here and departed from the literal meaning, and remarked that in case of absurdity, inconsistency or repugnance,

> we may predicate that the words never could have been used by the framers of the law in such a sense.

I think these illustrations are sufficient to shew that the modification I suggest, as required here by the purview of the Act, of the grammatical sense of the words in question are well within precedent and authority. See Maxwell, Hardcastle and Endlich if further illustrations be needed.

There is no decision binding this court to adopt such an interpretation of this sub-section as the respondent contends for. We have been pressed to accept dicta that appear in the *Bothwell Election Case*(4) as expressing the opinion of this court upon the question raised here. In that case the deputy re-

(1) [1894] 1 Q.B. 373.
(2) L.R. 7 Q.B. 361.
(3) 7 Ex. 475, at p. 546.
(4) 8 Can. S.C.R. 676.

turning officer, at No. 1 Sombra Poll, did just what the deputy returning officer is complained of doing in this case. But when he was counting the ballots he came to the conclusion that those which had written upon them the objectionable numbers ought not to have been so numbered, and he proceeded to obliterate the numbers, and did so in the presence of the agents of the parties to the election, and then counted the ballots as if nothing had been marked. What right had he to do this? What right if the sub-section in question is to be given such an absolute literal interpretation as asked for could he possibly have? The sub-section speaks clearly and distinctly in relation to the appearance of the ballots when taken from the ballot box.

If the deputy returning officer had the right after the ballots were taken from the box thus to rectify his mistake surely all that is asked by the appellant here is simply an extension of the same procedure. The court is asked to ignore here what the officer there, as the court held, had properly obliterated. So far, therefore, from the *Bothwell Election Case*(1) being a decision in favour of the respondent I read it as in favour of the appellant's contention. What the appellant says is, that the words are not inflexible, and do not in law require an inflexible interpretation. And that the court seems expressly to have decided. It is true, that the late Mr. Justice Gwynne in that case dissented and his opinion is quite consistent with the interpretation contended for by the respondent here. The late Mr. Justice Henry also seems to have indicated that but for *Jenkins* v. *Brecken*(2) he might have been of the same mind, but joined the majority of the court.

(1) 8 Can. S.C.R. 676.

(2) *Queen's (P.E.I.) Election Case*, 7 Can. S.C.R. 247.

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The late Chief Justice Ritchie said:

It seems to me that this in no way differs from the principle acted on in *Jenkins* v. *Brecken*(1), but is a much stronger case for the application of that principle, the only difference being the rectification of the error or irregularity by the officer at the close of the poll. The appellant's contention is that this rectification made a ballot, bad in the box, good out of the box, but this, though on the surface plausible, is, in my opinion, by no means a legitimate or accurate way of stating the case; if literally so, it is no more nor less in effect than was done in the *Brecken Case*(1). In what respect does the present case differ substantially from that of an officer inadvertently marking a ballot and giving it to a voter and before being used he discovers that he has improperly marked it, and then and there effectually expunges the mark and hands it to the voter? In such a case he immediately, before any harm is done, corrects his error. In the present case the officer, in the fair and legitimate discharge of his duty, innocently but irregularly marks a ballot; discovering his error at the very first moment it could be done, in the presence of the agents of the parties, he proceeds to undo what he had improperly done, and he accomplishes this in such a manner that the secrecy of the ballot is preserved, and also in such an effectual way that there is no possibility that any party could be injured thereby, and this, too, in the presence and without the slightest objection or protest on the part of the agents of the candidates.

He also said before this in regard to the question of secrecy having been preserved:

And I may say if they had been seen by the deputy returning officer I should doubt whether even this would affect the question because the secrecy in such a case would be as much preserved by the oath of the deputy returning officer as in the case of the ballots he marks for illiterate voters.

Mr. Justice Strong, in his brief judgment concurring with the Chief Justice, says:

I desire also to add that, by assenting to the grounds upon which the judgment proceeds, I do not mean to preclude myself from the right to consider in any future case in which the question may arise, whether *any* mark put on a ballot by mistake and in good faith by a deputy returning officer is to be held a ground for rejecting the ballot.

The late Mr. Justice Fournier, in his judgment,

(1) *Queen's (P.E.I.) Election Case*, 7 Can. S.C.R. 247.

states the facts, follows much the same line of reasoning as the Chief Justice, and finds, as he believed, according to the principle of the judgment in *Queen's (P.E.I.) Election Case; Jenkins* v. *Brecken*(1) and of the then sec. 80, that was identical with the present sec. 152, to which I have adverted.

I am, therefore, unable to assent to the proposition that the *Bothwell Election Case*(2) can in any way be relied upon to support the respondent's position here. And I do think that it is a most significant thing that so able and astute a lawyer as Mr. Justice Strong should have preserved, in the way he did, his right to declare, if he saw fit, the meaning of the then section. His intimation to my mind is plain.

As to the decisions upon the English Ballot Act, 1872, and the Election Act of Ontario, there is one observation to be made applicable to both. These Acts were framed upon an entirely different principle from the Dominion Elections Act, 1900. Under the former in both cases numbers had to be put upon the back of the ballots and so they were traceable. Scrutiny might be had, and incidentally to scrutiny, numbers such as were put upon the back here would facilitate the exposure of secrecy, supposed to be covered by the ballot. It would do more. It would facilitate, when secrecy was violated, the improper revelation to one bent upon what was intended to be kept secret.

On the other hand, the Act we are now considering in its whole scope prevents possibility of scrutiny. There is no chance of such a thing being successfully sought for. There is no reason in such an act to anticipate disclosures by means of the machinery put in operation necessary for a scrutiny.

In one way of looking at all this consideration of

(1) 7 Can. S.C.R. 247. (2) 8 Can. S.C.R. 676.

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the two kinds of legislation it may be said that the necessity (in the case of this Act) for prohibition of anything tending to expose the ballot to identification needs to be construed more liberally than otherwise and given effect to with the utmost rigour. It may be said that the prohibition of scrutiny indicates an intention to make of secrecy the supreme guide for the interpretation of the Act.

On the other hand when there is no practical possibility of the numbers that are complained of being seen and thereby leading to identification of the voter there can be no necessity for the rigid interpretation, and it cannot be predicated of the legislation to be interpreted that it was supposed necessary at the expense of all else so to protect the voter. Whichever may be the proper inference, or whatever may be the proper reasoning to be drawn from a comparison of the English cases and the Ontario cases with this, I do not think, when we consider the difference in the policy of those Acts, upon which those decisions are respectively founded, that they can be held for our present purpose as of high authority.

In regard to the Ballot Act, 1872, I do not find in it any such curative provision as I have referred to as existing here, and relied upon in the *Bothwell Election Case*(1). In both that Act and the Election Act of Ontario it is expressly provided, in addition to forbidding the counting of the ballot having unauthorized writing upon it by which the voter can be identified, that *it shall be void.* The Act in hand is one that by these different features and other minor details is so much differentiated from the Acts I have just referred to that its interpretation must be sought for upon consideration of its own purview, and can-

(1) 8 Can. S.C.R. 676.

not be aided much by considering entirely different legislation.

With every respect, I think in this case there has been entirely too much importance attached to the secrecy of the ballot and the risk of exposure and identification by means of the numbers wrongfully placed by the deputy returning officer. When is this to take place? I have pointed out that it cannot be through the means of the scrutiny. I think it cannot be by the means of the first count of the votes by the deputy returning officer or by means of the recount by the judge.

I entirely agree on this point with the well-reasoned judgment of Judge Ardagh where he held in the *North Simcoe Election Case,* in 1904(1), that the deputy returning officer had no right to look at the poll book and compare it with the ballots. One has but to read the whole of sec. 80, sub-sec. 1, to see that it contained two distinct directions as to the work to be done by the deputy returning officer. One relates to the disposition to be made by him of the papers including ballots spoiled and unused and poll books and only then when he has completed that part of his work shall he open the ballot box and proceed as directed in the language I have quoted from the section. His simple duty at the next stage of the proceeding is to count ballots. He does not need to refer to the numbers on the poll book for identification in any way. When he sees his own numbering wrongfully put upon the ballots he is under no necessity in order to understand what that means to refer to any poll book. No one else has a right any more than he to refer to the poll book for that or any other purpose, after the total number of votes has been checked.

(1) 41 Can. L.J. 29.

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No comparison of numbers on poll book and ballot paper can properly be made at any stage of the proceedings till a trial of a petition, and then only so far as to discover the nature of the impropriety to be investigated.

The counting the number of votes that appear on the poll book as having voted has all been accomplished before the count or recount of ballots is made.

The proceedings before the county judge are simply a repetition of what I have thus described as having been done by the deputy returning officer. I see no occasion for looking at or inspecting the poll books. The number of the ballots cast can be checked without any such reference and, with all respect, I think ought to be checked without any such reference.

If this all be right when is the terrible disaster to overtake the secrecy of the ballot? By what means is such a thing to be accomplished? One can conceive of resorting to methods to which the deputy returning officer might be a party, and, with his connivance, improper results might be obtained, but that as well as the improper use by the deputy returning officer of such numbering as done here can be dealt with when fraudulently done, and the fraudulent act defeated by such remedy as setting aside the election if need be, or by declaring the correct results. Fraud has to be reckoned with in every phase of human activity, has to be met by the strong arm of the law, and when the case, that rests upon fraud as the basis of the improper dealing that has led to such numbering of ballots as here complained of, arises, it must be dealt with by the way and in the spirit that the courts have to deal with fraud and wilful wrongdoing, both in election and in other cases.

I dissent, with respect, from the opinions of those

who attach such supreme importance to the secrecy of the ballot. And I have adverted thus to the subject to shew wherein I think it is in this connection of little moment. I may add also that, whilst the ballot no doubt protects the weak against the strong, it is but a very small fraction of the electorate who need and actually depend on such protection.

The great majority of freemen are proud to avow their opinions and openly declare outside the polling booth their preferences. When one reflects on this well-known fact and the exceptional nature of the case we have to deal with, I think it must be seen that far too much importance is attached to the secrecy that helps the few, and too little weight given to the wrong done the many. Such protection is bought at a price I am sure the legislature never intended to pay. We have in the judgment of the trial court appealed from the opinion of Sir William Meredith, concurred in by Mr. Justice Teetzel, that the interpretation which I have been arguing for would be the correct reading of the provision as it stood before the revision of the statutes in 1886. I quote the following from their opinion:

> Reading the provision as to the rejection of ballot papers as it stood before the revision of the statutes in 1886, in connection with the directions for the guidance of electors in voting, no canon of construction would be violated, I think, by interpreting the words "any writing or mark by which the voter could be identified" as meaning any such writing or mark placed on the ballot paper as is mentioned in the directions, and therefore as extending only to those placed on it by the voter himself or by his connivance or with his consent.

This opinion, I think, should govern this case, for I do not think that the change made in the revision of 1886 makes any difference. I think the following remark made by Baron Martin in *Miller* v. *Salomons* (1)

(1) 7 Ex. 475.

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at page 531, might well be applied to the amendment in question:

> It is quite notorious that Acts of Parliament are frequently made and that much more frequently sections are introduced to meet objections and set at rest doubts without much consideration as to whether they be really well founded or not.

The amendment consists in the addition of the words, "other than the numbering by the deputy returning officer in the cases hereinbefore provided for," at the end of the sub-section in question.

This amendment seems to have come into the statutes simply in the process of revision in 1886 and in considering it, and what effect is to be given to it as a change of the law, if any, I think regard should be had to 49 Vict. ch. 4, sec. 8.

I am, with great respect, unable to see how or why this change should make any difference in the interpretation. It would be necessary by the application of the principles I have sought to apply herein for the officer to adopt the same line of duty, and the court to avoid the same absurdity and repugnance to the purview of the Act.

Applying those principles and the considerations that Chief Justice Meredith seems to think are properly to be had in view, the result would be the same. There had been an obvious oversight in not originally making the exception that these words provided, and all that seems to happen is that the Commissioners in the revision observing the oversight added these words. The amendment proceeds upon the presumption that the officer will have discharged his duty, will not have acted improperly, and that the proper interpretation of the section as it originally stood would be the correct one when thus added to.

I think the appeal ought to be allowed, but inas-

much as the judgment appealed against was in accord with judicial opinions that might reasonably be followed, and that it might be said bound the court below, yet does not bind this court, I would not give costs.

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*Appeal dismissed with costs.*

Solicitor for the appellant: *J. P. Stanton.*

Solicitor for the respondent: *H. C. Gwyn.*

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*June 28.
*Oct. 3.

# CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF KING'S, N.S.

WILLIAM F. PARKER (PETITIONER) . . APPELLANT;

AND

SIR FREDERICK W. BORDEN (RESPONDENT) . . . . . } RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF WEATHERBE C. J.

*Controverted elections—Service of Petition—Service out of jurisdiction—Second service on agent—Nova Scotia Election Court Rules.*

Under the Dominion Elections Act service of an election petition cannot be made outside of Canada. Idington J. dissenting.

By rule 10 of the Nova Scotia rules under the Election Act, a candidate returned at an election may, by written notice deposited with the clerk of the court, appoint an attorney to act as his agent in case there should be a petition against him.

*Held*, than an agent so appointed is only authorized to act in proceedings subsequent to the service of the petition, and service of the petition itself on him is a nullity.

APPEAL from the judgment of Weatherbe C.J. allowing the preliminary objections to the petition against respondent which denied that the same had been served and dismissing said petition.

By order of a judge the election petition was served on respondent at Boston, Mass., and the latter thereupon appointed an agent under rule 10 of the Supreme Court Rules relating to controverted elections, which is as follows:

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Idington JJ.

Any person returned as a member may, at any time after he is returned, send or leave at the office of the clerk of the court a writing signed by him, or on his behalf, appointing a person entitled to practice as an attorney to act as his agent, in case there should be a petition against him, or stating that he intends to act for himself, and in either case giving an address, within the City of Halifax, at which notices may be left.

A copy of the petition was afterwards served on such agent at Halifax after preliminary objections to the petition had been filed. By leave of a judge further objections were then filed, by which it was denied that the petition had ever been served, and on the hearing thereon the Chief Justice dismissed the petition for want of service.

The material sections of the Election Act and rules thereunder are set out in the judgment on this appeal.

*Lovett* and *R. V. Sinclair* for the appellant.

*Roscoe K.C.* and *Mellish K.C.* for the respondent.

THE CHIEF JUSTICE.—The respondent having been returned at the general elections of 1904 as a duly elected member of the House of Commons for the County of King's, N.S., the appellant on the 12th December, 1904, presented a petition impugning the said return.

As the respondent was then in Boston an order was taken by the appellant, on the 16th, extending the time for service to the 23rd of January, 1905, inclusive, and on the same day, 16th December, an order was taken giving leave to effect service on the respondent personally at Boston.

Under these orders the respondent was served personally at Boston three days later, on the 19th of December. On the 23rd the respondent, under the

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rules, appointed one C. F. Pearson as his agent and attorney, notice whereof was given by said Pearson on the 24th, and on the same day the respondent filed preliminary objections against the petition.

On the 23rd of January following, the petitioner himself casting a doubt upon the service in Boston, a second service of the petition was made at Halifax on the said Pearson, as agent of the respondent. What became of the first preliminary objections filed on the 24th of December does not appear by the printed record. They are not now in question. On the 6th of April, upon leave, a second set of preliminary objections was filed by the respondent against the petition on the ground, amongst others, that the said petition had never been duly served upon him. By the judgment now appealed from these preliminary objections were maintained, and the petition dismissed, the learned judge holding the service in Boston bad because not authorized by statute, and the service on Pearson also bad because not previously authorized by the court or a judge. This judgment is, in my opinion, unassailable.

As to the service in Boston there is nothing in the statute that governs this case (54 & 55 Vict. ch. 20, sec. 8), or the rules of the court construed with that statute, as they must be, that authorizes a service abroad. And no such service can be legally made without clear statutory authority. Here the statute must be construed as authorizing exclusively, first, a personal service anywhere in Canada, if possible, and, secondly, if that is not possible, a service upon such other person or in such other manner *in Canada* as directed by the court or judge. As to the service upon respondent's agent at Halifax, it is invalid because not authorized by the court or a judge. Rule 20 of the Election

Rules, N.S., enacts, it is true, that when a party against whom a petition is filed is not within the province, the petition shall be served in such manner as one of the judges shall direct, but the words "in such manner" must now be read as if followed by the words "in Canada." The appellant argued that under rules 10 and 46 of the N.S. Election Rules, the service on respondent's agent at Halifax was valid.

Those rules read as follows:

10. Any person returned as a member may at *any time after he is returned* send or leave at the office of the clerk of the court a writing signed by him or on his behalf appointing a person entitled to practice as an attorney to act as his agent in case there should be a petition against him or stating that he intends to act for himself, and in either case giving an address within the City of Halifax at which notice may be left and in default of such writing being left within a week after service of the petition notices and proceedings may be given and served respectively, by posting up the same in the office of the clerk of the court.

This is a reproduction of rule 10 of the English and Ontario rules.

Rule 46 says that:

An agent employed for the petitioner or respondent shall forthwith leave written notice at the office of the clerk of the court of his appointment to act as such agent, and services of notices and proceedings upon such agent shall be sufficient for all purposes. (59 of the English rules and 49 of Ontario rules.)

At first I thought that the appellant's contention was well founded, and that these rules authorized the service of the petition on the agent, but after further consideration I have come to the contrary conclusion.

In England, though the two preceding rules referred to are enacted in the same terms, they could not have been intended to have any application to the service of the petition itself, since rule 14 specially adds that

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where the respondent has named an agent, the service of an election petition may be by delivery of it to the agent.

Rule 14 in Ontario is in the same sense.

Now when, in drafting their rules, the judges in Nova Scotia, who had before them the English rules, which in many instances they adopted textually, deliberately left out this last one, the legal inference is that they did not intend to authorize the service of the petition itself on the agent, but simply the service of the proceedings subsequent to an effective and valid service of the petition.

Then by the statute of 1891, subsequent to these rules, when the service cannot be made upon the respondent himself in Canada, it can only be made upon such other person as directed by the court or a judge. Here there was no order permitting service on respondent's agent. The service upon him was, therefore, void and ineffective.

The appellant further argued that the respondent had waived any objection he might have had against the service by appointing an agent and filing preliminary objections, and taking proceedings thereupon. This contention cannot be supported; *Montmagny Election Case*(1).

The preliminary objections alleging no service could not with any fairness be construed as admitting a legal service. The respondent here, it is true, filed a cross-petition, and such a proceeding could be taken perhaps only after service, but he carefully, in express terms, filed this cross-petition "without waiving any objection to the service of said petition."

It may be that the cross-petition filed on the 30th of December, 1904, is irregularly on the record; this

(1) 15 Can. S.C.R. 1.

we do not have to decide. But it cannot have the effect contended for by the appellant of an unconditional admission by respondent of a legal service of the petition. There is nothing inconsistent in the respondent saying "a *de facto* service, or an attempted service, or what the appellant pretends to be a service has been made on me, or on some one else or somewhere for me, but I impeach the validity of that service, and appear for the exclusive purpose of asking the court to declare it illegal, ineffective and null."

Another point raised by the appellant is as to his allegations of corrupt practices by the respondent at a previous election which were struck out by the judge. As the petition must stand dismissed for want of service we need not adjudicate upon this point. I may as well remark, however, that no appeal would lie from the dismissal of the paragraphs of the petition relating thereto (23 to 34), if all the other preliminary objections had been dismissed, as the judgment thereupon would not in that case have put an end to the petition, but solely to the said paragraphs thereof; sec. 50, ch. 9, R.S.C.

The appeal is dismissed with costs.

GIROUARD J.—The service of the election petition in Boston is bad, because it was not made in Canada; 54 & 55 Vict. ch. 20, sec. 8. The second service in Halifax is also bad, because it was made not upon a general agent authorized by the respondent to accept service of an election petition and all papers connected with the same, but upon an attorney or agent authorized to represent him in a special cause already instituted. The appeal should be dismissed with costs.

DAVIES J.—I have carefully read and considered all the cases cited by the learned counsel who argued

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this appeal. I concur in and adopt the rule laid down by the Court of Appeal in *In re Busfield*(1), at page 132, by Cotton L.J., as the result of all the cases, in the following words:

> Where anything like jurisdiction over the person has been sought to be exercised leave to serve abroad in cases not coming within the terms of Order XI., has been refused as in *Re Maugham* (2), and in *Re Mewburn's Settled Estates*(3). In my opinion the principle laid down by the late Master of the Rolls is correct, that the court has no power to order service out of the jurisdiction except where it is authorized by statute to do so .

Then does the Controverted Elections Act authorize such service out of the jurisdiction? The jurisdiction of the Election Court, as already determined by this court in the *Queen's and Prince Election Case*(4), so far as service of the petition is concerned, extends all over Canada. After that case was decided Parliament amended the 10th section of the Controverted Elections Act by 54 & 55 Vict. ch. 20, which in its 8th section declares that notice of the presentation of an election petition, etc., may be served on the respondent *personally* "at any place within Canada." The section goes on to declare that if such personal service cannot be made then service may be effected.

> upon such other person or in such other *manner* as the court or judge on the application of the petitioner directs.

It is clear to my mind that this substituted service, if made on any other person than the respondent, was not authorized to be so made *out of Canada,* and it is equally clear to me that the "other manner" of service means some other manner within Canada, and does not alter and was not intended to alter the *place* where legal service could be effected. In other words

(1) 32 Ch. D. 123.
(2) 22 W.R. 748.
(3) 22 W.R. 752.
(4) 20 Can. S.C.R. 26.

substituted service alike with personal service must be within Canada, the statute not having either expressly or by necessary implication authorized it to be made out of the jurisdiction of the court.

The result is that the personal service effected on the respondent in Boston was not a good service, and I fully agree with all my colleagues that the subsequent service without any special order therefore made upon the respondent's agent appointed for the purpose of taking exception to the personal service made upon him in Boston by preliminary objection was not a good service. The rules of the Supreme Court of Nova Scotia do not cover any such case, and the English rule and the Ontario rule, under which such service may be effected, seem to be designedly omitted. At any rate these later rules are not in the Nova Scotia rules.

The appeal, therefore, should be dismissed with costs.

NESBITT J.—I concur in the judgment of the Chief Justice.

IDINGTON J. (dissenting).—I think this appeal must be determined by the interpretation to be given to section 10 of the Dominion Controverted Elections Act as amended by 54 & 55 Vict. sec. 8, whereby it is made to read as follows:

> Notice of the presentation of a petition under this Act, and of the security, accompanied with a copy of the petition, shall, *within ten days after the day* on which the petition has been presented, or within the prescribed time, or within such longer time as the court, or any judge thereof, under special circumstances of difficulty in effecting service, allows, be served on the respondent or respondents *at any place within Canada.* If service cannot be effected on the respondent or respondents personally within the time granted by the court or judge, then it may be effected upon such

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other person, or in such other manner, as the court or judge, *on the application of the petitioner*, directs.

Obviously the first part of this section contemplates that notice of a petition must be served within Canada.

It is equally clear to my mind that service within Canada was intended to be in all cases a personal service if possible.

Then the second part of the section provides for service, when that cannot be so effected on the respondent,

upon such other person, or in such other manner as the court or a judge on the application of a petitioner directs.

When the service which the first part of the section provides for, that is the personal service within Canada, cannot be accomplished, I think the alternative proposition of the section, providing for all else in the way of service, commits the entire subject matter of service to the discretion of the court or judge to dispose of on the application of the petitioner. Power is given to direct service upon any other person than the respondent. It might be directed to be made upon any one named. Any person in the same association or representing the same party, or in some way from identity of interest likely to defend respondent's seat might well have been named, but failing that or the adoption of such plan of action, on whom can it be served?

The judge or court have committed to them, I think, in the widest possible sense the power to direct service on another person or by substitution in any way that the words "or in such other manner" are capable of authorizing to be done. Does that extend to a service beyond the jurisdiction?

Would it have been improper for the judge who made the order in this case to have directed only that notice and a copy of the petition should be mailed (say at Halifax) to the respondent at Boston and order that such should be service?

When the judge knew that the respondent was sojourning at a place so near to his home as Boston, or if he had been even nearer, would he have discharged his duty properly by directing that the petition, as has been suggested, might be posted up with notice in the office where it was filed as a mode of service, and yet have refrained from directing a communication thereof by mail or otherwise to the respondent, simply because respondent happened to be beyond the boundary line?

Can it be said that a judge would have the discretion to direct the most obscure method of service, and that he must abstain from daring to direct transmission even for a few feet beyond the boundary line of Canada, of the notice of the presentation and copy of petition?

The whole difficulty, it is suggested, arises from the necessity for the observance of a highly technical rule requiring foreign service to be effected only by virtue of a statute.

One thing to be observed and borne in mind is that this proceeding is not one begun by way of a common law writ which never could have run into, or by any such semblance thereof as service abroad be permitted to run into, a foreign country.

The law permitting that to be done must be by or founded upon a statute.

It is likewise to be borne in mind that despite such rigid rule of the common law the practice of the Court of Chancery grew up whereby proceedings began by

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bill, and the invitation to answer was served abroad by means of a subpœna. It is said that might go for nothing. As to relief to be got against the person of the defendant it obviously must go for nothing, yet such service abroad seems to have been usual.

Side by side with these classes of cases which illustrate distinctly different growths of law the practice of service abroad, of notice in some form or other, of proceedings, in relation to things over which the court had a jurisdiction, grew. The curious may follow the inquiry in Daniell's Chancery Practice and other books wherein interpleader, for example, is shewn to have been one where the court first had required to be satisfied of such notice abroad, then proceeded to exercise, if the party abroad disregarded the notice, such jurisdiction as would give to those invoking the power of the court a remedy and protection in regard to their property within the jurisdiction which would have the effect of forever barring the right of him who happened to be abroad.

I am not concerned to follow this learning further than to shew that there was not, even long ago, an inflexible rule of law that was of such universal application, that every statute creating a new jurisdiction such as these election courts, must be held to have necessarily had implied in their constitution a limitation of power forbidding the use (unless most explicit, express language gave it recognition) of notice to be communicated to a party in a foreign country, as of any force or effect whatsoever.

Is there such an inflexible rule of law requiring us to place such a restricted meaning upon the comprehensive and the plain words in question?

I rather think there is not now any such principle of law by which we must so interpret the words now

under consideration, but on the contrary thereof that we must interpret the statute in the light of reason and daily practise and give to the words "such other manner" their widest signification.

If we look at the history of foreign service as outlined in Piggott on Service out of Jurisdiction, or for my present purpose concisely set forth in the judgment of Lord Chancellor Chelmsford in *Drummond* v. *Drummond*(1), and we find that the authority upon which the courts have acted, in making rules under and by virtue of which foreign service has become almost a universal form of procedure, at first rested upon implied rather than express power, we will be better able to appreciate the importance of not confining the powers of the court or judge under the second part of the section I am now considering within too narrow limits.

The power upon which at that time such general jurisdiction rested is well put in the judgment I am referring to thus:

> But one of the Acts in pursuance of which these orders are made is the 3 & 4 Vict. ch. 94, which is of much more extensive operation. It empowers orders to be made with respect to the process, pleadings and course of proceeding in the Court of Chancery, not only in certain specified particulars but also in general and comprehensive terms. Amongst others, power is given to make alterations "generally in the form and mode of proceeding to obtain relief and in the general practice of the court in relation thereto." These words seem to me to be sufficiently large to authorize rules to be made upon service to parties anywhere out of the jurisdiction, without which, in many cases, relief would not be attainable.

Can it be said that the words quoted

*generally in the form and mode of procedure to obtain relief and in the general practice of the court in relation thereto*

are any more definite or imply in any more de-

(1) 2 Ch. App. 32.

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finite way that foreign service may be provided for than the words "in such other manner as the court or judge," etc., directs service to be had? Yet in *Drummond* v. *Drummond*(1) Lord Chancellor Chelmsford evidently had the opinion that these words he quoted were sufficient authority for providing by general rules for service abroad.

It is unnecessary to say more on this than point out that the expression which Lord Chelmsford quotes was not used in relation to service at all, but the words we have to interpret expressly relate to service.

Yet the rules committee, constituted of the most eminent lawyers of that day, felt authorized thereby to expressly provide for foreign service.

True such had to be submitted to Parliament before coming into force.

I think, however, if foreign service was then so much beyond legal ken, or habit of thought, as the argument here would indicate, the judges would have refrained from submitting, as they did, by virtue of such authority, rules (which would be in light of that argument of such an invasive character), providing for it.

When the judges of the Supreme Court of Nova Scotia enacted rules they had only general, comprehensive words empowering them to make such rules of court

> for the effectual execution of this Act and of the intention and object thereof and the regulation of the practice and procedure and costs with respect to election petitions and the trial thereof and the certifying and reporting them.

They then, by Rule 20, provided as follows:

> When the party against whom any petition is filed is not within the Province of Nova Scotia the petition and the accompanying

(1) 2 Ch. App. 32.

document shall be served in such manner as one of the judges shall direct.

When a service was made in Ottawa of a petition filed in Nova Scotia, against the member representing one of the ridings in that province, without deciding the question of the extent of the authority given by the rule, this court held that the service was good and at the same time the late Chief Justice Ritchie remarked(1):

> I throw out of consideration altogether in this case the point raised as to the power of the Supreme Court of Nova Scotia to make rules in relation to the service of the presentation of the petition when the respondent is out of the province and jurisdiction of the court in which the petition is filed. If I was called on to express an opinion at the moment I would, as at present advised, think the court possessed such power.

Most of the other judges seem to have been impressed with the order for extending time being one of discretion, and the service having been made at Ottawa, seems to have been treated as if good though beyond the jurisdiction of the province. This was before the Act was amended so as to make it clear that personal service within Canada would be sufficient.

This seems to me, when we look at the original section 10, which it interprets, to differ in spirit from that mode of interpretation that we are now asked to apply to the amended one in regard to the principle of extra territorial service.

It makes the jurisdiction of the court in regard to the directing of such service as within the purpose of the Act as it then stood.

The amendment nowise affects the spirit in which this mode of interpretation of the *Shelburne-Queen's Election Case*(2) should be applied to the second part of the amended section.

(1) *Shelburne Election Case*, 14 Can. S.C.R. 258, at p. 263.

(2) 36 Can. S.C.R. 537.

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If we adopt the same ideal of interpretation and do not feel hampered by practice or mode of interpretation that restricts service to mean anything but foreign service, we are at liberty to interpret this second part of the section in the same spirit in which the first part was interpreted in that case.

It would be in accord with the spirit of modern legislation throughout the Dominion, and especially with the spirit of the special legislation of Nova Scotia in regard to the rules of practice for the local courts providing for service of writs of summons, or notice thereof, of notice of originating summons or petition, as the case may be, within the usual range of subjects such rules are made applicable to.

If the words I refer to are capable of authorizing the judges to make a general rule of practice going the length of providing for foreign service, then, I think, in default of the rule, the language enables in each specific case the court or a judge on the application of a petitioner to make such order as was made here.

The case of the *Credits Gerundeuse Ltd.* v. *Van Weede*(1) would seem very much in point.

It was an application for leave to serve a copy of an interpleader summons obtained under Order 57 out of the jurisdiction, and the application was granted. The court observed that they did not assert any present jurisdiction over Jordi or propose to compel him to submit to its process, but merely give him notice of the proceedings which were being taken.

Jordi had commenced action in the court claiming the goods or their value, but he was beyond the jurisdiction of the court. The order did not rest upon any

(1) 12 Q.B. D. 171.

special legislation, but upon a long line of authorities, such as I have intimated above in regard to interpleader and other matters. I think the claim against the respondent is very much as was said by Sir Henry Strong in a somewhat similar case,

that these petitions are not personal actions, but more properly actions *in rem*.

All these considerations and such authority must not be lost sight of when we come to interpret the authority that is given by virtue of the words

or in such other manner * * * as the court or judge may direct.

I think the principles laid down by Lord Justice Bowen in *Re King's Trade Mark*(1) should be observed in the construction of this and any similar statute.

His exposition of the law therein seems amply to cover this or any other case. Amongst other things he says:

If the court at home has jurisdiction over the person or the thing, then the question whether sufficient notice has been given to anybody who is interested in the way in which the court exercises that jurisdiction, is a matter of municipal procedure—municipal procedure to be regulated by statute, or by rules of court, where the court is empowered to make rules, but if there is no statute and no rules of court, a procedure which is to be judged of by the light of natural justice. In the last mentioned case the question of the validity of the notice is a question of procedure. It is not a question of jurisdiction.

I think these words are applicable to this case when considering the meaning to be attached to the words we have to give effect to.

As to the application of words "other manner" see in *Jackson* v. *Rainford Coal Co.*(2) remarks of Chitty J.

(1) 40 W.R. 580; [1892] 2 Ch. 462.

(2) [1896] 2 Ch. 340, at p. 344.

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KING'S (N.S.) ELECTION CASE.

Idington J.

The *West Algoma Election Case* (1) would seem, as well as these other considerations and decisions, to uphold the conclusion I have arrived at, that it was entirely within the discretion of the judge who made the order for personal service in Boston, to do so or not and that with the exercise of that discretion we have no right to interfere.

I may add that I would not if I could, for the order seems to me to be in accordance with reason and common sense as well as natural justice.

I think the appeal should be allowed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellant: *John A. McKinnon.*

Solicitor for the respondent: *G. Fred. Pearson.*

(1) 2 Ont. Elec. Cas. 13.

## CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF SHELBURNE AND QUEEN'S.

1905
*June 28.
*Oct. 3.

EDWARD A. COWIE (PETITIONER) ....APPELLANT;

AND

WILLIAM S. FIELDING (RESPONDENT) ..... } RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF CHIEF JUSTICE WEATHERBE.

*Controverted election—Practice—Service of petition abroad—Subsequent service in Canada.*

Service of an election petition out of Canada being void, does not invalidate a subsequent legal service in Canada.

APPEAL from the judgment of Weatherbe C.J. allowing preliminary objections to the petition against the return of respondent as a member of the House of Commons and dismissing said petition.

A copy of the election was served on the respondent in London, England, by order of a judge of the Supreme Court of Nova Scotia. Subsequently, respondent having return to Canada, another copy was served on him at Ottawa within the time for service as extended by a judge under the Elections Act. Preliminary objections to the petition were filed, in some of which the respondent claimed that he had never been served as required by law. These objections

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Idington JJ.

1905

SHELBURNE-QUEEN'S ELECTION CASE.

were allowed by the Chief Justice of the Supreme Court of Nova Scotia, who held that the service in London was void, but that it prevented a second service, and he dismissed the petition.

*Lovett* and *R. V. Sinclair* for the appellant.

*Roscoe K.C.* and *Mellish K.C.* for the respondent.

THE CHIEF JUSTICE.—This is an appeal from the judgment of the Chief Justice of Nova Scotia dismissing, upon preliminary objections as to the service thereof on the respondent, the appellant's petition against the return of the respondent as member of the House of Commons for the electoral district of Shelburne and Queen's, N.S., at the general elections of 1904.

The said petition was presented in due time under the statute on the 12th of December, 1904. Before it could be served the respondent had left for Europe. On the 16th of December an order was taken extending the time for service to the 10th of February, 1905. On the same day an order was taken giving leave to effect service on the respondent in Austria or in England. On the 3rd day of February, 1905, the respondent was served at London, in England. On the same day an order was taken extending the time for service to the 25th of March, 1905, and on the 28th day of February, the respondent having returned to Canada, service was made upon him personally at Ottawa. On the 6th day of March (the 5th being a Sunday), within five days of the service upon him at Ottawa, the respondent appeared by attorney and filed the preliminary objections now in question, having taken no notice of the service upon him in England. The judgment *a quo* dismissed the petition on

the ground: 1st. That the service in England was bad because not authorized by the statute. 2ndly. That the service at Ottawa was also bad because a first service had been made or attempted to be made in England.

With deference, there is, in my opinion, error in that judgment upon the second point, and I would allow the appeal upon the ground that the service at Ottawa was a perfectly good and valid one.

The respondent has to admit that, but for the previous attempted service in England, the validity of that service at Ottawa could not be questioned under the provisions of the statute 54 & 55 Vict. ch. 20, sec. 8; *Queen's and Prince (P.E.I.) Election Case*(1). Now, as held by the court below, that service in England was clearly unlawful; the statute does not authorize a service out of Canada and, without a direct authorization, such a service is void. Compare *Williams* v. *The Mayor of Tenby*(2). And that being so, the appellant had a perfect right to effect a personal service at Ottawa within the extended delay.

A defective previous service cannot, as the respondent would contend, invalidate a subsequent service made in conformity with the statute; *Glengarry Election Case*(3). The respondent, who rightly insists that the service in England was a nullity *de non esse,* having no force and effect whatever, and treated it with contempt, would now argue that it has the effect of nullifying the service at Ottawa. I fail to see upon what ground that contention can be supported.

Another ground of appeal taken by the appellant is as to the striking out of his petition by the judgment the allegations of corrupt practices by the re-

(1) 20 Can. S.C.R. 26. (2) 5 C.P.D. 135.
(3) 20 Can. S.C.R. 38.

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spondent at the previous election of 1900, and in allowing No. 16 of the respondent's preliminary objections. As to this part of the judgment no appeal lies under sec. 50, ch. 9, R.S.C., as the allowance of this paragraph of the preliminary objections would not alone have put an end to the petition. Compare *McIntosh* v. *The Queen*(1). So that paragraphs 23 to 34 of the petition remain struck out.

The appellant has argued that, by appearing and filing preliminary objections, the respondent had waived his right to complain of the irregularities or deficiencies of the service. Though it is unnecessary to determine the point, in the view we take of the merits of the preliminary objections, yet it is not inexpedient to remark that the decision in the *Montmagny Election Case*(2) does not support that contention.

The appeal must be allowed with costs and the preliminary objections dismissed with costs.

GIROUARD J.—The notice of the election petition served upon the respondent in London, England, was contrary to 54 & 55 Vict. ch. 20, sec. 8, and is null and void. But the service made personally upon him in the City of Ottawa within the prescribed time was valid. There is no law and no authority for holding that a process of law cannot be served a second time, when, as in this instance, the first service was bad. The service may even be validly made twice or thrice; such a course would involve only a question of costs. The appeal should be allowed with costs.

DAVIES J.—For the reasons given by me in the case of *King's (N.S.) Election Case; Parker* v. *Borden*(3),

(1) 23 Can. S.C.R. 180. (2) 15 Can. S.C.R. 1.
(3) 36 Can. S.C.R. 520.

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just decided, I am of opinion that the service upon the appellant outside of Canada of the notice of the presentation of the petition in this case was not a good service.

I concur, however, with all my colleagues in holding that the personal service subsequently effected upon the appellant was a good service, being in conformity with the statute, and not being in any way affected by the previous invalid service. This latter service was made in Canada and within the time therefor properly extended by the proper authority. The appeal should be allowed with costs.

NESBITT J.—I concur in the judgment of the Chief Justice.

IDINGTON J. concurred in the result but not in the reasons.

*Appeal allowed with costs.*

Solicitor for the appellant: *John A. McKinnon.*

Solicitor for the respondent: *G. Fred. Pearson.*

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*June 27.
*Oct. 3.

## CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF CUMBERLAND.

HANCE J. LOGAN (RESPONDENT) ....APPELLANT;

AND

WILLIAM RIPLEY (PETITIONER) ....RESPONDENT.

## CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF PICTOU.

EDWARD M. McDONALD (RESPONDENT) ..... } APPELLANT;

AND

ADAM C. BELL (PETITIONER) .....RESPONDENT.

## CONTROVERTED ELECTION FOR THE ELECTORAL DISTRICT OF NORTH CAPE BRETON AND VICTORIA.

DANIEL D. McKENZIE (RESPONDENT) ..... } APPELLANT;

AND

JOHN GANNON (PETITIONER) .....RESPONDENT.

ON APPEAL FROM THE JUDGMENTS OF MR. JUSTICE GRAHAM.

*Controverted election—Preliminary objection—Status of petitioner—Corrupt acts—Evidence—Dominion Elections Act*, 1900, *sec.* 113.

Section 113 of the Dominion Election Act, 1900, provides that any person hiring a conveyance for a candidate at an election, or his

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Idington JJ.

agent, for the purpose of conveying any voter to or from a polling place shall, *ipso facto*, be disqualified from voting at such election.

*Held*, that the right of an elector to present a petition against the return of a candidate at an election may be questioned, by preliminary objection, on the ground that he is disqualified under the above section and that on the hearing of the preliminary objection evidence may be given of the corrupt act which caused such disqualification. *Beauharnois Election Case*, [31 Can. S.C.R. 447] distinguished.

*Held*, also, that though, unless the commission of the corrupt act charged is admitted, it must be judicially established, such admission or judicial determination does not take effect merely from the time at which it is made but relates back to the commission of the act.

APPEAL from the judgment in each case of Mr. Justice Graham, who dismissed the preliminary objections filed by the respective respondents to the election petitions.

To each of the three election petitions the respondent filed preliminary objections, one of which, No. 10, alleged that the petitioner had been guilty during the election of the offence mentioned in section 113 of the Dominion Elections Act, 1900, and was therefore disqualified from voting at said election, and consequently from petitioning against the return of the candidate elected thereat. The trial judge dismissed all the preliminary objections, holding that he had no power to receive evidence of the corrupt acts charged by the tenth. The respondents to the petition appealed from such decision.

On the hearing of the appeal an objection was taken to the jurisdiction of the court, but it was ruled that if the evidence had been received and the charges sustained, that would have put an end to the petitions, thus giving the court jurisdiction.

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*Roscoe K.C.* and *Mellish K.C.* for the appellants referred to the *North Victoria Election Case*(1); *North Simcoe Election Case*(2); *Dufferin Election Case*(3).

*Lovett* and *R. V. Sinclair* for the respondents cited the *West Assiniboia Election Case*(4); *Marquette Election Case*(5).

THE CHIEF JUSTICE.—I am of opinion that these appeals from the judgment in each case dismissing the tenth preliminary objection should be allowed with costs.

GIROUARD J.—The principal, and, in fact, the only question involved in this appeal is whether or not evidence should be received of alleged corrupt practices by the petitioner at the election in question. The trial judge decided that such evidence could not be received. If the Dominion Controverted Elections Act, ch. 9, sec. 5, of the Revised Statutes of Canada, had not been altered by subsequent legislation, it seems to me that we would be almost bound to adopt the conclusion Mr. Justice Graham arrived at, supported as it is by eminent judicial authorities in this country. The point came before this court in *The Beauharnois Election Case*(9) but was not decided, the majority of the court holding simply that there was no evidence to support the charge of corrupt practices made against the petitioner. Now we have to face the difficulty which presents itself almost in the form of a demurrer to the preliminary objections of the respondent.

(1) Hodg. El. Cas. 584.
(2) Hodg. El. Cas. 617.
(3) 4 Ont. App. R. 420.
(4) 27 Can. S.C.R. 215.
(5) 27 Can. S.C.R. 219.
(6) 31 Can. S.C.R. 447.

It is contended by him that both under the New Franchise Act of 1898, 61 Vict. ch. 14, secs. 4(*d*) and 5, and the Dominion Elections Act, 1900, 63 & 64 Vict. ch. 12, secs. 3(*a*) and (*d*), a person inscribed on the voters' list, guilty of corrupt practices, cannot vote and cannot maintain a petition against the return. Then section 64, sub-sec. 3, of the same Act provides:

> If the elector's name is found on the list of voters for the polling division of the polling station he shall, subject to the provisions hereinafter contained, be entitled to vote.

Further on come several sections providing for the disqualification of voters guilty of corrupt practices, especially section 113, about the hiring of teams for the conveyance of voters to the poll, which, *ipso facto,* disqualifies the voter from voting at such election. This section is in these words:

> 113. The hiring or promising to pay or paying for any horse, team, carriage, cab or other vehicle by any candidate or by any person on his behalf, to convey any voter or voters to or from the poll, or to or from the neighbourhood thereof, at any election, or the payment, by any candidate or by any person on his behalf, of the travelling or other expenses of any voter, in going to or returning from any election, are unlawful acts; and every candidate or other person so offending shall forfeit the sum of one hundred dollars to any person who sues therefor; and any voter hiring any horse, cab, cart, waggon, sleigh, carriage or other conveyance for any candidate, or for any agent of a candidate, for the purpose of conveying any voter or voters to or from the polling place or places, shall, *ipso facto,* be disqualified from voting at such election, and shall, for every such offence, forfeit the sum of one hundred dollars to any person who sues therefor.

I quite agree with Mr. Justice Graham, quoting with approbation the language of Baron Martin in the *Norwich Election Case*(1), that even in the case of hiring teams, a judgment declaring the voter guilty of the act is necessary, unless, perhaps, he confesses, but the judgment or confession will have a retroactive

(1) 19 L.T. 615, at p. 621.

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effect. The charge may be made in any proceeding relating to the trial of an election petition, by way of preliminary objection or petition for disqualification as well as by an independent action. The inquiry must, however, be limited to the hiring of teams under section 113, for no other clause uses the same language. We have nothing to do with the reason which induced Parliament to impose this exceptional severity, but it is obvious. The hiring of teams for polling day is, perhaps, the most common and effecting corrupt practice at elections, and, apparently, the least objectionable, morally, in so far as the voter is concerned.

The question, as put by the learned judge, is, perhaps, too general; it may be allowed as an introduction to the specific offence. In my humble opinion, the voter may have committed all the corrupt practices prohibited by the statute and yet be a qualified petitioner, if he has not been guilty of the offence defined in section 113.

Clause 129 provides for the punishment of all corrupt practices, and, undoubtedly, comprises the hiring of teams prohibited by section 113, which, by section 120, is declared to be a corrupt practice; but the effect of the various unlawful acts or corrupt practices is not the same. Under section 129 it is *in futuro* only, but under section 113 it goes back to the date of the commission of the act, at least to the polling day. The voter hiring any conveyance, whether his own or any other, for the purpose of conveying any voter to or from any polling place, is *ipso facto* disqualified from voting at such election, and, consequently, from being a petitioner in an election petition.

The result may not serve public interest. I quite

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agree with the late Chief Justice Richards that the importance to the public of determining whether the petitioner's hands are clean is insignificant compared to that of being satisfied that the respondent has not obtained the seat illegally. But the remedy rests, not with the courts, but with Parliament. In such a case as in the scandalous, so-called, "sawing-off," the intervention of a new petitioner ought to be provided for within a certain delay.

I believe the appeal in each case should be allowed with costs.

Girouard J.

DAVIES J.—These three appeals from the judgments of Mr. Justice Graham dismissing preliminary objections to the election petitions filed against the several respondents involve practically the same points, and may be consequently disposed of together.

The objections were: (1) That the petitioners had been guilty of bribery at the elections as defined by the 108th section of the Dominion Elections Act, 1900, and, therefore, had no right to vote; and (2) That they had hired conveyances to carry voters to the polls in violation of section 113 of the said Act, and were, by such act, expressly disqualified.

In dismissing both objections the learned judge expressed himself as being concluded by the *Beauharnois Election Case*(1). The learned judge, however, entirely misapprehended that decision. The headnote of the report correctly states the decision, which was that

> as corrupt practices had not been proved the question as to the effect of the statutes did not arise.

It is true that Mr. Justice Gwynne expressed himself to the effect stated by Mr. Justice Graham, but

(1) 31 Can. S.C.R. 447.

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his statements were purely obiter and not necessary for the decision of the case while the remaining five members of the court studiously avoided expressing any opinion on the points raised by him, and the then, and also the present, Chief Justice, who delivered reasoned judgments, explicitly stated the grounds of their judgments to be the absence of any evidence of corrupt practices.

With respect to the other authorities cited by the learned judge, I have read them all with great care, but cannot say that they are of much assistance in determining the points in question on these appeals.

These points must be determined by the language of the Dominion Elections Act, 1900, and the Controverted Elections Act, the former of which was not in force, in its present form, when the decisions referred to by the learned judge were rendered.

The Controverted Elections Act gives the right to present an election petition exclusively to: (1) "A person who has a right to vote" at the elections to which the petition relates, or; (2) to a candidate at such election.

The questions raised by way of preliminary objections in this case were to the status of the petitioners, alleging that they were not persons entitled to vote at the respective elections because of their having been guilty of bribery and corruption within the 108th section of the Dominion Elections Act, or of unlawful acts within the 113th section.

The 12th section of the Controverted Elections Act provides for the presentation of preliminary objections to the petition and for their disposal in a "summary manner."

The proviso of the 5th section of that Act, defining who may be a petitioner, declares that nothing

in the Act should prevent objections under section 12

to any further proceeding on the petition by reason of the ineligibility or the disqualification of the petitioner.

The proper time and way, therefore, to raise the objection to the petitioner's status was at and by the preliminary objections, and the sole questions to be determined are whether petitioners, if proved to have been guilty of bribery and corruption, within the meaning of the 108th section, or of unlawful acts within the 113th section, were still persons entitled to vote at the election, and, therefore, entitled to petition.

Turning to the Dominion Elections Act, 1900, I find in the 7th section three classes of persons declared disqualified and incompetent to vote: First, judges of the courts; 2ndly, persons disqualified for corrupt practices under sections 126 and 129 of that Act and; 3rdly, persons disfranchised for taking bribes under chapter 14 of the statutes of 1894. The next section, the 8th, then goes on to disqualify and declare incompetent to vote, certain officials and persons acting in connection with the election for pay or reward.

Then comes an entirely new section, 9, which reads:

Every person guilty at an election of the unlawful act mentioned in section 113 is disqualified from voting at such election.

I am of the opinion that, without doing violence to the clear language of this section, I cannot hold either that a person so guilty is not disqualified from voting or that he is "a person who had the right to vote at the election," and so a person entitled, under the words of the Controverted Elections Act, to file a petition.

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Turning to the 113th section itself, I find the intention of Parliament emphasized by the repetition of the disqualification of the voter in the following language:

> Any voter hiring a horse, cab, cart, waggon, sleigh, carriage or other conveyance for any candidate for the purpose of conveying any voter or voters to or from the polling place or places shall, *ipso facto*, be disqualified from voting at such election.

No language could be clearer or more explicit than this, and, when coupled with the new clause 9, which Parliament added to the disqualifying clauses in the revision of the Elections Act, in 1900, places the question, for me, beyond any doubt.

An impression seemed to prevail at the argument that the official list of voters was conclusive of the right of a man to vote. If his name was found there, his right to vote existed. If it was not found such right did not exist. Any such impression is, obviously, inaccurate.

In one, at least, of the provinces, there are no voters' lists at all, and no such test is applicable there.

Many classes of persons whose names have been omitted from the lists in consequence of some provisions of the local law, are, nevertheless, entitled, under the 6th section of the Franchise Act, 1898, to vote at the place where, but for such omission, they would have been entitled to vote, on their taking the prescribed form of oath.

Others, whose names are on the list, but who are at the time of the election, either persons in a gaol for a criminal offence, or confined in a lunatic asylum or a poorhouse or other similar institution, are disqualified and incompetent.

So the question, in all cases, comes back to that

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of actual competency, and is one of fact to be determined on preliminary objection to the petition and by no means concluded by the production of the list of voters.

I cannot draw any distinction between any of the enumerated classes of disqualified persons I have mentioned and those offenders against the 113th section of the Act who, by the words of the statute are disqualified and rendered incompetent by the very commission of the offence.

Those voters who are charged with having committed generally the offences of bribery or corruption, within the definitions of those offences in the 108th section of the Act, seem to stand in a different position. Their case is governed by the 7th section of the Act which disqualifies

> persons disfranchised for corrupt practices under sections 126 and 129 of this Act.

These words, obviously, relate to those persons who, under the words of these two sections, have been "found guilty," and "after they have had an opportunity of being heard."

Their disqualification covers a long period of years, and is not confined to the election at which they have committed the offence.

They cannot, therefore, be said to be "disqualified" until they have been "found guilty after they have had an opportunity of being heard." The disfranchisement is not made to operate from the commission of the offence, but from their conviction, after trial.

I am not concerned with the distinction Parliament has drawn between the two classes of offenders, or for the reasons which prompted the distinction. I find it in the Act, and my duty is to give effect to it. If Parliament determines to put both classes of of-

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fenders upon the same footing, as regards election petitions, a very few will suffice to do so.

These appeals must, therefore, each and all, be allowed with costs so far as the judgment and rulings of the learned judge went, disallowing the 10th preliminary objections and excluding evidence of petitioners' guilt under the 113th section of the Dominion Elections Act, 1900.

On the other ground, of the exclusion of evidence tending to shew that the petitioners were guilty of bribery or corruption generally, as defined by the 108th section of the Act, I think the rulings of the learned judge were correct, and that the preliminary objections were properly disallowed.

With respect to the jurisdiction of the court to hear the appeal, we disposed of that upon the argument, being all of the opinion that we had jurisdiction, the preliminary objections being of a character which, if they had been allowed, "would have been final and conclusive, and have put an end to the petition."

NESBITT J.—I concur with the judgment of Mr. Justice Davies.

IDINGTON J.—The first-mentioned case was argued and the other two agreed by counsel to stand upon the same argument with attention being called to the slight variations that obtained in each that might in certain events differentiate it from the first case.

In the view I take they may be disposed of together. The question raised is whether or not the status of the petitioner can be attacked by reason of any breach of the Dominion Elections Act, 1900, committed by him, at or during or immediately preced-

ing, the election, and, thus, if he be found guilty of such breach, the petition may be dismissed.

It has been held in the court below that the respondent cannot, in such a case, take any such objection to a petition, unless and until the petitioner had been adjudged guilty of the offence charged.

It has, undoubtedly, been held in courts in Ontario and other provinces that, upon somewhat similar legislation to that now presented for our consideration, the offences of a petitioner, under the circumstances arising here, cannot be set up for the purpose of impeaching his status as a petitioner.

I do not think that it is necessary to review in detail each one of these cases. To do so would involve a comparison of the statute or statutes upon which they were decided with the statutes we have now to consider in order that such a review might be of any value. Some of these cases, no doubt, were correctly decided upon the statutes that were then before the courts deciding them. Others would seem of doubtful authority.

The utmost, however, that can be said is that none of them seem to be the affirmation of any legal principal that must of necessity decide these cases now in hand.

I propose, therefore, considering the Dominion Controverted Elections Act, the amendments thereto and the other statutes that may bear upon the issue raised in these cases independently of these authorities, none of which are binding upon this court.

I think we must give such interpretation to section 5 of the Dominion Controverted Elections Act as it will bear upon consideration of the section itself and these other statutes that I have referred to.

This section five reads as follows:

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A petition complaining of an undue return, or undue election of a member, or of no return, or of a double return, or of any unlawful act by a candidate not returned, by which he is alleged to have become disqualified to sit in the House of Commons, at any election, may be presented to the court by any one or more of the following persons:

(a) A person who had a right to vote at the election to which the petition relates; or

(b) A candidate at such election.

And such petition is, in this Act, called an election petition; provided always, that nothing herein contained shall prevent the sitting member from objecting, under section twelve of this Act, to any further proceeding on the petition by reason of the *ineligibility or disqualification of the petitioner* or from proving, under section forty-two hereof, that the petitioner was not duly elected.

If I had come to the consideration of what the words of sub-section (*a*) meant without having been embarrassed by the authorities I have referred to, I should have thought that there could be but one meaning to attach to such language.

The plain, ordinary meaning would certainly be that a person who had not the right at any time, during the election, to take the oath that any deputy returning officer, elector or agent had a right to tender him, could not be said to have had a right to vote at the election.

The language is so plain that it is hard to understand, without a review and full consideration of the cases, how it could have been interpreted otherwise. It is not now, as I have said, necessary to do so.

Whatever may have been the legislation to be considered in relation to these words elsewhere, I think it is our duty, not being fettered by authority, to declare, in accordance with the plain, obvious meaning of the words.

I am not oppressed with any question of convenience or inconvenience (which had weight in some of the cases), no matter how difficult the problem may

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become of solution by reason of the want of facility for procuring evidence, and the want of legislative provision for making a proper issue, upon which the facts might be intelligibly tried, with due regard to the rights of any one and every one concerned. I think there is no insuperable difficulty in the way.

With due respect, I think there never has been any difficulty in the way. The courts of each province have had imposed upon them, by section 62 of this statute, the duty to make rules for *"the effectual execution of this Act and of the intention and object thereof,"* and, if the court has any difficulty in solving the question now raised by reason of any of the considerations I have just adverted to, then the fault must lie with the court not with the legislature or with the legislation in question.

The failure to have provided a proper means, a due course of procedure, for the trial of an issue that obviously lay at the threshold of the exercise of the jurisdiction of the court, or judge thereof, such as that of the status of a person professing as a petitioner to have had a right to vote at the election to which his petition relates, cannot affect in any way the proper interpretation to be given to this section, since the meaning has, otherwise, become clear. The issue that sub-section (*a*) of section 5 presents is as simple and as clearly presented for the consideration of the court, trying to find the facts, as language can make it. The facts in one case might be of the simplest possible character; in another case, although the cause for impeaching the petitioning voter's right might be of the simplest possible character, the facts to be dealt with might render it a most difficult matter to determine. Difficulties such as these might present themselves in carrying into effect any statute and any law. The difficulties disappear when properly grappled with.

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It became the duty of the court to furnish by general rules, applicable to this statute, the method for carrying it into execution, and, if the court failed in doing so, it must then, by section 63, proceed according to

> the principles, practice and rules on which election petitions, touching the election of members of the House of Commons in England were, on the 26th day of May, one thousand eight hundred and seventy-four, dealt with

so far as consistent with this Act.

By section 26 of 31 & 32 Vict. ch. 125 (Imp.), it was provided that

> Until rules of court have been made in pursuance of this Act, and, so far as such rules do not extend, the principles, practice and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions shall be observed so far as may be by the court and judge in the case of election petitions under this Act.

Such, in the absence of suitable rules for the purpose of trying the question as to the status of a petitioner, would be the law by which the court must be governed. Before the adoption of the trial of election petitions by courts of law, numerous cases indicate that committees of the House of Commons had, from time to time, been able to try and adjudicate upon the question of the right of a petitioner to present a petition.

I am not concerned with the result of such cases. I am only concerned in pointing out that, however consistent or inconsistent the results of such trials may have been, it was recognized practice that the petitioner's right could be tried by the committee before proceeding to try the petition. The Dominion Controverted Elections Act, by the section I have quoted, plainly indicates that the sitting member might object, under section 12

to any further proceeding on the petition by *reason of the ineligibility or disqualification of the petitioner.*

Section 12 required as follows:

Within five days after the service of the petition and the accompanying notice, the respondent may present in writing any preliminary objections or grounds of insufficiency which he has to urge against the *petition or the petitioner* or against any further proceeding thereon and shall, in such case, at the same time, file a copy thereof for the petitioner and the court or judge shall *hear the parties upon such objections and grounds and shall decide the same in a summary manner.*

The courts have found means of trying very important questions arising out of preliminary objections, and, in relation to such trials, have not found it difficult to find herein power in the court or judge, by virtue of this legislation, to give effect to the trial of and adjudication upon the validity or invalidity of such preliminary objections.

I see no difficulty in the way of the use of such power even without the enactment of rules for the procedure thereof, so as to try any issue, such as is raised, in regard to the status of the petitioner in any one of the cases now before us.

The words "a summary manner" indicate a form of trial in which the ancient established course of legal proceedings may be so far disregarded as to enable an expeditious determination to be reached.

The rules that were formulated by the judges of the Supreme Court of Nova Scotia for the trial of controverted elections, which were made under and by virtue of the Act in question, and other powers vested in or inherent in such judges, by rule 52 thereof, provide:

In all cases not otherwise provided for, the rules of practice of the Supreme Court of Nova Scotia shall apply to all proceedings on election petitions.

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I think, therefore, with due respect, that there could be found within the various powers conferred by the Act in question directly upon the judges, the power, within the rules governing procedure in England in similar cases, (especially when establishing the introduction of the practice and power of election committees), and the inherent or expressed powers and practice of the Supreme Court of Nova Scotia in other matters, of trying according to law the question of whether or not the petitioner in this case had, at the time of the election, a right to vote at the election in question.

I think it should have been done.

Without such a trial, the proviso in section 5 and the preliminary objection against the petitioner in section 12 are, in a plain, obvious case, rendered null. And that it cannot be done in a difficult case is what should not be held in any court possessed of the ample powers that I think have been conferred by the legislation and rules I have just referred to.

I am unable to understand where the line is to be drawn. The numerous absurd results that would follow from adopting the voters' lists as conclusive forbid drawing the line there. And when once that is departed from to try the simple issue of the petitioner, admittedly an alien, admittedly disqualified by virtue of office or from the simpler cases of that kind, I see no reason to draw the line of distinction between such cases and the more complicated cases where the petitioner may refuse to admit that he is an alien, or that he holds a disqualifying office, or that he had, in any way, become disqualified to vote at the election.

To render the absurdity of drawing the line at

the certified voters' lists more manifest, what of the cases where there are no voters' lists?

This petition affirms, in words of the statute, by the petitioner, "that he had the right to vote." He then swears, when presenting the petition, to an affidavit that he has good reason to believe and verily does believe that the several allegations contained in the petition are true.

It is not pretended that although he may have, by virtue of his own acts, so disqualified himself from voting, that he dare not have ventured to take the oath, that the deputy returning officer may have tendered him, in asking for a ballot, yet that he can take this oath verifying the petition.

I am unable to comprehend the distinction. The plain, ordinary meaning of the words seem to indicate the same thing. The oath at the poll is of a searching character. The oath verifying the petition is not of that character. If the petitioner were disqualified, this is such a statement as he cannot properly be heard to say ought not to be tried on a preliminary investigation.

It would be, in fact, whatever the intention may have been, an imposition upon the court, and courts have always heretofore found ways to deal with offences of that character.

I see no reasons for drawing the line at election petitions.

Since writing the foregoing, I observe the following very apposite remark of Chief Justice Taylor in the *Marquette Election Case* (1):

> Unless that affidavit is so presented there is properly no petition before the court. And, as I have already said, it cannot be a matter of indifference whether the required affidavit is true or false. That

(1) 11 Man. Rep. 381, at pp. 389, *et seq.*

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no affidavit has ever been objected to in Ontario can be no reason why, as counsel seemed to argue, the court must accept without question an affidavit even although it may be a false one. From the language used by Patterson J.A., *In re West Simcoe*(1), it is plain that the court, there, expect a petitioner to make a careful study of the facts and of the provisions of the Act as to corrupt practices before swearing to such an affidavit as is required.

There is, therefore, no doubt in my mind that the court can inquire as to the truthfulness of an affidavit presented with a petition and whether it has been imposed upon in connection with the presentation of a petition.

Section 7 of the Dominion Elections Act, 1900, provides that:

The following persons shall be disqualified and incompetent to vote at any Dominion election, whether disqualified or incompetent or not to vote at a provincial election.

And of those, sub-section (*c*):

persons disqualified for taking bribes under section fifteen of the Act to disfranchise voters who have taken bribes, being chapter 14 of the statutes of 1894.

Section 8 declares that

the following persons shall be disqualified and incompetent to vote at an election, etc.

Of those are returning officers, election clerks, any person at any time employed at same election by by any person as counsel, attorney, solicitor, agent or clerk at any polling place at any such election, who has received or expects to receive any sum of money, etc., and, by section 9,

every person guilty at an election of the unlawful act mentioned in section 113, is disqualified from voting at such election.

Section 113 provides that

any voter hiring any horse * * for the purpose of conveying any voter to or from the polling place or places shall, *ipso facto*, be disqualified from voting at such election, etc., etc.

(1) 1 Ont. Elec. Cas. 137.

To my mind, and I think the mind of every person conversant with the evil at which section 113 was intended to strike, this is what the section, as I have expressed it, was intended to meet.

I am not prepared to fritter away, by a refining of the words of section 113, what obviously was intended by the enactment of section 9.

It was the unlawful act, in any one of its several manifold manifestations, that section 113 presents that was intended to be reached.

We are asked to hold that all those who may thus be disqualified by such strong and emphatic language from voting at any election are yet within the meaning of the words in section 5, persons *having a right to vote.*

I have said, elsewhere, in relation to decisions upon Election Acts, that where there are so many considerations within the purview of any one of them, that, when these are added to in another or taken away by another, the general purview of the Act may not be or appear to the court to be the same and the decisions thereon should not necessarily be the same.

I am constrained to think that, if the eminent judges whose authority is appealed to on behalf of the decision in the court below, could have had presented to them, in its present condition, the Act now under consideration and the various considerations that are suggested by the legislation since these decisions were made, that they each and all would have adopted the course of refusing to be bound by such opinions as a proper interpretation of the Act as it now stands.

I was, at first, impressed with the review of the

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authorities and the decision of the late Chief Justice Moss in the *Dufferin Election Case*(1).

I think, if he had survived to the present day to witness the alleged growth of "saw-off," he would have been the first to realize the need of an untainted petitioner, and first, probably, to have discovered the need for and means of placing the power of petition in the hands of untainted promoters of petitions.

Since writing the foregoing I have had the pleasure of reading the judgment herein of my brother Sir Louis Davies, and regret that I cannot agree with the distinction he draws between the cases where the Dominion Elections Act and its amendments specially disqualify the voter and those others where voters may have been guilty of other corrupt acts.

The first class consist of a number of whom some have been, by way of emphasis, specially declared to be disqualified. It was, obviously, necessary, in framing the Election Act, to have a disqualification clause as to judges and others disqualified by reason of office. And, as the express disqualification for some specific acts and results of or incidental to judicial investigation had crept into the Act, it would have been unwise to omit in such a general disqualification clause a repetition of all such cases, lest unintentional and unwarranted inferences should be drawn from such omission.

I cannot think that, by reason of such special marking of disqualification in some cases, the legislation in which it is found is to be read as intending all others to be eligible to vote; for the oath the voter may have to take seems to bar him from such eligibility.

We are asked here to construe section 5 of the

(1) 4 Ont. App. R. 420.

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Dominion Controverted Elections Act, and that specially points by express words at "*ineligibility or* disqualification of the petitioner" as grounds that may be taken by way of preliminary objection.

I see no reason, therefore, for limiting this section 5 and also section 12 to the cases of express disqualification. The one voter is expressly and the other impliedly disqualified. And neither can, in my opinion, be held eligible to vote.

I agree in the result of reversing the ruling, but, with respect, I think it should be unlimited.

*Appeals allowed with costs.*

Solicitor for the appellants: *G. Fred. Pearson.*

Solicitor for the respondents: *T. B. Robertson.*

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*May 16-19.
*Oct. 3.

THE STEAMSHIP "CAPE BRETON" AND OWNERS (DEFENDANTS)..... APPELLANTS;

AND

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY, OWNERS OF THE STEAMSHIP "CANADA" (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, QUEBEC ADMIRALTY DISTRICT.

*Admiralty law—Navigation—Narrow channel—Rule of the road—Look-out—Meeting ships—Collision—Special rule of port—Sorel harbour regulations—Lights and signals—Negligence—Evidence—Damages—Practice—Improper comments in factum—Appeal to Privy Council—Order for bail.*

A pilot in charge of a ship, or a man at the wheel, is not a sufficient look-out within the rules of navigation for preventing collisions in narrow channels. Judgment appealed from (9 Ex. C.R. 67) affirmed.

Where meeting ships are in collision and one of them has neglected to observe the regulations, there must be evidence of gross dereliction of duty or want of skill in navigation in order to make out a case for apportionment of damages against the other ship.

Where a ship navigating a narrow channel has no proper look-out and neglects to signal her course at a reasonable distance, thus perplexing and misleading a meeting ship, the former is alone responsible for all damages caused by collision, even if, in the agony of collision, a different manœuvre on the part of the other ship might have avoided the accident. Judgment appealed from (9 Ex. C.R. 67) reversed, Girouard J. dissenting.

Commentaries in the appellants' factum relating to a judgment of the Wreck Commissioner's Court, which did not form any part of the record, were ordered to be struck out, with costs to the respondents.

See note at p. 592, respecting appeal to Privy Council.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgwick, Girouard, Nesbitt and Idington JJ.

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APPEAL from the judgment of the Exchequer Court of Canada, Quebec Admiralty Division (1) by which both ships were held to be at fault and were condemned for one-half the damages caused to each, respectively, by a collision in the River St. Lawrence near the Harbour of Sorel.

The action was brought by the respondents, owners of the "Canada," for $150,000 damages suffered by her, on account of the collision, occasioned, as was alleged, by negligence and want of skill in the navigation of the "Cape Breton." The appellants made a cross-demand for $6,211.40 for damages sustained by the "Cape Breton" by reason of the same collision. The trial took place before Mr. Justice Routhier, who rendered the judgment appealed from (1) by which both ships were held to be in fault and the appellants were condemned to pay to the respondents one-half of the damages arising out of the collision to the steamer "Canada," while the respondents were condemned to pay to the appellants (as counter-claimants) one-half of the damages suffered by the "Cape Breton," the parties, respectively, to pay their own costs.

The appellants now appeal from that part of the judgment whereby they are held to be in any way to blame for the collision in question, and are condemned to bear part of the damages caused thereby or any costs incurred in consequence thereof.

The material facts of the case and questions at issue on this appeal are sufficiently stated in the judgments now reported.

At the hearing the respondents moved to strike out portions of the appellant's factum which referred to, reproduced and commented upon the judgment of the

(1) 9 Ex. C.R. 67.

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Wreck Commissioners' Court, a document which did not form a part of the present case on the appeal. Counsel were heard for the motion and contra.

*Harris K.C., F. Meredith K.C.* and *Aimé Geoffrion K.C.* (*Holden* with them), for the appellants, relied upon the decisions in *The Turret Steamship Co.* v. *Jenks*(1); *The "Cuba"* v. *McMillan*(2); *The "Vic-*

*NOTE:—The text of the Privy Council judgment referred to (not officially reported) delivered 20th March, 1901, is as follows:

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

THE TURRET STEAMSHIP COMPANY v. WILLIAM G. JENKS, AND OTHERS.

PRESENT.—The Lord Chancellor, Lord Macnaghten, Lord Davey, Lord Robertson, Lord Lindley.

THE LORD CHANCELLOR.—In this case their Lordships have had the opportunity of considering the matter without reserving judgment. Unlike a great many cases of the sort, the surrounding circumstances as well as the direct evidence make the cause of the collision particularly clear. The "Turret Age" was going up and the "Lloyd S. Porter" was coming down the River St. Lawrence. According to the rules which deal with narrow channels such as that which, in one sense in any event, both vessels were in, speaking broadly, each vessel ought to keep to its own side of the road. Their Lordships will not stay for a moment to consider the question who was in or who was out of the channel. It is clear, according to the evidence, that the "Lloyd S. Porter" in disregard of that rule was coming down on her wrong side. The result was that the vessel that was going up and which was on its proper side was placed according to the whole of the evidence in considerable difficulties. It is idle to speak of the recognition by either vessel of the other as big or little. It is at night. All that the parties can see at a reasonable distance (such a distance as would be necessary to avoid the danger of collision) is the lights by which they are guided if they see them and if they look out for them. So far as the "Turret Age" is concerned there appears to have been a very careful look-out. There was no doubt that the pilot was there giving directions and observing what was being done. If one looks at the evidence of what

(1) 36 Can. Gaz. 609 [*]

(2) 26 Can. S.C.R. 651.

*tory"*(1); *The "James Mackenzie"*(2); *The "Thingvalla"*(3); *Wilson, Sons & Co.* v. *Currie*(4); *The "Arabian"* v. *The "Alma"*(5); *The "Ngapoota"*(6);

was done on board the other vessel, the "Lloyd S. Porter," it is impossible to doubt that there really was no look-out at all. The only person who purports to be looking out at all is the helmsman who comes on deck about fifteen minutes before the collision. He receives one direction to keep the vessel so as to avoid the buoy and then he is left to be guided by whatever he may choose to consider a fulfilment of that direction. It is probably fair to suppose that the point of light that he does select is one which, in the then condition of things, would enable him to clear the buoy. That is all he does and that is the only direction given to him and the only thing that he purports to do. On the other hand, the "Turret Age" is encountered by a vessel which, if it is performing the manœuvres that it ought to perform, will keep clear of them. They proceed, and their Lordships think that they had a right to proceed, upon the fair belief that the vessel which they saw was going to perform the proper manœuvres for the purpose of avoiding any difficulty or danger. Suddenly and without any warning the vessel that they were meeting changes her course and suddenly starboards. The whole point of the controversy between the parties resolves itself into a question of whether, upon that sudden manœuvre made by the "Lloyd S. Porter," there was time to avoid the collision by any counter-manœuvre that could be made by the "Turret Age."

Their Lordships have had the advantage of a nautical assessor to whom they have propounded the questions: First, "Whether or not the 'Turret Age' was right in keeping to the north side of channel?" And he is of opinion that she was right in keeping to the north side. Their Lordships have also asked him: "Whether, in his judgment, there was time, under the circumstances proved, by any manœuvre on the part of the 'Turret Age' to avoid the collision?" He is of opinion that there was no time to avoid the collision under the circumstances.

Putting those two propositions together, with the circumstances that have been referred to, it would seem to be clear that the one vessel, because she was a light vessel and because she did not care about great

(1) 168 U.S.R. 410.
(2) 2 Stu. Vice Ad. R. 87.
(3) 42 Fed. Rep. 331; 48 Fed. Rep. 764.
(4) [1894] A.C. 116.
(5) 2 Stu. Vice Ad. R. 72.
(6) [1897] A.C. 391.

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*The "Bywell Castle"* (1); *The "Tasmania"* (2); *The "Nor"* (3); *The "Sarah Thorp"* v. *The "America"* (4); *The "Glannibanta"* (5); *The "Maud Pye"* (6); *The "Rabboni"* (7); *The "Bold Buccleugh"* (8); *Ward* v. *The "Ogdensburg"* (9); *The "Ottawa"* (10); *The "Shenandoah" and The "Crete"* (11).

Where fault on the part of one vessel is established by uncontradicted testimony and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is at least

depth of water, was so loosely and vaguely steered that she might have been in or out of the channel, without there being any wilful misrepresentation in what the witnesses have said. Their Lordships think the more reasonable hypothesis would be, considering what she was steering for and where she was coming from, that she was in the channel; up to a certain time, on the north side of it. The position of the wreck afterwards does not seem to be conclusive as to where she was at the moment of the collision because there would be certainly the question both of wind and stream to be considered; but undoubtedly it brings it all within a very narrow compass.

In the result, their Lordships are of opinion that the "Lloyd S. Porter" was wholly and solely to blame and they will, therefore, humbly advise His Majesty to allow the appeal, to reverse the judgment of the Superior Court, in Review, with costs, and to reverse the judgment of the Superior Court, and order judgment to be entered for the appellants in their action and also in the cross-action which was brought by the respondents with the costs of both the action and cross-action, and to remit the case to the Superior Court for the assessment of the damages to be paid by the respondents.

The respondents must pay the costs of the appeal.

*Appeal allowed with costs.*

(1) 4 P.D. 219.
(2) 15 App. Cas. 223.
(3) 30 L.T. 576.
(4) 44 Fed. Rep. 637.
(5) 1 P.D. 283.
(6) Stockton Vice Ad. Rep. 101.
(7) 53 Fed. Rep. 952.
(8) 1 Pritchard's Adm. Dig. 221.
(9) 29 Fed. Cas. 199.
(10) 3 Wall. 268.
(11) 33 Can. S.C.R. 1.

some presumption adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favour. *The "Samuel Dilleway"*(1); *The "Parkersburg"*(2); *The "Atlas"*(3); *The "Young America"* (4); *Chamberlain* v. *Ward*(5).

The "Canada" should have kept to her starboard side of the fairway, but in any event, even if she had had a right to starboard her helm the last time, she was bound to indicate by the proper signal to the "Cape Breton" her intention to do so before leaving her own side of the fairway and the "Canada" should in any event have stopped and reversed before the collision. Regulations, arts. 25, 28 and 23; *The "Clydach"*(6); *The "Victory"*(7); *"River Derwent"* (8); *The "Bermuda"*(9).

The presumptions are always against a vessel failing to comply with the narrow channel rule. Marsden on Collisions (5 ed.) pp. 343, 379, 440, 443; (4 ed.) pp. 383, 539, 542; Spencer on Collisions, pp. 192, 222, 316, 324; *City of New York*(10); *The Mexico*(11); 25 Am. & Eng. Enc. 992. See also Kay on Shipmasters and Seamen (2 ed.) pp. 512, 532.

*Angers K.C., Pentland K.C.* and *A. H. Cook K.C.* (*Archer* with them), for the respondents. When the collision, from any cause, could not be avoided, both vessels were bound to take such action as might best aid to avert collision. The "Canada" did so, while the

(1) 98 Fed. Rep. 138.
(2) 5 Blatchford 247.
(3) 10 Blatchford 459.
(4) 30 Fed. Cas. 872.
(5) 21 How. 548.
(6) 5 Asp. 336.
(7) 168 U.S.R. 410; *per* Fuller C.J. at p. 416.
(8) 64 L.T. 509; *per* Halsbury L.C. and Herschel L.J.
(9) 11 Fed. Rep. 913.
(10) 147 U.S.R. 72.
(11) 84 Fed. Rep. 504.

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"Cape Breton" failed to do so and was negligently and unskilfully navigated. Further, the well-known rule of prudent seamanship was infringed when the "Cape Breton" put her helm hard-a-port and reversed full speed astern with a right-handed propeller, to a green light.

The trial judge, before whom all the witnesses were heard, believed the pilots of the "Canada," but did not credit the pilot of the "Cape Breton." He came to the conclusion that the three lights and then the green light of the "Canada" were seen at a much earlier period and a much great distance than the "Cape Breton's" witnesses pretend, and that the collision was largely due to the error of her pilot in determining at first to pass port side to port side and obstinately persisting in that resolution though having reason to know, and in fact knowing, that the approaching vessel was about to enter the Harbour of Sorel in the manner provided by regulation 33, which provides that:

> Unless it is otherwise directed by the Harbour Commissioners of Montreal, ships and vessels entering or leaving the Harbour of Sorel shall take the port side, anything in the preceding articles to the contrary notwithstanding.

He held also that the helm of the "Canada" was not altered after passing the last buoy until the whistle of the "Cape Breton" was first heard; and he accordingly determined that the "Cape Breton" was to blame in each of the three respects above mentioned.

The learned judge further held that the "Canada" was also to blame; that she was not provided with the proper look-out; that the lights of the "Cape Breton" were properly exhibited and burning efficiently and should have been seen by the people on board the "Canada," at least a mile off, and would have been so

seen had there been an efficient look-out. He held, further, that the "Canada" should have blown two blasts of her whistle at an earlier period than she actually did, viz., when slightly starboarding on passing the third buoy and directing her true course on Sorel. And for these various acts on her part he held the "Canada" also to blame.

As to the look-out, two men thoroughly familiar with the navigation of that portion of the St. Lawrence were in the wheel house, one managing the wheel as pilot and the other as look-out, provided with powerful binoculars for use if required. There was no other look-out. The services of the pilot in a proper position for seeing and conversant with the lights which he was likely to meet were in fact and in law those of a proper look-out and more likely to be serviceable than, in the present instance, the knowledge of the look-out forward of the "Cape Breton."

The appeal should be dismissed with costs for the following amongst other reasons: 1. Because the side lights of the "Cape Breton" were not exhibited as required by law after she had raised her anchor and proceeded on her course immediately before the collision and because such lights were, if in their places, immediately before the collision so placed after the vessel was under way, and were not burning brightly and efficiently as provided by the regulations. 2. Because no proper and efficient look-out was kept on board the "Cape Breton." 3. Because the "Cape Breton" ported her helm from time to time improperly in view of the position and approach of the "Canada." 4. Because the "Cape Breton" neglected to sound a blast of the whistle as by law obliged when she ported her helm at the distance of

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about a mile. 5. Because the people of the "Cape Breton" knew that the "Canada" was steering her course, for her port, the Harbour of Sorel, and improperly determined to pass across her course and to the south of her, in contravention of the established regulations. 6. Because the "Cape Breton" after porting twice sounded one blast of her whistle and put her helm hard-a-port improperly, a manœuvre which immediately led to the collision. 7. Because in putting her helm hard to port, the "Cape Breton" was also put full speed astern with a right-handed propeller, making the collision inevitable. 8. Because the evidence as found by the learned judge establishes that the "Cape Breton" improperly neglected to ease or stop her engines at any time before whistling.

Besides the authorities mentioned in the notes furnished by the trial judge, we submit the following: "Starboard Side," Marsden (4 ed.) p. 514; Todd & Whall, Practical Seamanship, p. 281; "Stopping and Reversing," art. 23, Moore's Rule of the Road at Sea, p. 51; "Slacken Speed," *The "Beryl"* (1); *The "Benares"* (2); Marsden (3); *The "Germany"* v. *The "City of Quebec"* (4); *The "Martha Sophia"* (5); *The "Hope"* (6); "The Course," Marsden (7); *The "Bougainville"* (8); "Sound Signals," art. 28; *The "Mourne* (9); *The "Uskmoor"* (10); *The "Agra"* (11).

We refer, also, to *The "Princess Royal"* (12); *The "Liberty"* (13); *The "Leverington"* (14); *The "Eliza*

(1) 9 P.D. 137.
(2) 9 P.D. 16.
(3) (4 ed.) p. 491.
(4) 2 Stu. Vice Ad. Rep. 158, at p. 166.
(5) 2 Stu. Vice Ad. Rep. 14.
(6) 1 W. Rob. 154, at p. 157.
(7) (4 ed.) p. 517.
(8) L.R., 5 P.C. 316.
(9) [1901] P.D. 68.
(10) [1902] P.D. 250.
(11) L.R. 1 P.C. 507.
(12) Cook, Vice Ad. Rep. 247.
(13) 2 Stu. Vice Ad. Rep. 102.
(14) 11 P.D. 117.

*Keith"*(1); *The "Lorne"*(2); *The "Perim"*(3); *The "Quebec"*(4); Spencer on Collisions, p. 93, sec. 26; *The "Stanmore"*(5); *The "Emma"*(6).

THE CHIEF JUSTICE.—This case, as it comes to us, lies within a narrow compass though, judging by the length of the argument at bar, counsel on both sides must be presumed not to have been of that opinion.

The respondents' contention, that the "Cape Breton," on the occasion in question, had committed a breach of the regulation which requires side lights on a steamer under way, having been dismissed by the local judge in admiralty, and they not having appealed from that dismissal, nor from the judgment holding them liable upon various grounds for half of the damages caused by the collision, the only point for our determination upon this appeal is whether or not, by the evidence adduced at the trial or as an inference of fact therefrom, they have proved their contention that by error, want of skill or culpable negligence the "Cape Breton's" crew contributed to the said collision so as to render their owners liable jointly with them for the other half of the said damages, as they were held to be by the judgment now appealed from by the said owners.

That question must be answered negatively. The "Canada" is alone to blame for this collision.

There is, in the record, no evidence that the "Cape Breton's" crew were guilty, on the occasion, of any wrongful manœuvre at all, so that, as I view the case, there is no room in it for the application of the law on

(1) Cook Ad. 107, at p. 120.
(2) 2 Stu. Vice Ad. Rep. 177, at p. 181.
(3) Marsden (4 ed.) p. 514.
(4) Cook Vice Ad. 37.
(5) 10 P.D. 134.
(6) 3 W. Rob. 151.

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collisions whenever caused or contributed to by errors of judgment committed *in extremis*.

The respondents' contentions rest on a palpable error. They assume that the "Cape Breton's" crew were aware of the fact that the "Canada" had no proper look-out and did not see their side lights. But there is no foundation whatever for that assumption. It is the contrary that the "Cape Breton's" crew assumed, and, in law, were bound to assume. *The Dorchester*(1). And having no reason whatever to doubt when they first sighted the "Canada," that she, seeing their regulation lights (as they believed she did), would act lawfully and keep her course in the North Channel, her crew were not in fault for not stopping and reversing sooner. *Wilson, Sons & Co.* v. *Currie*(2); *The Free State*(3). They were justified up to the last moment in relying upon the "Canada" obeying the ordinary rules, by which both were bound, instead of doggedly and recklessly persisting, as she did, in unlawfully attempting to force them to disregard those rules. *Turrett* v. *Jenks*(4), in the Privy Council, 1901. A mere apprehension, had there been room for it, that the "Canada" would persist in starboarding her helm would not, under the circumstances, have been a valid reason for the "Cape Breton" to leave the south side of the channel, assuming always, as she rightly did, that the "Canada" had her (the "Cape Breton's") red light in sight as soon as the latter had the former's light in sight. To justify a departure from a rule of the road in such a case it must appear with perfect clearness, amounting almost to certainty, that adhering to the rule would have brought on a collision, and violating the rule would have avoided

(1) 121 Fed. Rep. 889.
(2) [1894] A.C. 116.
(3) 91 U.S.R. 200.
(4) Note p. 566, *ante*.

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it. See *per* Dr. Lushington, in the *Boanerges* v. *The Anglo-Indian*(1). Of course, if the "Cape Breton" instead of sounding a first blast and porting her helm had, at that moment, sounded two blasts and starboarded her helm, or had stopped and reversed, it is now evident that there would have been no collision. But there was no reason whatever then for her to do either one or the other, and "being wise after the event" cannot be a guide for our decision. The question is: Was the possibility of a collision then present? Could her pilot then foresee any immediate danger of it? The "Canada's" own manœuvring answers "No." She would herself, had she seen the "Cape Breton's" red light in time, either have stopped or ported her helm; and the "Cape Breton" could reasonably remain certain up to the last moment, not being aware of the fact that she had no eyes to see her (the "Cape Breton's) red light that she, the "Canada," would either stop, or port, in time, not attempt madly to cross her bow as she did.

Certainly, as argued by the respondents, the "Cape Breton" would not, in law, have been justified in standing upon her right obstinately, recklessly and regardless of the safety of the "Canada" if, by any manœuvre whatever, she could have prevented a collision. But, when charging her with want of skill and negligently failing to adopt measures to avoid a collision, it was incumbent upon the "Canada" to prove, without any doubt, not only that her crew had it in their power to adopt safe measures to avoid it, but also that they must necessarily have been perfectly convinced, in time to avoid it, of the imminent danger of it. See *per* Dr. Lushington, in *"The Legatus"* v.

(1) 2 Mar. Law Cas, (Asp.) 239.

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*"The Emily"* (1). And that proof is entirely wanting. It is only when it was too late to avoid the collision that the "Canada" shewed her green light to the "Cape Breton." When the "Cape Breton" sounded her first blast, she had the "Canada's" red light in sight. So that the possibility of any danger at all could not then have come to her pilot's mind.

The sole cause of the accident is that the "Canada's" crew did not see the "Cape Breton's" red light till after the "Cape Breton's" first blast, when she ought to have ported her helm, as the "Cape Breton" rightly depended upon her doing so. And the reason why they did not see that light is presumed, in law, to be because they did not in fact have a proper look-out. R.S.C. ch. 79, sec. 6. *"The Englishman"* (2). And the principle in such cases, where there has been a departure from an important rule of navigation, is that if it is at all possible that the non-observance of the rule has caused the accident then the party in default cannot be excused. *Emery* v. *Cichero* (3); *McCabe* v. *Old Dominion S.S. Co.* (4). Here, there is no room for doubting that if the "Canada" had seen the "Cape Breton's" red light before hearing her first blast, she would either have kept to the north side of the channel, or, *before* starboarding her helm to take her course towards Sorel, would have sounded two blasts. *The "Cuba"* v. *McMillan* (5); *"The Victory"* (6). If the "Canada" had ported her helm when she heard the "Cape Breton's" first blast, the weight of the evidence is that the collision would have been avoided. However that may be, it is clear that if the

(1) Holt's Rule of the Road 217.
(2) 3 P.D. 18.
(3) 9 App. Cas. 136.
(4) 31 Fed. Rep. 234.
(5) 26 Can. S.C.R. 651.
(6) 168 U.S.R. 410.

"Cape Breton" had continued on her same course or starboarded her helm when she heard the "Canada's" two blasts, she could not have prevented the collision. R.S.C. ch. 79, sec. 5. The "Canada's" manœuvring had then rendered it inevitable.

There was then no possibility for the "Cape Breton" of avoiding the collision, (says Hamelin, her pilot): To starboard her helm then would have made matters still worse, (says McNeil, her first mate): When the "Canada" sounded her two blasts there was no possibility of avoiding a collision, (says Bromley, her look-out).

And any reasonable doubt on this point, were there any, must be solved in favour of the appellants. The respondents were deliberate transgressors of the law; on them—I repeat it—was the burden of proving clearly that the appellants' crew might, by ordinary skill and prudence, have avoided the collision. They have failed to do so. *Emery* v. *Cichero*(1); *Valentine* v. *Cleugh*(2); *The "City of New York"*(3); *The "Chicago"*(4); *The "Teaser"*(5). The weight of the evidence is the other way. Had the "Canada" been a few feet further north, so as to sink the "Cape Breton" instead of the "Cape Breton" sinking her, the "Cape Breton" could not have been found guilty of negligence or of wrong manœuvring. Such a plea by the "Canada" in that case in answer to the "Cape Breton's" claim would have been equivalent to saying to her, "Why did you not starboard your helm and sink us both?" *The "Agra" and "Elizabeth Jenkins"*(6). With logic of the same force she now says to her: "You blundered because you should have given us a chance to sink you with us."

(1) 9 App. Cas. 136.
(2) 8 Moo. P.C. 167.
(3) 147 U.S.R. 72.
(4) 125 Fed. Rep. 712.
(5) 127 Fed. Rep. 305.
(6) 4 Moo. P.C. (N.S.) 435.

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Rule 33 as to Sorel Harbour has no possible application. The "Cape Breton" was not going to Sorel and the "Canada" knew it. It is not the case, as the respondents' contentions on this point would necessarily lead to, that every ship going from Montreal to Quebec or England has to pass through the Harbour of Sorel. Then, when the "Canada," with a meeting ship in sight, coming almost end on, which she knew was not going to Sorel, changed her helm at a point arbitrarily chosen by herself, two miles away from Sorel, to direct her course to port, presumably intending to force that ship to meet her under the Sorel rules instead of the St. Lawrence rules, which, up to that moment, governed them both, it was incumbent upon her to sound the two regular blasts. When the "Cape Breton's" pilot saw her closing upon him, but not sounding two blasts, he was led to think that she did not intend to put herself across the "Cape Breton's" bow. On the contrary, by not then sounding two blasts she warned the "Cape Breton" to keep her course in the South Channel; yet she would now say to her: "You ought to have crossed over to the North Channel; I deceived you, but you were wrong to believe me." The respondents' contentions, based on this Sorel rule, are, however, only an afterthought. The simple reason that the "Canada" directed her course towards Sorel so far away from it without previously signally to the "Cape Breton" her intention to do so, is that she did not then see her, and she did not see her because she had no proper look-out. Had she seen her she would have steadied her course up the river and steered towards Sorel only after passing her. Her pilot admits it.

Great stress has been laid by the respondents on the flash of the "Canada's" green light that the "Cape

Breton" is proved to have had in sight for a moment, when still a mile, at least, away from her, not ceasing herself to shew her red light to the "Canada." But that is a piece of evidence which seems to tell more in favour of the appellants than in their favour. By the fact that the green light was immediately shut out from the "Cape Breton's" sight, the red one and the white one only remaining in sight, the "Cape Breton's" crew had reason to believe that this momentary flash of it was due either to the sinuosities of the channel or to the sheering of the "Canada" in the current. Had the "Canada," having the "Cape Breton's" red light in sight, or presumed by the "Cape Breton's" crew to have had it in sight, and herself then not ceasing to shew her red light to the "Cape Breton," intended then to change her course and make for the south shore, she would before doing it, as already remarked, have reasonably been expected by the "Cape Breton" to sound the two regular blasts. And by not doing so at that moment, the "Cape Breton's" crew rightly assumed that the "Canada" intended to observe the rule of the road and meet her port to port, she not having signalled a contrary intention. There certainly was then no immediate danger of collision, no reason for either ship to stop and reverse, and for the "Cape Breton" to then starboard her helm, with the "Canada's" red light in sight, would have been a flagrant breach of the rules.

The appeal is allowed; decree to be entered for appellants on the action and on the cross-action, with costs on both in both courts against the respondents; case remitted to the Exchequer Court, Quebec Admiralty District, for the assessment in the usual way of the damages to be paid by the respondents.

The "Rules of the Road" now in force in Canada,

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which govern the case, are those promulgated by the Order in Council of the 9th of February, 1897, page LXXXI—Statutes of 1897 (D.).

The motion by the respondents to strike out of appellants' factum their commentaries upon the judgment of the Wreck Commissioner's Court is allowed with costs. That judgment does not form part of the record and could not legally have been received in evidence.

SEDGEWICK J. concurred in the judgment allowing the appeal with costs and remitting the case back to the court below to have damages assessed; also in the order striking out irrelevant matter in the appellants' factum.

GIROUARD J. (dissenting)—The principles of law governing cases of collision are well known and easily understood, but their application to the special circumstances proved has always been difficult. The evidence on both sides in this case form two immense volumes, and there is a big volume of exhibits consisting of photographs, maps and plans, which were explained by the witnesses to the local judge in admiralty of Quebec (Routhier J.) of great experience in cases of this description, and this may account for the absence of nautical assessors, whose attendance was not even suggested by either party.

Before reversing the judgment of Mr. Justice Routhier, I would certainly refer the case to the court below in order to obtain the opinion of one or more nautical assessors as to whether there was time for the "Cape Breton," on the evidence, to avoid the collision—a course which seems to be in accord with the decision of the Privy Council on the appeal of the *Tur-*

*rett Steamship Company, Limited* v. *Jenks and others*(1), decided in 1901, relied upon by the appellants, and in the still more recent case of *The "Empress of India"* v. *The Imperial Chinese Government*(2), decided in August last, but not yet reported. Their Lordships even referred the question to nautical assessors to report to themselves. I doubt that this court, having only a statutory constitution, can go so far, but we certainly can send the case back to the court below for the purpose of obtaining that information. Little reliance can be placed upon the opinions of experts examined as witnesses who almost invariably support the views of the party who retains their services.

Of course we had the explanations of the volume of exhibits by counsel, but no one will contend that they are as valuable as those made by the witnesses. Furthermore, the trial judge has entirely, and apparently for good cause, discredited some of the witnesses of the appellant, especially pilot Hamelin, and expressed a preference for others.

> Unfortunately, (he says), the questions of fact are a great source of embarrassment in this cause by reason of the great number of witnesses heard and of the astonishingly conflicting evidence produced by them. Several of the witnesses seem to believe it is their duty to swear contrary to what the witnesses of the adverse party have affirmed and that they are called in court but for that purpose.

Under the circumstances I do not feel inclined to interfere with his findings of fact, and I think the soundness of his rulings of law cannot seriously be questioned. I do not intend to review the facts of the case. This gigantic work has been exhaustively done by the learned judge in his reasons for judgment, which cover nearly thirty pages of the printed case. He has

(1) 36 Can. S.C.R. 566, *note*. (2) See 45 Can. Gaz. 447.

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so fairly summed up in a few pages the whole situation as it existed when it was yet time for the "Cape Breton" to avoid the accident—which seems to be the only point dividing this court—that I cannot do better in concluding than reproduce them:

Let us now go into a more detailed examination of the course of the "Canada" and of the "Cape Breton" and let us see what mistakes were made on both sides which led them to the collision. I say at first that the two vessels perceived one another from a distance and that having ascertained they were coming closer, the "Cape Breton" had the right to believe they would meet according to rule 18, that is to say, each keeping to the right, red light to red light. Here is this rule 18; it reads as follows:

> "When two steam vessels are meeting end on or nearly end on so as to involve the risk of collision each shall alter her course to starboard so that each may pass on the port side of the other."

Well, the "Cape Breton" evidently relied on this rule and thenceforth she had the right to follow the right of the channel, that is to say the south according to rule 25, which says:

> "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel."

It is simple and consistent with the law.

With respect to the "Canada" the question of the course to be taken became on the contrary complex. She was going to Sorel and the lights of the Harbour of Sorel were already visible at the horizon on her left side; consequently, two different courses were open to her to meet the "Cape Breton," and in taking into consideration the general practice followed by her she might have thought she had to choose between two conflicting rules,—rule 18 which told her as well as the "Cape Breton": "Meet to your right"; and rule 33, applicable to the Harbour of Sorel, which told her: "Meet to your left."

Rule 33 says this:

> "Unless it is otherwise directed by the Harbour Commissioners of Montreal, ships and vessels entering or leaving the Harbour of Sorel shall take the port side, anything in the preceding articles to the contrary notwithstanding."

The first of these courses, that is to say according to rule 18, was certainly, in my opinion, the safest, because it is the general rule, the rule known to all mariners, and a great number of them even know of no other rule with respect to meeting one another.

I have had proof of this in a number of cases that have come before me.

In following it the meeting would have taken place in perfect security, and without lengthening in a perceptible measure the course towards Sorel.

But the "Canada" was in the habit, as the other boats of the plaintiff company were, to take the direction of the Harbour of Sorel, immediately after having passed the last black buoy and even occasionally between the two black buoys, so as to follow the tangent, instead of a line more or less angular, and the mariners in charge of this vessel did not dream of departing from this habit and this practice.

Evidently it never struck them,—First, that this practice was, perhaps, not known to all mariners; and,—Secondly, that the vessel to meet might not have known the "Canada" and not be aware that she was going to Sorel; and finally, that the Sorel wharf was still two miles distant, and that the extent of this harbour is determined by no law, unfortunately, and has no measurement nor known boundaries, and that rule 33 was, perhaps, not applicable to this part of the river where they were then and where the meeting was to take place.

No doubt of this kind seems, however, to have crossed their minds, and when they had passed the last black buoy they changed their course and inclined towards the south, applying thenceforth rule 33, and preparing to meet on the left the steamer which was coming towards them.

Seemingly, with perfect security, they probably said: "The officers on the steamer coming to meet us must know who we are, and where we are going, and they must know, as we do, rule 33 of the Harbour of Sorel." But it was presuming too much on the knowledge and information possessed by the officers of the "Cape Breton," and it was taking as unquestionable their contention that from that place and from the moment they left the ship channel, they were entering the Harbour of Sorel, which is not absolutely certain. It was wanting to impose on the other vessel a local and not a universal practice. Undoubtedly, we can say: "It was not only a practice and a habit, it was rule 33, and even with respect to the habit, it is just to take it into account." So, if one refers to Marsden, on page 370, we read this:

> "But though the regulations are the paramount rules of navigation, yet where the usage of the place and the business and courses of particular vessels are obvious and well-known, no seaman has a right to neglect the knowledge he has of the probable movements of other ships with reference to such usage."

Spencer, at page 44, sec. 22, says this:

> "Where well-known usage has sanctioned a particular method of navigating local waters, it is competent for the court to

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admit evidence of such usage, and if it be proved that the matter is regulated by general usage, the court may, in its discretion, hold the vessel to conform to such usage."

Different from a general principle, usage is of an exceptional application in the discretion of the court, which is bound to weigh the circumstances and to take usage into account.

Well then, I say this: In this situation, and weighing all the circumstances of the evidence, I think that the obligation was upon the officers of the "Canada" to signal the "Cape Breton" of their intention to pass on the left instead of passing on the right.

It is a general principle, if a steamer follows a course that may appear extraordinary to the other steamers, though justified by special reasons, she does it at her risk and peril, and if she wishes the other steamers to be informed of it she must signal her intentions, because the others have a right to presume that her course will be conformable to the ordinary rules. There is occasion in this case to apply rule 28, because both vessels were following a course they thought authorized by the regulations.

Rule 28 says this:

> "When vessels are in sight of one another, a steam vessel under way in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, viz:—One short blast, to mean:—'I am directing my course to starboard.' Two short blasts, to mean:—'I am directing my course to port.' Three short blasts, to mean:—'My engines are going full speed astern.'"

I say that the "Canada" in such a case, should have blown two blasts to say:—"I am going to port side and not to starboard."

When two steamers mutually perceive each other going in opposite directions, and going to meet one another, and there is any doubt as to the direction of one of them, rule 28 becomes obligatory, and they must mutually signal each other by blasts of the whistle to inform each other and naturally they must signal each other when it is still in time and not wait until it is too late. In the present case both steamers are in fault in this respect. As soon as the "Cape Breton" saw the "Canada" change her course, a manœuvre which suddenly shewed her green light for an instant, (this is proved by the officers of the "Cape Breton") she should have understood that the "Canada" was directing her course towards the south, or at least that her course was uncertain, and she should have then, from that moment, have blown a blast of the whistle. Likewise, the "Canada," which was preparing to meet differently from the requirements of rule 18, should have informed the "Cape Breton" of it by two blasts of the whistle. The "Canada" was all the more obliged to do it, as she was following a course which was familiar to her, but which was not to the "Cape Breton," and of which the "Cape Breton" could ignore the reason.

I therefore say that, under these circumstances, and to avoid the collision which they should have foreseen, the two steamers should have exchanged blasts of the whistle to mutually inform each other of their respective courses, and that they should not wait till it was too late as did the "Cape Breton."

There were still other manœuvres which the circumstances commended them to use to avoid the collision, and which I blame them for neglecting. I cite to this effect Spencer on Collisions, p. 93, sec. 26, intituled:—"Where lights are doubtful," and who says what follows:

> "Keeping a steamer under way at full speed when there is uncertainty as to the meaning of the lights carried by another vessel is negligence *per se*."

The author cites four precedents in support of this doctrine. At p. 193, sec. 80, he says:

> "Under the rules, the obligation to reduce speed arises whenever there is any uncertainty as to a vessel's own position or the movements or course of an approaching vessel sufficiently near at hand to render her a menace to the other's safety.
> "Where uncertainty of position or of course is coupled with dangerous proximity, both vessels should reverse and come to a stop, until all uncertainty as to each other's situation is determined."

Five precedents are cited in a foot-note in support of this doctrine.

Let us apply these two rules of conduct, which are based upon reason and jurisprudence to the facts proved on both sides in this case, and we should, I think, conclude therefrom that neither the "Canada" nor the "Cape Breton," complied with these rules.

In the first place, the officers of the "Canada" contend that up to the last minute the "Cape Breton" shewed neither red nor green light.

Till the first blast of the "Cape Breton's" whistle, they swear having seen only her white light, which would not have been sufficient to inform them as to the steamer's course.

If this be true, they must then have been in great uncertainty with respect to the meaning of this white light, which was moving all the same, and which was drawing nearer and on the course they were following, and the danger of being drawn nearer was being added to this uncertainty. What were they then to do? The text writers and jurisprudence answer: "They should at first reduce speed, reverse and come to a stop until all uncertainty had ceased. Now they did neither one thing nor the other. Therefore, they are in fault."

Did the "Cape Breton" behave better? Her officers tell us they were going down the river at full speed. On leaving Sorel, they perceived the white light on the "Canada's" mast and her

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saloon lights. They say they did not know it was the "Canada," but they saw the lights of an upbound steamer. She was still four miles distant at the time. Then they saw her red light, and they ported their helm to meet on the right. This is not what I blame them for. That was all right. Thus the "Canada's" red light indicated she was directing her course towards the north to meet on the right and the "Cape Breton" was directing her course towards the south.

But one thing which should have astonished the officers of the "Cape Breton" is, that while shewing her red light, the "Canada" was also remaining almost in a line with the "Cape Breton" which, nevertheless, kept her helm to port and was tending obliquely towards starboard.

All of a sudden the "Canada" shewed her green light. McNeill and Hamelin said it was but a flash which did not last long. I have serious doubts upon this point and there are many reasons to believe that from that very moment the "Cape Breton" must have seen the three lights and that afterwards she must have seen but the green light when the "Canada" had changed her course after passing the second black buoy. Be it as it may, the sudden appearance of this green light, and the fact that the "Canada" was drawing near the south, instead of getting away towards the north were sufficient to give rise in the minds of the officers of the "Cape Breton" to serious doubts as to the meaning of the green flash and upon the true course of the "Canada."

But are these doubts mere hypotheses, or did they exist in the minds of the officers McNeill and Hamelin? Yes; these doubts did exist.

I find the proof of the same in their testimonies, and I also find it in the log-book, where this uncertainty is recorded. It is sufficient to see upon this point the citation of the log-book in Captain Reid's evidence. Here follows what we read there:—

> "A few minutes before the collision the "Canada's" masthead and port side lights were shewing at about one point or one and a quarter off our port bow. The pilot finding the "Canada" was closing in on him, ported and kept to starboard. A little later on, the pilot asked me: 'What does he mean. I am keeping to starboard and he is closing in on me?' Then the pilot ported and blew one blast of the whistle. The "Canada" answered by blowing two blasts. The wheel was put hard-a-port, the pilot again blew one blast, and ordered the engines stopped and full speed astern."

This is what we find in the log-book.

As we see, the pilot was noticing that the "Canada's" light was always at one point or one and a quarter points on the port bow, notwithstanding that the "Cape Breton" was going full speed to starboard. In spite of having ported his helm, the "Can-

ada" was always closing in on him. What does this mean, he said to the other officers. What is the steamer doing? I am going more and more to starboard and she pursues me.

Therefore Hamelin was in doubt. He no longer understood the "Canada's intentions, the meeting of the flash of the green light, and the course the "Canada" was following.

In this condition of uncertainty, he should: (1) Reduce his speed; (2) Reverse and come to a stop until he could understand what course the "Canada" was following. He did neither one nor the other of these two things, and made the same mistake as the "Canada."

There is more, and that must have increased pilot Hamelin's uncertainty. It is the fact that he was then a few hundred feet outside of the channel to the south and that he was consequently deviating from the course generally followed by steamers and from the one he had himself intended to follow in leaving Sorel. Since he wanted to pass north of the black buoy, as I heretofore said, and that if the "Canada" obstinately kept barring his way, he himself shewed the same obstinancy in placing himself across the "Canada's" way. Such a course followed by two steamers toward the south outside the channel must have appeared to him at least, strange, and increased his uncertainty.

The "Canada" could at least say: "I am here because I am going to Sorel," but she, the "Cape Breton," (which was going down to Quebec), why was she out of the main channel; and why did she persist in wanting to pass south of the "Canada," while her ordinary course towards Quebec was north and free?

In my opinion the appeal should be dismissed with costs. I am not satisfied that the judgment appealed from is wrong. Before reversing, I would certainly require the opinion of competent and disinterested experts and, for that reason, I would agree that the case be sent back to the court below for the purpose of getting the opinion of three nautical assessors upon the question as to whether there was time, under the circumstances proved, by any manœuvre on the part of the "Cape Breton," to avoid the collision; costs then to follow final decision.

NESBITT J.—The action is one by the Richelieu Company in respect of a collision which occurred about 2.35 a.m. of the 12th June, 1904, between the

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steamers "Canada" and the SS. "Cape Breton" in the St. Lawrence River about two miles below Sorel, which lies at the mouth of the Richelieu. The case was argued at great length, the evidence being voluminous, but I have concluded the essential facts are within small compass.

The "Cape Breton" had been anchored over night in the River St. Lawrence opposite the Harbour of Sorel. She had weighed anchor and had proceeded about two miles down the River St. Lawrence when the collision occurred. The "Canada" was on her way up the river from Quebec. The River St. Lawrence flows in a northeasterly direction so that the "Cape Breton" had the south shore on her starboard side and the "Canada's" starboard was towards the north shore. The boats came into collision on the south side of the fairway or mid-channel line, the "Cape Breton's" stem striking the "Canada" on her starboard quarter between the pilot house and wheel-box. The "Cape Breton" was damaged to some extent by the collision and the "Canada" sank in about thirty-five feet of water, with her bow about 400 feet south of the centre line of the channel.

Both vessels were carrying the regulation lights. The "Canada" was steaming at about 14 miles an hour, and the "Cape Breton" at about ten miles an hour. The "Cape Breton" was being navigated by a regularly licensed branch pilot, and her first officer (who carried a master's certificate) was in command of the vessel on the bridge with the pilot. An able-bodied seaman was stationed in the "Cape Breton's" bow in the capacity of "look-out," and having no other duties to perform, while the ship's boatswain and another able-bodied seaman completed the watch on deck at the time.

The "Canada" had no look-out, and the red and green lights of the "Cape Breton" were not seen by any one. When the "Canada" arrived at the north of the black buoy described in the evidence, she not having seen the lights indicating an approaching vessel changed her course and turned for Sorel without giving any signal to any approaching vessel that she was going to the other side of the channel, and in effect becoming a crossing instead of a passing vessel. It is at this point only of the case I have entertained any doubt, because, if the evidence satisfied me that, notwithstanding this default, nevertheless those in charge of the "Cape Breton" should or did see the green light indicating an approaching crossing vessel, then I think the "Cape Breton" would be partially to blame. If, on the other hand, the fact of the "Canada" attempting to cross only became apparent after the first blast and the answer to it, then I think no fault can be attributed to those in charge, even if, in the agony of collision, a different movement might have avoided the accident. Certain principles seem to me to be well settled by the authorities. First, that these vessels were approaching each in a narrow channel and rule 25 was applicable, which compels each to keep to that side of the fairway or mid-channel, which lies on the starboard side of the vessel. The "Canada" answers by referring to rule 33 by which ships entering or leaving Sorel are directed to take the port side, but even assuming the point where the "Canada" changed her course was within that rule (which I am inclined to think it was not), she was bound under the combined effect of rules 27 and 28 to give notice to an approaching vessel of the intention to so direct her course as to cross the other. Assuming after that the "Canada" was properly on her course she

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was bound under article 19 to keep out of the way of the "Cape Breton," and if necessary to slacken her speed or stop and reverse. She neither gave notice of her change of course from that to be assumed under rule 25 she was going to follow nor attempted to keep out of the way, nor slackened, nor stopped, nor reversed, and the conclusion is irresistible that she behaved as she did simply because she failed utterly to see the lights of the "Cape Breton" by reason of failure to keep proper look-out and so to appreciate that a vessel was approaching. In fact her pilot Boulle says he saw the red light of the "Cape Breton" first when that vessel blew a single blast, and then she was only 700 or 800 feet away. Even then, after an interval of five or six seconds, he blew two whistles and continued on his course. As I have said, notwithstanding this utter failure to obey the rules on the part of those in charge of the "Canada," if those in charge of the "Cape Breton" knew or with due care should have known of the change of course of the "Canada" and could have prevented the collision by any act on their part, then the judgment must stand. The pilot Hamelin admits that a mile away he saw a flash of a green light indicating, if it continued in view, a crossing vessel, but he swears it was a momentary flash to be expected from an approaching vessel owing to the sinuosity of the river, and that he kept a constant look-out and saw nothing but a red and white light indicating an approaching and passing vessel until, a quarter of a mile away, the vessel suddenly turned in front of him when he signalled he would go still more to the right, assuming the vessel would obey the signal, and to his astonishment she answered she would continue her course, and that instantly he stopped and reversed, but too late to avert the disaster. The trial judge does

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not expressly find upon this, but indicates his doubts as to whether the green light was not visible for a longer period of approach than I have indicated. Had he found expressly it might have been difficult for the appellants to displace the finding, but, bearing in mind the well-settled principles of law applicable, I think the defendants must be absolved. The fault of the "Canada" being obvious and inexcusable, the evidence to establish the fault on the part of the "Cape Breton" must be clear and convincing in order to make a case for apportionment, and the burden of proof is upon the "Canada" to establish fault in the "Cape Breton". The trial judge has not discredited the testimony of those in charge of the "Cape Breton"; he relies apparently on an ambiguous entry in the "log" and a conversation between the pilot and mate which I think is shewn to have taken place when the first blast was given and not when the green light flashed momentarily in view. I think in view of the findings that the regulation lights of the "Cape Breton" were burning, and that she was on her proper course, she was not bound by seeing the momentary flash of the green light to anticipate the conduct of the "Canada"; that she took all proper precautions as soon as chargeable with notice of risk of collision and, assuming the learned judge is right, that if she had starboarded her helm the accident might have been avoided (though the weight of evidence seems to me to be the contrary), the pilot exercised the best judgment he could in the agony of collision without violating any express rule, and cannot be held responsible if his judgment erred. The case, I think, is governed by *The "Victory"*(1); *The "Cuba"* v. *McMillan*(2);

(1) 168 U.S.R. 410.

(2) 26 Can. S.C.R. 651.

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*Turret SS. Co.* v. *Jenks*(1), decided in the Privy Council, in 1901. I would allow the appeal with costs in all courts.

IDINGTON J.—I concur for the reasons stated by my brother Nesbitt.

*Appeal allowed with costs.**

Solicitors for the appellants:

Solicitors for the respondents:

*NOTE.—Upon the application of the respondents, on 21st October, 1905, before His Lordship Mr. Justice Idington, in Chambers, for an order under the rules established by the Colonial Courts of Admiralty Act, 1890 (Imp.), fixing bail to be given by the said respondents upon an appeal by them to His Majesty in Council to answer the costs of such appeal, after hearing counsel for both parties, it was ordered that the respondents should give bail to answer the costs of the proposed appeal in the sum of £300 sterling, to the satisfaction of the Registrar of the Supreme Court of Canada, on or before the 30th of October, 1905, costs of the application to be costs in the cause.

(1) 36 Can. S.C.R. 566, *note*.

THE TORONTO TYPE FOUNDRY COMPANY AND THE CANADIAN-AMERICAN LINOTYPE CORPORATION (DEFENDANTS) ..... APPELLANTS;

AND

THE MERGENTHALER LINOTYPE COMPANY (PLAINTIFFS) ..... RESPONDENTS.

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*Oct. 17.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

*Infringement of patent of invention—Exchequer Court Act*, ss. 51 *and* 52 — *Order postponing hearing of demurrer—Judgment—Leave to appeal.*

Unless an order upon a demurrer be a decision upon the issues raised therein, leave to appeal to the Supreme Court of Canada cannot be granted under the provisions of the fifty-first and fifty-second sections of the Exchequer Court Act, as amended by 2 Edw. VII. ch. 8.

APPLICATION for leave to appeal from an order of the judge of the Exchequer Court of Canada postponing the decision of the issues raised upon a demurrer to the plaintiffs' statement of claim until the trial of the cause.

The action was brought in the Exchequer Court of Canada in respect of alleged infringements of certain letters patent of invention. The defendants demurred to the plaintiffs' statement of claim, and, upon hearing arguments upon the demurrer, on the 18th of September, 1905, the judge of the Exchequer Court adjudged that the said demurrer should be disposed of at the trial of the action. The defendants' motion was

*PRESENT:—Mr. Justice Maclennan, in Chambers.

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for leave to appeal from the said order under the provisions of the fifty-second section of the Exchequer Court Act, as amended by the Acts 54 & 55 Vict. ch. 26, there being no evidence that the amount involved exceeded five hundred dollars.

*Orde* and *Markey* for the motion.

*Aylen K.C.* contra.

MACLENNAN J.—The motion is made by the defendants for leave to appeal from an order of Mr. Justice Burbidge, in the Exchequer Court of Canada, directing that a demurrer of the defendants to the statement of claim should be disposed of at the trial of the action and that the costs of the demurrer should follow the event.

Mr. Aylen, opposing the motion, admitted that the amount in controversy exceeded five hundred dollars, but objected that the order complained of was not a judgment within the meaning of sections 51 and 52 of chapter 16 of 50 & 51 Vict., as amended by 54 & 55 Vict. ch. 26, and 2 Edw. VII. ch. 8, sec. 2, and, therefore, was not appealable, even with leave, and he urged the objection as a complete answer to the motion.

I think the objection is well taken. The enactment, as amended, reads thus:

> Any party to any action * * * who is dissatisfied with any final judgment, or with any judgment upon any demurrer, given therein by the Exchequer Court,

may, on taking certain prescribed steps, appeal against such judgment to this court. One of the essential steps, in a case like the present, is obtaining leave of a judge of this court.

The order in question is not a judgment upon the demurrer. It is merely a postponement of judgment

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until the trial. The learned judge has expressed no final opinion on the issues raised by the demurrer. They are still undetermined, and, therefore, there has been no judgment upon the demurrer within the meaning of the statute.

If the defendants' contentions were to prevail, then an order of the learned judge postponing the argument for a day, or a week, would also be appealable. I think the judgment meant by the statute is a judgment upon the issues raised by the demurrer. It would be very anomalous that there could be no appeal against any other judgment, unless it were final, and yet, that there could be an appeal from an order, in the case of a demurrer, which had decided nothing whatever.

The motion should be refused with costs.

*Motion refused with costs.*

Solicitors for the appellants: *Smith, Markey, Montgomery & Skinner.*

Solicitors for the respondents: *Lafleur, Macdougall & Macfarlane.*

NOTE.—The appellants, having taken proceedings for an appeal, *de plano,* under section 51 of the Exchequer Court Act, the respondents, on 23rd Oct., 1905, moved to quash the appeal for the same reasons as are stated in the foregoing judgment. The appeal was quashed with costs on 24th Oct., 1904.

*Macdougall* for the motion.

*Markey* contra.

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*May 29, 30;
Oct. 23.
*Oct. 24.

WILLIAM HEWSON (PLAINTIFF) .....APPELLANT;

AND

THE ONTARIO POWER COMPANY OF NIAGARA FALLS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Constitutional law—Construction of statute—B.N.A. Act*, 1867, *sec.* 92, *sub-sec.* 10(*c*)—*Legislative jurisdiction—Parliament of Canada—Local works and undertakings—Recital in preamble—Enacting clause—General advantage of Canada, etc.—Subject matter of legislation—Presumption as to legislation of Parliament being intra vires—Practice—Motion to refer case for further evidence.*

In construing an Act of the Parliament of Canada, there is a presumption in law that the jurisdiction has not been exceeded.

Where the subject matter of legislation by the Parliament of Canada, although situate wholly within a province, is obviously beyond the powers of the local legislature, there is no necessity for an enacting clause specially declaring the works to be for the general advantage of Canada or for the advantage of two or more of the provinces.

*Semble, per* Sedgewick and Davies JJ. (Girouard and Idington JJ. *contra*).—A recital in the preamble to a special private Act, enacted by the Parliament of Canada, is not such a declaration as that contemplated by sub-section 10(*c*) of section 92 of the British North America Act, 1867, in order to bring the subject matter of the legislation within the jurisdiction of Parliament.

A motion made, while the case was standing for judgment, to have the case remitted back to the courts below for the purpose of the adduction of newly-discovered evidence as to the refusal of Parliament to make the above-mentioned declaration was refused with costs.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Idington JJ.

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APPEAL from the judgment of the Court of Appeal for Ontario(1), affirming the decision of Mr. Justice Britton(2), refusing the injunction sought by the plaintiff to restrain the company's proceedings for the expropriation of certain lands required for their works and dismissing the action with costs.

The respondent company was originally incorporated by a special Act, 50 & 51 Vict. ch. 120, under the name of the Canadian Power Company and, by section 29 of that Act, the powers of expropriation mentioned in the "Railway Act" were conferred upon the company. The name of the company was subsequently changed and other powers conferred upon it by the Dominion Statutes, 54 & 55 Vict. ch. 126, 56 Vict. ch. 89, 62 & 63 Vict. ch. 105, 63 & 64 Vict. ch. 113, and 2 Edw. VII. ch. 86. Under the powers so conferred upon them, the company took proceedings for the expropriation of certain lands belonging to the appellant as being necessary for the carrying out of the objects for which they had been incorporated and for the construction of their works in the Village of Chippewa, where they were constructing a canal and hydraulic tunnel. The appellant objected to the expropriation upon the ground that the plan of the respondents' undertaking upon which the expropriation proceedings were founded shewed a substantially different undertaking from that authorized by Parliament; that the undertaking with which the respondents are actually proceeding is in fact a third undertaking, entirely different both from the undertaking shewn upon the plan and from that authorized by Parliament; that the two undertakings last referred to, for either of which the appellant's land would alone be required, are abandoned, or at least cannot be proceeded with for

(1) 8 Ont. L.R. 88. (2) 6 Ont. L.R. 11.

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an indefinite time; and that, in any event, the undertaking is merely local and private, and not within the authority of the Dominion Parliament, and that power of expropriation in connection therewith could be obtained exclusively from the Provincial Legislature.

The case came before Mr. Justice Britton, on a motion by the company for the possession of the lands. The plaintiff had brought his action to restrain the company from proceeding towards the expropriation and notice, on his behalf, had been given for an injunction against the company. By consent of the parties, the motion for possession of the lands was considered as a motion for judgment in the action; a chamber motion for leave to pay the amount of the award was also to be determined. Notice had also been served, pursuant to an order of Mr. Justice Street, upon the Attorneys-General for Canada and for the Province of Ontario, inasmuch as the validity of the Act of 50 & 51 Vict. ch. 120 (D.), and the Acts amending the same were called in question, but neither Attorney-General was represented at the trial.

The preamble to the Act of incorporation recited that it was desirable "for the general advantage of Canada" that a company should be incorporated for the purpose of utilizing the natural water supply of the Niagara and Welland Rivers, and that the contemplated works "will interfere with the navigation of the Welland River." The Act then proceeded to incorporate the company with, amongst other powers, those already referred to, but without enacting any clause declaratory of the general advantage of Canada or of any two or more of the provinces through the works or undertakings of the company so incorporated. The Act also authorized the company to enter into contracts extending beyond the limits of Canada.

At the trial, Mr. Justice Britton held that the preamble shewed, by implication, the intention of Parliament to give power to deal with matters subject to the exclusive jurisdiction of the Dominion of Canada and, in connection therewith, to expropriate private property in the Province of Ontario; that this amounted to a Parliamentary declaration that the formation of the company for the purposes mentioned was for "the general advantage of Canada"(1). On appeal to the Court of Appeal for Ontario, this decision was affirmed(2), and, in delivering the judgment of that court, Mr. Justice Maclennan said:

"We are of opinion that this judgment should be affirmed.

"The first objection to the power of expropriation claimed by the defendants is that the work authorized by the company's Acts of incorporation is a purely provincial work and therefore *ultra vires* of the Dominion Parliament.

"It is not necessary that we should say that we agree with all the reasons given by the learned judge for his opinion that this objection is not well founded. It is sufficient to say that the matter is made quite clear by the preamble of the Act, and the power granted to the company by section two, 50 & 51 Vict. ch. 120 (D.), to contract with any bridge company having a bridge across the Niagara River to carry wires *across*, and to connect with wires of any electric light company or other company *in* the United States.

"The preamble recites that it is desirable for the general advantage of Canada that a company should be incorporated for certain purposes; that certain persons have prayed for incorporation of such a company, and that it is expedient to grant their prayer. And then follow the enacting clauses. We think that recital is clearly a declaration by Parliament that the work which is thereby authorized is a work for the general advantage of Canada within section ninety-two, sub-section 10(*c*), of the B.N.A. Act. We also think the power granted by section two of the company's Act above mentioned makes the work authorized a work, or undertaking, extending beyond the limits of the province, within section ninety-two, sub-section 10(*a*). The work is therefore one excluded from the jurisdiction of the legislature of the province.

"It was also objected that the work being constructed by the company is not such as authorized by its Act, because the terminus selected is not that prescribed.

(1) 6 Ont. L.R. 11. (2) 8 Ont. L.R. 88.

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"The canal which is authorized is to extend from some point on the Welland River at or near its conjunction with the Niagara River to a point or points on the west bank of the Niagara River about or south of the Whirlpool. The point selected for the southern terminus is near the falls, which is said to be two and one-half miles south of the Whirlpool, and it is argued that the point so selected is therefore not *about or south* of the Whirlpool. We cannot say that these words restrict the company to the selection of a point about or near the Whirlpool, or that a point two and one-half miles south of it is not within the language used. So to hold, would be to construe the words as if they had been about *and* south.

"It is further contended that the company is seeking to expropriate a greater width of land than is authorized by the Dominion Railway Act.

"We think this objection also fails. By section twenty-nine of the company's Act, certain sections of the Dominion Railway Act (1), are made applicable to the company, and among others section eight, prescribing the breadth of the land which may be taken without the consent of the owner. That section declares that where the railway is raised more that five feet higher, or cut more that five feet deeper, than the surface of the line, the land taken shall not exceed one hundred yards in breadth. It is sworn that the depth of the company's canal where it passes through the land in question is more than five feet, the average depth being seventeen and one-half feet, as appears upon the plan and profile filed and approved by the Deputy Minister of Railways and Canals. The width claimed by the company from the plaintiff is one hundred yards, and we think the company is within its rights in making that claim.

"We think there is clearly nothing in the objection that the work has been abandoned, for, by the Act 63 & 64 Vict. ch. 113 (D.), the time for the completion of the company's works was extended for six years from the passing of that Act, that is, from the 7th July, 1900."

The Court of Appeal for Ontario affirmed the judgment of Mr. Justice Britton refusing the injunction sought by the plaintiff's action and dismissing the action with costs. The plaintiff asserts the present appeal.

The questions at issue upon the appeal are sufficiently clear from the foregoing statement and the references made in the judgments now reported.

(1) R.S.C. ch. 109.

*Lafleur K.C.* and *H. S. Osler K.C.* for the appellant.

*Walter Cassels K.C.* and *F. W. Hill* for the respondents.

While the case was standing for judgment a motion was made on behalf of the appellant to have the consideration of the appeal discharged and the case remitted back to the Court of Appeal or to the trial court in order that newly discovered evidence might be adduced tending to shew that the Parliament of Canada had, on several occasions, refused to incorporate in the Acts respecting the company any clause or clauses enacting a declaration that the works and undertaking of the company were for the "general advantage of Canada or for the advantage of two or more of the provinces."

*Glyn Osler* appeared for the appellant in support of the motion.

*F. W. Hill,* contra, was not called upon for any argument.

THE CHIEF JUSTICE.—The appellant, evidently not expecting a judgment in his favour on his appeal as submitted for consideration in May last, moved the court yesterday for an order

referring the case back to the Court of Appeal or to the High Court of Justice to take further evidence as to the refusal of the Parliament of the Dominion of Canada to declare the undertaking and works of the respondent company to be works for the general advantage of Canada.

This motion must be dismissed with costs.

Assuming that the evidence tendered could be legally received, and that the appellant was able to

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prove the fact that Parliament has refused to specifically declare that the works in question were for the general advantage of Canada, the fact would remain that it has, in fact, repeatedly assumed legislative jurisdiction over them. Now, all presumption being in favour of the constitutionality of such legislation, it must be assumed that, if they have refused to enact a special clause that would unquestionably have given it jurisdiction, and yet continued to exercise that jurisdiction by repeatedly amending the original Act, it was because such a special clause was deemed unnecessary by Parliament itself, either because in the preamble of the Act the motive that induced Parliament to pass it being that the Act was for the general advantage of Canada is an admission amounting to a declaration that it was so, or, because such a declaration was unnecessary, as the Act was one to authorize an interference with the navigation of the Welland River, or because the works were to extend beyond the limits of the province. So that, assuming that the facts alleged in the affidavits filed with the motion are true, they could not in any way affect the result of the appeal.

The motion is dismissed with costs.

DAVIES J.—I concur in the judgment dismissing the motion to refer the appeal back in order that some further evidence might be taken on the ground that the evidence proposed to be given is, in my opinion, clearly inadmissible. My reasons for the judgment on the merits are quite outside of and not affected by the evidence sought to be introduced even if admissible.

GIROUARD and IDINGTON JJ. concurred.

The following are the opinions of their Lordships on the merits.

THE CHIEF JUSTICE.—I would unhesitatingly dismiss this appeal.

The first ground upon which the appellant attempted to support his case is that the Dominion Act incorporating the company respondent, 50 & 51 Vict. ch. 120, is *ultra vires* and unconstitutional.

Now, upon him was the burden of establishing the soundness of that contention; the presumption in law always is that the Dominion Parliament does not exceed its powers. The ground upon which he bases his argument on this part of his case is that the Dominion Parliament has not declared this company and its undertaking to be for the general advantage of Canada. But assuming, without deciding, that it has not done so as required by the British North America Act, 1867, it is evident, on the face of the Act of incorporation, that such a declaration was quite unnecessary to give to the federal legislative authority exclusive control over the company.

The preamble of the Act alleges that the company's contemplated works "will interfere with the navigation of the Welland River." Now, that was acted upon by Parliament, the petition for incorporation granted, the works authorized, permission granted to interfere under certain conditions with the navigation of the said river, which is proved to be a navigable one, and, by section 32 of the Act, the provisions of the Act respecting certain works over navigable rivers (R.S.C. ch. 92) were extended to the company. Now that the federal Parliament has the exclusive right to so legislate needs no demonstration. The fact that the company may not yet in fact have interfered with the

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navigation of that river cannot affect the constitutionality of the Act. It had and has yet the power to do so.

Moreover, by the Act 56 Vict. ch. 89 (D.), amending the company's charter, the words "or any other wires or cables which the company may lay across the said river," were added to section 2 thereof, making it clear that the company has the right to lay cables across the boundary line into the United States and to do business therein. *Vide Canadian Pacific Railway Co.* v. *The Western Union Telegraph Co.*(1). Such a company, with works extending beyond the limits of the province, is not a company with provincial objects. It may, if it pleases, do business only in the United States, not at all in Ontario. And the Ontario legislature could not have given the powers that the federal Parliament has granted them.

The other grounds taken by the appellant are frivolous; I am inclined to say as frivolous. The judgments of the two courts below amply demonstrate it.

The appeal is unanimously dismissed with costs, as was, by the Ontario Court of Appeal, the appeal from Mr. Justice Britton's judgment dismissing the appellant's action.

SEDGEWICK J.—I agree that the appeal should be dismissed with costs for the reasons stated by my brother Davies.

GIROUARD J.—I am of the opinion that the appeal should be dismissed for the reasons given by Mr. Justice Maclennan in the Court of Appeal.

(1) 17 Can. S.C.R. 151.

DAVIES J.—The chief contention on the part of the appellant was that the charter of the respondent was null and void as not being within the legislative jurisdiction of the Parliament of Canada and as being a purely local work and undertaking which the Legislature of Ontario could alone authorize.

The Court of Appeal for Ontario held the charter of the respondents to be *intra vires* of the Dominion Parliament on two grounds: First, that the general recital in the incorporating Act

> that it was desirable for the general advantage of Canada that a company should be incorporated for the purpose of utilizing the natural water supply of the Niagara and Welland Rivers

was a sufficient declaration within sec. 92, sub-sec. 10 (*c*) of the British North America Act, 1867, and: Secondly, that the power given by section 2 of the company's charter to connect its wires with the wires of any electric or other company in the United States, made the work one extending beyond the limits of the province and so within sec. 92, sub-sec. 10 (*a*).

As at present advised I do not think the general declaration in the preamble of this private Act such a declaration as that contemplated by sub-sec. 10 (*c*) of section 92 of the British North America Act, 1867. In my present view of that section I should be inclined to think that with respect to a work or undertaking of a purely provincial kind solely within the jurisdiction of the provincial legislature, and with respect to which Parliament was assuming jurisdiction on the sole ground that the undertaking was for the general advantage of Canada or of two or more of the provinces, the declaration intended was an enacting declaration to the effect required by the Imperial Act. Such a declaration is not, I think, one which might be spelled out of the charter granted or inferred merely

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from its terms or deduced from recitals of the promoters in the preamble, but one substantially enacted by Parliament. It is not necessary for me, however, to decide the point now, as I hold the charter valid on other grounds and wish to leave the point open.

The jurisdiction of the legislature of Ontario is limited to the incorporation of companies with provincial objects only, and such legislature could not confer on a company incorporated by them such extensive powers as are conferred on this respondent company.

It is true that the location of the works where the "electric power is to be generated is near Niagara Falls and solely within the province." But the undertaking of the company is not simply to generate power, but to supply such power

> to manufacturers, corporations and persons for use in manufacturing or any other business or purpose.

Now the subject matter of the charter is obviously not merely a local one. On the contrary it is obviously one which contemplates extension over large areas. I do not find in the Act any words importing or implying a limitation upon these powers as to area. I should read the second section of the Act as giving powers to extend if found necessary or desirable to any part of Canada which was found practicable. The objects of the company as defined by the Act contemplated, in my opinion, possible extension beyond the limits of one province, and it is therefore just as much within the express exception of the British North America Act, 1867, as a telegraph or telephone company with like powers of extension. *City of Toronto* v. *Bell Telephone Company of Canada*(1).

Suppose a similar charter granted to a company

(1) [1905] A.C. 52, at p. 57.

to erect its works on the Ontario side of the Chaudière Falls, at Ottawa, would not the argument that the language of the charter permitted the company to extend its wires for half a mile across the bridge into Hull, in the Province of Quebec, be almost irresistible. Where are the words limiting or preventing such extension to be found? There are clearly no such words while, on the contrary, the general words used fully permit of the extension from one province to another.

It is not necessary in an Act of the Parliament of Canada expressly to enact that the company created shall have power to extend its undertaking from the place where its chief works are authorized to be constructed into any other part of Canada. The Parliament of Canada is speaking and, unless there are words of limitation introduced, or the subject matter is obviously of a local or private nature, the language of the statute will be read as applicable to Canada, and not simply to the province in which, such as in this case, the generating works are authorized to be constructed. On the other hand, a provincial charter will be construed as having a provincial limitation, and the legislature will not be presumed to assume jurisdiction beyond the limits of the province.

The preamble recites the object of the promoters to be

> the promoting manufacturing industries and inducing the establishment of manufactories *in Canada.*

The second section, as I read it, not only gives them general and unlimited powers of supplying electric power to parts of Canada beyond the province where their generating works are to be situate, but expressly authorizes them

> to connect with the wires of any company in the United States.

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Mr. Lafleur felt himself obliged to contend that the local legislature could grant similar powers of connection, and I was disposed at the argument to agree with him. But a closer examination of the clauses of the British North America Act, 1867, has led me to entertain very grave doubts that this is so. It seems clear to me that the legislature could not grant a local company power to connect its wires with those of a local company in any of the other provinces. If it could each company would cease to be one of a "local or private nature" and become interprovincial and general. How then could the legislature grant power to connect the wires of the company it was creating with those of the companies of a foreign country. The local or private company on such connection taking place would at once cease to be "local or private" within the British North America Act, 1867, and become international.

It was argued that the province has as much right to confer powers beyond its jurisdiction upon the corporations it calls into existence as the Dominion Parliament has beyond Canada. In a certain sense that may be true. But there is a difference and a rational one too. Provincial charters are defined by the British North America Act, 1867, as matters of a local or a private nature not "connecting the province with any other or others of the provinces," and "not extending beyond the limits of the province." Dominion charters are not controlled by any such statutory limitations, and while the exercise of the powers they confer upon a company of connecting at the international boundary line with the works of a foreign company may be subject to the municipal law of that country and permitted and controlled by the comity of nations, there is no statutory prohibition in the Bri-

tish North America Act preventing the granting of the power by the Canadian Parliament to a company it incorporates to connect with a company of the United States at the boundary line.

It is not necessary, however, for me to decide whether a grant by the legislature of the province to a company created by it to connect its wires with those of a foreign corporation, at the frontier, would be necessarily beyond its powers or would invalidate the charter altogether or simply in part. That question was not argued excepting incidentally because the validity of a provincial charter was not an issue on this appeal. Whether there exists a concurrent jurisdiction in the Dominion and the province to confer such a power I am not called upon now to decide. I do hold the power to exist in the Dominion Parliament; and that, because of its exercise with respect to this special corporation and also because of the general extent of the powers granted, the Act of incorporation here in question is legal and valid.

With respect to the point raised as to whether or not the work under construction is within the Act, I concur with the Court of Appeal.

Mr. Justice Sedgewick desires me to say that he concurs with the foregoing reasons.

IDINGTON J.—There is undoubted authority for saying that an Act may extend in its operative force and effect beyond the preamble's statement of fact or purpose inducing the enactment. And it is said that where the preamble is found more extensive than the enacting part it is inefficacious to control the effect of the latter.

The preamble has, however, always been a guide to the interpretation of the enacting clauses following

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it. And the Interpretation Act, by secs. 3 and 4 and sub-sec. 56 of sec. 7, formally declares the relation of the preamble to the clauses following and in the latter section says, that

> the preamble of every Act shall be deemed a part thereof, intended to assist in explaining the purport and object of the Act.

It seems to me that these considerations and declarations cannot be given full force and effect to, in the interpretation of the incorporating Act that created the respondent company, unless we read the preamble thereof as meaning that which begins by saying,

> whereas it is desirable for the general advantage of Canada that a company should be incorporated, etc.

to be a declaration of the mind of the Parliament of Canada and its purpose in making the enactment. What more can sub-section (*c*) of sub-section 10 of section 92 of the British North America Act, 1867, require to give it vitality here?

Is this recital anything else than a declaration of the Parliament of Canada? Its very essence is of that nature.

Its being by law declared to be a part of the Act, to manifest its purpose, seems to render it impossible to hold it anything else than, or as falling short of, what the creative power of the sub-section (*c*) requires as a condition preliminary to its exercise.

That condition being thus duly complied with, the Parliament of Canada had undoubtedly the power to incorporate, and incidentally thereto to confer on this company so incorporated the right to expropriate the land in question.

I do not wish, especially as this suffices for disposing of the appeal, to express or to be held as impliedly

expressing an opinion on some of the interesting questions of great constitutional importance that have been considered in the courts below.

I must add, however, that I see no difficulty in the company's way by reason of its mode of procedure or alleged expiration of its powers, and on these points I agree with the reasons given in the judgment of Mr. Justice Maclennan.

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

*Appeal dismissed with costs.*

Solicitor for the appellant: *Alexander Fraser.*

Solicitor for the respondents: *F. W. Hill.*

1905

*May 5.
*May 15.

## CARSTENS ET AL. v. MUGGAH.

*Evidence—Admissibility—Harmless error—New trial.*

APPEAL from a judgment of the Supreme Court of Nova Scotia(1) setting aside a verdict at the trial in favour of the plaintiffs and ordering a new trial.

The action was for the price of goods sold and delivered, and the defence that the goods were received by defendant as plaintiffs' manager and not otherwise. The ground on which the new trial was ordered was that plaintiffs' books of account were improperly received in evidence against the defendant.

The Supreme Court of Canada reversed the judgment appealed from and restored the verdict at the trial holding that the books were received on the taking of evidence under commission by the express consent of both parties, and their reception could not afterwards be objected to on the general ground that they were irrevelant and immaterial to the issue.

*Appeal allowed with costs.*

*Newcombe K.C.* and *W. F. O'Connor,* for the appellants.

*J. J. Ritchie K.C.,* for the respondent.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Idington JJ.

(1) 37 N.S. Rep. 361.

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ZENON FONTAINE AND OTHERS (OPPOSANTS) ..... } APPELLANTS;

*Nov. 2.
*Nov. 14.

AND

LOUIS PAYETTE AND ANOTHER (PLAINTIFFS; EXECUTION CREDITORS) ..... } RESPONDENTS;

AND

LA COMPAGNIE DE L'OPERA COMIQUE DE MONTRÉAL..... } DEFENDANTS.

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

*Sheriff's sale of lands—Opposition afin de charge—Discretionary order—Default in furnishing security—Res judicata—Estoppel by record—Frivolous and vexatious proceedings — Quashing appeal—Jurisdiction of Supreme Court of Canada—R.S.C. c. 135, ss. 27, 59—Arts. 651 and 726 C.P.Q.*

In proceedings for the sale of lands under execution, the appellants filed an opposition to secure a charge thereon and, under the provisions of article 726 of the Code of Civil Procedure, a judge of the Superior Court ordered that the opposants should, within a time limited, furnish security that the lands, if sold subject to the charge, should realize sufficient to satisfy the claim of the execution creditor. On failure to give security as required the opposition was dismissed, and, on appeal to the Supreme Court of Canada, the judgment dismissing the opposition was affirmed (35 Can. S.C.R. 1). Subsequently the proceedings in execution were continued and, on the eve of the date advertised for the sale by the sheriff, the opposants filed another opposition to secure the same charge, offered to furnish the necessary security, and obtained an order staying the sale. The judgment appealed from maintained a subsequent order made under art. 651 C.P.Q. which revoked the order staying the sale and dismissed the opposition.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

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*Held*, that, the judgment dismissing the opposition on default to furnish the required security was *chose jugée* against the appellants and deprived them of any right to give such security or take further proceedings to secure their alleged charge upon the lands under seizure.

*Per* TASCHEREAU C.J.—In a case like the present an appeal to the Superior Court of Canada would be quashed, on motion by the respondent, as being taken in bad faith.

*Per* GIROUARD J.—As the order by the judge of first instance was made in the exercise of judicial discretion the Supreme Court of Canada, under section twenty-seven ot the Act, was deprived of jurisdiction to entertain the appeal.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of Mr. Justice Tellier in the Superior Court, District of Montreal, dismissing the opposition *afin de charge* of the appellants with costs.

The appellants' opposition *afin de charge* was filed under the circumstances mentioned in the head-note and, thereupon, they obtained an order staying the sale of the lands seized in execution of the judgment of the respondents against the Compagnie de l'Opéra Comique de Montréal. The respondents then moved for an order, under art. 651 C.P.Q., revoking the order staying proceedings upon the execution and for the dismissal of the opposition on the grounds that it was irregular, frivolous and made with the object of unjustly retarding the sale. The motion was granted and, on an appeal, the judgment allowing the motion and dismissing the opposition was affirmed.

*R. Taschereau* and *Desaulniers* for the appellants.

*DeLorimier K.C.* for the respondents.

LE JUGE EN CHEF.—Cet appel doit être renvoyé avec dépens, et nous sommes unanimement de cet avis.

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FONTAINE v. PAYETTE.

The Chief Justice.

De fait, pour un, j'aurais été d'opinion de ce faire sur motion, eusse-t-elle été faite, sous la section 59 de l'acte de la cour suprême qui nous donne le droit de rejeter sommairement toutes procédures faites de mauvaise foi.

Celui des opposants qui a fait l'affidavit requis au bas de l'opposition en question a dû éprouver de la difficulté à se convaincre qu'il pouvait sans scrupules jurer qu'elle n'était pas faite dans le but de retarder injustement la vente, mais qu'elle était faite de bonne foi et dans le seul but d'obtenir justice. Et c'est là, je présume, pourquoi les appelants ont dû attendre jusqu'au dernier moment pour la faire.

Ceci est la troisième fois que ces mêmes appelants viennent devant cette cour dans cette même cause. Voir, *Desaulniers* v. *Payette*(1) ; *Desaulniers* v. *Payette*(2). Pour la troisième fois, leurs procédures pour retarder la vente en justice de l'immeuble en question à la poursuite des créanciers hypothécaires ont été déboutées par le jugement et de la cour supérieure et de la cour d'appel, et pour la troisième fois leur appel ici est maintenant débouté comme frivole et vexatoire. En face du jugement de mai, 1903, passé en force de chose jugée, les déclarant déchus du droit de fournir le cautionnement antérieurement ordonné par la cour, il m'est difficile de comprendre comment le même juge a pu, en face de l'art. 654 C.P.Q. leur donner un ordre de surseoir sur une opposition absolument basée sur les mêmes motifs que la précédente, et ce, *ex parte,* sans aucun avis à la partie adverse.

Le jugement unanime de la cour d'appel, confirmant celui de la cour supérieure, casse le dit ordre et rejette la dite opposition. Il ne pouvait en être autre-

(1) 33 Can. S.C.R. 340. (2) 35 Can. S.C.R. 1.

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The Chief Justice.

ment. Il y aurait lieu de dire aux appelants qu'en venant ici se plaindre de ce jugement ils se sont trop fiés sur la maxime *fortuna audaces juvat,* s'il n'était pas patent que le seul mobile de leur appel, sans le moindre espoir de succés, a été le même que celui de leur opposition, de retarder l'éxécution du jugement dans le but de s'approprier, aussi longtemps qu'il leur sera possible d'entraver l'administration de la justice, les revenus de l'immeuble en question au détriment des intimés.

GIROUARD J.—Le nouveau code de procédure civile de Québec, art. 651, a consacré une règle de procédure qui avait auparavant reçu la sanction des tribunaux dans plusieurs causes; elle est conçue dans ces termes:

> En tout temps, après le rapport de l'opposition et avant l'expiration des quatre jours qui suivent la signification de l'avis de ce rapport, le juge peut, sur motion d'une des parties, renvoyer l'opposition si elle est faite dans le but de retarder injustement la vente.

Le juge de premier instance, usant de la discrétion que lui conférait indubitablement cet article, sur motion de l'intimé, renvoya l'opposition de l'appelant avec dépens.

Sur l'appel de ce dernier, la cour du banc du roi décida qu'il avait "sagement usé de sa discrétion."

L'appelant appelle à cette cour, mais en face de la clause 27 de la constitution de cette cour, nous n'avons pas même pouvoir de l'entendre. Juger autrement serait faire manquer le but que la législature veut atteindre, savoir, empêcher des procédures frivoles et des appels pour délai. Nous avons d'autant moins de difficulté à arriver a cette conclusion que nous sommes tous d'avis que l'opposition est faite dans le but de retarder injustement la vente. L'appelant offre de

donner cautionnement, mais il est déchu de ce droit par un jugement antérieur du 19 Mai, 1903, qui a été confirmé par cette cour (1).

L'appel est débouté avec dépens.

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Girouard J.

DAVIES, IDINGTON AND MACLENNAN JJ. agreed that the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellants: *Robillard & Rivet.*

Solicitors for the respondents: *Angers, de Lorimier & Godin.*

(1) 35 Can. S.C.R. 1.

1905

*Nov. 2
*Nov. 16.

EMERY LESPÉRANCE (DEFENDANT) ..... APPELLANT;

AND

JOSEPHINE GONÉ ET VIR (PLAINTIFFS) ..... RESPONDENTS.

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

*Title to land—Servitude—Construction of deed—Reservations—"Representatives"—Owners par indivis—Common lanes—Right of passage—Private wall—Windows and openings on line of lane—Arts. 533-538 C.C.*

A conveyance of lands fronting on public highways with the right of passage merely over a private lane does not create a servitude that can entitle the grantee to make windows and openings in walls which are built upon the line of the lane.

A reservation in a deed of partition to the effect that lanes through subdivided lands should be held in common by the proprietors *par indivis* or their representatives must be construed as reserving the rights in common only to the co-proprietors, their heirs or the persons to whom such rights in the lanes might be conveyed.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Montreal, and maintaining the plaintiffs' action with costs.

A block of land in the City of Montreal, bounded by public streets, was subdivided into building lots by the proprietors *par indivis*, with private lanes in rear and at the sides of the lots of sub-division, each of the

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

lanes being described by a number on the plan. The lane in question in the present case bore the number 41, and formed the rear boundary of a lot numbered 47, on the corner of Roy Street and Laval Avenue. On the opposite side it formed the side line of another lot of the same sub-division numbered 40, fronting on Laval Avenue. Subsequently the owners *par indivis* executed a deed of partition among themselves, by which it was declared that the lanes shewn upon the plan of sub-division should be held in common for themselves and their representatives.

The defendant acquired lot 47 through the plaintiff, Josephine Goné, one of the parties to the deed of partition, "with the right of passage" over the lanes bearing the numbers 36 and 41, and proceeded to construct a building on the lot he purchased, with the rear wall on the line of the lane (No. 41), and pierced openings in this wall for doors and windows.

The plaintiff, Josephine Goné, owner of lot 40, authorized by her husband, then brought an action *negatoria servitutis* for a decree ordering that the openings in the wall should be closed up. The defendant pleaded that the conveyance of the lot to him with the right of passage over the lanes constituted him the representative of the former owner, and vested in him a right of servitude which entitled him to have doors and windows opening upon the lane as accessory and appurtenant to lot 47 and to the use of the right of passage granted therewith.

The plaintiffs' action was dismissed with costs by Mr. Justice Davidson, in the Superior Court, who held that the plaintiff, Josephine Goné, had conveyed all accessory rights in respect of the lane (No. 41) when she sold lot 47 to the defendant, and that the rights of view and light possessed by her had vested in the

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defendant. This judgment was reversed by the judgment now appealed from, which ordered the defendant to close and stop up all the windows and openings made by him in the rear wall of his building, within four months from service of the judgment upon him, and in default of his doing so, that the plaintiffs should have the right to close and stop up the same, with all costs against the defendant.

*Mignault K.C.* for the appellant.

*Angers K.C.*, and *DeLorimier K.C.*, for the respondents.

The judgment of the court was delivered by

GIROUARD J.—Je suis d'avis de renvoyer l'appel avec dépens.

La question soulevée me paraît simple. Quatre héritières, co-propriétaires d'un immeuble, en font un partage entr'elles et un plan de sub-division faisant face à des rues publiques et traversées par des ruelles, leur propriété, qu'elles déclarent devoir être "en commun tant pour elles que pour leurs représentants." Ces derniers ne peuvent être que des héritiers ou des acquéreurs. Or le titre d'achat de l'appelant au sujet de ces ruelles déclare simplement qu'il acquiert l'immeuble

> avec droit de passage dans les ruelles portant les numeros trente-six et quarante-un de la subdivision, etc.

En présence d'une déclaration aussi expresse, la servitude de l'appelant est restreinte au droit de passage sur deux des ruelles, et non pas sur toutes; elle ne comprend certainement pas un droit de vue. La cour d'appel a donc eu raison d'ordonner la fermeture

des fenêtres et ouvertures et le jugement qu'elle a rendu doit reçevoir son exécution.

Je concours pleinement dans les observations du juge en chef Lacoste.

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Girouard J.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Robillard & Rivet.*
Solicitors for the respondents: *Angers, DeLorimier & Godin.*

1905
*Oct. 23, 24.
*Nov. 27.

W. G. CLARK (DEFENDANT) ..... APPELLANT;

AND

JOHN DOCKSTEADER (PLAINTIFF) .. RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

*Mining law — Staking claim — Initial post — Occupied ground— Curative provision—R.S.B.C. c. 135, s. 16 — 61 V. c. 33, s. 4 (B.C.).*

In staking out a claim under the mineral Acts of British Columbia the fact that initial post No. 1 is placed on ground previously granted by the Crown under said Acts does not necessarily invalidate the claim, and sub-sec. (*g*) of sec. 4 of 61 Vict. ch. 33 amending the "Mineral Act" (R.S.B.C. ch. 135) may be relied on to cure the defect. *Madden* v. *Connell* (30 Can. S.C.R. 109), distinguished.

Judgment appealed from (11 B.C. Rep. 37) affirmed, Idington J. dissenting.

APPEAL from a decision of the Supreme Court of British Columbia (1) affirming the judgment at the trial in favour of the plaintiff.

The action was brought by the owner of the "Colonial" mining claim to adverse the "Wild Rose" claim, owned by the defendant Clark. The trial judge held that the "Wild Rose" claim was invalid, and on appeal to the full court and also on the present appeal the only question dealt with was whether or not the "Colonial" was a good claim.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

(1) 11 B.C. Rep. 37.

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The objection to the "Colonial" was that its initial post No. 1 was placed some 290 feet in on the "Chicago," another claim located and held by grant from the Crown. The trial judge and the Supreme Court of British Columbia held that this was not, under the circumstances, calculated to mislead other prospectors in the vicinity; that the plaintiff had actually discovered mineral in place; and that he had, *bonâ fide,* attempted to comply with the provisions of the "Mineral Act"; therefore his claim was valid. The defendant then appealed to the Supreme Court of Canada.

*W. A. Macdonald K.C.* for the appellant. Under the mineral Act of British Columbia the initial post, No. 1, is the root of title to the claim: *Madden* v. *Connell*(1); and must be placed on the ground to be located; *Madden* v. *Connell*(1); *Belk* v. *Meagher*(2).

The defect in this case is not a mere formality which can be cured by sub-section(*g*) of the Act of 1898(3); *Pellent* v. *Almoure*(4); *Callanan* v. *George* (5); *Coplen* v. *Callahan*(6); *Collom* v. *Manley*(7).

Sub-section (*f*) of the Act of 1898 provides a means whereby the locator of a fractional claim could make it valid notwithstanding such an error which shews, by implication, that a full claim could not, *Expressio unius est exclusio alterius.* See *Hamilton* v. *Baker*(8).

*S. S. Taylor K.C.* for the respondent. The maxim *expressio unius est exclusio alterius* cannot be applied

(1) 6 B.C. Rep. 76, 531; 30 Can. S.C.R. 109.
(2 104 U.S.R. 279.
(3) 61 Vict. ch. 33.
(4) 1 Martin M.C. 134.
(5) 8 B.C. Rep. 146; 1 Martin M.C. 242.
(6) 30 Can. S.C.R. 555.
(7) 32 Can. S.C.R. 371.
(8) 14 App. Cas. 209.

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as contended; see *London Joint Stock Bank* v. *Mayor of London*(1); *Thames Conservators* v. *Smeed, Dean & Co.*(2); Broom's Legal Maxims, 493.

As to position of the post see Lindley on Mines, (2 ed.) pp. 548-9, 656-8; *Del Monte Mining Co.* v. *Last Chance Mining Co.*(3); *Sandberg* v. *Ferguson*(4).

THE CHIEF JUSTICE.—I would dismiss this appeal. The finding at the trial, approved of by the court *in banco,* that the position of the No. 1 post was not calculated to mislead other persons desiring to locate claims in the vicinity cannot be reviewed here, and that puts an end to the controversy. Sub-section (*g*) of section 16, as amended by the Act of 1898, must be given a liberal interpretation. It applies in express terms to all the preceding provisions of the section.

I entirely agree with Chief Justice Hunter's reasoning.

GIROUARD J.—The appeal should be dismissed with costs, for the reasons given by Chief Justice Hunter.

DAVIES J.—I am of the opinion that this appeal should be dismissed and the judgment of the majority of the Supreme Court of British Columbia affirmed for the reasons stated by the Chief Justice of that court speaking for the majority.

I will add a few words only to those reasons which commended themselves to my mind as alike comprehensive and conclusive, and I do so only because of the differences in the opinions of the members of this court.

(1) 1 C.P.D. 1, at p. 17.
(2) [1897] 2 Q.B. 334, at p. 351.
(3) 171 U.S.R. 55.
(4) 35 Can. S.C.R. 476.

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Davies J.

The question before us is as to the true construction of sections 12, 15 and 16 of the "Mineral Act" of British Columbia, as amended by the Act of 1898, and the particular point we are asked to decide is whether a free-miner in staking his claim under the 16th section invalidates and voids the claim *in toto* if he inadvertently places its initial stake within the legal bounds of another miner's claim or location, or whether the curative provisions of sub-section (*g*) of section 16 are applicable and can be invoked even in such a case so as to validate that part or portion of the claim sought to be located which did not infringe upon any other claim.

The arguments against the curative section applying to correct an error arising out of an initial stake being placed inadvertently in another claim or location were that such latter claim was expected by section 12 out of the waste lands of the Crown which a free-miner could enter upon and locate, and, therefore, the mining locator could not place his stake there at all, it being "proscribed land" to him, that he was really trespassing in so doing, and the provisions of the curative section could only apply to correct inadvertent mistakes in marking out a legal location selected and entirely within the area allowed by section 12.

Reliance was placed upon the case of *Madden* v. *Connell*(1), decided before the curative section in question had been introduced into the Act, where it was held that a location which had its No. 1 post on foreign territory is void. I see no reason whatever to call in question that decision or the principle on which it was based. The legislature of British Columbia had no jurisdiction whatever over the lands of a foreign

(1) 30 Can. S.C.R. 109.

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country and none of the provisions of the Mining Act could by any possible intendment be held as applicable to a stake driven in the soil of that country and indicating where a mining location was to be found and bounded in British Columbia. To my mind there is a marked and vital difference between such a stake and one set within the territory generally allocated to mining prospectors in British Columbia, but which on a proper survey of the location turns out to be set within the legal limits of an adjoining prior location; a totally different set of questions at once arises.

Of course, no one could contend that the setting up of such a stake in an adjoining location operated to take away any of that location from its owner. All that is contended for is that under certain well defined statutory conditions such a placing of the initial stake is not necessarily *fatal* to the entire claim or location of the miner setting it up.

Then we were pressed with our decision in *Collom* v. *Manley* (1). The curative section of the Act as it exists at present could not be invoked in that case, because it was not passed until after the disputes there had arisen, and I fail to understand how our decision in that case affects this one. In delivering the judgment of the court, Sedgewick J. explaining what our holdings were in the previous case of *Coplen* v. *Callahan* (2) said, at page 374,—

> We held that every direction of section 16 was imperative, that any deviations from or irregularity in respect to such directions were fatal to the location unless they came within the curative provisions of sub-sec. (*g*); that these were the only statutory provisions that could be invoked in favour of an otherwise invalid location.

There is nothing, however, in that case putting any

(1) 32 Can. S.C.R. 371. (2) 30 Can. S.C.R. 555.

construction upon this curative section or attempting to place any limitation upon its provisions.

We have, therefore, now to put a construction upon it for the first time and unfettered by any previous decision.

To my mind the argument of the appellant that the placing of the initial post of a location or claim within the limits of a prior location was fatal and could not be cured must logically, under our decision in *Collom* v. *Manley*(1), apply also to the second stake, because the placing of one as of the other is by the same section 16 made imperative and the absence of either or the placing of either on "proscribed lands" would be equally fatal; and so I am unable to see why the logical conclusion of the argument would not extend to a location sought to be made where both stakes were placed properly enough upon waste lands of the Crown, but the line between the two embraced within it part of a prior location. Such part was equally "proscribed lands,"and if the placing of one of the posts in such proscribed lands was fatal so the crossing of such lands by the line between the posts and embracing them within the junior location must be fatal also to that location. The statute requires that such line shall be marked

> so that it shall be distinctly seen in timbered localities by blazing trees and cutting underbrush.

Chief Justice Hunter has, I think, satisfactorily answered the argument that the placing of the initial post in located lands was a trespass. The limited nature of the locator's rights in his location sufficiently shews that. If it was held to be a trespass as against a prior locator, so would be a similar placing

(1) 32 Can. S.C.R. 371.

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Davies J.

of No. 2 post, and so would be the mining and marking out of a line across a prior location, even if the two posts were properly placed.

In fact it seems to me that the result of the argument invalidating the entire location in any and every event and condition because the initial post was in a prior location would be so to minimize the effect of the curative sub-section as to render it practically inoperative.

Mr. McDonald, for the appellant, was obliged to concede that even if that post was placed on a prior location with the full consent of its owner, the result would be equally the same.

Now what does the curative sub-section (*g*) say? It reads as follows:

> Provided that the failure on the part of the locator of a mineral claim to comply with any of the foregoing provisions of this section, shall not be deemed to invalidate such location, if upon the facts it shall appear that such locator has actually discovered mineral in place on said location, and that there has been on his part a *bonâ fide* attempt to comply with the provisions of this Act, and that the non-observance of the formalities hereinbefore referred to is not of a character calculated to mislead other persons desiring to locate claims in the vicinity.

Now, one of the foregoing provisions of section 16 required both posts, Nos. 1 and 2, to be placed in waste lands of the Crown not previously located. That is the very contention of the appellant as to the meaning of the section, and in the present case one of the posts was admittedly not so placed. But the trial judge has found as facts on evidence which the court below held, and which I hold, as fully satisfactory that

> the locator had actually discovered mineral in place; and there was a *bonâ fide* attempt on his part to comply with the provisions of the Act, and his blunder—if it is a blunder—is not of a character calcu-

lated to mislead other persons desiring to locate claims in that vicinity.

I cannot, therefore, entertain any reasonable doubt that this finding brings the locator within the very object and scope of the sub-section, and that his inadvertent mistake was not, under the circumstances and findings a fatal one, though, of course, it did not and could not operate so as to take away any of the rights of the prior locator.

IDINGTON J. (dissenting).—If the British Columbia Act, known as "The Mineral Act," had not been amended, since the case of *Madden* v. *Connell*(1) arose, would that decision bind us here to allow this appeal?

The judgments in this court and in the court below in that case are so brief and pointed that I do not think it difficult to apprehend their meaning.

The initial stake in question there had been erroneously planted 289 feet beyond the boundary line between Canada and the United States.

Mr. Justice Martin, in that case, which is reported in 6 British Columbia Reports at page 531, speaking for the full court, said:

> The Mineral Act of British Columbia does not contemplate the existence of a claim which takes its root, *i.e.*, has its initial post, in a foreign soil, and, as I regard it, the whole situation is void *ab initio*, or, to put it in another way, there never was in law such a claim as the Sheep Creek Star.

Sir Henry Strong, then Chief Justice of this court, in delivering the unanimous judgment of the court on the appeal from the above mentioned judgment, briefly stated the conclusion, and then said:

(1) 30 Can. S.C.R. 109.

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As Mr. Justice Martin says in giving judgment for the Supreme Court of British Columbia, the position is the same as if there had never been such a claim.

Idington J.

Did these judicial deliverances rest upon any legal impossibility of going across the line that divides the two countries, to verify the courses and length of boundaries that the claimant of the location had thus mistakenly defined?

I should think not. Neither international law, nor the relations between the countries at the time, had placed the slightest obstacle in the way of verification of the boundaries of the location, and of rectification thereof, if the mining law of British Columbia had permitted of such rectification.

It seems to me that these judgments were the result of a long line of authorities that treated literal compliance with the requirements of the statutes in regard to mining locations as a condition precedent to the validity of any claim to a license to mine in a particular location.

The miner locating had no right to invade the territory of another, whether that other happened to be a foreign state, or a neighbouring proprietor, or licensee, for the purpose of either selecting a place to plant, or of planting, an initial stake.

The law clearly defined where he had a right to go to do so. It was on the waste lands of the Crown, or lands over which the Crown had a right to license mining to be done.

It was never supposed that the free-miner would go elsewhere.

It was, indeed, I think, pre-supposed that he would not.

And, as a result, when he did, and invaded, though only slightly, land in a neighbouring state, but yet

held by no more sacred rights of ownership than that of any other neighbours, he never acquired, thereby, any right of location.

It is upon the principle I thus indicate that I conceive the decision of *Madden* v. *Connell*(1) was rested.

I, therefore, am constrained to hold that having regard to the principle that guided this court to that(1) decision, it is now, here, binding upon us, unless the law has been changed by the amendments that have been so elaborately discussed before us.

What has since been done, is to repeal section 16 of the Mining Act, and substitute for it another which provided, first, for fractional mineral claims, being located, and described, by a plan that need not be rectangular; and then, secondly, at the end of the amended section, the curative provision that still remains part of the section, and to which I will hereafter advert, was added.

Then the legislature in a year or two, apparently intending to restrict the liberty of description that the preceding amendment had given the free-miner in regard to fractional claims, further amended this section by repealing and substituting an amended section, which directed that

> a fractional mineral claim shall be marked by two legal posts placed *as near as possible on the line of the previously located mineral claims* and shall be numbered 1 and 2, etc., etc.

This was a departure that imposed by law upon the free-miner a duty, the proper execution of which involved some risk. If regard was to be had to the recognized legal methods of interpretation, and the same canons of construction were to be applied

(1) 30 Can. S.C.R. 109.

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to these requirements as had hitherto for a long time been applied to such like enactments respecting posts for defining general mining locations, the free-miner should in justice be protected against this risk.

And he was by this amended section protected accordingly by providing for the Gold Commissioner of the District, moving *in the case of an honest mistake the post that had been inadvertently placed on another previously located mineral claim, instead of on the line as required by the Act.*

Now, without pressing unduly the application of the maxim *expressio unius est exclusio alterius,* what does appear to me as very singular is, that if placing posts or selecting a place in which to place posts as means of defining a location is a mere formality, that the curative proviso of this section would be applicable to, why was this particular method of protecting against mistakes honestly made in regard to those posts, locating the fractional mineral claim adopted and specially enacted?

I am unable to see any good purpose it could serve if the present contention of the respondent be well founded.

The curative proviso stood in the section *before this amendment.*

It remained word for word, as much more of the section did, when amended.

One thing from this is quite clear, that the legislature did not think lightly of the consequences of invading with such posts the territory of another.

The legislature did not see fit to rely on the efficacy of this curative proviso, with serene confidence that it would protect all honest miners who had within the fraction discovered mineral.

Of course, if the maxim of which so much has been

said were to be strictly applied, there would seem to be an end of the respondent's case. But we are trying to get at the meaning of a complicated enactment that was not framed all at one time, but at many times, and, therefore, allowance has to be made in such cases. See remarks of Baron Martin in *Miller* v. *Salomons*(1).

I think we must look at the curative proviso, and interpret it in the light of the history of the legislation in question and of the history of the judicial interpretation of such legislation, the probable wrongs such a proviso was intended to remedy and the measure of protection it probably was designed to give to honest discoverers, and adopt a result if we can that will not be fantastical.

It is quite clear that posts properly placed have ever been intended to bind the discoverers as well as protect the prospectors.

It is equally clear, that the rigid interpretation of the minor and formal requirements of legislation, in relation to the nature of the post, and the markings thereon and in relation thereto, had harsh and unexpected results, and that a necessity arose for relaxing these.

It is not so clear that this relaxation was ever intended to go the length of sweeping away everything but a discovery and honest intent.

Much less could it be supposed that the place selected by the miner for his initial stake, which has been properly called the root of his title, might be chosen with impunity and be looked upon entirely as a *formality*.

If that had been the purpose of the legislature I

(1) 7 Ex. 475, at p. 531.

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think the whole plan of legislation would have been changed, and the Act recast.

And when we come to read this proviso which is as follows:

> Provided that the failure on the part of the locator of a mineral claim to comply with any of the foregoing provisions of this section shall not be deemed to invalidate such location, if upon the facts it shall appear that such locator has actually discovered mineral in place on said location, and that there has been on his part a *bonâ fide* attempt to comply with the provisions of this Act, and *that the non-observance of the formalities hereinbefore referred to* is not of a character calculated to mislead other persons desiring to locate claims in the vicinity,

we must read it as a whole.

And when we do that we must read it as dealing with "the *formalities*" and not with the very essence of the whole work or plan of action.

It was never necessary to do so.

The miner had ample means of fully protecting himself in making a general mining location.

The law provided that prior prospectors should not only erect posts, but also blaze lines or erect posts to mark clearly the ground already taken, so as to clearly distinguish it from the remaining waste lands upon which the newcomers could operate.

Thus the free-miner could, with due care, protect himself, by keeping well within the waste lands and clear of the established lines of prior locations, when selecting the place to plant an initial post; and *to the right and left of that selected point, or the line drawn therefrom,* he could claim as much as the law allowed him.

And if by chance he overlapped, such overlapping and all else that followed in his work might or might not be of the nature of a "formality."

It is to be observed that the discoverers do not rest

such claims as are put in issue here, upon a grant from the Crown or any one else. At this stage the claimant prescribes, of his own motion, and to be effective must comply strictly with the requirements of the statute permitting him to prescribe such a right, unless the requirements be clearly qualified by some protecting proviso.

To go so far as the respondent asks, in order to protect him, would savour, I venture with due respect to think, of legislation rather than adjudication.

I think, therefore, the appeal should be allowed with costs, and the declaration be made that Mr. Justice Martin suggests in favour of the "Wild Rose" claim.

MACLENNAN J.—I am of opinion that the respondent's location is valid and that the judgment in his favour to that effect is right.

The contest is between two mineral locations covering in great part the same ground. The respondent's location was made on the 7th of October, 1900, and that of the appellant on the 4th September, 1902. It is not disputed that but for the previous location of the respondent's location called the "Colonial" the appellant's location called the "Wild Rose Fraction," would be in all respects valid. The sole question, therefore, is the validity of the "Colonial."

The first objection made to the validity of the "Colonial" is that when it was located the ground was occupied by a previous location called the "Cody Fraction." The courts below all held unanimously that the "Cody Fraction" was and always had been an invalid location, for reasons in which I entirely agree, and that the validity of the "Colonial" was not thereby affected.

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The only serious question in this appeal is whether or not the "Colonial" is invalid on the ground that stake No. 1 was placed within the limits of another location called the "Chicago," which had then been surveyed and Crown granted, at a point as much as 290 feet from the boundary; and that the line between stakes No. 1 and No. 2 passed on a part of its course a few feet within the limits of another location called the "Freddie Lee." The "Colonial," as described, is a tract 2,500 feet square, lying to the left of the line drawn between the posts 1 and 2,—that line being one of the sides of the square. According to one of the plans produced, the encroachment of this square upon the "Chicago" is in the form of an acute angled triangle containing about 2½ acres, and the encroachment upon the "Freddie Lee" is a long and very narrow strip containing perhaps half or three-quarters of an acre of land.

Now, there is no question that this encroachment was made in good faith and by inadvertence. The whole location contains 51½ acres, of which about three acres overlap or encroach upon the "Chicago" and "Freddie Lee," and the remaining 48½ acres are upon perfectly lawful ground. Of course, the respondent could get or take nothing within the limits of the "Chicago" and "Freddie Lee" locations. Those locations had already been secured by others to whom grants had been made by the Crown. But why should his location not be good for the 48½ acres? His description covered that perfectly, although it also covered a little more. If the Crown having granted the "Chicago" and "Freddie Lee" had afterwards granted the "Colonial" by the very description adopted by the respondent, there can be no doubt the later grant would be good for all not previously included in the other two.

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The object of the mining Acts is to promote the discovery of minerals in the lands of the Crown, and an inducement is held out to persons to search for them by enabling them to secure the exclusive possession of ground or rock in which they may have found minerals and to take the minerals for their own use. The essential thing to secure that privilege is the discovery of minerals, and the Act contains certain directions to enable the discoverer to describe and to secure his location, and to obtain the reward offered by the legislature for his industry.

Such being the object and purpose of the Act, I think in construing it every reasonable intendment ought to be made to uphold the validity of a claim where there has been actual discovery and an honest attempt to comply with the directions of the legislature in staking and describing the location of the discovery. Except the encroachment on adjacent locations the respondent has complied in every respect with the directions of the Act, and the learned Chief Justice of British Columbia in his judgment has pointed out how difficult it is in a mountainous region to ascertain with exactness the limits of locations, and how easily a person staking a claim might, notwithstanding the greatest care, place his post No. 1 over the boundary of another claim.

Therefore, unless the Acts contain something which expressly or by implication declares a location to be invalid by reason of such an error as was committed by the respondents, I think we should hold it not to be fatal in this case.

Section 16 of the "Mineral Act," R.S.B.C. (1897) is that which prescribes the proceedings to be taken on the ground in locating a claim. It directs the planting of two posts 1,500 feet apart, and that the location is

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to be at right angles to the straight line between them. It directs certain particulars to be inscribed on the respective posts. No. 1, among other things, to be marked "Initial Post," and with a statement of the bearing or direction of post No. 2 therefrom. It is further directed that in the event of its being discovered on a survey that No. 2 is more than 1,500 feet distant from No. 1, it shall be moved to the proper distance. It is declared that it shall not be lawful to move No. 1. It may justly be said, therefore, that post No. 1 is a more important post than No. 2, but granting it to be so, I do not see why if it should happen to be placed a foot or even as many as 290 feet within the boundary of an adjacent claim, it should not still answer its purpose of defining the miner's location. The posts are to be placed as nearly as possible on the line of the ledge or vein of mineral which he has discovered, and, of course, to the extent, if any, that such vein or ledge is upon ground already located his location would be inoperative; but his posts would still serve their purpose of defining the ground which he claimed as the reward of his discovery.

Now, section 16 instead of containing any declaration that the planting of an initial post beyond the line of another location is illegal and void, contains the following sub-section (*g*):

> Provided that the failure on the part of the locator of a mineral claim to comply with any of the foregoing provisions of this section shall not be deemed to invalidate such location, if upon the facts it shall appear that such locator has actually discovered mineral in place on said location, and that there has been on his part a *bonâ fide* attempt to comply with the provisions of this Act, and that the non-observance of the formalities hereinbefore referred to is not of a character calculated to mislead other persons desiring to locate claims in the vicinity.

It is clear that the conditions which make the pro-

viso applicable exist in this case. It is not disputed that the locator had discovered mineral in place on the location, and it is evident that he made a *bonâ fide* attempt to comply with the provisions of the Act, and I think that, although the contrary was very strenuously argued, the fault in locating the initial post within the limits of the "Chicago" was not calculated to mislead other persons desiring to locate claims in the locality.

It was argued that the fault committed by the respondent was a violation of sections 12 and 15, and that violations of those sections are not cured by sub-section (*g*).

Section 12 provides that a free-miner may enter, locate, prospect and mine upon any waste lands of the Crown with certain exceptions, one of which is "land lawfully occupied for mining purposes"; and section 15 provides that such miner may locate a claim 1,500 feet square "subject to the provisions of the Act." Now, what the respondent did was a literal compliance with section 12. He did, in fact, enter upon waste lands of the Crown and found mineral thereon, and the land on which he found mineral was not land then occupied for mining purposes. In making his discovery he had not committed any infraction of either section 12 or section 15. It was not until he came to comply with section 16 by defining and describing his location by marking it with posts that he committed an error. By mistake he planted his initial post outside of the waste lands of the Crown on which he had discovered mineral. That was something he did in endeavouring to comply with section 16, and his mistake, in my judgment, is cured by sub-section (*g*).

It was argued also that this case is governed by

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that of *Connell* v. *Madden*(1), in which the decision of the courts of British Columbia was affirmed in this court. In that case the initial post was planted in the United States at a distance of 289 feet south of the international boundary, and it was held that the claim was thereby made utterly void, and that the position was the same as if there never had been such a claim. The location which was there in question was located in August, 1894, before sub-section (*g*) was enacted. I think that is a very different case and not decisive of the present. A post planted in a foreign country could be nothing whatever in this country.

For these reasons, and those expressed in the opinion of the learned Chief Justice of British Columbia, in which I concur, I am of opinion that the appeal fails and should be dismissed.

*Appeal dismissed with costs.*

Solicitor for the appellant: *W. A. Macdonald.*

Solicitors for the respondent: *Taylor & O'Shea.*

(1) 6 B.C. Rep. 76, 531.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANTS) .. } APPELLANTS;

AND

WILLIAM H. EGGLESTON AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

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*Oct. 27.
*Nov. 27.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

*Operation of railway—Straying animals—Negligence—Duty as regards trespassers—Herding stock—Evidence—Inferences.*

A railway company is not charged with any duty in respect of avoiding injury to animals wrongfully upon its line of railway until such time as their presence is discovered. Idington J. dissented though concurring in the judgment on other grounds.

APPEAL from the judgment of the Supreme Court of the North-West Territories affirming the decision of Mr. Justice Scott, at the trial, which maintained the plaintiffs' action with costs.

The action was for damages for injury to a number of horses, the property of the plaintiffs, killed or injured by a train operated by the defendants on the line of the Calgary and Edmonton Railway. The band of horses were being driven north from Montana and had arrived, in charge of the drovers, on the evening of the day of the accident, at a point near Wetaskiwin, in Alberta. The drovers camped for the night and left the horses loose upon the prairie about a mile from the railway. At this point the ditches on both sides of the track were full

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of water, the line of railway was not fenced and the defendants were under no obligation to build fences enclosing this portion of the line of their railway. During the night the horses strayed on to the tracks of the railway and a train of cars ran into the bunch, killing or injuring over forty head of horses. The train struck the bunch of horses about three miles south of Wetaskiwin, whilst running through a ground-fog which obscured the view of the engine-driver and ran through the herd for a distance of 500 or 600 yards until the engine was derailed at a culvert bridge over which the horses were unable to pass.

The trial judge found that the straying animals had got on to the track at a point north of the derailment and had wandered along the track between the ditches until they were crowded together on the track between the flooded ditches and headed off by the culvert. He also found that the moonlight, on the occasion in question, gave sufficient light to enable the engineman to see the horses a quarter of a mile ahead, and that the train could have been stopped within a distance of one hundred yards; that the engine-driver had not kept a continuous look-out ahead; that there was a heavy fog on the prairie, and that simultaneously with the engine entering the fog-bank it struck the horses.

The learned judge held that the engine-driver could, by reasonable and ordinary care, have seen the horses and stopped the train in time to avoid injury, and that he was guilty of negligence "either in not keeping a proper look-out ahead of his engine, or in not stopping the train in time to prevent the injury." He also held that at the time of the accident the horses were trespassers upon the railway property, but that the injuries were due to the negligence of the

railway company's engine-driver and a verdict was entered for the plaintiffs. This decision was affirmed upon appeal, Wetmore and Prendergast JJ. dissenting.

*G. Tate Blackstock K.C.* for the appellants.

*C. deW. Macdonald,* for the respondents.

THE CHIEF JUSTICE.—We are all of opinion that this appeal should be allowed with costs and the action dismissed with costs. Mr. Justice Maclennan has written the opinion of the majority of the court.

GIROUARD and DAVIES JJ. concurred in the reasons stated by Mr. Justice Maclennan.

IDINGTON J.—I concur in the result of the opinion of my brother Maclennan. I desire, however, with great respect, to say that I am unable to assent to the proposition that seems implied therein, that until *aware* of the presence of animals on the railway track the company could not have any duty in respect to them.

The probabilities of meeting trespassers on the track might be so well known to a railway company and its servants as to render it their duty to keep some look-out or take some degree of care. To limit the duty to trespassers, to cases of actual knowledge of their being in the act of trespassing, narrows the definition too much I conceive.

*Bird* v. *Holbrook*(1) illustrates the principle that I think should prevail in many conceivable cases of trespassers.

(1) 4 Bing. 628.

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MACLENNAN J.—I am of opinion that this appeal should be allowed and the action dismissed.

I think the case is very fully and fairly discussed by Mr. Justice Wetmore in his dissenting judgment in the court below and, agreeing as I do in that judgment, I do not think it necessary to add many observations to what he has well said.

I think the law is well settled that, the plaintiffs' animals having been wrongfully on the track, no duty rested upon the defendants or their engineer until they or he became aware of their presence. In other words, the company is not obliged, as between them and such wrongdoers, to be on the look-out for such animals. They may assume that owners of animals will observe the law and will not trespass upon the company's line.

The learned trial judge's finding on the evidence is that the engineer, by exercising only reasonable and ordinary care, might have seen the horses on the track in time to stop the train to avoid injuring them, and that he was guilty of negligence, either in not keeping a proper look-out ahead of his engine, or in not stopping the train in time to prevent injury. On this dilemma he founds his judgment against the defendants. He does not say on which ground of negligence he rests it. If on the first it would be clearly wrong, and he has not found as a fact that, after seeing the animals, he was guilty of delay in stopping the train.

In that state of the findings of the learned trial judge it was competent to the appellate court to form its own opinion on the facts.

Unfortunately the majority of the Supreme Court of the Territories rests its judgment mainly on the same erroneous view of the law taken by the trial judge, and without finding whether or not, as a fact

upon the evidence, there was negligence after discovery by the engineer that the animals were on the track.

The learned judge goes on to say that, however the law might be in England or the Eastern provinces on the duty of railway companies expecting and looking out for animals on their tracks, such a rule might not be applicable to the conditions of the territories where horses have the right to, and do, roam at large. No attempt was made to uphold that view of the law before us.

Under these circumstances, none of the witnesses having been discredited by the trial judge, it was competent to the Supreme Court of the Territories, as it is competent to us, to take an independent view of the evidence and the inferences to be drawn therefrom. That being so, after a perusal of the evidence, I think the preferable view is that of Mr. Justice Wetmore, that it is not sufficiently proved that after he had become aware of the presence of the animals the engineer was guilty of any negligence in stopping the train in order to prevent doing them injury.

Nor am I pressed, by the number of the animals killed, even to suspect undue delay on the part of the engineer. The whole herd contained 227 animals, besides sucking colts. Having got on the track between two ditches full of water, they naturally formed a large group, or "bunch," as it was called by the witnesses, in front of the engine, there being an impassable culvert in front of them. Under these circumstances, it does not seem to me surprising that one out of every five of the whole herd was injured.

I think the appeal should be allowed with costs.

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*Appeal allowed with costs.*

Solicitors for the appellants; *Lougheed & Bennett.*

Solicitors for the respondents; *Macdonald & Griesbach.*

PIERRE REMY PLISSON (PLAINTIFF) ..... } APPELLANT;

AND

JAMES M. DUNCAN (RECEIVER) ....RESPONDENT;

AND

JOHN F. DIEMERT .....DEFENDANT.

1905

*Oct. 27.
*Nov. 27.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

*Receiver—Management of business—Supervision and control—Laches.*

The receiver of a partnership who is directed by the court to manage the business until it can be sold should exercise the same reasonable care, oversight and control over it as an ordinary man would give to his own business, and if he fails to do so he must make good any loss resulting from his negligence.

The fact that the receiver is the sheriff of the district does not absolve him from this obligation though the partners consented to his appointment knowing that he would not be able to manage the business in person.

The Chief Justice and Maclennan J. dissented, taking a different view of the evidence.

APPEAL from a decision of the Supreme Court of the North-West Territories affirming, by an equal division of opinion, the judgment of Mr. Justice Newlands, who granted the application of the receiver to be discharged.

The plaintiff (appellant) and the defendant were in partnership, at Francis, as hotel-keepers, and the former brought an action against the latter for dis-

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solution of the partnership, an account, and the appointment of a receiver. By an order made by Mr. Justice Newlands, with the consent of the interested parties, bearing date the 4th day of July, 1904, the respondent, Duncan, who is the sheriff of the Western Assiniboia Judicial District, was appointed as such receiver to collect, get in, and receive the debts and other assets, property, and effects belonging to the partnership business carried on by the plaintiff and the defendant, Diemert, and to carry on and manage the said hotel business at Francis.

The respondent entered into possession of the hotel business and put one Neil N. McLean in charge to manage the same. The parties to the action settled it, and the receiver proceeded to have his accounts as such passed. Upon the passing of the accounts it appeared that the management of the hotel business by the receiver had not proved financially successful, and that there was a deficit of $1,367.16. The plaintiff and the defendant, who appeared by counsel on the passing of the receiver's accounts before Mr. Justice Newlands, claimed that the deficit was due to the neglect of his duties by the receiver and that the latter should be held responsible for and charged with this deficit.

On the 29th March, 1905, Mr. Justice Newlands gave judgment, holding that the receiver was not responsible for the deficit above referred to, and further that he, the receiver, was entitled to be indemnified by the parties to the suit against all debts incurred by him during the time that he was in charge of the business. The ground on which this judgment was based was that both parties assented to the appointment, knowing that the sheriff could not attend personally to the business, and that

he visited the hotel and examined affairs there as often as his official duties permitted. Both parties appealed to the court *en banc*.

The Supreme Court of the North-West Territories, *en banc*, was evenly divided, Chief Justice Sifton and Mr. Justice Harvey agreeing with the judgment appealed from, while Mr. Justice Wetmore and Mr. Justice Prendergast were of opinion that the judgment of Mr. Justice Newlands should be reversed. In the result, the appeal was dismissed and from that decision the present appeal to the Supreme Court of Canada was taken.

On the appeal being called,

*Chrysler K.C.*, for the respondent, moved to quash on several grounds, namely, that the decision appealed from was not a final judgment in the action to dissolve the partnership, that it was a matter for the discretion of the provincial courts, that it was a domestic matter to be dealt with by the courts below, and that the formal orders of Mr. Justice Newlands and the court *en banc* were not in the printed case. The court ordered the hearing to proceed on the merits, reserving judgment on the motion.

*Ewart K.C.*, for the appellant.

*Chrysler K.C.*, for the respondent.

THE CHIEF JUSTICE (dissenting).—In this case the majority of the court have come to the conclusion that the appeal should be allowed with costs of this court and of the court of appeal and the receiver and manager be declared liable for and charged with the deficit of $1,367.16, and that he should be ordered to deliver

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up possession at once of the partnership estate and effects which came to his hands by virtue of the order of the court of 4th July, 1904, and thereupon should be discharged.

I cannot concur in that judgment and would dismiss the appeal. Mr. Justice Maclennan has written a dissenting opinion in that sense in which I concur.

The respondent's motion to quash is dismissed with costs, as we intimated at the hearing. There is no room for doubting our jurisdiction to entertain the appeal.

GIROUARD J.—The appeal should be allowed with costs.

DAVIES J.—This was an application by the receiver and manager of an insolvent estate for the passing of his accounts as filed. The court made a declaration that he should not be held liable for a deficit which the accounts shewed during the management of the estate by him and that he should retain possession of the property until the plaintiff's creditor paid over to him the amount of this deficit, $1,367.16.

This judgment was maintained by a majority of the court of appeal.

At the hearing counsel for the plaintiff (appellant) contended that the liability of the receiver and manager should not only be declared to cover the deficit, but that it should also extend to such profits in addition as should have been made by the business if it had been reasonably and properly managed.

We are now relieved from giving consideration to this latter contention because counsel consent that judgment should be given on the assumption that no such profits were actually proved in this case, and the

question before us is therefore reduced to one of the liability of the receiver and manager for the actual deficit which occurred during his management, namely, $1,367.16.

I concur generally in the judgment given by Wetmore J. and concurred in by Prendergast J. as to the responsibility of a receiver and manager of a business entrusted to his care.

The deficit in this manager's accounts was, in my judgment, shewn to be the direct result of his wilful default in leaving the business for months together to take care of itself without his own or any other supervision or control. No accounts were apparently kept, by the person appointed to manage the hotel, with the hotel guests or lodgers or generally of the hotel business. No attempt was made to keep separate the receipts from the lodgers or guests at the hotel and those from the casual patrons of the eating room. In fact all receipts were supposed to have been put in the bar-room till or money register. Even the hotel register which might have aided in ascertaining the times during which the several boarders lodged at the hotel was not forthcoming. The hotel manager was called to explain the accounts and generally to account if possible for the deficit. His explanations such as they were only served to make matters look worse than they did on the face of the accounts and deservedly called down upon the witness a severe rebuke from the trial judge for the manner in which he was giving his evidence. My only surprise is that under the circumstances as stated in the evidence the deficit was so small.

If under such circumstances as those described in this case a paid receiver and manager of a business is not to be held liable for the deficit in his accounts I

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do not know under what circumstances he should be. Surely it is not necessary to prove personal wrongdoing or peculation on his part in order to make such liability attach. Creditors of an estate, the running business of which is placed by a court in the hands of a receiver and manager, are entitled to exact from him such reasonable care, supervision and control as an ordinary man would give to the business were it his own. The trust was voluntarily accepted by the receiver and manager. The fact that he was also sheriff did not absolve him from the ordinary responsibilities of a position of trust which he chose to accept. He continued the business for about five months, for the three latter of which he neither gave any personal attention to it nor took any steps to preserve a business supervision or control over it. No accounts were rendered during this time shewing how the business was progressing nor did the manager cause any inspection whatever of it. The natural results of such culpable negligence ensued. The man in charge handed in certain moneys and substantially said, there is a deficit but I can give no explanations. It is said, however, that the onus rests upon the creditors to prove how the loss occurred and to shew that it was caused by the direct action or default of the receiver and manager. I do not think so. Surely every intendment must be made against a trustee or manager presenting accounts such as those in this case, and asking that they be passed and he discharged. Reasonable care and ordinary business control and oversight are required from the receiver and manager. If he brings them to the discharge of his duties he may well claim to be absolved from losses which nevertheless occurred. If he fails to do so he cannot complain if he is held answerable for losses which are the legi-

timate result of his negligence, and which, in my opinion, the evidence shews the $1,367.16 loss was.

The appeal should be allowed with costs of this court and of the court of appeal and the receiver and manager be declared liable for and charged with the deficit of $1,367.16, and he should be ordered to deliver up possession at once of the partnership estate and effects which came to his hands by virtue of the order of the court of 4th July, 1904, and thereupon should be discharged.

IDINGTON J. concurred in the reasons stated by Davies J.

MACLENNAN J. (dissenting).—After a careful perusal of the evidence in this case I am unable to see that we ought to interfere with the judgment.

The appellants have tried out their case to the best of their ability, and have adduced all their evidence; but I think it amounts to no more than a strong suspicion that money may have been received which has not been accounted for, or that goods may have been given away without payment, or without a proper price having been charged and collected therefor, or that McLean may have received some money which he has not paid over to the receiver. But mere suspicion, however strong, will not do. I do not find that there is any particular sum, large or small, which was, or ought to have been received, but not accounted for. Without that, how is it possible to charge the receiver with any such sums? That difficulty was seen by the learned dissenting judges; and what they do is to express an opinion that the matter should be tried again, that it should be referred to the clerk, or some other officer, to take an account of what the profits

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of managing the business should be without any negligence on the part of the receiver. But that is the very thing which has already been done, and in which the plaintiffs have failed. They do not pretend that they have discovered any new evidence, and I see no ground on which the case should be sent back for a new trial as suggested by the learned judges.

McLean ought no doubt to have kept more exact accounts, and the receiver failed to exercise all the supervision which his duty required. But I think it is not proved that any specific sums were lost, or not accounted for, with which the receiver ought to be, but has not been charged. If that had been done the learned judge would have charged the receiver with them. If he had omitted to do so that could be corrected on this appeal. But the evidence is no more than general evidence of mismanagement, without proving the loss of any sum or sums of money resulting therefrom.

The learned judge might have deprived the receiver of his remuneration, but he has not done so, and I do not understand that the appellants ask for that.

I think the appeal should be dismissed.

*Appeal allowed with costs.*

Solicitors for the appellant; *Johnston & Ross.*

Solicitors for the respondent; *Balfour & Martin.*

THE GRAND TRUNK RAILWAY OF CANADA (DEFENDANTS) ..... } APPELLANTS;

AND

NAPOLEON HUARD ET UX. (PLAINTIFFS) ..... } RESPONDENTS.

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*Oct. 31.
*Nov. 27.

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THE GRAND TRUNK RAILWAY OF CANADA (DEFENDANTS) ..... } APPELLANTS;

AND

MARY JANE GOUDIE (PLAINTIFF PAR REPRISE D'INSTANCE) ..... } RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW AT MONTREAL.

*Joint operation of railway—Master and servant—Negligence—Responsibility for act of joint employee—Traffic agreement*—62 & 63 *V. c. 5(D.).*

Where by the negligence of the train despatcher engaged by the Grand Trunk Ry. Co. and under its control and directions, injuries were caused by a collision of two Intercolonial Railway trains on the single track of a portion of the Grand Trunk Railway operated under the joint traffic agreement, ratified by the Act, 62 & 63 Vict. ch. 5(D.), the company is liable, notwithstanding that the train despatcher was declared by the agreement to be in the joint employ of the Crown and the railway company and the Crown was thereby obliged to pay a portion of his salary. Judgment appealed from affirmed, Taschereau C.J. *dubitante.*

APPEALS from judgments of the Superior Court, sitting in review, at Montreal (1), affirming the judgments of the Superior Court, District of Montreal, maintaining the actions with costs.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

(1) *Atkinson* v. *The Grand Trunk Railway Co.* (Q.R. 27 S.C. 227).

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Both actions were for damages for the death of relatives, employees of the Crown on a Government railway, killed in a collision between two trains of the Intercolonial Railway, the property of the Crown and operated by the Government of Canada upon a portion of the defendants' railway, between the City of Montreal and the Village of Ste. Rosalie, in the Province of Quebec. At the time of the accident the Government trains were being run by the officers and servants of the Crown upon the line of the defendants' railway under an agreement between the Crown and the defendants, dated 1st February, 1898, which was ratified by the Act 62 & 63 Vict. ch. 5 (D.), the portion of the said railway above referred to being therein described as the "Montreal Joint Section." By the said agreement the company leased the "Montreal Joint Section" to the Crown for use jointly with the company on the terms and in the manner therein mentioned, the Crown to bear a share of the cost of maintenance and operating expenses of this portion of the railway, and among other things, the following provisions were contained in the agreement:

"In case of injury occurring to persons or property on the trains of either party, the proper officer of the party on whose train the said injury occurred shall settle the same as in all cases of settlement under this clause (7). The release executed shall be made to include and free and discharge both the parties hereto from all and further liability to the claimant.

"Any loss or damage to person or property on the trains of either of the parties hereto which may be caused in any manner whatever by the negligence or the fault of any person or persons in the joint employ of the parties hereto while in the working of said railway hereby demised or the terminals thereof, shall

be paid by the party upon whose train such loss or damage occurs, and such party shall save the other harmless and indemnify the other from all claims, costs, or proceedings for or in respect to such loss or damage.

"The superintendent, operators, despatchers, agents, and all others employed upon the repairs and maintenance and in the operation of the said joint sections, though paid by the Grand Trunk Railway in the first place, shall be considered as, and are in fact, in the joint employ of the parties hereto in reference to any question of liability of either party hereto to the other party for their negligence, and in reference to any and all other questions; and they shall render to each party such services as they may be called upon to render within the scope of their position or employment, and shall be subject to dismissal if they decline, neglect or refuse to render such assistance and service to either party hereto as such employees are usually called upon to render.

"Each of the parties hereto assumes all responsibility for the accidents or casualties upon, or to its own trains, and to its passengers, freight and employees, by reason of any imperfection of the track, or misplacement of switches by its own employee or a joint employee or strangers, or for damages for stock killed, or injury that may occur to persons walking upon the track or at highway crossings (if any liability therefor), or from any other cause (aside from or except collision, in any form, with the trains of the other party, or negligence of an exclusive employee of the other party) and no such accident or casualty shall give either party the right of action or claim against the other party, it being the intention and design that each party shall be responsible for its own

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trains, for the conduct of its own and joint employees as respect such trains, freight, passengers and employees, and generally, except when the other party or its employees are at fault."

The plaintiffs, admitting that the deceased were not in the company's service but were employees of the Crown, alleged that the deceased persons and the trains which collided were under the control of the company and its employees, for whom it was responsible, and that such employees negligently directed or allowed the trains to run in opposite directions on a single track of the railway, and thus caused the accident.

Sir Melbourne Tait, Acting Chief Justice, in delivering the judgment appealed from, referred to the facts in evidence as follows:

"An examination of the proof shews that the collision was due to the neglect of G. D. Stinson, then train despatcher at Bonaventure Station. When the west-bound train, drawn by engine No. 61, was reported to him at Ste. Rosalie, he issued to this train running orders to St. Hubert, but failed to provide for a crossing point between it and the east-bound train, drawn by locomotive No. 209, which had orders to run to Ste. Rosalie. The result of this neglect was that the two trains collided at about two and a half miles from Ste. Madeleine, at about 5.45 a.m.

"At the time of the accident the movements of the different trains between Montreal and Ste. Rosalie were under the control of Mr. Stinson, who had to provide crossing places for those running in opposite directions, without regard to which company owned the trains or by which company the employees thereon were engaged.

"Without going into the question how far, if at all.

Stinson was subject to the direct orders of the officials of the Intercolonial Railway, the evidence shews that he was selected, engaged and paid by the company defendant, and that in the performance of his duties he was governed by certain time tables, rules and regulations supplied him by that company, that he was also subject to orders of the chief despatcher, and that the whole despatchers' department was under the general superintendence of Mr. Blaiklock, the company defendants' superintendent of the Eastern division of its railway, which included within its limits the line between Montreal and Ste. Rosalie. He appointed and discharged train despatchers, and kept a record of their conduct while in the company's employ.

"Under the agreement, Stinson was in the joint employ of the parties thereto. He was a train despatcher at a terminal (Bonaventure Station). In section 8, despatchers are declared to be in fact in such joint employ, and by section 19 the Crown agrees to pay a share of his salary to the company defendant.

"The learned judge, in his judgment, refers to sections 11 and 20, and holds that the control of the movement of engines, vehicles and trains of the Intercolonial Railway, while on the portion of the line called in the agreement the "Montreal Joint Section," was vested in the company defendant to be governed by the time-tables prepared by said company, its reasonable regulations and the direction of its officials; and that the two trains, at the time of the accident, were under the agreement, and as a matter of fact, under the control of defendant company exercised through Stinson; that he was employed by the company and committed the fault which caused the collision while in the performance of the work for which he was so

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employed, and that the company was responsible for his fault, and that plaintiff, as a third party, was not affected by the clauses of the agreement which did not exempt it from responsibility towards her. The inscription in law was maintained in part with costs against defendant, and it was condemned to pay plaintiff $3,000 for damages without any costs.

"I concur in this judgment.

"The grounds urged against it by the company defendant in its factum (and it cannot be heard upon any other) are first, that it cannot be held responsible for damages caused by the negligence of those who were operating the trains of its lessee the Intercolonial Railway; that no liability arises from the fact that the accident occurred on Grand Trunk Railway territory, for a lessor is not responsible for an act of negligence made by his tenant on the leased premises; that the tenant is in no sense the agent of the landlord; in support of this, the case of *Keiffer* v. *Le Séminaire de Québec*(1), is cited; and secondly, that the company defendant cannot be held liable for the negligence of despatcher Stinson, who was a joint employee, because, when he, as such joint employee, was despatching Intercolonial trains, he was, in fact and in law, the servant of that railway and not the company defendants', and that his negligence in despatching two Intercolonial Railway trains without providing a meeting-place, can create no liability on the part of the company defendant.

"The company defendant also states in its factum that it does not invoke the agreement against third parties as being binding upon them. It asserts that it refers to it to ascertain what was in effect the position of the particular individual whose negligence

(1) (1903) A.C. 85.

caused the accident; that the question of fact must be determined by the court before any legal inferences can be drawn and the agreement between the lessor and lessee as to the joint employment of this individual is one of the facts which can only be determined by reference to the contract.

"Accepting the statement that Stinson was the joint employee of the parties, we can eliminate the first ground of defendants' appeal, and come down to the question whether both parties are not jointly and severally responsible for his fault. I think they are. This results from arts. 1054 and 1106 C.C., the latter of which says that the obligation arising from the common offence or *quasi*-offence of two or more persons is joint and several. *Pothier,* from whom this is taken, says (Obligations, No. 453):

"'Ce n'est pas seulement en contractant, que les préposés obligent leurs commettants. Quiconque a commis quelqu'un à quelques fonctions, est responsable des délits et quasi-délits que son préposé a commis dans l'exercise des fonctions auxquelles il était préposé, et s'ils sont plusieurs qui l'ont préposé, ils en sont tous tenus solidairement sans aucune exception de division ni de discussion.'

"Such joint and several responsibility towards third parties appears to have been contemplated by the agreement, and especially by the second part of section 7, which we are unanimous to confirm with costs."

*Lafleur K.C.* and *Beckett* for the appellants. The respondent cannot be held responsible for damage caused by the negligence of those who were operating the trains of its lessee, the Intercolonial Railway. No liability arises from the fact that the

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accident occurred on Grand Trunk territory. A lessor is not responsible for an act of negligence committed by his tenant on the leased premises. The tenant is in no sense an agent of the landlord: *Kieffer* v. *Le Séminaire de Québec*(1).

The respondent cannot be held liable because the accident occurred through the negligence of the despatcher Stinson, who was a joint employee. When he was despatching Intercolonial trains he was in fact and in law the servant of the Intercolonial Railway and in no sense the servant of the Grand Trunk Railway Company. Consequently, his negligence in despatching the two Intercolonial trains can create no liability on the part of the Grand Trunk Railway Company. The general superintendent of the eastern division of defendants' railway, and the chief despatcher, who appointed and discharged train despatchers and kept a record of their conduct while in the company's employ, were also joint employees within the meaning of the agreement.

Whatever might be the effect of section 20 of the agreement, as to the Grand Trunk Railway Company exercising a certain control over the joint staff, in a case which was covered by its terms, it has clearly no application to a despatcher who was not an official or employee of the Intercolonial Railway *on board* either of the trains. The section in terms refers only to the staff by which the Intercolonial trains are manned.

The appellants do not invoke the agreement as binding on persons not parties to the contract. But appellants refer to that contract to ascertain what was in fact the position of the particular individual whose negligence caused the accident. The question of fact must be determined before legal inferences can

(1) (1903) A.C. 85.

be drawn, and the agreement between the lessor and the lessee as to a joint employment of this individual is one of the facts which can only be determined by reference to the contract.

The cases referred to in art. 1106, C.C., and in Pothier, "Obligations," No. 453, are those in which several masters employ a common servant to do the same work, but the principles do not apply to cases where the same servant may be performing distinct and separate duties for different employers.

Lastly, as to the fact that the despatchers were chosen and paid by the defendants, no inference can be drawn that, *quoad* the particular service which Stinson was rendering at the time, *i.e.,* despatching the two Intercolonial Railway trains, he was, for that purpose, anything but an employee of the Crown. It is of no consequence through whom Stinson may have been paid his wages because the agreement provided that joint employees should be paid through the Grand Trunk Railway Company, the Intercolonial Railway contributing its proportion for the services rendered to it. The selection of the despatcher by the Grand Trunk Railway Company cannot change the position as it does not distinguish the present case from those in which a general servant is loaned or hired by his master to others. In all cases it is implied that the general employer has himself selected his servant but that the servant ceases to be his servant in respect of any particular work which is performed by that servant for another master.

*Laflamme* and *W. G. Mitchell,* for the respondents. The train despatcher whose negligence caused the accident was, at the time, in the service of the appellants; he had been hired and was paid by them; he

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was, while performing his duties, governed by the rules, regulations and time-tables issued by them and by the instructions of their superintendent and chief despatcher.

The evidence conclusively shews that the appellants had and exercised the entire and exclusive control over the movements of both Grand Trunk and Intercolonial trains on this section of their railway, while the Intercolonial Railway authorities exercised no control over the movements of their trains on that section, apart from preparing the schedules of regular trains and fixing the number of extra trains. The Intercolonial Railway authorities exercised no control whatever over the despatchers' department, or the crossing points. The despatchers follow the Intercolonial Railway schedule in the case of regular trains, but, in the case of extra trains, such as those which collided, the instructions of the despatcher guide altogether.

Appellants are not relieved from responsibility, under the circumstances, by the effect of statute 62 & 63 Vict. ch. 5 (D.), confirming the agreement of the 1st of February, 1898, because, as control is the foundation of responsibility, where there is control there is also responsibility, if fault be proved. The allegations of joint employment, joint control and joint ownership set up in the plea are not, properly speaking, allegations of fact, but depend entirely upon an interpretation erroneously placed upon the agreement and the statute. The plaintiffs cannot be in any manner bound or affected by this agreement to which they were neither parties nor privies. Under the circumstances proved, even this agreement, by its terms, would not relieve the defendants of their responsibility for the injuries resulting from their neg-

ligence. See art. 1106, C.C.; *Duquette* v. *Pesant dit Sans-Cartier*(1); *Jeannotte* v. *Couillard*(2); *Paquet* v. *Cité de Québec*(3); *Rancour* v. *Hunt*(4).

It is recognized jurisprudence that where a railway company grants running powers over its line to another railway company the owner, particularly when controlling the operation and movements of trains, remains responsible for collisions. 23 Am. & Eng. Encycl. of Law (2 ed.), p. 733, par. 6; p. 784, par. *b*; pp. 785, 786, 730, and p. 731, sub-par. *b* of par. 3.

The decision in the case of *Kieffer* v. *Le Séminaire de Québec*(5), has no application. There the act of negligence was that of the lessee; in the present case the act of negligence is that of the lessor.

*Delisle K.C.* held a watching brief on behalf of the Attorney-General for Canada.

THE CHIEF JUSTICE.—At the conclusion of the argument in these cases I was inclined to think that there was nothing in the appellant's contentions, but, after consideration, I am not so sure of it. I find, however, that the majority of the court have agreed to dismiss the appeals. The nature of the cases is such that I would not feel justified in delaying the judgments in that sense which are now ready to be given. I concur *dubitante*.

GIROUARD J.—Cette cause ne souffre aucune difficulté. L'appel doit être debouté avec depens pour les raisons données par Sir M. M. Tait, A.C.J.

(1) Q.R. 1 S.C. 465.
(2) Q.R. 3 Q.B. 461.
(3) Q.R. 8 S.C. 58.
(4) Q.R. 1 S.C. 74.
(5) (1903) A.C. 85.

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Davies J.

DAVIES J.—These appeals present the same facts, were argued together and are to be determined by the same considerations and principles.

I do not think the agreement between the Grand Trunk Railway Company and the Government as to the running rights which the Intercolonial Railway should have over the road can prevail to relieve the Grand Trunk Railway Company, the owner of the road, from its responsibility for the accident which resulted in the damage to the several respondents. It was the negligence of an employee of the Grand Trunk Railway Company which caused the accident, an employee selected, engaged and paid by them. The special work in which this employee was engaged had reference to the operation of the railroad as a whole, and was not confined to the running of the Intercolonial Railway trains over the road. We are not called upon to express any opinion as to the liability of the Intercolonial Railway to the plaintiff respondents, either jointly with the Grand Trunk Railway Company, or separately from them, and I expressly refrain from touching upon that point. Whether, under the running agreement between the Crown and the company, there is any right or remedy over, by the Grand Trunk Railway Company against the Intercolonial Railway, is a question not before us and which I decline to consider.

Once it is determined, as I think it was here rightly determined, that the negligence which caused the disaster was that of a Grand Trunk Railway employee in the discharge of his ordinary and general duties, the liability of that railway company to the injured plaintiffs is fixed.

The appeals should be dismissed with costs in each case.

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Idington J.

IDINGTON J.—These two cases turn upon the question of the liability of the appellants for the negligence of a train despatcher, hired by the defendants, now appellants, pursuant to the agreement between them and Her late Majesty, represented by the Honourable the Minister of Railways and Canals of Canada.

This agreement provided for the running of Intercolonial Railway trains over part of the appellants' track. It purports to lease thereby to the Crown, but provides in fact for a joint use of appellants' property.

The agreement was confirmed by 62 & 63 Vict. ch. 5 (D.), and appears in full, with that Act, in the Dominion statutes.

The negligence of the train despatcher resulted in two of the Intercolonial trains colliding on this track of the appellants used under the said agreement by the servants of the Crown in running Intercolonial trains in connection with that railway system.

This collision resulted in the death of engineer and fireman on one of these trains.

It was found by the learned trial judge and upheld by the Superior Court (in review) at Montreal that the appellants were liable and judgment was entered accordingly.

From this latter judgment the appeal is taken, and it is urged by the appellants that inasmuch as the train despatcher was engaged at the time solely in the directing of Intercolonial trains and, by the agreement in question, the agents of the Crown had some right to object to the employment by appellants of such officers, and the Crown had become bound to indemnify the appellants in such cases, and as they allege, also assumed the burthen of accidents on the

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Idington J.

Intercolonial trains, the Crown must be liable, if any one be liable, for the damages in question.

I am unable to take that view of the matter. The appellants had the right to hire, and to discharge, and, possibly, a right of interference in the directing of some trains which the Crown had not.

I think we must hold this train despatcher to have been the servant of the company.

Article 1054 of the Civil Code seems identical with what I take the English law to be on the subject of the master's liability.

There may be some difference between the effect of art. 1106 C.C., and the English law, as to a several liability in some such cases, but not in a way to touch this case.

The kernel of the matter is very much like that involved in the cases of *Laugher* v. *Pointer*(1) and *Quarman* v. *Burnett*(2), of which the first named gave rise to much difference of judicial opinion.

Having regard to the almost exclusive right to hire enjoyed by the appellants and the payment of the salaries by them to the despatchers they might hire, and also to the right of selection of the appellants' superintendent of their Eastern division, who was also the superior officer of those despatchers, and to the fact that he had been engaged and paid by the appellants in the same way as the despatchers (in almost every respect), I think it must be held that the appellants were, at the time of the accident in question, the masters who must answer for the negligence of this culpable despatcher, whose neglect caused the deaths in question.

The contract between the owners of these two

(1) 5 B. & C. 547. (2) 6 M. & W. 499, at p. 507.

railway systems provides, by clause 8 thereof, as follows:

> The superintendent, operators, despatchers, agents and all others employed upon the repairs and maintenance and in the operation of the said joint sections, though paid by the Grand Trunk Railway in the first place, shall be considered as, and are in fact, in the joint employ of the parties hereto in reference to any question of liability of either party hereto to the other party for their negligence, and in reference to any and all other questions; and they shall render to each party such services as they may be called upon to render within the scope of their position or employment, and shall be subject to dismissal if they decline, neglect or refuse to render such assistance and service to either party hereto as such employees are usually called upon to render.

I am unable to understand how this can in this case help the appellants. It only shifts the point of view and seems to constitute both parties masters of the despatchers. They may, as suggested in the court below, be jointly liable. If joint masters and jointly liable, the effect of art. 1106 of the Civil Code, which governs this contract, is to render them severally liable and thus remove a difficulty possible to arise under English law but not in this case upon this Code.

In arranging time-tables and the running of extra trains it might be urged from the general scope of the contract that the appellants have the right of precedence in saying what should be done, though, it is true, bound to concede to the other party what may be reasonable in that regard.

The provisions of the contract for indemnity also point rather in the same direction.

These suggestions of precedence and the effect of the indemnity clauses are only such and are not to be taken as final opinions or even the important basis upon which my opinion rests here.

The contract in question is one that presents many

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sides and possible room for many distinctions in cases that may arise upon it.

I think the appeal ought to be dismissed with costs.

MACLENNAN J.—I am clearly of opinion that these appeals fail.

The simple question is, whose servant the train despatcher, by whose fault the accident occurred, was. He was employed by the appellants, was responsible to them alone for the performance of his duties, and they alone were responsible to him for his wages. It is plain that if his wages were not paid any action he could bring must be against the appellants alone and, in like manner, they alone could sue him for any fault in the performance of his duties.

I do not see how any agreement between the appellants and the Crown could give the latter any right of action against the despatcher.

Besides, even if both the appellants and the Crown were liable, it seems to be plain that, by Quebec law, the liability would be several, as well as joint, in a case like the present.

*Appeal dismissed with costs.*

Solicitor for the appellants: *A. E. Beckett.*

Solicitors for the respondents: *Laflamme & Mitchell.*

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... APPELLANTS;

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*Oct. 31.
*Nov. 29.

AND

ERNEST PERRAULT (PLAINTIFF) ... RESPONDENT.

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

*Railways—Farm crossings—Jurisdiction of Board of Railway Commissioners for Canada—Statutory contract—Railway Clauses Act*, 1851 — *Grand Trunk Railway Act*, 1852 — *"Railway Act*, 1888"—*"Railway Act*, 1903"—*Appeal — Controversy involved— Jurisdiction.*

Orders directing the establishment of farm crossings over railways subject to "The Railway Act, 1903" are exclusively within the jurisdiction of the Board of Railway Commissioners for Canada.

The right claimed by the plaintiff's action, instituted in 1904, to have a farm crossing established and maintained by the railway company cannot be enforced under the provisions of the Act, 16 Vict. ch. 37 (Can.) incorporating the Grand Trunk Railway Company of Canada.

Judgment appealed from reversed, Idington J. dissenting in regard to damages and costs.

An application to have the appeal quashed on the grounds that the cost of the establishing the crossing demanded together with the damages sought to be recovered by the plaintiff would amount to less than $2,000 and that the case did not come within the provisions of the Supreme Court Act permitting appeals from the Province of Quebec was dismissed.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Arthabaska, and maintaining the plaintiffs' action with costs.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

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The action was to compel the defendants to establish and maintain a farm crossing for the use of the plaintiff in passing from one part of his farm to another where it was intersected by the railway and to recover fifty dollars damages occasioned by the defendants' refusal to furnish the crossing when required to do so. The principal defence was that the court had no jurisdiction to make any order as prayed for since the enactment of the "Railway Act, 1903," vesting the exclusive jurisdiction in regard to such matters in the Board of Railway Commissioners for Canada. The action was dismissed in the Superior Court, where Mr. Justice Carroll held that the jurisdiction to make such orders had been taken away from the courts and vested solely in the Board of Railway Commissioners. His decision was reversed by the judgment now appealed from on the ground that the plaintiff, by law and by the special Act incorporating the company (16 Vict. ch. 37), as well as by the general railway Acts in force at the time of the construction of the railway, was entitled to have the farm crossing as demanded by his action.

*Lafleur K.C.* and *P. H. Coté K.C.* for the appellants (*Beckett* with them). The present appeal affects the lands of the railway and a servitude asserted in relation thereto by the plaintiff and, consequently, is of the class of cases in which an appeal will lie to this court. We refer to *Chamberland* v. *Fortier*(1); *McGoey* v. *Leamy*(2); and the established jurisprudence of the court under numerous decisions since the reports mentioned.

The express provisions of the "Railway Act, 1903," vesting plenary and exclusive jurisdiction in all

(1) 23 Can. S.C.R. 371. (2) 27 Can. S.C.R. 193.

matters such as those now in question in the Board of Railway Commissioners for Canada have the effect of ousting the jurisdiction of courts of law or equity: *Cates* v. *Knight*(1); *Breakey* v. *Carter*(2); *Mayor of Montreal* v. *Drummond*(3), at p. 412; *The Ottawa, Arnprior and Parry Sound Railway Co.* v. *The Atlantic and North-West Railway Co.*(4); *Ontario Lands and Oil Co.* v. *Canada Southern Railway Co.*(5); *Canadian Pacific Railway Co.* v. *Northern Pacific & Manitoba Railway Co.*(6); *Grand Trunk Railway Co.* v. *McKay*(7).

The special statutes affecting the Grand Trunk Railway impose no greater liability as to crossings that can be required under the general railway Acts: *Vézina* v. *The Queen*(8); *Guay* v. *The Queen*(9); *Grand Trunk Railway Co.* v. *Therrien*(10).

*Beaudin K.C.* and *J. E. Perrault*, for the respondent. The respondent asks the construction of a crossing with two gates to communicate from one part to the other of his farm, the cost of which would not exceed one hundred dollars, as shewn by the affidavits filed and also $50 damages. Consequently, the total amount of his claim is $150, and is not sufficient to give this court jurisdiction to hear an appeal. The case does not come within the class of cases in which appeals from the Province of Quebec are permitted by the Supreme Court Act: *Cully* v. *Ferdais*(11); arts. 1209, 1211, C.P.Q.; *Desaulniers* v. *Payette*(12); *Shaw* v. *St. Louis*(13).

(1) 3 T.R. 442.
(2) 4 Q.L.R. 332.
(3) 1 App. Cas. 384.
(4) 1 Can. Ry. Cas. 101.
(5) 1 Ont. L.R. 215.
(6) 5 Man. R. 301.
(7) 34 Can. S.C.R. 81.
(8) 17 Can. S.C.R. 1
(9) 17 Can. S.C.R. 30.
(10) 30 Can. S.C.R. 485.
(11) 30 Can. S.C.R. 330.
(12) 35 Can. S.C.R. 1.
(13) 8 Can. S.C.R. 385.

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Under the Acts, 16 Vict. ch. 37, sec. 2, and 14 & 15 Vict. ch. 51, sec. 13, the appellants are bound to establish and maintain the farm crossing as required by the plaintiff. The right accrued over fifty years ago, when the railway was constructed, and the "Railway Act, 1903" cannot operate retrospectively to take away that right: *Grand Trunk Railway Co.* v. *Huard* (1). Under the special Act incorporating the Grand Trunk Railway Co., as well as under the general Acts concerning railways, the Superior Court has always had, and still has, jurisdiction to enforce the rights of individuals under what may be termed the statutory contract. This court, in the case of the *Canada Southern Railway Co.* v. *Clouse* (2), did not entertain any doubt as to the jurisdiction of the Superior Court. See *per* Gwynne J. at page 157; *Canada Southern Railway Co.* v. *Erwin* (3). In the case of the *Grand Trunk Railway Co.* v. *Therrien* (4); the question as to the right to a crossing was decided on the merits, this court admitting, implicitly, that it had jurisdiction over the case. See also *Dubuc* v. *Compagnie du Chemin de Fer de Montréal et Sorel* (5); *Smith* v. *Atlantic and North-West Railway Co.* (6).

Section 23 of the Railway Act does not give to the Board more power than the Railway Committee had under the Act of 1888. The Railway Committee, under that Act, had the same jurisdiction as the present Board, nevertheless the courts heard cases similar to the present one and have always declared that they were competent to do so. The "Railway Act, 1903," has not created a new recourse, nor a special tribunal,

(1) Q.R. 1 Q.B. 501.
(2) 13 Can. S.C.R. 139.
(3) 13 Can. S.C.R. 162.
(4) 30 Can. S.C.R. 485.
(5) 7 Legal News 5.
(6) M.L.R. 5 S.C. 148.

applicable to this case, inasmuch as the recourse of the respondent existed long before the passing of that Act.

Parliament could not take away the jurisdiction of the Superior Court except by an express enactment absolutely clear and positive: *Vide* Lord Kenyon C.J., and Ashurst J., in *Cates* v. *Knight* (1); Ashurst J., in *Shipman* v. *Henbest* (2); Loranger, Commentaire du Code Civil, vol. 1, p. 140, No. 25; Ramsay J., in *Grenier* v. *City of Montreal* (3); Hardcastle (3 ed.), at p. 133; *Balfour* v. *Malcolm* (4); Endlich, Interpretation of Statutes, p. 736, No. 522. The "Railway Act, 1903," does not contain any text expressly taking away the jurisdiction of the Superior Court, nor which necessarily implies that it has not jurisdiction over a case like the present one. Section 198 speaks of farm crossings, but it does not give any exclusive power to the Commissioners. The Board has the power to act if application is made to it, but there is no obligation to have recourse to the Commissioners. The Commissioners can act only at the instance of the proprietor. In the present case the proprietor brought suit before the Superior Court. He has chosen his tribunal; he could not go before the Commissioners and make the same demand, and, under section 198, the appellants could not do so because the Commissioners can act only upon the request of the owner of the land.

THE CHIEF JUSTICE.—Mr. Justice Davies has written in this case an opinion in which I fully concur that the appeal should be allowed.

Mr. Justice Carroll's reasoning in the Superior

(1) 3 T.R. 442, at p. 445.
(2) 4 T.R. 109, at p. 116.
(3) 25 L.C. Jur. 138, at p. 144.
(4) 8 Cl. & F. 485.

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Court, I may add, is conclusive, and his judgment, reversed by the Court of Appeal, is restored, with costs in all the courts against the respondent. An application to quash made by the respondent at the hearing must be dismissed. Our jurisdiction to entertain the appeal is incontrovertible. The action is unfounded in law, and dismissed for that reason.

GIROUARD J.— Whatever doubt might exist under prior railway Acts, none is possible under the Act of 1903, sec. 42. I entirely agree with my brother Davies.

DAVIES J.—The judgment appealed from in this case determined that the plaintiff's right to a farm crossing on the appellants' railway, which ran through his farm, did not arise under the "Railway Act" of 1888, or that of 1903, but was a right which was created and existed under the original Act of Incorporation of the Grand Trunk Railway Company. Trenholme J., who delivered the judgment of the Court of Appeal, says:

> It is, therefore, in virtue of the original Act of Incorporation of the Grand Trunk Railway Company that appellant, as owner of a farm severed by respondent's railway, is entitled to a crossing in the present case.

That being so, the court held that jurisdiction of the ordinary courts to give effect to plaintiff's right had not been taken away by the general "Railway Act" of 1903, and they accordingly reversed the judgment of the Superior Court at Arthabaska, which had dismissed plaintiff's action, declared the plaintiff entitled to the crossing he demanded, and ordered the same accordingly with the necessary subsidiary orders to make their judgment effective.

The judgment proceeded upon the ground that the court was bound by its judgment in a previous case of *Grand Trunk Railway Co.* v. *Huard*, rendered in June, 1892(1),

based on the same statutes as are applicable in the present case (and which they held to be a) direct authority for our course in this case both in declaring appellant's right to a farm crossing and in ordering it.

I am of opinion that the judgment appealed from is erroneous and that the old charter of the Grand Trunk Railway Company, to which the court of appeal refers, does not confer any such right upon the plaintiff to a farm crossing.

The question was discussed at great length in this court in the cases of *Vézina* v. *The Queen*(2), and *Guay* v. *The Queen*(3).

The meaning of sections identically worded as that upon which the court of appeal decided in this case were there considered and determined. This court there held that these statutes (that is, the Consolidated Railway Act prior to 1888) did not give a right of crossing over the railway apart from contract. This same conclusion was re-affirmed in the case of *Grand Trunk Railway Co.* v. *Therrien*(4). By these decisions we are bound and, as far as I am concerned, I may say I fully concur in them.

The only statutory right, therefore, to a crossing which the plaintiff has is that conferred by the railway Acts of 1888 and 1903. The question then arises whether the enforcement of this right is within the exclusive jurisdiction of the Board of Railway Commissioners.

I am of opinion that it is. In the case of *Grand*

(1) Q.R. 1 Q.B. 501.
(2) 17 Can. S.C.R. 1.
(3) 17 Can. S.C.R. 30.
(4) 30 Can. S.C.R. 485.

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*Trunk Railway Co.* v. *McKay*(1), we had occasion to consider the question of the exclusive jurisdiction of the Railway Commissioners with respect to the speed of trains when crossing highways at level crossings through thickly populated parts of cities, towns and villages, and with respect to the safeguards which in such cases should be maintained for the safety of the travelling public. In that case we reached the conclusion that the jurisdiction of the Railway Commissioners in the section there in controversy was exclusive, and, from the very nature of the case, was intended by Parliament to be so. My reasons for judgment in that case were expressly concurred in by the Chief Justice and Killam J., and were substantially those advanced by Sedgewick J. On that point there was no difference of opinion, Girouard J. basing his dissenting opinion upon other grounds.

I feel it, therefore, unnecessary to repeat at length this reasoning. It is true the special section relating to crossings, 198 of the Act of 1903, was not before us in the case of *Grand Trunk Railway Co.* v. *McKay*(1), but, in my judgment, the same reasoning which led this court to the conclusion that the jurisdiction of the Railway Commissioners was exclusive with respect to the sections of the Act involved in that case, applies to this section 198 of the Act of 1903. The sub-section of that section says:

> The Board may upon the application of any land-owner order the company to provide and construct a suitable farm crossing across the railway wherever in any case the Board deems it necessary for the proper enjoyment of his land on either side of the railway and safe in the public interest; and may order and direct how, when and where, by whom and upon what terms and conditions such farm crossing shall be constructed and maintained.

(1) 34 Can. S.C.R. 81.

We are not now dealing with a common law right or with an antecedent vested statutory right, but with a right of crossing created by the section itself, of which I have quoted the sub-section. The crossing is to be given

> wherever in any case the Board deems it necessary for the proper enjoyment of his land * * * and safe in the public interest.

Many considerations have to be weighed in reaching a conclusion under this section, and some of them relating to the "public interest" may be quite apart from the immediate surroundings. What weight, if an ordinary court was considering the question, would they give or have a right to give to the "public interest?" The special Board of Commissioners is enjoined to consider what would be safe in the public interest. The ordinary court is not so enjoined, and I know not on what ground but one of statutory injunction they would be justified in such a matter as farm crossings in considering the safety of the general public. These considerations on which alone its judgment would be based would, I should imagine, be limited to the rights and interests of the land-owner on the one side and the railway company on the other.

Then consider what an extraordinary jumble might and probably would arise if two courts proceeding on different considerations reached opposite conclusions. Section 3 of section 42 enacts explicitly that

> the finding or determination of the Board upon any question of fact within its jurisdiction shall be binding and conclusive on all courts.

So that, if there existed concurrent jurisdiction, the exercise by the Board of its powers must override and control, so far as facts are concerned, any conclusions of other courts. If, as I have stated, the considerations

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the conflicting courts were to consider were necessarily different the result would be startling.

I am of opinion that this is a case of a statute giving a right and prescribing a mode of giving effect to it, and looking at the whole Act and especially at sections 24, 42 and 198, I entertain no doubt that the jurisdiction conferred on the Board by the latter section was intended to be exclusive.

I think the appeal should be allowed and the judgment of the Superior Court restored with costs in all the courts.

IDINGTON J.—The respondent claims a farm crossing but fails to establish exactly when the appellants built their road over which he seeks a crossing.

Had he shewn that it was before the time when the statute was changed by substituting "at" for "and" in 14 & 15 Vict. ch. 51, sec. 13, as explained by 20 Vict. ch. 35, I would have been prepared to consider the meaning of the statute before that change.

I do not think the change was merely the immaterial one it has been represented to be. In the evidence that is now before us such loose expressions as that the road was built "about fifty years ago" do not warrant me in considering the respondent's rights, if any, as having arisen under the earlier law, especially so when this evidence is only given by a man of forty-three years of age. The respondents can, therefore, if at all, only claim such rights as may have accrued since the change of words to which I have adverted.

This court has by the cases of *Vézina* v. *The Queen* (1), and *Guay* v. *The Queen*(2), put upon "The Government Railways Act," R.S.C. ch. 38, secs. 16, 17, 18 and 19, which are to me not distinguishable

(1) 17 Can. S.C.R. 1. (2) 17 Can. S.C.R. 30.

from Consolidated Statutes of Canada, ch. 66, secs. 13, 14, 15, and 16, in regard to the question of farm crossings, an interpretation that precludes us now from holding that any right to a farm crossing, save by contract or possibly by way of necessity, could arise or exist in consequence of anything done, from the time of the coming into force of the Consolidated Statutes of Canada to the passing of the "Railway Act" of 1888.

It seems to me that *Huard* v. *The Grand Trunk Railway Co.*(1), relied upon in the court below, may have been rightly decided if the right arose before the Act was amended in consolidating the statutes in 1859, but otherwise the decision would seem to be inconsistent with the principle affirmed in the decisions of this court above referred to.

It does not get over the difficulty these cases have created to refer to them as decisions upon another statute, when that other statute has for its aim the creation of exactly the same sort of right or regulating power, and uses almost identical words with that of the Consolidated Statutes of Canada, ch. 66.

For a period of twenty-nine years the railway companies and land-owners accommodated their relations in regard to crossing rights, without the law creating a right thereto, as it turns out, but probably in light of the decisions of the Ontario and Quebec courts, as if the law had imposed the duty upon the railway company to furnish a crossing where needed.

Then, about the time the question of the crossings arose in the cases, referred to, as decided by this court, the "Railway Act" of 1888 was passed, whether in consequence of the doubt which had arisen in these

(1) Q.R. 1 Q.B. 501.

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particular cases or generally, in previous litigation, does not appear.

The decisions were not given until 1889. The cases were pending in March, 1888. The enactment of section 191, in the Act of 1888, and section 198 in the "Railway Act, 1903," providing for farm crossings becomes in the light of this history of the question most perplexing.

Is it remedial legislation? Is it declaratory? Is it to apply to the cases where the railway had been constructed at any time antecedent to such enactment? Assume that, and it might, if taken absolutely so, and in the widest sense, apply to cases where the railway company may have compensated in full for the damages that severance of the land produced, or in respect of which they may have contracted to be freed from the burthen of making and maintaining a crossing.

On the other hand, confine the operation of either provision to the cases of future railway building and for that purpose future expropriations, and the numerous cases that the past railroad construction, and legal uncertainty, have no doubt given rise to, are then left quite unprovided for, and the land-owners unprotected, though all parties may have proceeded upon the supposition that the law already provided what these cases decide it had not.

There is no provision in the "Railway Act" of 1888 for damages. In the "Railway Act" of 1903, there is by section 294 the express recognition of such a right. I am of the opinion that this case falls under the latter Act, and that such a right of action exists here, and that the solution of this case and the questions it raises is, as to damages, an action upon the statute; and as to the specific relief of ordering a

crossing the provision of the statute confers the right and the remedy given therefor must be followed.

We are not embarrassed by the question of the company's acquisition of the title in the road allowance, as was the case in *Ontario Lands and Oil Co.* v. *Canada Southern Railway Co.*(1).

We have, however, before upholding the claim for damages here or indeed any right in the respondent, to meet the question of what is meant by the words *"across whose lands the railway is carried"* in section 198.

They are quite comprehensive enough to cover such a case as the title here. More apt words could easily have been selected for the purpose, I assume, of giving a remedy retrospectively, where the rights of the parties depend on such facts as found here.

I go no further. Each way one looks at this section of the statute difficulties are presented, and some of them most formidable. When, however, we look at the purview of the Act I cannot think it was intended to cut off the claims of those who had, without any fault of theirs, lost in law, without compensation, such rights of crossing as both they and the railway company, I have no doubt, until the decision I refer to, conceived there existed.

It is to be observed that this legislation was also probably meant to deal with the cases of sub-divisions, not within the probable consideration of either party when a railway was built.

To meet that phase of farm crossings the whole question of granting or refusing is remitted to the discretion of the Board of Railway Commissioners.

That is not all that is remitted to that tribunal to dispose of in the case of farm crossings. I venture to

(1) 1 Ont. L.R. 215.

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think that so much is, and if so, why should the whole field of such crossings whether arising from future railway building or future sub-divisions of lands, or the cases arising out of past railway building not also be provided for?

It seems when these questions are all borne in mind that we must conclude they were all present to the mind of Parliament, and the result was the use of words capable of furnishing a remedy for each and every case so arising.

It would seem as if the question of the jurisdiction of the superior courts having been taken away or not, has, though the contest throughout has been in regard to that, never in law arisen. It never existed, except as to damages.

It follows that this case has been throughout contested on an entirely erroneous basis.

I cannot accede to the proposition put before us that the right created by this legislation is one of a conditional character, only to come into effect upon the granting or issuing of an order by the Board of Railway Commissioners.

The right may be limited by the discretion of the Commissioners, in some of the many kinds of cases that are sure to arise.

It seems to me, however, that the companies cannot safely assume, and ought not to act upon the assumption in all cases, that until an order is got no right exists, and especially ought not to do so on such facts as this case presents.

I am of opinion that the judgment, directing a crossing to be made, must be set aside, and the application for an order be left to the authority appointed by this Act, that created the right to grant it, and the manner of its performance or execution. This is one of

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the cases, however, in which the granting of the order might also be said to be administrative so clear does the right seem to be. The appellants are liable, in my view, for damages for failing to observe the statutory duty created by sub-section 1 of section 198 of the "Railway Act" of 1903. If authority be needed section 294 of this Act seems clear. And it is equally clear to me that the first sub-section creates a right here quite independently of the second sub-section.

The demand was made for a crossing. It might have been made in better form. Nothing was done. No explanation is offered by the defendants. It certainly ought not, I think, to be laid down as law that before the land-owner, who is given this statutory right, can hope to enjoy it he must, in every case, simple or complex, alike institute proceedings that the railway company ought to help to avoid. And especially so in such a case as this where years ago they had recognized the right and duty. I think in the result that each party should pay his own costs of appeal to this court and the costs in the Court of Appeal below, and that the judgment in the trial court should be with such costs as the amount of damages will carry.

MACLENNAN J.—I concur for the reasons stated by Mr. Justice Davies.

*Appeal allowed with costs.*

Solicitor for the appellants: *P. H. Coté.*

Solicitors for the respondent: *Perrault & Perrault.*

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*Nov. 13.
*Nov. 27.

THE CITY OF SOREL (PLAINTIFF) . . . APPELLANT;

AND

THE QUEBEC SOUTHERN RAILWAY COMPANY (DEFENDANTS). } RESPONDENTS.

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

*Railway aid—Municipal by-law—Condition precedent—Part performance — Annulment of by-law — Right of action — Assignment of obligation—Notice—Signification upon debtor—Art.* 1571 *C.C.*

An action to annul a municipal by-law will lie although the obligation thereby incurred may be conditional and the condition has not been and may never be accomplished.

Where a resolutory condition precedent to the payment of a bonus under a municipal by-law in aid of the construction and operation of a railway has not been fulfilled within the time limited on pain of forfeiture, an action will lie for the annulment of the by-law at any time after default, notwithstanding that there may have been part performance of the obligations on the part of the railway company and that a portion of the bonus may have been advanced to the company by the municipality.

In an action against an assignee for a declaration that an obligation has been forfeited and ceased to be exigible, on account of default in the fulfilment of a resolutory conditon, exception cannot be taken on the ground that there has been no signification of the assignment as provided by article 1571 of the Civil Code of Lower Canada. The debtor may accept the assignee as creditor and the institution of the action is sufficient notice of such acceptance. *The Bank of Toronto* v. *The St. Lawrence Fire Insurance Co.* ([1903] A.C. 59) followed.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Richelieu, which dismissed the plaintiff's action with costs.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

In 1894, the City of Sorel passed a by-law to aid the construction of a railway from Longueuil, opposite Montreal, to Levis, opposite Quebec, on the south side of the River St. Lawrence. The by-law granted a bonus of $50,000 to a syndicate then promoting a company for the construction of the railway and was subject, amongst others, to the conditions that the railway company should bridge the Richelieu River within the city limits; erect workshops in the city for the construction and repair of their rolling stock; construct and operate lines of railway between Sorel, Verchères, Nicolet and Levis, with special reduced rates of fare upon accommodation trains running into Sorel every Saturday, and take their supply of water and gas at Sorel from the city works at rates specified. It was provided that all these conditions should be fulfilled and that the workshops should be constructed, equipped with the necessary tools and machinery and be in operation within three years from the date of the by-law, otherwise that the by-law should lapse and become void and that all sums payable thereunder should be forfeited.

The rights of the syndicate were assigned to the South Shore Railway Company, which subsequently sold and assigned them to the defendants, but the notice of such assignment was never served upon the city as required by art. 1571 of the Civil Code.

After a portion of the construction of the railway into Sorel had been completed and put in operation, in 1896, one-half of the bonus was paid by the city, but the railway was never completed or operated as contemplated; a blacksmith's shop with an anvil, a forge and three workmen was established instead of general railway workshops and, finally, the railway company became insolvent and discontinued the operation of the railway.

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The city instituted an action, in 1904, to set aside the by-law for default in the fulfilment of the resolutory conditions to which it was subject, and to have a declaration discharging it from all liability as to the unpaid portion of the bonus, and further reserving its rights as to recovering back the portion of the bonus, $25,000, which had been advanced to the company in 1896.

The plaintiff's action was dismissed at the trial and the judgment appealed from affirmed this decision, although differing somewhat from the reasons given in the court of first instance.

The material questions at issue upon the present appeal are discussed in the judgment of His Lordship the Chief Justice now reported.

*Beaudin K.C.* and *Belcourt K.C.*, for the appellant.
*Béique K.C.* and *Robertson,* for the respondents.

LE JUGE EN CHEF.—Le 3 Mars, 1904, la cité de Sorel instituait contre la compagnie intimée une action dont le rejet par la cour supérieure et par la cour du banc du roi a donné lieu au présent appel.

Par sa déclaration elle demandait d'être relevée d'une obligation de $25,000 qu'elle a contractée en 1894, en aide d'un certain chemin de fer, expressément sous certaines conditions résolutoires, qui n'ayant pas, d'après elle, été remplies par l'intimée ou ses auteurs, lui donnent le droit de demander l'annulation de la dite obligation dont l'intimée est maintenant porteur.

Deux questions préliminaires ont été soulevées à l'audition. La première est que, d'après les allégués de l'appelante elle-même, il apparait qu'elle n'a pas droit maintenant à ses conclusions, parce que, dit l'intimée, ces $25,000 n'étant pas encore exigibles, elle ne peut

demander d'avance l'annulation d'une obligation à laquelle il est possible qu'elle ne soit jamais tenue. Cette objection, maintenue par la cour supérieure, a été justement écartée par la cour d'appel. Ces $25,000 sont au passif de l'appelante et diminuent d'autant son crédit et son pouvoir d'emprunter, limité par sa charte à 20% de la valeur de la propriété immobilière imposable par elle.

Une seconde objection de l'intimée contre l'action de l'appelante est qu'il n'existe aucun lien de droit entre elle et l'appelante, parce que, dit-elle, la vente et cession à elle du chemin de fer et des $25,000 en question, n'a pas été signifiée à l'appelante. Cette objection n'a pas non plus prévalu devant la cour d'appel, et ne le devait pas. D'abord, l'appelante, par son action, reconnait et accepte l'intimée comme sa créancière. C'est bien là accepter, comme il lui était parfaitement loisible de ce faire par son action, la cession à l'intimée des $25,000. *Bank of Toronto* v. *The St. Lawrence Fire Insurance Co.*(1). Et l'intimée ne peut aucunement s'en plaindre. Elle excipe, par cette objection, du droit d'autrui. Puis, si elle désirait avoir le vendeur de l'intimée en cause, elle n'avait qu'à ce faire elle-même. Et, en supposant qu'un jugement dans l'instance soit défectueux ou ineffectif parcequ'il ne serait pas chose jugée avec les auteurs de l'intimée, c'est l'appelante qui en souffrira, non l'intimée.

Maintenant tant qu'au mérite même du litige. L'action de l'appelante a été déboutée par la cour supérieure principalement sur le motif que la résolution de droit sous-entendue dans tout contrat ne pourrait avoir application dans l'espèce parce qu'il y a eu de part et d'autre un accomplissement partiel des obligations réciproquement contractées et qu'il est

(1) (1903) A.C. 59.

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impossible de remettre les parties dans l'état où elles étaient avant 1894. Il y avait là erreur. C'était perdre de vue, et la cour d'appel l'a justement remarqué, que par une clause expresse du contrat entre les parties, il est stipulé que si les ateliers ou usines de la compagnie

ne sont pas construits, outillés et en opération dans les trois ans de l'entrée en vigueur de ce règlement, alors et dans ce dernier cas, icelui règlement deviendra caduc et aucune partie du bonus dont l'octroi est contemplé ne sera payable en vertu d'icelui.

Le jugement de la cour d'appel, confirmant le dispositif de celui de la cour supérieure, rejette l'action sur le motif que la preuve ne démontre pas qu'il y ait eu par l'intimée ou ses auteurs une violation suffisante de leurs obligations pour entrainer la caducité du bonus en question. Nous ne pouvons en venir à la même conclusion.

Il nous semble évident que l'intimée, en face de la preuve, ne peut pas soutenir qu'elle a raisonablement rempli ses obligations. Elle semble croire que l'appelante n'a pas droit à ses conclusions parce qu'elle n'a pas procédé de suite en 1897 à demander la résolution du contrat dès qu'elle, l'intimée et ses auteurs, ont été en défaut. C'est là, tout en admettant ses fautes, se plaindre de ce que l'appelante lui a accordé un trop long delai pour remplir ses engagements et lui reprocher de ne pas avoir exercé son droit d'action avant 1901. Et cependant, elle a spécialement plaidé que l'action est prématurée. Il faudrait, d'après elle, que l'appelante lui paie ces $25,000, puis prenne une action pour s'en faire rembourser. Cette prétention, surtout de la part d'une compagnie insolvable, ne peut prévaloir. Si l'appelante aurait droit de les recouvrer, les eût-elle payées, elle doit avoir le droit de demander d'être relevée de l'obligation de les payer sans avoir à

attendre pour ce faire dix, vingt ou cinquante ans au gré de l'intimée.

C'était à condition d'avoir le chemin de fer autorisé par le statut, 57 Vict. ch. 72 (Que.), c'est-à-dire, un chemin de fer construit et complété dans cinq ans, que l'appelante a consenti à souscrire ces $25,000. Elle ne l'a jamais eu. Et tant qu'à son engagement d'avoir à Sorel des ateliers outillés et en opération dans les trois ans du contrat, elle s'en est moquée comme des autres. La preuve démontre que durant sept ans elle n'a eu là qu'une enclume, une forge et trois ouvriers. Même depuis l'institution de l'action, toutes les réparations importantes sont faites ailleurs parce que, dit son propre surintendant, "la *shop* n'est pas suffisament outillée."

Or, quand elle s'est obligée d'avoir ses ateliers outillés et en opération dans trois ans, ceçi doit s'entendre "suffisament outillés" pour toutes les fins du chemin de fer afin d'avantager la population de Sorel en compensation du bonus souscrit pour eux par l'appelante. Dés 1897 l'intimée était déchue du droit de reclamer ces $25,000. Or, rien depuis l'a relevée de cette déchéance.

Tant qu'à la construction du chemin jusqu'à Nicolet et le défaut de tenir la partie construite en opération, le fait admis qu'elle est en faillite et dans l'impossibilité de remplir aucun de ses engagements envers l'appelante serait suffisant à lui seul pour faire maintenir l'action s'il était nécessaire à l'appelante de l'invoquer. Arts. 1082, 1092 C.C.

L'appel est maintenu avec dépens dans toutes les cours contre l'intimée, l'action de l'appelante maintenue et le règlement No. 218 déclaré caduc et annulé à toutes fins que de droit tant qu'à cette partie d'icelui concernant les $25,000, et l'appelante déchargée de

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payer à l'intimée ou à ses ayants cause ces $25,000 contemplés par le dit règlement.

GIROUARD J.—Cet appel doit être accordé. Les contribuables de Sorel ont voté un bonus de $50,000 pour la construction d'un chemin de fer qui a passé entre les mains de l'intimée. Des conditions précises sont imposées et particulièrement,

> si les ateliers ou usines ci-après enumerés ne sont pas construits, outillés et en opération dans les trois ans de l'entrée en vigueur de ce règlement; alors et dans ce dernier cas, icelui règlement deviendra caduc et aucune partie du bonus dont l'octroi est contemplé ne sera payable en vertu d'icelui.

Il est incontestable que cette dernière condition n'a pas été remplie et la conséquence est non une simple réclamation en dommages, mais la résiliation du contrat stipulée au règlement. Le fait que la ville de Sorel a payé la moitié du bonus avant l'expiration des trois ans, ou qu'elle a attendu longtemps, avant de porter cette action ou de se plaindre, n'est d'aucune importance. Le conseil de la ville ou ses officiers peuvent avoir négligé ou manqué à leurs devoirs, les avoir mal compris ou executés; ils ne peuvent changer les droits des contribuables garantis par un règlement qu'eux seuls pouvaient voter.

J'abonde dans le sens du juge en chef de cette cour.

DAVIES J.—I concur for the reasons stated by their Lordships the Chief Justice and Mr. Justice Girouard.

IDINGTON J.—I concur for the reasons stated by His Lordship the Chief Justice.

MACLENNAN J.—I agree that the appeal should be allowed.

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*Appeal allowed with costs.*

Solicitors for the appellant: *Ethier & Lefebvre.*

Solicitors for the respondents: *Béique, Turgeon, Robertson & Béique.*

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wall of the pit had been allowed to remain in an unsafe condition, and held the defendants responsible on account of negligence in this respect. On appeal to the Supreme Court of Canada: *Held*, reversing the judgment appealed from, Girouard J. dissenting, that, as an inspection had been duly made by competent persons, using their best judgment in the honest discharge of their duty, who reported the wall to be secure, there could be no negligence imputed to the company in that respect, although it afterwards appeared that there had been error in judgment or in the manner in which the inspection was performed.—*Held*, also, Girouard J. dissenting, that where there is evidence that makes it unnecessary to draw inferences or rely upon presumptions from facts proved, the findings of two courts below, which have acted upon such inferences or presumptions, should be reversed. CANADIAN ASBESTOS Co *v.* GIRARD.....**13**

3——*Constitutional law—Railway company — Negligence — Agreements for exemption from liability—Power of Parliament to prohibit.*]—An Act of the Parliament of Canada providing that no railway company within its jurisdiction shall be relieved from liability for damages for personal injury to any employee by reason of any notice, condition or declaration issued by the company, or by any insurance or provident association of railway employees; or of the rules or by-laws of the association; or of privity of interest or relation between the company and the association or contribution of funds by the company to the association; or of any benefit, compensation or indemnity to which the employee or his personal representatives may become entitled to or obtain from such association; or of any express or implied acknowledgment, acquittance or release obtained from the association prior to such injury purporting to relieve the company from liability, is *intra vires* of said Parliament. Nesbitt J. dissenting. *In re* RAILWAY ACT, 1904.....**136**

(Leave for an appeal to the Privy Council granted, 28th Nov., 1905.)

4——*Railway company—Excessive speed—Fencing—Railway Act*, 1888, *ss.* 194, 197 — 55 *& 56 V. c.* 27, *s.* 6 *(D.)*—*Evidence—Reasonable inferences.*] The provisions of 55 & 56 Vict. ch. 27, sec. 6, amending sec. 197 of The Railway Act, 1888, and requiring, at every public road crossing at road level of the railway the fences on both sides of the crossing and of the track to be turned in to the cattle guards applies to all public road crossings and not to those in townships only as is the case of the fencing prescribed by sec. 194 of The Railway Act, 1888. *Grand Trunk Railway Co.* v. *McKay* (34 Can. S.C.R. 81) followed. Three persons were near a public road crossing when a freight train passed, after which they attempted to pass over the track and were struck by a passenger train coming from the direction opposite to that of the freight train and killed. The passenger train was running at the rate of forty-five miles an hour, and it was snowing slightly at the time. On the trial of actions under Lord Campbell's Act against the railway company, the jury found that the death of the parties was due to negligence "in violating the statute by running at an excessive rate of speed" and that deceased were not guilty of contributory negligence. A verdict for the plaintiff in each case was maintained by the Court of Appeal. *Held*, that the railway company was liable; that the deceased had a right to cross the track and there was no evidence of want of care on their part and the same could not be presumed; and, though there may not have been precise proof that the negligence of the company was the direct cause of the accident, the jury could reasonably infer it from the facts proved and their finding was justified. *McArthur* v. *Dominion Cartridge Co.* ([1905] A.C. 72) followed; *Wakelin* v. *London & South Western Railway Co.* (12 App. Cas. 41) distinguished.—*Held*, also, that the fact of deceased starting to cross the track two seconds before being struck by the engine was not proof of want of care; that owing to the snowstorm and the escaping steam and noise of the freight train they might well have failed to see the headlight or hear the approach of the passenger train if they had looked and listened. GRAND TRUNK RAILWAY Co. *v.* HAINER; GRAND TRUNK RAILWAY Co *v.* HUGHES; GRAND TRUNK RAILWAY Co *v.* BREADY.....**180**

right to cross the track and there was no evidence of want of care on their part and the same could not be presumed; and, though there may not have been precise proof that the negligence of the company was the direct cause of the accident, the jury could reasonably infer it from the facts proved and their finding was justified. *McArthur* v. *Dominion Cartridge Co.* ([1905] A.C. 72), followed; *Wakelin* v. *London & South Western Railway Co.* (12 App. Cas. 41), distinguished.—*Held*, also, that the fact of deceased starting to cross the track two seconds before being struck by the engine was not proof of want of care; that owing to the snowstorm and the escaping steam and noise of the freight train they might well have failed to see the headlight or hear the approach of the passenger train if they had looked and listened. GRAND TRUNK RAILWAY CO. *v.* HAINER; GRAND TRUNK RAILWAY CO. *v.* HUGHES; GRAND TRUNK RAILWAY *Co. v.* BREADY ..... **180**

5——*"Railway Act*, 1903," *ss.* 23, 184—*Construction, etc., of street railway or tramway—Removal of tracks, etc.—Board of Railway Commissioners for Canada—Jurisdiction — Condition precedent—Use of highways in cities and towns—Consent by municipal authority — Approval of by-law—Quebec Municipal Code, arts.* 464, 481.] In the case of a street railway or tramway or of any railway to be operated as such upon the highways of any city or incorporated town, the consent of the municipal authority required by sec. 184 of the "Railway Act, 1903," must be by a valid by-law approved and sanctioned in the manner provided by the provincial municipal law, and, in the absence of evidence of such consent having been so obtained, the Board of Railway Commissioners for Canada have no jurisdiction to enforce an order in respect to the construction and operation of any such railway. The order appealed from was reversed and set aside, the Chief Justice and Girouard J. dissenting. MONTREAL STREET RAILWAY CO. *v.* MONTREAL TERMINAL RAILWAY CO..... **369**

6——*Operation of railway — Straying animals—Negligence — Duty as regards trespassers—Herding stock—Evidence—Inferences as to facts.*] A railway company is not charged with any duty in respect of avoiding injury to animals wrongfully upon its line of railway until such time as their presence is discovered, Idington J. dissented though concurring in the judgment on other grounds. CANADIAN PACIFIC RAILWAY CO. *v.* EGGLESTON ..... **641**

7——*Joint operation of railway—Master and servant—Negligence—Responsibility for act of joint employee—Traffic agreement—62 & 63 V. c. 5 (D.).*] Where by the negligence of the train despatcher engaged by the Grand Trunk Ry. Co. and under its control and directions, injuries were caused by a collision of two Intercolonial Railway trains on the single track of a portion of the Grand Trunk Railway operated under the joint traffic agreement, ratified by the Act, 62 & 63 Vict. ch. 5 (D.), the company is liable, notwithstanding that the train despatcher was declared by the agreement to be in the joint employ of the Crown and the railway company and the Crown was thereby obliged to pay a portion of his salary. Judgment appealed from affirmed, Taschereau C.J. *dubitante.* GRAND TRUNK RAILWAY CO. *v.* HUARD *et al.* **655**

8——*Farm crossings — Jurisdiction of Board of Railway Commissioners for Canada — Statutory contract — Railway Clauses Act*, 1851—*Grand Trunk Railway Act*, 1852—*"Railway Act*, 1888"—*"Railway Act*, 1903" — *Appeal — Controversy involved—Jurisdiction.*] Orders directing the establishment of farm crossings over railways subject to "The Railway Act, 1903" are exclusively within the jurisdiction of the Board of Railway Commissioners for Canada.—The right claimed by the plaintiff's action, instituted in 1904, to have a farm crossing established and maintained by the railway company cannot be enforced under the provisions of the Act, 16 Vict. ch. 37 (Can.) incorporating the Grand Trunk Railway of Canada. Judgment appealed from reversed. Idington J. dissenting in regard to damages and costs. GRAND TRUNK RAILWAY CO. *v.* PERRAULT... **671**

9——*Appeal from Board of Railway Commissioners—Special leave—Jurisdiction of judge in chambers*..... **321**

*See* APPEAL 8.