REPORTS

OF THE

SUPREME COURT

OF

CANADA

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79089—A

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

The Right Hon. Sir Louis Henry Davies C.J., K.C.M.G.

" John Idington J.

" " Lyman Poore Duff J.

" Francis Alexander Anglin J.

" Louis Philippe Brodeur J.

" Pierre Basile Mignault J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Right Hon. Charles Joseph Doherty K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Hugh Guthrie K.C.

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ERRATA ET ADDENDA.

Page 663, in the seventh line, replace the word "held" by the words "on consent of the parties, ordered".

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL NOTED SINCE THE ISSUE OF VOL. 59 OF THE SUPREME COURT REPORTS.

Barthe v. *Alleyn-Sharples* (59 Can. S.C.R.1). Leave to appeal granted, July 6, 1920.

Board of Commerce, in re, (59 Can. S.C.R. 456). Leave to appeal granted, July 30, 1920.

Gauvreau v. *Page* (59 Can. S.C.R. 181). Leave to appeal refused, July 30, 1920.

Great West Saddlery Co. v. *The King—John Deere Plow Co.* v. *The King—A. Macdonald Co.* v. *Harmer* (59 Can. S.C.R. 19). Leave to appeal granted, Aug. 19, 1919.

Montreal, City of, v. *Morgan* (59 S.C.R. 393). Leave to appeal refused, July 30, 1920.

Quebec, City of, v. *Lampson* (56 S.C.R. 288). Appeal allowed with costs, Aug. 5, 1920.

Watt & Scott v. *City of Montreal* (59 S.C.R. 523). Leave to appeal granted, July 26, 1920, in case in which the Supreme Court allowed the appeal from K.B.—Leave to appeal refused, Dec. 10, 1920, in case in which the Supreme Court quashed the appeal for want of jurisdiction.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

ULRIC BARTHE, ès-qual, (Plaintiff)..... } Appellant;

AND

DAME M. ALLEYN-SHARPLES and others, (Defendants)..... } Respondents.

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*Nov. 14.
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Feb. 3.

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

Constitutional law—Succession duty—Situs of property—"Direct taxation within the province"—B N.A. Act, 1867, *s.* 92, *s.s.*2—4 *Geo. V., c.* 10 (Que.)—*Art.* 6, C.C.

The Quebec Succession Duty Act (4 Geo. V., c. 10) imposes succession duties upon "all transmissions within the province, owing to the "death of a person domiciled therein, of movable property locally "situate outside the province at the time of such death."

Held that the statute is *intra vires* of the legislative authority of the province over taxation, conferred by sub-section 2 of section 92 of the B.N.A. Act, the succession duty imposed being "direct taxation within the province."

Judgment of the Court of King's Bench reversed.

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*Present:—Sir Louis Davies C.J., and Idington, Duff, Anglin and Mignault JJ.—

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The Chief Justice.

APPEAL from a judgment of the Court of King's Bench, appeal side, Province of Quebec, reversing the judgment of Lemieux C.J. at the trial(1) and dismissing the appellant's action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Lanctot K.C., *Geoffrion K.C.*, and *St. Laurent K.C.*, for the appellant.

Lafleur K.C., and *Gravel K.C.* for the respondent.

The CHIEF JUSTICE—The questions raised in this appeal are no doubt most important ones relating, as they do, to the power of the several provinces of Canada to levy succession and legacy duties on personal or movable property locally or actually situate outside of the province but owned at the time of his death by one domiciled in the province.

In the present case the property on which or the transmission of which it was sought to recover the duties consisted of intangible property, namely shares in companies whose head offices were outside of the province of Quebec.

The Superior Court, acting upon and applying the well known rule *mobilia sequuntur personam*, gave judgment for the plaintiff ès-qualité for the amount of the duties levied and payable under the statute.

This judgment was reversed on appeal by the Court of King's Bench in a majority judgment of that court which held that

the powers of the Provincial Legislature are not plenary but limited to "direct taxation within the Province"; (British North America Act,

(1) Q.R. 55 S.C. 301.

section 92, s.s. 2); and that any attempt to levy a tax on property locally situate outside the Province is not taxation within the Province and is beyond the competence of the Provincial Legislature; that the taxation of transmissions within the Province of property locally situate outside the Province is an attempt to do indirectly that which the Legislature is forbidden to do directly and is in effect taxation of property within the Province; and that the property and shares in question in this case are locally situate and have a situs outside the Province.

I agree with that part of this judgment which declares the powers of the provincial legislature not to be plenary but to be limited to "direct taxation within the Province." And I further agree that the taxation of "transmissions within the Province" of property locally situate outside it is an attempt to do indirectly that which the legislature cannot do directly, but I differ from the conclusion reached by the court that the property and shares in question in this case are locally situate and have a situs outside of the province and so beyond the jurisdiction of the provincial legislature in levying succession duties. The judgment now in appeal ignores the application of the rule making the domicile of the deceased owner, in questions arising out of succession and legacy duties, the test of the situs of the property and shares in question and adopts that which allots the situs to the location of the head office of the respective companies and so carries this intangible property outside of the province of Quebec.

In an appeal case from the province of Nova Scotia, recently decided in this court, *Smith* v. *The Provincial Treasurer of Nova Scotia*,(1) this court held that to determine the situs of personal property liable to succession duties on the death of the owner the rule

(1) 58 Can. S.C.R. 570.

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to be applied is that expressed in the maxim *mobilia sequuntur personam.*

That judgment was the subject of much consideration and all the authorities bearing upon the question there in issue were carefully studied.

I may say that owing to the grave and great importance of the question I have deemed it right in this appeal again to re-read all these authorities with the result that I am more firmly convinced than ever that, in construing the powers of "direct taxation within the Province" granted to provincial legislatures by our Constitutional Act, so far as the levying of succession and legacy duties are concerned, the true rule is that which existed alike in Great Britain as in the province of Quebec at the time such Act was passed, namely, that the domicile of the deceased owner of the property, and not its actual location at his death, determined which province could impose succession and legacy duties upon it. That rule is not applicable in the construction of statutes levying probate, and estate duties or other taxes, but is confined to succession and legacy duties. The whole question was thoroughly thrashed out and determined in the House of Lords, in the appeal case of *Winans* v. *Attorney General,*(1) where the rules respecting succession and legacy duties and estate and probate duties are clearly laid down and the reasons for the application of the *mobilia* rule to the two classes of duties, succession and legacy, are given and for its non application to estate and probate duties. I was greatly tempted to embody in these reasons of mine some extracts from the judgments of the noble lords who

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

decided that case. They were unanimous in their reasons for the judgment they delivered in determining that so far as succession and legacy duties were concerned the domicile of the deceased owner, and not the local situation of the property, must be taken as the controlling factor. As Lord Atkinson said at page 32:

> In each case (namely legacy or succession duty) the same principle brings constructively the property within or carries it without the reach of the taxing statutes of this realm according as the domicile of its deceased owner is without or within the realm,

and as he says on the same page.

> wide as is the language of the statute imposing them.

If that was the true rule applicable to ordinary imperial legislation, why should it not be applied to our constitutional Act? To my mind there is greater reason in so applying it to such a statute as ours creating a confederation of then existing and of future provinces in one dominion and delimiting their powers of legislation, than to ordinary statutes. The grounds upon which the rule of the domicile was first introduced are stated to be based upon convenience and international law. To my mind, such grounds afford the strongest reasons for construing our constitutional Act in accordance with the rule of the domicile so long and universally adopted.

I venture in conclusion to reproduce a paragraph from my reasons for judgment in the case of *Smith v. The Provincial Treasurer of Nova Scotia* (1), above cited.

> The broad ground on which my judgment rests is that the maxim *mobilia sequuntur personam* embodies the principle applicable to the succession of property of a domiciled decedent of any province of Canada for succession and legacy duties, as distinct from probate or estate

(1) 58 Can. S.C.R. 570, at p. 575.

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duties; that in regard to those special succession and legacy duties the domicile of the decedent and not the physical or actual situs of the property must prevail; that this was the law in England decided in a series of cases before the "British North America Act" was passed and that the power of taxation within the province granted to the provinces in subsec. 2 of sec. 92 of that Act must be construed in accordance with the English law as it then was decided to be; that accordingly each province has the power of levying succession and legacy duties only upon the personal property passed by a domiciled decedent of the province, which either is locally situate therein physically or by virtue of the maxim "mobilia sequuntur personam" is drawn into such province by reason of the domicile; that while the Imperial Legislature itself or a colony possessing plenary powers of taxation could at any time overrule the principle embodied in the maxim (see *Harding* v. *Commissioner of Stamps for Queensland*), (1) the several provinces of Canada being limited in their powers cannot do so or by any enactment of their own enlarge or extend the powers of taxation granted to them by section 92 of the "British North America Act;" that any other construction of these powers of taxation would create endless, if not insuperable difficulties and would subject the same property to possible double liability to succession duty taxation, one in the province where the domiciled decedent owned the property and the other in which it was locally situated at his death. The result of my holding would be that the domicile of the decedent would be the test in Canada of the right to levy succession duties upon his personal property wherever it might be locally or physically situate and that such taxation could only be levied by the province of the domicile.

For the foregoing reasons I would allow this appeal with costs and restore the judgment of the Superior Court.

IDINGTON J.—The question raised by this appeal is whether or not 4 Geo. V., ch. 10, is, as regards the taxation imposed thereby, *ultra vires* of the Quebec legislature.

The first part of the section in question reads as follows:

All transmissions within the Province, owing to the death of a person domiciled therein, of movable property locally situate outside the Province at the time of such death, shall be liable to the following

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

taxes calculated upon the value of the property so transmitted, after deducting debts and charges hereinafter mentioned.

This, contrary to the express language used, it is urged must be read as a taxation of property outside the province. I cannot so read it by any of the ordinary rules of interpretation and construction.

It is the transmission "within the province" by force of the laws enacted by the legislature of the province, in virtue of its exclusive jurisdiction under the British North America Act, sec. 92, over (item 13), "Property and Civil Rights in the Province," which clearly is dealt with, and not something else constituted by the theories of interpreters as a basis for their interpretation of this section.

The legislature which is given thus the power to destroy, if it see fit, can surely take a toll upon that which its creative power confers.

It has not gone so far as to attempt to destroy the supposed right of successions but has, on the contrary, conferred that right by virtue of its laws and imposes as a condition of the assertion of such right the tax measured by a scale set forth.

We are so accustomed to assuming, which is not the legal fact, that the property left by a deceased person becomes as a matter of course, that of some survivor named in a will, or statute of distributions, or other law of succession, that we forget that both will and succession of another sort are but the creation of the legislative powers over property and civil rights.

The right to tax the transmission is, in the last analysis, but the right to define to whom the property of a person domiciled in a country shall pass at the death of him so domiciled.

Such an exercise of the power of taxation is as direct

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as anything can well be, and is certainly as direct as that imposed by the licensing of a brewer in Ontario to carry on his business, which was upheld by the Judicial Committee of the Privy Council in the case of *Brewers & Malsters Association for Ontario* v. *The Attorney General for Ontario.*(1)

It was argued therein that the licensing power was indirect and therefore *ultra vires.*

It has never been argued since, until recently, that the taxation of the exercise of any supposed right within a province was something so impalpable; indeed such a mere "abstract concept", that such taxation was unthinkable and hence impossible.

If that is a complete answer then I submit the imposition of a licensing tax as a preliminary condition to the carrying on of a business, or use of an automobile, for example, would seem to be thus left without any basis to rest upon.

If that sort of argument must prevail and be given effect to, then, of course, there can be nothing in the basis which I have suggested above for taxing transmission.

I hope it will not be necessary in order to demonstrate the existence of the fundamental basis of such a tax to repeal all laws of succession and begin anew.

We are asked to follow what has been properly designated by Mr. Justice Pelletier in the Court of King's Bench as only an *obiter dictum* in the case of *Cotton* v. *The King.*(2)

The judgment in that case proceeded upon the construction of the Act there in question, being by its terms confined to property within the province, and

(1) [1897] A.C. 231. (2) [1914] A.C. 176.

upon that ground alone it was held that the appeal must be allowed.

Then their Lordships proceeded to deal with another ground which, with great deference I submit, was not necessary or necessarily relevant to the decision of the case.

The fact that at least the members of the majority in this court had each written judgments resting partly or wholly on the right and power to tax a transmission of property by force of the laws of the province, apparently received no consideration.

For my part, I had with tiresome, probably too tiresome, reiteration presented that view of the case in many ways in *The King* v. *Cotton.*(1)

I, therefore, must refrain from enlarging upon it here, and refer the curious, (if any, in that regard), thereto and to the case of the *Standard Trust Company* v. *The Treasurer of Manitoba,* (2) wherein I presented the same views; I therein pointed out that if people could get property situated outside the province which had been that of a deceased person who had been domiciled at death in the province, without asking recognition of some provincial authority, or relying upon provincial law, then they might escape the tax. The case of *Woodruff* v. *The Attorney General of Ontario* (3) illustrates how it may be done by transactions *inter vivos.*

The judgment of the Judicial Committee of the Privy Council in the *Cotton case,* (4), above referred to, at page 195, contains the following paragraph.

To determine whether such a duty comes within the definition of direct taxation it is not only justifiable but obligatory to test it by exam-

(1) 45 Can. S.C.R. 469.
(2) 51 Can. S.C.R. 428.
(3) [1908] A.C., 508.
(4) [1914] A.C. 176.

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ining ordinary cases which must arise under such legislation. Take, for instance, the case of movables such as bonds or shares in New York bequeathed to some person not domiciled in the province. There is no accepted principle in international law to the effect that nations should recognize or enforce the fiscal laws of foreign countries, and there is no doubt that in such a case the legatee would, on duly proving the execution of the will, obtain the possession and ownership of securities after satisfying the demands, if any, of the fiscal laws of New York relating thereto. How, then, would the Provincial Government obtain the payment of the succession duty? It could only be from someone who was not intended himself to bear the burden but to be recouped by someone else. Such an impost appears to their Lordships plainly to lie outside the definition of direct taxation accepted by this Board in previous cases.

This seems to suggest the possibility of the production of the will and proof of its execution before the court in New York entitling the legatee to get possession and ownership of the securities there.

But, with great respect, I submit that neither was there in that case, nor is there in the present case, any evidence demonstrating as a practical possibility, such a course as outlined.

I am not prepared to say that, if it were proven that there was no other property than in the foreign state and that the laws of that state were of the unusual character which would permit such a proceeding in respect of the will of a testator domiciled in Canada, or other country outside of that state, such a mode of proceeding would be impossible.

If, however, as happens almost universally, the executor, in order to enable him to get possession of the goods, which were the property of his testator (and he can only get possession thereof by means of the law of that testator's domicile at death) is thereby under the necessity of applying to some authority created by a provincial legislature to give the necessary recognition of the right as defined by that law; or that law giving the right is so conditionally framed as to give rise to

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any right only upon due compliance with the taxing terms imposed; then he is surely bound to submit to the terms thereby imposed, and pay such tax as required as the price of such recognition. I hold that is very direct taxation.

The scale of its distribution is but another term of the conditions which the state conferring the right or assenting to the necessary recognition of it sees fit to impose, and, like many other subsidiary things such as involved in the due and convenient means of the execution of the business in hand, has nothing to do with determining the question of the constitutional right to impose such a tax. There is nothing save the question of that right involved herein.

I may say that probably the fair construction to be put upon that above quoted is that it was not intended to assert, as matter of law, all that it seems at first blush to imply, but merely as an illustration of what is to be understood as direct taxation within the Act.

Assuming that to be all intended then, for the reasons I have already assigned, it does not fit this case or meet the argument I present which induces me to hold that the tax in question is most direct taxation, and much more clearly so than was the tax imposed in question in the case of the *Bank of Toronto* v. *Lambe*, (1)

I do not understand that the judgment in the latter case, or in any other (unless in the above mentioned *Cotton Case*) (2) in which reference has been made to the definitions by John Stuart Mill of direct and indirect taxation, maintains them as a final determination of what must imperatively guide us in relation to any question arising from the taxing power conferred by the British North America Act upon the provincial

(1) 12 App. Cas. 575. (2) (1914) A.C. 176.

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legislatures. To impose such a test as obligatory and conclusive in all cases would, I submit, be productive of much mischief. Indeed the judgment in the said case of *Bank of Toronto* v. *Lambe* (1) expressly renounces at pages 581 and 582 any such test as obligatory.

The very able group of men who framed the British North America Act certainly had presented to their minds the actual case of customs dues, most frequently spoken of in those days as indirect taxation which then, apart from the others, such as revenues from wild lands, was the chief source of revenue on which the government of old Canada depended for carrying on.

In the scheme of government which they were concerned in framing, it was intended that all (except that or the special provisions of a temporary nature provided for in sections in ch. 8, under caption of Revenues, etc.) derivable from customs, should go to the dominion and be incidental to the regulation of trade and commerce, and that none of the provinces should be permitted to interfere therewith.

To render the chief indirect mode of taxation of the day an impossible source of revenue by way of taxation by any province, section 121 of the Act was enacted.

In contradiction to that chief revenue derived from the customs dues, universally recognized as indirect taxation, the term "direct taxation" no doubt seemed appropriate for use in the section of the British North America Act in question herein, especially to designate other available taxation which, when thus confined within the province must of necessity be what in popular language would be presumed to be direct taxation.

(1) 12 App. Cas. 575.

That the framers of the Act designed, except in that sense, to impose therein upon the provinces an obligatory observance of the doctrine enunciated by any philosophic writer on economic questions, however eminent, I most respectfully deny.

To hold otherwise would be to assume, for example, that a tax upon land which on close examination is generally an indirect tax according to the definition quoted, though in the popular sense it is taken to be a most direct tax, and is imposed in some of our provinces.

Yet, according to Mill's definition, it would, I submit, if imposed here by clear headed men, be one of an indirect character, for assuredly in this country, under the conditions existent therein, such a tax would fall within the meaning of the definition of indirect taxation which he gives as follows:

> A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another such as the excise or customs.

Despite my high regard for the author's work I doubt if the definition, resting upon intention and desire, is a very happy one. Some of the masters imposing a land tax might deem it direct and the clear headed see its beauty in its indirect character, though not always so.

I need not elaborate, or shew how (whether expected or not) the possessor of land so taxed would inevitably succeed in reaping a return of taxes so imposed from those renting from him, or how in the case of business properties the tax would become further distributable.

Social conditions in countries where the possession of land adds so much to the importance of the possessor

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that he may be averse to refrain from exacting the indemnity against such a tax and hence the definition, so far as relates to direct taxation, may be applicable to some lands; but here where land is held chiefly for what there is or is supposed to be in it, as a monetary investment, the result of imposing such a tax is certainly expected, by those possessing clear heads, to become so operative as to make a tax on land felt by him who as tenant occupies it for business purposes and thus impel him to distribute the burden over those buying his merchandise or manufactured goods.

I am not to be taken as assuming that, instantly such a mode of taxation may be adopted, the then possessor of land could in every instance be able to collect reimbursement of the tax from someone else, but ultimately such would be the manifest result in almost every case.

In those cases where the terms of the lease, as not infrequently happens, provide that the tenant pay all taxes the tax in the case of business properties would be almost instantly distributable in the way I suggest.

Even in the imposition of such an indirect tax as customs dues there are many instances as in its operation in the case of him importing for his own use where it becomes as direct as any tax can be and is not invariably distributable.

Again the taxation of land by municipalities had been and still is their chief source of revenue.

Another source of their revenue, especially in Ontario, then Upper Canada, was the taxation of commodities which is classed by political economists as indirect taxation. And so it continued for thirty-four years after the British North America Act had

been enacted and then was changed as to form into the business tax.

As illustrative of the mode of thought, on the subject of taxation, prevalent in old Canada, at the time when the constitution of a joint authority for the general purposes of its government, coupled with a separate legislature for each of the provinces of Upper and Lower Canada, was first mooted, and there arose an agitation therefor which culminated some eight years later in the wider scheme presented by the British North America Act we may profitably turn to Upper Canada's Assessment Acts.

The Consolidated Assessment Act of Upper Canada (passed in A.D. 1859) in section 8 reads as follows:

> 8.—All municipal, local or direct taxes or rates, shall, when no other express provision has been made in this respect, be levied equally upon the whole ratable property, real and personal, of the Municipality or other locality according to the assessed value of such property, and not upon any one or more kinds of property in particular or in different proportions.

The substance thereof was taken from an Act passed six years earlier and the exact language used was adopted in section 8 of another new assessment Act passed in the year 1866.

The phrase "local or *direct* taxes or rates" evidently had no relation to theories of writers such as Mill on political economy, for each of these several Acts provided for the imposition of taxes on commodities which according to such theories would be indirect taxation.

I present its use as a fair sample of the Canadian mode of thought in relation to the question of what must have been intended by the words "direct taxation within the province" as used in the item No. 2 of

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section 92 of the British North America Act, now to be applied herein.

Quite true that basis of taxation to which I refer was only used for purposes of municipal revenue and not for those provincial revenues now in question. Yet its adoption when expressly designated as "direct tax" suggests how little the framers of this Act, knowing of and having regard to the possibilities of the future possible variation in such municipal assessment Acts by the legislatures they were calling into being, had regard to mere economic theories in using the term "direct taxation within the province," for the master spirits among them had taken part in enacting these municipal assessment Acts.

Is it conceivable that it was intended to give to the creations, prospectively in the power of provincial legislatures, as all municipal institutions were to be and to become liable to be in fact increased by them in importance, and taxing power, and assigned wider powers of taxation than each of such legislatures was being assigned for its own purposes? Or, is there to be applied the still more absurd alternative, that thenceforward all taxation, which political economists of the time deemed to be indirect, were to be eliminated from municipal taxation?

I hold neither of these alternatives should be adopted as expressive of the intention of those using in the British North America Act the term "direct taxation" to limit the operation of the power so conferred, to the meaning of the word "direct" within the lines laid down by any political economist.

This is not the place for an essay on the subject.

I merely desire to point out how dangerous it is to question the authority to tax land as a source of

provincial revenue, and how thoroughly illusory must be the dependance, solely upon some of the best of philosophic theories in political economy, as the only or even chief means of interpreting the language used by very able and practical statesmen in framing this division of the powers of government.

And let us never forget that the home parliament in that enactment was but trying to correctly appreciate and execute the purposes dictated by the then mode of Canadian thought, and that the expressions therein ought to be interpreted as far as possible in accord therewith.

No Canadian who lived through those strenuous times is likely ever to discard that point of view unless and until by due constitutional methods another has been substituted therefor.

I admit that whilst rejecting such guiding lines in the sense of their being obligatory and finally determinative of any such question as raised herein, they may well be casually as it were, considered as an element proper for consideration along with other possible features, in the way which has been done in some of the cases in which they have been used or incidentally referred to.

To sum up: The purpose of the provision now in question was to assign to each province the direct use "within the province" of the taxing power, just as fully as possessed by any other autonomous state, in relation to all those subjects or subject matters assigned exclusively to the several provincial legislatures; saving the use of those taxing powers which were being assigned either expressly or by clear implication, exclusively to the dominion parliament. That parliament had, subject thereto, for any of its purposes,

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specifically assigned to it any mode or system of taxation.

The legislature of the province of Quebec is exercising or asserting the right to exercise just such powers as other states have, so far as relevant to the particular subject matters in question, assigned to its exclusive jurisdiction.

Whether or not the power is justly asserted in some cases is not for us herein to determine or perhaps even to pass upon, for we cannot remedy the possible evil of double, or possibly double, taxation. Yet I may be permitted to suggest that an examination of the doctrine of private international law, by which the domicile of the deceased has been made the basis of so much, as grouped in the judgment of Lord Chancellor Westbury in *Enohin* v. *Wylie*, (1) it might and possibly may for the purpose of avoiding such an undesirable result, determine the line to be observed.

Sovereign states may be doing the very same thing. If this assertion of power on their part is unjust, the remedy is to be sought by other means than a denial of jurisdiction to our provinces, which would only help to perpetuate the evil by handing over to foreign states alone the determination of a just or unjust basis for settling such questions.

I feel that I may profitably add a few words relative to *Smith* v. *The Provincial Treasurer of Nova Scotia*, (2) which seems, I respectfully submit, to have led to some confusion of thought herein.

I may be permitted to point out that in some of the provincial legislation which has come before this court in the attempts to deal with the problem of succession duties, the legislature has failed to use such approp-

(1) 10 H.L. Cas. 13. (2) 58 Can. S.C.R. 570.

riate and comprehensive language as lies in the meaning of the words "transmission within the province."

Hence in trying to get at their meaning resort has had to be had to the appropriate legal maxims and decisions and other statutes to see if when applied to the words used they can be held to comprehend such transmission as taxable by another name.

In like manner, by reason of probate not being always needed in Quebec, the illustrations drawn from decisions relative to the imposition of a probate duty, may not be so apt when applied to a Quebec case as in those arising elsewhere. Yet as perhaps the earliest and most apt illustration of what might be meant by taxation within a country and made the basis of a direct tax, decisions resting upon a probate duty are serviceable. The relative amount of the tax imposed does not affect the principles upon which it rests or the right to impose it.

The mere name seems to some persons to signify everything and hence whilst recognizing a probate tax as valid, they refuse to so recognize a tax resting upon same basis when called a succession or death duty tax.

As an instrument of government the British North America Act requires not only attention to the genesis of the frame thereof, and the growth of the law which it recognizes as existent, but also the application of a wider vision and more comprehensive and accurate grasp of what is thereby dealt with than is evident in such distinctions.

Is it necessary to call this tax on transmission a probate duty in order to render it effective? And, to make it clear that it is a direct tax, for provincial revenue purposes, is it necessary to take all that which probate or other like courts deal with under the direct

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supervision of provincial government? I think not. Let us grasp the realities even though presented in the garb of what seem to the court below to be a mere "abstract concept" for the authority endowed with the taxing power is apt and entitled to be fertile in resources for the mode of its exercise.

I think the appeal should be allowed with costs.

DUFF J.—This appeal raises a question which in this court was supposed to be represented by the appeal in *Cotton's Case* (1) The discussion was, in that case, without practical effect because it was held in the Privy Council that it all proceeded upon an erroneous hypothesis respecting the scope and meaning of the statute under consideration.

The question concerns the authority of the province when professing to exercise the legislative power conferred by section 92, paragraph 2, of the British North America Act, the power, that is to say, to

> make laws in relation * * * direct taxation within the province in order to the raising of a revenue for provincial purposes;

and is whether by virtue of this authority the province can exact death duties payable in respect of the transmission of personal property upon the death of a person domiciled in the province, notwithstanding the fact that such personal property has a situs outside the boundaries of the province.

In *Cotton's Case*(1) I gave my reasons for thinking that this question ought to be answered in the affirmative. I still think that those reasons afford adequate ground for that conclusion and I shall, of course, not repeat them now. But there are one or two points I should like to emphasize.

(1) 1914 A.C. 176.

One of these is the fact that by a practice almost uniform in common law jurisdictions—a practice embodied in the law of Quebec by statute in 1866—the law of the situs takes (as regards movables) its rules of succession from the law of the domicile; that this practice had for a long time been in force at the time of the passing of the British North America Act, and further that the existence of this practice is and has been generally held to be a sufficient ground for considering that the legislative authority of the domicile is acting within its proper sphere in levying duties upon the beneficial surplus of all movables, wherever situate, comprised in the succession.

Strictly, of course, where the situs is outside the territory of the domicile, the law of the domicile has no operation within the territory of the situs and the beneficiary who acquires an interest in, e.g., a tangible chattel having such a situs acquires nothing directly through the law of the domicile; but it would not be difficult to furnish a list of authorities to shew that lawyers as well as legislators have persistently refused to treat these matters from this point of view exclusively.

Emphasis is sometimes laid upon the fact that the benefit is a benefit * * * derived from the law of the domicile, see, e.g., *Wallace* v. *Attorney General*, (1) per Lord Cranworth. In other cases *mobilia sequuntur personam* and the ascription of a national situs to the movable succession at the place of the domicile is treated as the ground of jurisdiction, as by Lord Herschell in *Colquhoun* v. *Brooks* (2).

And the sum of the matter is admirably stated by Mr. Justice Holmes in *Bullen* v. *Wisconsin*. (3)

(1) 1 Ch. App. 1. (2) 14 App. Cas. 493 at p. 503.
(3) 240 U.S.R. 625, at p. 631,

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The power to tax is not limited in the same way the power to affect the transfer of property. If this fund had passed by intestate succession it would be recognized that by the traditions of our law the property is regarded as a universitas the succession to which is incident to the succession to the persona of the deceased. As the States where the property is situated if governed by the common law, generally recognize the law of the domicile as determining the succession, it may be said that, in a practical sense at least, the law of the domicile is needed to establish the inheritance. Therefore the inheritance may be taxed at the place of domicile.

These principles have been considered to be validly applied in the fiscal legislation of a colony. *Harding* v. *Queensland* (1); *Re Tyson* (2); and there can be no doubt, I take it, that prior to confederation the old province of Canada or the province of N.S. could have enacted such legislation validly.

In *In re Tyson* (2) Griffith C.J., said at p. 37:

It was contended that such legislation was beyond the province of a colonial legislature. The powers of the legislature of this colony, at any rate, have only one fetter. That is to say, their legislation only extends within their boundaries; but as international law treats the personal property of persons who die domiciled in Queensland as being in Queensland, it is no transgression of that rule to pass an Act providing that duty shall be payable upon it. In another sense there is, of course, another fetter on the legislative powers of the colony, and that is that the colony may not make a law which is directly contrary to a law of the United Kingdom extending to Queensland. Beyond these two I do not know that there is any limit at all, and we have to enforce the laws as we find them.

When this practice is considered and the words "taxation within the province" are read in the light of it, they must, I think, be held to be comprehensive enough to authorize the enactment of such legislation.

There is a broader ground upon which it might be forcibly contended that such enactments when passed by a Canadian province can be sustained. I think the words "within the province" are capable of being

(1) [1898] A.C. 769. (2) 10 Queensland L.J. 34.

read as merely declaratory of the principle that legislation of a provincial legislature enacted under the power conferred is operative only within the territorial limits of the province. The words "within the province" it may be observed, are not to be found in the Quebec Resolutions; and these Resolutions may properly be looked at for the purpose of construing ambiguous expressions in the British North America Act; *Eastman Co. v. Comptroller General.* (1)

The language of the paragraph in the Quebec Resolutions upon which the second paragraph of section 92 is founded assuredly affords no indication that the provinces who agreed to the resolutions had any intention of restricting the existing power of direct taxation or of accepting a grant of power of direct taxation more restricted than the existing power; the reservation of the right to levy certain export duties appears to have been a concession to one of the provinces which was eventually abandoned.

Some support for this interpretation might perhaps be found in the *Bonanza case.* (2) Their Lordships appear in that case to have held in effect that the office of the words "with provincial objects" in No. 11 of section 92 is not to delimit a class of companies (companies with provincial objects) for the incorporation of which the provinces are empowered to legislate; but that these words were inserted for the purpose of making it clear that companies incorporated in the execution of this power—while within the province they enjoy such powers and rights as they possess by virtue of provincial legislation—can acquire and enjoy powers and rights beyond the province only by force of extra-provincial recognition

(1) [1898] A.C. 571 at pp. 573-4. (2) [1916] 1 A.C. 566.

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or grant; in other words, the phrase "for provincial objects" merely denotes that in legislating upon the subject "incorporation of companies" the province legislates for the province alone. See pp. 578, 583-4.

In this view subject to the condition implied in the words "direct taxation" and subject to any exemptions established by the Act the legislative power of the province in respect of taxation would only be limited by virtue of the principle that it is a power to make laws on that subject for the province and would not be less ample than the power possessed by the provinces before the Union.

The other question requiring from me a single observation concerns the topic of "direct" and "indirect" taxation. I think Lord Moulton's reasoning does not apply to the provisions of the statute as they now stand. The notary, executor, etc., is only responsible in his representative capacity and then only to the extent of the property of the defaulting beneficiary in his hands against which judgment can be executed. He is treated as custodian and compelled to deliver up the keys.

In *In re Muir Estate* (1) I stated too broadly as I now conceive it, the effect of the judgment in *Cotton's Case* (2) although the statute then discussed was within the principle of *Cotton's case* (2) since the executor or administrator was made personally responsible in the first instance for the payment of the duty to the extent of the assets of the estate coming into his hands.

The appeal should be allowed.

ANGLIN J.—Amongst other assets the estate of the late Honourable John Sharples, who died domiciled in

(1) 51 Can. S.C.R. 428. (2) [1914] A.C. 176.

the Province of Quebec, in July, 1913, comprised shares in various companies (most of them foreign) whose head offices were not in that province, of which the aggregate value was $213,039.75. The defendant Margaret Alleyn-Sharples is the universal legatee in ownership. The plaintiff, as collector of provincial revenue, sues to recover succession duties in respect of this property.

Art. 1387(b) of the R.S.Q., as enacted by 4 Geo. V., c. 10, reads as follows:

> 1387 (b). All transmissions within the province, owing to the death of a person domiciled therein, of movable property locally situate outside the Province at the time of such death, shall be liable to the following taxes calculated upon the value of the property so transmitted, after deducting debts and charges as hereinafter mentioned.

In the French text for the phrase "locally situate" we find the single word "situés." The only possible question of construction arises on these words. If they do not exclude property having no physical situs, the intention to impose taxation on, or in respect of, the property in question is indisputable.

In *Cotton* v. *The King*, (1) the phrase "locally situate" is applied to such property (pp. 186 and 188). For convenience I refer to my discussion of it on the same case. (2) In the case of tangible property it no doubt means "physically situate;" in the case of intangible property I regard it as intended to denote the attribute of locality which such property possesses according to some recognized rule of law, such as those applied in *Lovitt's case* (3) and in *Smith* v. *Provincial Treasurer of Nova Scotia* (4) respectively.

Of the assets in question 14 shares of the capital stock of the Northern Crown Bank, valued at $1,190,

(1) 1914 A.C. 176.
(2) 45 Can. S.C.R., 469, at p. 521.
(3) [1912] A.C., 212, at p. 218.
(4) 58 Can. S.C.R., 570.

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and 1,227 shares of the capital stock of the Union Bank of Canada, valued at $169,326, would, according to the opinion of the majority of this Court in the *Smith Case* (1) (Davies C.J., Idington and Brodeur JJ; The Chief Justice, however, acceding to this view only if "the domicile of the decedent is (not) the determining factor") have their situs at the place in the province of Quebec where the same were registered and transferable, which would render them subject to taxation under Art. 1375 of the R.S.Q., as enacted by 4 Geo. V., c. 9, unless excluded from its operation by the restrictive description "actually situate"–"réellement situé"—of art. 1376 of the R.S.Q.

The situs of the rest of the property in question, however, is admittedly foreign, unless the maxim *mobilia sequuntur personam* should be deemed to give it a situs in Quebec for purposes of succession duty taxation. Indeed the plaintiff makes no claim that any of the property in question falls within Art. 1375 R.S.Q. On the contrary, it is common ground that, if taxable at all, it is under Art. 1387 (b) R.S.Q., and as

movable property locally situate outside the province.

We are therefore once more confronted with the question whether the imposition of succession duties in respect of such property is within provincial legislative jurisdiction—is "direct taxation within the province."

In the present Quebec statutes some features found by the Judicial Committee in the former legislation and held in the *Cotton case* (2) to render it obnoxious as imposing indirect taxation have been carefully eliminated, or, to speak perhaps with greater precision, their

(1) 58 Can. S.C.R. 570. (2) [1914] A.C. 176.

existence has been expressly negatived. (Arts. 1387 (g) and 1380 R.S.Q.) For the present the views enunciated by their Lordships as to the indirectness of the taxation imposed by the former legislation must be loyally accepted; but, may I say with deference, it will not occasion surprise in this country if, whenever it may again become necessary to delimit the federal and provincial legislative jurisdiction in this field, some of them, based on what, with respect, seems to have been a misconception of the provisions of the Quebec statutes, may be dealt with by their Lordships, somewhat in the same way as they dealt in *Cotton's Case* (1) with the reasoning of Lord Collins in *Woodruff* v. *Attorney General for Ontario*. (2) The taxation here in question is in my opinion direct. When not paid by the beneficiary intended ultimately to bear it, the tax is payable only out of property to which he is entitled in the hands of the executor, trustee or administrator. It falls within Mill's classic definition, the applicability of which to the phrase "direct taxation" in s. 92 of the British North America Act their Lordships have said "is no longer open to discussion." P. 193.

I adhere to the opinion that the words "within the province" in s. 92 (2) of the British North America Act were intended to be restrictive of the right of taxation of each provincial legislature so as to prevent its trenching on the like exclusive right of the legislature of any sister province or upon the domain of a foreign state, just as the word "direct" was designed to preserve intact for the Dominion Parliament the field of indirect taxation. One purpose of the restriction imposed by the words "within the province" was, in my opinion, to preclude

(1) [1914] A.C. 176 at p. 193. (2) [1908] A.C. 508.

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identical taxation of the same subject in two or more provinces; and this limitation of legislative power cannot be frustrated by any attempt to change the situs of property by declaratory legislation, or to disguise the nature of the taxation really imposed by giving to it a name not properly descriptive of it, or by a disclaimer of an intention to exceed statutory powers.

Personally I remain of the opinion which prevailed in *Woodruff's Case*, (1) that imposing the tax on the transmission of movables "situate outside the province"—"on the devolution or succession," as Finlay A.G., there put it *arguendo*,

> involves the very thing which the legislature has forbidden to the province—taxation of property not within the province (p. 513),

that the real incidence of the tax rather than the form given it must be considered in determining whether it is or is not taxation within the province and that s. 92 (3) of the British North America Act should be taken to authorize taxation

> only where the real subject of the tax—whether person, business or property—is within the province

—and I cannot add anything to the statement which I made in the *Cotton Case* (2) of the arguments that seem to me to warrant those views.

In the recent case of *Smith* v. *Provincial Treasurer of Nova Scotia* (3) without explicitly saying so I deferred to what I conceived to be the condemnation of them implied in the Judicial Committee's comment in *Cotton's Case* (4) on the *Woodruff Case* (1) and in the fact that the judgment of their Lordships proceeded on the ground of indirect taxation, rather than on the

(1) [1908] A.C. 508.
(2) 45 Can. S.C.R., 469.
(3) 58 Can. S.C.R., 570.
(4) [1914] A.C. 176 at p. 196.

foreign situs of the property which was most strongly pressed by the appellants. I had perhaps failed in the *Standard Trusts Co.* v. *Treasurer of Manitoba* (1) to give to this virtual overruling of *Woodruff's Case* (2) so far as it affected successions the full weight to which further consideration led me to think it entitled. Thus accepting what I conceived to be the opinion of the Judicial Committee that provincial legislation imposing succession duties on foreign movables of a domiciled decedent was not *ultra vires*, I endeavoured in *Smith's Case* (3) to state what, from my point of view, were the most plausible arguments in support of the applicability of the maxim *mobilia sequuntur personam* in justification of such legislation.

In the present case the transmission itself admittedly took place under and by virtue of Quebec law and in that sense "within the province." If the transmission may be regarded as the subject thereof, the taxation would clearly be within provincial legislative jurisdiction. There is no doubt a body of authority, much of it conveniently collected in a recent American publication cited by the appellant, Gleason & Otis on "Inheritance Taxation", in favour of that view. But, unless *Lambe* v. *Manuel*, (4) may be so considered (I think it cannot) no English authority has been cited for it.

But whether the tax now in question should be regarded as imposed on the transmission itself or on the property on the occasion of its transmission, it is unquestionably a succession duty in the strict sense of that term as understood in England. This Court has so recently held in *Smith* v. *Provincial Treasurer*

(1) 51 Can. S.C.R. 428.
(2) [1908] A.C. 508.
(3) 58 Can. S.C.R. 570.
(4) [1903] A.C. 68.

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of Nova Scotia, (1) that it is competent for a provincial legislature to impose such duties on the movables of a domiciled decedent situate outside the province that further examination of that question here seems futile—if, indeed, it is not entirely precluded. Following that decision therefore, I would allow this appeal with costs here and in the Court of King's Bench and would restore the judgment of the learned Chief Justice of the Superior Court.

MIGNAULT J.—This is an appeal by the collector of provincial revenue for the district of Quebec, in the province of Quebec, from the judgment of the Court of King's Bench (appeal side), which reversed the judgment of the Superior Court (Lemieux C.J.) (2) and dismissed the action which the appellant had taken against the respondents in recovery of $14,828.46, for succession duties and interest alleged to be due on shares of the aggregate value of $213,039.75 in a large number of companies whose head offices are outside the province of Quebec. The respondent, Mrs. Sharples, is sued as well personally as in her quality of testamentary executrix of the late Honourable John Sharples, in his lifetime of the city of Quebec, and the other respondents are sued as executors of the said Honourable John Sharples, and the prayer is that Mrs. Sharples, personally, be condemned to pay the said sum, and that the judgment be declared executory against all the respondents, in their quality of executors, on the property or moneys in their possession belonging to the beneficiaries of the succession of the late Mr. Sharples.

(1) 58 Can. S.C.R. 570. (2) Q.R. 55 S.C. 301.

The Superior Court, (1) applying the rule *mobilia sequuntur personam* gave judgment to the plaintiff, but this judgment was reversed by the Court of King's Bench for the following grounds, the Chief Justice and Carroll J. dissenting:

Considering that the powers of the Provincial Legislature are not plenary but limited to "direct taxation within the province" (British North America Act, section 92, s.s.2), and that any attempt to levy a tax on property locally situate outside the province is not "taxation within the province" and is beyond the competence of the provincial Legislature.

Considering that the taxation of transmissions within the province of property locally situate outside the province is an attempt to do indirectly that which the Legislature is forbidden to do directly and is in effect taxation of property not within the province.

Considering that the property and shares in question in this case are locally situate and have a situs outside the province.

Considering that there is error in the judgment appealed from, to wit, the judgment of the Superior Court sitting in and for the District of Quebec herein rendered on the twenty-second day of November, 1918, maintaining the action of the Respondent es-qualité:

The Court doth maintain the appeal, doth reverse the said judgment appealed from, and now giving the judgment which the Superior Court ought to have pronounced, doth declare the statute 4 Geo. V., ch. 10, upon which the present action is founded, to have been and to be ultra vires of the Quebec Legislature and doth dismiss the action of the respondent es-qualité with costs in the Superior Court and costs of the appeal against the respondent es-qualité in favour of the Appellants.

The legislation in question is contained in three statutes passed in 1914 by the Quebec Legislature, being chapters 9, 10 and 11 of 4 Geo. V.

Chapter 9 imposes succession duty on property movable and immovable, the ownership, usufruct or enjoyment whereof is transmitted owing to death, and it defines "property" as including

all property, movable or immovable actually situate (in the French version, "réellement situé") within the province, and all debts which were owing to the deceased at the time of his death, or are payable by reason of his death, and which are either payable in the province, or are due by a debtor domiciled therein; the whole whether the deceased

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at the time of his death had his domicile within or without the province, or whether the transmission takes place within or without the province.

Chapter 10 imposes succession duty upon

all transmissions within the province, owing to the death of a person domiciled therein, of movable property locally situate outside the province (in the French version "biens meubles situés en dehors de la province") at the time of such death.

It also states that

all debts owing to the deceased at the time of his death, or which are payable by reason of his death, and which at the time of such death were payable outside the province, are included in the movable property taxable in virtue of this section.

Chapter 11 is a declaratory statute, the object of which is to declare that these taxes are direct taxes within the meaning of section 92 of the British North America Act. I do not think that this statute need be further considered, for if these taxes are really indirect taxes, the express declaration that they are direct would not change their nature.

Taking now the scheme of taxation adopted by the Quebec legislature as a whole, it taxes:—

1. All property, movable and immovable, actually situate ("tout bien mobilier ou immobilier réellement situé") within the province, the ownership, usufruct or enjoyment whereof is transmitted owing to death, and all debts which were owing to the deceased at the time of his death, or are payable by reason of his death, and which are either payable in the province, or are due by a debtor domiciled therein, the whole whether the deceased at the time of his death had his domicile within or without the province, or whether the transmission takes place within or without the province (chapter 9);

2. All transmissions within the province, owing to the death of a person domiciled therein, of movable

property locally situate outside the province at the time of such death, including all debts owing to the deceased at the time of his death, or which are payable by reason of his death, and which at the time of such death were payable outside the province (chapter 10).

It is of course obvious that the rule *mobilia sequuntur personam*—which is laid down as a general rule subject to certain exceptions by article 6 of the Quebec Civil Code—may be excluded by the use of apt and clear words in a statute for the purpose (per Lord Robson in *Rex* v. *Lovitt* (1). I cannot help thinking that this has been done by these two statutes, the first of which taxes property, movable and immovable, *actually* situate within the province, and the second imposes the tax on the transmission within the province of movable property *locally* situate outside the province. In other words, the actual or local situation of movable property, rather than its situation by virtue of the rule *mobilia sequuntur personam*, is considered for the purpose of succession duties. This would suffice to distinguish this case from *Smith* v. *The Provincial Treasurer for Nova Scotia.*(2)

The Court of King's Bench holds that the province cannot tax property situate outside the province, and that to tax the transmission within the province of property locally situate outside is an attempt to do indirectly that which the legislature is forbidden to do directly and in effect is taxation of property not within the province.

This reasoning involves a major and a minor proposition. The major proposition, that the province cannot tax property outside the province, is in my opinion self evident. The minor proposition, that the

(1) [1912] A.C. 212, at p. 221. (2) 58 Can. S.C.R. 570.

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province cannot tax the transmission within the province, by succession, of property locally situate outside, and that such taxation is equivalent to taxing the property itself, appears to me very questionable. The transmission is not something that cannot be distinguished from the property transmitted. It is a right, derived under the law of the province, to succeed to property left by a testator or an intestate, and the province which grants this right can require the payment of a tax as a condition of its grant, such tax being a tax imposed not on the property itself but on the right to succeed to it.

I may add that the taxing of the transmission, as distinguished from a tax imposed upon the property transmitted, has been the outstanding feature of all the Quebec Succession Duty statutes since 1902, chapter 9 of the statutes of 1914 being the first statute to tax the property transmitted, while in chapter 10 we find the familiar form of a tax imposed upon the transmission. The Quebec civil code moreover distinguishes between the transmission and the property transmitted, the term succession being supplied to either (art. 596 C.C.) and there is no doubt in my mind that they are entirely distinguishable.

The only other observation I desire to make on this branch of the case is that the Quebec statutes differ essentially from the Manitoba Succession Duty law, considered by this court in *Standard Trust Co.* v. *Treasurer of the Province of Manitoba.* (1) This Manitoba statute (4 & 6 Ed. VII, ch. 45, sec. 4) expressly renders subject to succession duty movable property locally situate outside the province

(1) 51 Can. S.C.R. 428.

when the owner was domiciled in the province at the time of his death. Had the Quebec statute done the same, I would have had very grave doubts as to its validity.

The only other question discussed at the argument—but on this point the formal judgment of the Court of King's Bench expresses no opinion, although it is referred to in the opinions of the learned judges—is whether this tax is an indirect one and therefore beyond the powers of the legislature.

Their Lordships of the Privy Council in *Cotton* v. *the King*, (1) so held with regard to the Quebec Succession Duty Act in force before the enactment of the statutes of 1914, and if these statutes do not differ essentially from the former Act, the question of their validity must be answered in conformity with the judgment of the Judicial Committee. The test of an indirect tax, derived from the definition of John Stuart Mill, was also authoritively adopted by their Lordships and is whether the tax in question

> is demanded from one person in the expectation that he shall indemnify himself at the expense of another; such as the excise or customs.

After a careful examination of the Quebec statutes enacted in 1914, my opinion is that the only person personally liable to pay the succession duty imposed upon a legacy is the person in whose favour such legacy is made. The executor when called on to pay such tax—and he can be required to pay it only when he is in possession of the property bequeathed, or, in other terms, a judgment rendered against the executor can be executed against such property only—is sued merely in his representative capacity, and in no case

(1) [1914] A.C. 176.

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can it be truly said that the succession duty is demanded from the executor in the expectation that he shall indemnify himself at the expense of another, that is to say at the expense of the legatee. As I construe these statutes, the executor can never be required, representatively or otherwise, to pay succession duty on the transmission of property or money which has never come into his possession. The tax is personally due by the beneficiaries, not collectively but distributively, that is to say each beneficiary is personally liable for the tax due in respect of the property bequeathed to him and for no more. It may well be, in the case of a special bequest of property locally situate outside the province, when made to a person not domiciled in Quebec, that the government may be unable to collect the tax, for the beneficiary possibly may obtain possession from the local courts, without reference to any Quebec authority, and no judgment can be enforced against the executor except on the property bequeathed. The other beneficiaries are liable for the tax imposed on their shares only, and the executor is never held except when in possession of the property. All this shows that the present law so differs from the former statute as to render it impossible to come to the conclusion that the tax is an indirect one, and therefore I am respectfully of the opinion that the decision in *Cotton* v. *The King* (1) is clearly distinguishable.

With the evil of double taxation a court of law has no powers of interference. It is a matter for the consideration of the legislatures themselves, which may so exercise their powers of concurrent taxation

(1) [1914] A.C. 176.

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as to render this country an unattractive one for foreign investors. But of course the remedy is in their hands and not in ours.

In my opinion, for the reasons I have stated, the appeals should be allowed, the judgment of the Court of King's Bench set aside and the judgment of the Superior Court restored, with costs here and in the Court of King's Bench.

Appeal allowed with costs.

Solicitor for the appellant: *Louis S. St Laurent.*

Solicitors for the respondent: *Pentland, Gravel & Thompson.*

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*Feb. 3.

S. O. BAILEY AND OTHER (DEFENDANTS). } APPELLANTS;

AND

THE CITY OF VICTORIA AND THE ATTORNEY GENERAL OF BRITISH COLUMBIA (PLAINTIFFS). } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Highway—Dedication—Intention—Acceptance—Public user—Registration—Pending application — Priorities — By-law— Publication — "Municipal Act," R.S.B.C., 1911, *c.* 170, *s.* 53, *s.s.* 145a, 176, *s.s.* 140, 147, 399—"*Land Registry Act,*" *R.S.B.C.*, 1911, *c.* 127, *s.s.* 22, 34, 104, 114.

The second paragraph of s.s. 176 of s. 53 of the "Municipal Act" provides that "every by-law * * * shall, before coming into effect, be published in the Gazette * * *"

Held, that this provision implies the publication of the by-law *in extenso*. *City of Victoria* v. *Mackay* (56 Can. S.C.R. 524) followed.

Held, also, Idington and Brodeur JJ. dissenting, that, under the circumstances of this case, the necessary conditions to establish a public highway by dedication were not satisfied.

Per Duff, Anglin and Mignault JJ.—In order that a public highway may be established by dedication, two concurrent conditions must be satisfied: there must be on the part of the owner the actual intention to dedicate; and it must appear that the intention was carried out by the way being thrown open to the public and that the way has been accepted by the public.

Per Duff, Anglin and Mignault JJ.—Such acceptance by the public can only be established by proof of public user, or, *per* Duff and Anglin JJ. by the act of some public authority done in the execution of statutory powers.

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*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

Per Duff, Anglin and Mignault JJ.—The Registrar having declined to act upon the city respondent's application for registration of its title and no steps having been taken by it to appeal from this refusal under s. 114 of the "Land Registry Act," it is not now open to the respondent to allege that the appellant's mortgage, though registered after such application, must be taken subject to a *pending* registration. *National Mortgage Co.* v. *Rolston* (59 Can. S.C.R. 219) followed.

Per Idington and Brodeur JJ. dissenting.—The deed of sale by the owner to the city respondent, passed for the purpose of constituting the land sold part of a highway, being an abandonment of the property to the public use, and the payment by the respondent of the purchase price being an acceptance by the public or someone in authority to represent it, constitute a dedication of the land for the use of the public as a highway.

Judgment of the Court of Appeal ([1919] 3 W.W.R. 19) reversed, Idington and Brodeur JJ. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming the judgment of Murphy J. at the trial (2) and maintaining the respondent's, plaintiff's action.

The action was brought by the city respondent against the appellants to clear up the city's title to a strip of land required for the widening of Pandora Avenue in the city of Victoria. A by-law was passed expropriating that land, the property of one Moody. The "Municipal Act" enacted that such a by-law should be published in the Official Gazette and in a local newspaper. Instead of publishing a copy of the by-law, the respondent published a notice containing a statement of some of its salient provisions. The respondent later on served Moody with a notice to treat, paid him the compensation claimed by him and took from him a deed of the land. The respondent applied for registration of its title, but the Registrar declined to act upon it; and the respondent made no appeal against this refusal. A year later, Moody

(1) [1919] 3 W. W. R. 19. (2) [1919] 1 W.W.R.191

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mortgaged his land, including the strip in question in this case, to the appellant, who registered in due course his mortgage in the land registry office. Subsequently to such registration, the respondent completed the registration of its title and proceeded with the actual work of the widening of Pandora Avenue, removing the fences and verandah encroaching on the strip of land and also building a sidewalk. The respondent assert rights, as against the appellant mortgagee, to the strip of land in question on three grounds: 1. by expropriation, provided the by-law has been published according to statute; 2, by grant from Moody, provided the respondent's application to the Registrar for registration of its deed was still "pending" when the appellant registered his mortgage, and 3, by dedication, provided the necessary conditions for such were satisfied.

J. A. Ritchie and *Leitch*, for the appellant.

Mayers, for the respondent.

IDINGTON J. (dissenting).—The respondent is a municipal corporation, created as a town by a British Columbia statute in 1867 (which was republished in the Revised Statutes of British Columbia 1871), and is endowed with all the powers given thereby, so far as not modified by later legislation, and was later constituted a city.

Its council proposed, in the year 1911, or thereabout, to widen Pandora Ave., one of the streets of said City, and first by resolution and later by a by-law declared the said street should be widened according to a plan prepared by its engineer.

That by-law was followed by another expropriating

by-law which never came into effect in law by reason of the failure to follow the requirements of the relevant statute as to publication which we held in *City of Victoria* v. *Mackay*, (1) to be an imperative condition precedent to such a by-law becoming effective.

I cannot accept the suggestion submitted in argument that a mere notice, such as was published, can be held a due compliance with the statute.

The respondents' counsel proceeded to carry out the said purpose of widening said street by procuring from one Moody, the owner of the land in question, a deed dated 23rd. of May, 1912, of the strip thereof so needed for that part of the street fronting his lot, and paid him $6,200.00 therefor.

The deed recited as follows:—

> WHEREAS the Corporation of the City of Victoria, under the authority of the local improvement General By-law and Amendments thereto, and of certain by-laws relating to the particular work, have expropriated land for the purpose of widening Pandora Avenue from Douglas Street to Amelia Street;
>
> AND WHEREAS the said Party of the First Part is the owner or has some interest in the said lands hereinafter mentioned:
>
> AND WHEREAS the said lands hereinafter mentioned are necessary for the purpose of the said widening;

and then in consideration of $6,200 (the receipt of which is acknowledged) granted the said strip now in question to the respondent.

Moody thereby covenanted to execute such further assurances as necessary, and released to said corporation all his claims on said land.

The said price was duly paid out of the proceeds of the loan obtained to carry out the work of widening and paving on said street.

Stress was laid in argument upon the later use of said strip as part of the street, and also upon steps

(1) 56 Can. S.C.R. 524.

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taken and orders got validating said loan, and impliedly validating, it was urged, the whole proceeding.

In my view, the alleged implication of validating said by-law is ineffective save so far as needed to protect the debenture holders in their rights as against respondent and those ratepayers liable for the loan so got, to carry out the local improvement in question.

The fundamental question raised, upon which the claim of the respondent or either of them rests, is whether or not the said deed from Moody to the city respondent, and the payment of the consideration therefor by the said city, constitute a dedication of the said strip for the use of the public as a highway.

Dedication requires an abandonment to the public use of any property or part of the dominion over same by the owner and an acceptance thereof by the public, or someone in authority to represent it, in giving such acceptance.

I am quite unable to understand how it can be maintained that a deed of grant which expressly gives the entire property for the purpose of constituting it part of a highway and accepts voluntary compensation therefor, can be held less than a dedication, or that a duly constituted authority having power to deal with the question in paying the price can be said not to have accepted it.

The mode of giving, or the circumstances of its acceptance, and the proof of both as well as the extent of the gift, have given rise to many questions of law and fact, leading judges and writers upon these subjects to use, according to the exigencies of each case dealt with, more or less comprehensive language, in dealing therewith, respectively.

But the broad comprehensive lines of the principles

upon which dedication rests do not permit of rights created in accord therewith being frittered away by being limited to the appropriate language used by judges in some or even many of a very large class of cases falling within said principles, when accidentally defining the rights of each party in relation to the existence of possibly a very narrow right or power resting on said principles.

It seems to me idle to argue that because the by-law was ineffective as a means of enforcing expropriation therefore all the acts done by parties to such an express grant, must be treated as void.

Clearly the sole question which need be considered herein is whether or not there has been an effective giving of the land for the specific purpose of being used as a highway, and acceptance of that given, for the purpose claimed when that donated had been paid for by the donee or grantee and thus the grant became irrevocable.

The suggestion that a gift without any consideration is necessarily implied in the doctrine and that valuable consideration having passed renders the doctrine inoperative, is most remarkable.

Though it has been applied most frequently after long use by the public, when there did not appear to have been any consideration, that does not justify the assumption that where consideration having been paid then there is no place for the application of the doctrine.

The case for dedication is often much stronger when there has been an express or implied consideration. The case of dedication by a plan is one where certainly there is an implied consideration. There the consideration is the expectation of the benefits to

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be received, by virtue of sales made by the proprietor to parties expected to purchase one or more of the lots set out in the subdivision plan, which is often revocable until use by the public of receipt of the expected consideration therefor, through the sale and purchase of some lot pursuant to the plan.

Then we have the case cited to us of *Cook* v. *Harris & al*, (1) where an express monetary consideration was given by neighbours desiring a dedication, and the owner gave a bond to the commissioners and it was held that even if the bond was invalid, yet the dedication was complete.

We have also the cases of *McLean* v. *Howland*, (2); *Fraser* v. *Diamond*, (3); *Reaume* v. *Windsor*, (4); supporting the same view as well as the dictum of high authority in the judgment in the case of *The Attorney General* v. *Biphosphated Guano Co.* (5)

There seems, I respectfully submit, a further confusion of thought in assuming that, because user is often relied upon in support of a claim of dedication, therefore until actual user there can be no dedication.

As pointed out by Buckley J. in the case of the *Attorney General* v. *Esher Linoleum Company, Limited*, (6) user is not dedication though in most of the cases dedication is proved by user.

The moment the consideration was paid and the land was conveyed, it thenceforward was devoted to the public for use as part of the highway and could not be used for any other purpose. Any one of the

(1) 61 N.Y., 448.
(2) 14 Ont. W.R. 509.
(3) 10 Ont. L.R. 90.
(4) 8 Ont. W.N. 505; 7 Ont. W.N. 647.
(5) 11 Ch. D. 327 at pp. 338-9.
(6) [1901] 2 Ch. 647 at top of p. 650.

public had than and ever since the right to use it as part of the street and no one could complain of such use.

The fact that the second by-law as an instrument designed to enforce expropriation was as such invalid, did not render it illegal in the sense that a fraudulent or criminal attempt taints all it touches. It was good and stood as a mere resolution.

In view of what had preceded it, that proposition is not absolutely necessary to maintain the actual acceptance by the council of the grant and thereby complete the dedication.

The question of the capacity of the respondent city to take, without a by-law, such a deed and accept thereby the grant and make it valid, is of graver import by reason of the curious language of the statute of incorporation which reads, in section 56, as follows:—

> The municipal council shall be capable of holding real estate and have the entire control of all corporate property.

The rather loose manner of expressing the power by designating the municipal council as the party to become vested, has caused me some concern; for it certainly could never have been intended by the legislature to vest the property in the council, but rather in the corporation of which the council is only the governing body.

I hold the capacity, though so expressed, to have been intended to enable the corporation acting through its council by mere resolution to take and hold real estate. I do so the more readily because the respondents claim in their factum that the city had such capacity, and no argument to the contrary has been presented by the appellants.

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It seems to be assumed by the course of the appellants argument that the by-law being, as such, ineffective, all else done in the way of executing the purpose of the city respondent must also be held void.

But if the city had, as I hold, the capacity to buy a road allowance without resorting to a by-law for expropriation, then that was done completely established the widening of the highway so far as that part in question herein is concerned.

The appellants rely on many Ontario cases, and some Quebec cases, where such projects for making or widening highways have quite properly been held, under the respective law applicable, invalid for want of a by-law.

In doing so they overlook the fact that the Ontario cases were decided under a municipal Act which expressly declared that the powers of the council shall be exercised by by-law when not otherwise authorized or provided for and that the like enactments in Quebec governed the decisions in that province, cited to us.

The British Columbia legislature adopted an entirely different conception and without rendering the by-law an imperative necessity in all cases enacted that the municipal councils might, in a long list of cases specified, if they chose to do so, enact by-laws for any of the given cases.

It was thus left open to the municipal council of respondent (Victoria) or any other similarly empowered to hold real estate, to proceed to constitute highways by the purchase of the right of way. Everything of that sort could thus be done by mere resolutions. Of course if driven to expropriation proceeding that would involve the necessity of passing a by-law.

And hence in this case if respondent city had to rely upon expropriation alone and had proceeded entirely thereunder and obtained Moody's title thereby, then it might well be held that in such a case the by-law being ineffective the whole proceeding would fail. But that not being the case and the deed having been got by virtue of a voluntary bargain, and presented for registration, the highway *pro tanto* was duly constituted. The failure of its non registration was entirely the fault of the registrar in whose hands it was for registration when Moody gave, inadvertently I suspect, a mortgage on this whole lot including that he had duly conveyed to the city.

I fail to find anything in the provisions of the "Land Registry Act" which can help the appellants as against either of the respondents asserting their respective rights to protect the public.

I do not think it is necessary to go through all the provisions of that Act to demonstrate that each of those relied upon is ineffective. Let us take the most drastic of all those provisions, which is contained in the amendment of the act by section 8 of ch. 36, passed 1st of March, 1913, which reads as follows:—

> Every certificate of indefeasible title issued under this Act shall, so long as the same remains in force and uncancelled, be conclusive evidence at law and in equity, as against His Majesty and all persons whomsoever, that the person named in such certificate is seized of an estate in fee simple in the land therein described against the whole world subject to.

This is subject to a number of express exceptions set forth in section 22 of ch. 127 of the R.S.B. C. being "The Land Registry Act."

Of these s.s. (e) specifies

> any public highway or right of way, water course or right of water or other public easement.

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If I am right in my conclusion that the right of way had been effectively constituted by what happened in way of dedication, how can this furnish any answer to the claim of the Attorney General maintained on behalf of the Crown which had always up to this enactment been wholly excepted?

I submit this does not as against him amount to anything in support of appellants on such facts.

Sections 4, 5 and 6 of the "Highways Act" (now R.S. B.C. 1911, ch. 99) are relied upon by respondents and I think rightly as to sections 4 and 5, which are as follows:—

4. All roads, other than private roads, shall be deemed common and public highways.

5. Unless otherwise provided for, the soil and freehold of every public highway shall be vested in His Majesty, his heirs and successors.

It seems clear that either the city or the attorney general representing the public must have a grievance and right to a remedy, and possibly both, under the peculiar circumstances of the case.

If either, then needless to pursue the inquiry.

The appeal should be dismissed with costs.

DUFF J.—The first point for consideration is this: Was by-law 1183 published within the meaning of s.s. 176 of sec. 53, ch. 170 R.S.B.C. 1911? In common usage "publication" as applied to a document means, I think, something more than the giving of public notice of the existence of the document and information as to where it may be found and inspected. "Publication" of a document or newspaper means, I think, according to common speech in the absence of a qualifying context, the publication of the document *in extenso*. I think too much importance ought

not to be attached to the fact that in other provisions of the Act the direction is that the council shall publish a copy. In addition to the clause under consideration there are sections of the statute, see e.g. sections 140 and 147 as amended in 1912, in which the council is directed to publish the by-law. These last mentioned provisions contemplate mainly the circumstances and needs of rural municipalities and it is difficult to suppose that in these sections the legislature is providing for publication in the limited degree which is now contended is sufficient under s.s. 176.

It should also be noted that s.s. 176 applies, of course, to rural as well as urban municipalities and that the legislature must have had in view some practical expedient for bringing home notice of the plans of the council to persons being interested, we may, I think, not unreasonably assume that the legislative intention is best interpreted by reading the words according to their ordinary meaning.

The next question is: Can by-laws 1151 and 1183 have effect in the absence of publication? The enactments of s.s. 176 are explicit and they have been authoritively interpreted by this court in *City of Victoria* v. *Mackay* (1), as imposing the requirement of publication as a condition of any by-law passed under the authority of them taking legal effect as such. It should be mentioned here that no very convincing reason was suggested why by-law 1151 is not subject to the requirement of publication. The point is not very material and it may be that by-law 1183 is complete in itself; it ought not to be supposed that the assumption that this by-law was not within the condition is approved by this judgment.

(1) 56 Can. S.C.R. 524.

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The respondent's counsel meets the difficulty by arguing that the by-laws are sustainable as enacted under the authority of another provision of the Act; the contention being that as regards by-laws passed under that authority the requirement of s.s. 176 in relation to publication is inoperative.

The provision invoked in support of this is s.s. 145a of sec. 53 and is in these words:—

> Sec. 53.—In every municipality the council may from time to time make, alter and repeal by-laws for any of the following purposes, or in relation to matters coming within the classes of subjects next hereinafter mentioned, that is to say:—
>
> (a) Subsection 145:—For accepting, purchasing, or taking or entering upon, holding and using any real property in any way necessary or convenient for corporate purposes, and so that the council may direct the taking or entering upon immediately after the passing of any such by-law, subject to the restrictions in this Act contained.

The reasons which have convinced me that this view is not the right one are these. Ch. 170 contains a number of provisions having a variety of purposes by which powers of compulsory taking are given explicitly to the council, in some cases some specific restriction being imposed while in others a specific procedure is laid down. As an example of a specific restriction, s.s. 166 may be referred to—a clause dealing with the construction of sewers in which authority to expropriate is given but the land to be taken is limited to such lands as the council may deem necessary for the purpose of "constructing the main sewer" and is not in any case to exceed "10 feet in width." In s.s. 176 we have a special procedure.

Whatever be the purpose served by s.s. 145 (a) there appears to be no reason for failing to give effect to the words "subject to the restrictions in this act contained" and the object of this part of the subsection at all events appears to be plain. The words are

put there no doubt in order to exclude the construction which is now put forward, the effect of which would be that by resorting to this general provision the council could in those cases which have been specially provided for, escape the inconvenience of observing the specific restriction laid down or the specific procedure prescribed.

I conclude that by-laws passed with the purpose and intended to have the effect expressed in by-laws 1151 and 1183 can only become operative in law when the procedure laid down in s.s. 176 is observed.

If follows that subject to the question whether the highway was or was not established by dedication, the discussion of which I postpone for the moment, the proceedings necessary to establish a street by by-law under the authority of the "Municipal Act" were not taken; that the proceedings necessary to authorize the expropriation of property for the purpose of opening a street were not taken; and consequently that the respondent corporation cannot maintain its action on the ground that a title to the lands in question was acquired compulsorily for highway purposes.

In these circumstances, it seems impossible to hold that the corporation can establish a title under its conveyance from Moody as against the registered mortgage of Bailey. When Bailey applied for the registration of his mortgage, when he received a certificate of incumbrances, when he made his advance there was not even an application pending for the registration of the title of the corporation under the conveyance from Moody. An application had been made, it is true, for registration of the title but it was supported only by the production of the by-law, and it appears to have been only an attempt to comply with

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the requirement of s.s. 176 which prescribes that after the publication of a by-law for expropriation passed under that subsection the municipality shall apply for the registration of its title and shall file a copy of the by-law.

It is quite true that this application was made long before the registration of Bailey's mortgage but for some reason it was never entered in the list of incumbrances and noted against Moody's property. Nevertheless, whatever may have been the delinquincies of the officials of the Land Registry Office in their dealings with this application, the corporation appears to be concluded by the fact that after the registration of Bailey's mortgage its application was refused. In these circumstances sec. 104 of the Land Registry Act appears to be conclusive against the appellant.

The Registrar having declined to act upon the application and no steps having been taken under sec. 114, it is not now open to the defendant corporation to allege that the appellant Bailey's mortgage must be taken subject to a pending registration (see *National Mortgage Co.* v. *Ralston*) (1); *Howard* v. *Miller* (2) it is to be observed, was a decision relating to the effect of the registration of an agreement to purchase land and turned upon the point that on the facts disclosed the respondent was not entitled to enforce his agreement specifically as against the opposite party. No such situation arises here, Bailey's mortgage being a legal mortgage.

The substantive question for decision is that to which the learned judges in British Columbia evidently devoted their attention, namely whether in the locus

(1) 59 Can. S.C.R. 219. (2) [1915] A.C. 318.

in question a public highway has been established by dedication. For this purpose two concurrent conditions must be satisfied, 1st, there must be on the part of the owner the actual intention to dedicate, (*Folkestone* v. *Brockman*) (1), and 2nd, it must appear that the intention was carried out by the way being thrown open to the public and that the way has been accepted by the public. (*Attorney General v. Biphosphated Guano Co.*) (2). I can find nothing in the legislation of British Columbia relating to municipalities giving the municipality authority on behalf of the public to accept a dedication by the mere acceptance of a deed of grant of land for the purpose of creating a highway, and in my opinion acceptance by the public can only be evidenced by public user or by the act of some public authority done in the execution of statutory powers.

It should be observed that by section 22 of the "Land Registry Act," ch. 127 R.S.B.C. 1911, the title of the holder of a certificate of infeasible title is expressly made subject to any "public highway," and it follows, I think, that if the public highway had been actually created by dedication before the registration of Bailey's mortgage, there could be no doubt that the public right would prevail as against the registered interest.

In the absence of some legal obstacle arising from the character of the municipality as a statutory corporation, governed as regards its capacities and the exercise of them, by the provisions of the "Municipal Act," the evidence in favour of the existence of the *animus dedicandi* on the part of both Moody and the corporation would appear to be very

(1) [1914] A.C. 338. (2) 11 Ch. D. 327, at p. 340.

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cogent. Moody conveyed to the municipality on the assumption, it is true, that a street had been establidhes by the procedure laid down in the "Municipal Act," but on the other hand it is a most important circumstance that he, in transferring his land to the municipality, and the officers of the corporation in accepting it, were dealing with it as land devoted to the purpose of establishing a highway, an improved street along the front of that part of the property which Moody retained; a circumstance which no doubt affected materially both Moody and the corporation officials respectively in their judgment as to the amount to be demanded and paid by the way of compensation. The intention of the council to devote the strip of land to that purpose is unequivocally declared, and had the intention been acted upon by the immediate opening of the street and that again followed by acceptance by public user, the only question I should have though it necessary to consider at this point would have been whether or not the municipality could lawfully create a street by its ineffectual endeavours to follow the procedure laid down in s.s. 176 of section 53. As the municipality could not without a breach of faith continue to hold the land while applying it to a purpose other than that for which it was transferred, it is possible that the transaction (coupled with user by the public) might, in the hypothetical circumstances suggested, be regarded as a transfer to the municipality as a trustee for highway purposes and as amounting to dedication by the owner with the assent of the municipality and acceptance by the public. It may be that under the British Columbia statutes the results would be as suggested, namely, that the title to the fee would pass to the Crown

instead of to the municipality but the fact that this collateral and unexpected result would ensue would hardly be of sufficient importance to counterbalance the fact that it was the settled and unqualified determination of both parties to the transaction that the highway was to be established. Reverting now to the actual facts before us, these facts fail to establish the existence of a highway at the time Bailey made the advance and took his mortgage; and as against Bailey it seems to be clear enough that the public right can only be held to have arisen if the facts in evidence are sufficient to support the inference that he assented to the setting apart of the strip in question for the public purposes of a street.

The principle to be applied is expressed by Lord Macnaghten in *Simpson* v. *Attorney General*,(1) thus:—

> As regards the second, it is, I think, enough for me to say that a dedication must be made with intention to dedicate, and that the mere acting so as to lead persons into the supposition that a way is dedicated to the public does not in itself amount to dedication; *Barraclough* v. *Johnson* (2).

The facts proved do not appear to me to be sufficient to support the inference which the learned judges below have drawn.

ANGLIN J.—The plaintiffs assert rights as against the defendant mortgagee to the strip of land in question on three distinct grounds: (1) By expropriation; (2) By grant; (3) By dedication. Under either the first or the second head the title would be vested in the plaintiff city; under the third head the right of highway would be in the public; hence the joinder of the Attorney-General as co-plaintiff.

There can be no doubt that the expropriation proceedings taken by the city were instituted under

(1) [1904] A. C. 477, at p. 493. (2) 8 Ad. & E. 99.

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s.s. 176 of s. 53 of the "Municipal Act" (R.S.B.C., 1911, c. 170) and, since it makes special and specific provision for the acquisition of land for street widening (the purpose of acquiring the land in question) recourse, in my opinion, cannot be had to general powers for the acquisition of land conferred either by s.s. 145 of s. 53, or by s. 399 of the "Municipal Act" in order to escape the effect of failure to comply with an essential requirement of s.s. 176. *Generalia specialibus non derogant; Ex parte Stephens* (1). The heading of Part II of the "Municipal Act," of which No. 53 is the first section, viz., "Powers required to be exercised by By-law," makes it clear that a valid by-law is essential to the exercise of powers conferred by provisions included in that part of the statute. *Hammersmith Rly. Co.* v. *Brand* (2); *Eastern Counties and London & Blackwall Rly. Cos.* v. *Marriage* (3); *City of Toronto* v. *Toronto Rly. Co.* (4).

I agree with the learned trial judge that the by-law passed under s.s. 176 was ineffectual for want of publication as prescribed by that section. *City of Victoria* v. *Mackay* (5). The expense and trouble involved in publishing such a by-law *in extenso* might afford a strong argument for an amendment of the statute if the legislature should be convinced that the object of its policy would be sufficiently attained by the publication of a mere notice of the by-law, such as we have in this case, in some convenient and accessible place where a copy of it might be seen. But such an argument scarcely affords ground for a court undertaking to dispense with the

(1) 3 Ch. D. 659, at pp. 660-1.
(2) L.R. 4 H.L. 171 at p. 203.
(3) 9 H.L.Cas. 32, at p. 41.
(4) [1907], A.C. 315, at p. 324.
(5) 56 Can. S.C.R. 524.

observance of such a distinct requirement as that expressed in the words

> every by-law passed under the provisions of this sub-section before coming into effect shall be published.

I agree with the learned trial judge and the Chief Justice of the Court of Appeal, with whom Eberts J. concurred, that this implies publication in full. Sections 3 and 5 of the "Municipal Act" make it clear that s.s. 176 applies to the city of Victoria and that nothing in any special act relating to it shall "impair, restrict or otherwise affect" the powers which that subsection confers. The plaintiff municipality therefore did not acquire title by expropriation.

Neither can it assert title under its unregistered grant from the owner Moody in view of the provisions of s. 104 of the "Land Registry Act" (R.S.B.C. 1911, c. 27) that

> no instrument * * purporting to transfer * * land or any estate or interest therein * * shall pass any estate or interest either at law or in equity in such land until the same shall be registered in compliance with the provisions of this Act.

The city's application for the registration of the conveyance from Moody having been ultimately rejected and no steps having been taken to set aside the registrar's decision under s. 114, the case must be treated as if no application for registration of it had been pending when application was made to register the Bailey mortgage and it was in fact registered. *National Mortgage Co.* v. *Rolston* (1).

The claim of highway by dedication requires more consideration. In order to bind the mortgagee, against whom no finding has been made that he took his

(1) 59 Can. S.C.R. 219.

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mortgage with notice either of the city's attempted expropriation or of its negotiations with Moody and the conveyance given by him—and the evidence would not warrant such a finding—it must be established either that a highway existed when he obtained and registered his mortgage, which would in that case be subject to this public right, ("Land Registry Act," s.s. 34 and 22 (e),) or that the mortgagee himself dedicated his interest for highway purposes or is estopped by his conduct since becoming mortgagee from denying the existence of the highway claimed.

After fully considering the testimony of Bailey himself and all the other evidence in the record I have failed to find anything on which the existence at any time of the essential *animus dedicandi* (*Simpson* v. *Attorney General* (1); *Mann* v. *Brodie* (2); *Barraclough* v. *Johnson* (3) could safely be attributed to him. Neither do I see in his conduct, which was purely negative or passive, enough to found an estoppel against him. There is, in my opinion, nothing whatever to show that he was aware of circumstances which might give to his inaction the significance that the plaintiff now attributes to it—nothing to shew that a situation arose which called for active interference by a mere mortgagee at the peril of loss or impairment of his rights.

Notwithstanding the undoubted fact that it was the purpose of Moody, the owner, to convey the land in question to the city as a vendor and because he deemed himself obliged to part with it under the expropriation proceedings which had been instituted, I incline to the view and shall assume that his deed,

(1) [1904], A.C. 477-493. (2) 10 App. Cas. 378 at p. 386.
(3) 8 A. & E. 99.

though wholly ineffectual to convey any estate or interest, may be taken to evidence sufficiently the existence on his part of intention to dedicate the land described in it for a public highway—that it may even be regarded as an express dedication. *Reaume* v. *City of Windsor* (1) affirmed here on the second day of May, 1916. The appropriation and setting apart of the land for a public street would seem (to adopt the phrase of counsel for the respondent) to be "the conclusive factors" in dedication rather than the voluntary or gratuitous character of the transaction on the part of the owner.

But, in order to bring a highway into existence by dedication in addition to the intention of the owner of the soil to dedicate it to the public for that purpose, however directly evidenced, an acceptance by the public is also essential; *Moore* v. *Woodstock Woollen Mills* (2); *Mackett* v. *Commissioners of Herne Bay* (3); *Attorney General* v. *Biphosphated Guano Co.* (4); and the crucial question in this case in my opinion is whether there was such an acceptance as was necessary to make the land in dispute part of Pandora Avenue before the execution and registration of the defendant's mortgage. User by the public—the usual indication of acceptance by the public—is entirely absent. Nothing was done to throw the strip of land open until after Bailey had become the registered mortgagee of it. There was no expenditure of public money upon it. It remained fenced in with, and, to all appearances, part and parcel of, the Moody property.

But it is said there is abundant evidence of acceptance by the municipal corporation and that that is

(1) 7 Ont. W.N. 647; 8 Ont. W.N. 505.
(2) 29 Can. S.C.R. 627.
(3) 35 L.T. 202.
(4) 11 Ch. D. 327 at p. 340.

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acceptance on behalf of the public, or its equivalent. Of the intention of the municipality to devote this land to highway purposes there can be no question and there seems to be some American authority which may be invoked in support of the position that acceptance by the municipality without statutory authorization may be tantamount to acceptance by the public. The cases are collected and reviewed in 18 Corpus Juris, Vbo. Dedication, pars. 79, 80, 88 and 99. But I have failed to find any English authority which accepts that view.

The municipal corporation is a purely statutory body and it has and can exercise only such powers as are conferred upon it by statute. Its position in this respect is well stated by Brayton J. delivering the judgment of the Supreme Court of Rhode Island in *Remington* v. *Millerd* (1):—

> Supposing the dedication to be proved, is there in this case any evidence of an acceptance by the public, any assent on their part to the use of the land in the mode intended? The usual evidence of such acceptance, namely, a user by them, is here wanting. This way has never been used. In all the cases cited there had been a use by the public from which their assent might be inferred, and in many of them the use had been for so long a period as to warrant the presumption not only of their assent, but of the act of dedication also. It is not easy to perceive how otherwise than by user this assent is to be shewn. The term public includes the whole community, the whole mass of individuals in the state. They cannot constitute agents to assent for them. The whole doctrine of dedication is based upon the fact that the public have no agents; that there is no one with whom the owner of the land can agree or contract directly; and it is therefore said that in these cases it is not necessary that the public should be a party, and that, from the necessity of this case, they cannot be.
>
> Does the plea contain any other evidence of an acceptance on the part of the public? If so, it is the fact that the town council of East Greenwich, on the 31st day of August, 1844, declared the way to be an open highway, and ordered it to be repaired at the expense of said town. If this be evidence of such acceptance, it must be because the

(1) 1 R.I. 93.

town council are to be deemed the general agent of the public, and for this purpose represent them, or because they are by statute specially empowered to accept the way in the mode set forth.

But are they such agent? Have they any such representative character? They are the creature of the statute, invested with certain definite powers. They are enabled to do such acts as the statute authorizes and to do them in the mode prescribed; and if they assume to do other acts, or to do them in other modes, their doings are merely void, and cannot become the more valid from any representative character which may be imputed to them. It is difficult to see how they are the agent of the public, more than the surveyor of highways.

Here the sole authority of the municipal corporation for

establishing * * * opening, * * * making, * * * improving * * * widening, * * * roads, streets, * * * or other public thoroughfares

is conferred by s.s. 176 of s. 53 of the "Municipal Act." A by-law meeting the requirements of that section is the method prescribed for the exercise of those powers. The by-law passed by the council was inefficacious because of non-compliance with an essential requirement. (*City of Victoria* v. *Mackay* (1). It follows that the only power which the city possessed to widen Pandora Avenue or to procure or apply land for that purpose has not been exercised. To permit it to establish or widen a street otherwise than by following the specific method prescribed would be in effect to supersede the statute and to concede to the municipal corporation a power which it does not possess. It follows in my opinion that there was no highway in existence when the defendant's mortgage was executed and registered.

I would, for these reasons, allow this appeal with costs here and in the Court of Appeal, and would direct the entry of judgment dismissing the action with costs.

(1) 56 Can. S.C.R. 524.

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BRODEUR J. (dissenting).—The respondents claim the title to a strip of land on Pandora Avenue, in Victoria, B.C.

Notice of expropriation of that piece of property had been given by the city of Victoria, and after notice to treat, the owner Moody agreed, on the 23rd of May 1912, to sell that strip of land to the municipal corporation for a certain sum of money. The city unfortunately did not register its title; and in March, 1913, Moody gave to the appellant Bailey a mortgage affecting his property on Pandora Avenue and by the description which is made in the deed covering the strip of land sold to the corporation.

There was evidently no fraud on the part of the parties to the deed of mortgage and it is evident that they have acted in absolute good faith. In 1917 the city of Victoria having discovered its omission to register its conveyance applied to the Land Registry Office for registration but having found that the conveyance could only be registered subject to the Bailey mortgage, and Bailey having refused to sign a release, the present action has been instituted to have the Moody conveyance registered in priority to the Bailey mortgage.

The action was maintained by the trial judge and by the court of Appeal, the Chief Justice and Mr. Justice Eberts dissenting.

The trial judge found that the expropriation by-law was invalid because it had not been duly published but that the Moody conveyance constituted a dedication of the strip of land in question and that Bailey had acquiesced in such dedication.

The dissenting judges in the Court of Appeal held that there was no legal evidence of dedication, that the

transaction between Moody and the city was a compulsory sale, that Moody never intended to dedicate and that Bailey never acquiesced in such dedication.

The most important issue to dispose of at first is whether there is dedication.

There was at first a by-law passed by the city for the expropriation of the land in question, but the by-law was never duly published and registered. This court in a case of *The City of Victoria* v. *Mackay* (1), held that the publication of a by-law is a necessary condition to its validity.

The proceedings which have subsequently taken place consist in a notice to treat to Moody. in the delivery by the latter of his claim which seemed to have been accepted by the city since it issued its cheque for it and a conveyance was duly executed by him on the 23rd May, 1912, of a strip of land in front of his property for the purpose of widening Pandora Avenue.

Would that constitute dedication of this strip of land? I would not hesitate in answering in the affirmative. No formal conveyance is required to affect a common law dedication; but where there is a deed or writing as in this case, the conclusion is still more certain. Dedication means the setting apart by the owner of a land for the use of the public. In most of the cases of dedication, the title is a matter of inference as to the intention of the owner and as to the acceptance by the public. But in this case there is no doubt as to the intention of the owner Moody, since he formally signed a deed in which he declared that the land was granted for the purpose of widening a public street. There is no doubt also as to the grant

(1) 56 Can. S.C.R. 524.

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being accepted by the municipal corporation representing the public.

But, besides, works have been carried out by the municipal corporation on this strip of land in order to utilize it as a public street. The fences and verandah which were encroaching on the strip of land were removed and a sidewalk was built. All this was done when Bailey was the mortgagee of the property. Since he claims to-day that his mortgage was covering the whole lot, including the strip of land in question, he should have protested against the municipal authorities using part of his property.

He was fully aware of the situation. For months and months this widening of Pandora Avenue was discussed in the press and was the subject of public discussion in the municipal council amongst the residents of the locality. When he loaned money to Moody he made inquiries as to the value of the property; and it may be reasonably inferred that the estimation he got was as to the property less the strip of land in dispute. He saw the front of the property being altered, the fences and the verandah and the steps being removed; he saw the sidewalks being built and he did not object. He must be held as having acquiesced in the corporation respondent taking and using this strip of land. His conduct shews that he has himself dedicated it to the public. It is now too late for him to claim certain rights which the mortgagor did not intend to convey and which he himself did not intend to recover.

It is not necessary that the public should have possession of the lands dedicated for any great length of time. All that is required is the assent to the use of the property by the public and the actual enjoy-

ment of the same by the public for a length of time sufficient to have created on the part of the public such reliance upon the enjoyment of such easements as that the denial of such rights would now interfere with the public convenience and with private rights.

The appellant claims that the city of Victoria not having registered the conveyance by Moody of the strip of land, no estate or interest has passed; (sect. 104 of the "Land Registry Act," 1911).

Under the provisions of the "Land Registry Act," the holder of a registered mortgage, as Bailey, is only *prima facie* entitled to the estate interest in respect of which he is registered subject to the rights of the Crown (R.S.B.C. 1911 ch. 127, s. 34) and if a person has an indefeasible fee under section 22 he is seized of an estate in fee simple in the land against the whole world subject to different reservations; amongst others is the public highway.

The evidence, as I have said, shews to me that a public highway on the strip of land in dispute exists and the appellant cannot successfully claim that his title could prevent the public from using it.

For these reasons the appeal should be dismissed with costs.

MIGNAULT J.—My learned brothers have so fully dealt with this case that my conclusions may be briefly expressed.

The City of Victoria had decided by by-law to widen Pandora Avenue and to take by expropriation a strip from Moody's land facing on that avenue, and a notice to treat was served on Moody. This was in 1912, and Moody, whose land was being taken compulsorily, filed in April, 1912, a claim with the city for compensation, cost of removal of buildings and depreciation in

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rental value amounting to $6,260.00. The city decided to pay this amount to Moody and the latter, on the 23rd May, 1912, executed a conveyance to the city for the sum of $6,260.00, of the strip of land required for the widening of the avenue. This conveyance was not registered and it is only in March 1917, that the city applied for its registration.

The expropriation by-law was not published as required by R.S.B.C., ch. 170, sec. 53, sub-sec. 176, par. 2, and the notice of its adoption, which was published in the Gazette, is not, in my opinion, the publication required as a condition of the by-law coming into effect. I concur with the reasons of my brother Duff on this branch of the case and hold that this by-law did not come into effect, although Moody—and this is a feature of the case in so far as the question of dedication is concerned—must be taken to have assumed that under this by-law his land was expropriated for the purpose of the street widening and that the sole question was as to the amount of the compensation to be paid him.

The city, it is true, applied for registration of the by-law in June, 1912, and this application should have been noted as pending by the registrar, which however was not done. The application was refused in October, 1914, and the city did not appeal from the refusal.

In the meantime it was proposed to Bailey, who then resided in Victoria, to loan $15,000 on Moody's property, and after Bailey had ascertained the assessed value of the property, a mortgage was granted to him by Moody of this property on the 8th March, 1913. On the 10th March, 1913, Bailey obtained from the Registrar-General a certificate of incumbrance shewing

that there were no charges on Moody's land save Bailey's application to register his mortgage. Bailey duly advanced the $15,000.00 to Moody on the security of the property and his mortgage was registered on the 15th April, 1913.

As matters then stood, Bailey's mortgage was the only charge on Moody's property and was unaffected by Moody's unregistered conveyance to the City of Victoria. The latter however being unable to set up against Bailey the expropriation by-law for want of publication and Moody's conveyance for want of registration, claims that Moody dedicated the strip of land for the purposes of the highway and the Attorney General of British Columbia, as representing the public, joined the city in demanding that this dedication be declared effective.

Dedication is of course a matter of intention, and I will assume that Moody, who had received a notice to treat and who was submitting to a by-law expropriating a strip of his land for the widening of the highway, intended to dedicate this strip as a part of the highway. But intention to dedicate, although of course essential, does not alone suffice for a complete dedication. There must be an acceptance by the public and this acceptance is complete when there has been user of the dedicated land by the public.

Now it cannot be questioned that any user of this strip of land by the public was subsequent to the registration of Bailey's mortgage, and unless Bailey acquiesced in the dedication by Moody, I would think that no dedication of the strip of land by Moody can be set up against Bailey. To my mind, under the circumstances of this case, the only question is whether or not Bailey assented to Moody's dedication.

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The learned trial judge was of the opinion that the dedication had been accepted by the city before the Moody mortgage, because he apparently thought that public user—and there was none before April, 1914—was not essential to a vaild dedication. But assuming that this view was incorrect and that the mortgagee's assent or public user was essential to complete the dedication, the learned trial judge held that Bailey had assented to the dedication. This, as the learned judge clearly indicates, was merely an inference. He says:—

> Assuming that where a mortgagor is in possession of mortgaged premises, the mortgagee's assent is necessary to a dedication, and further assuming that user is essential to a valid dedication, I hold, on the facts here, the defendant must be held to have given such assent. The inference of assent by a mortgagee, cannot, I think, require more cogent proof than does the inference of dedication by the owner. If so, the evidence (excluding everything that occurred prior to April, 1914), already referred to as establishing dedication by Moody, establishes, in my opinion, assent by Bailey. In addition to this evidence, the record shews that Bailey was throughout this period resident in Victoria, that at any rate, some short time after the actual work was entered upon, he devoted particular attention to this property because of default in the payment of interest, that he has personally used the sidewalk built on the disputed land and that he made no objection until his pleadings in this action were filed.

Bailey was not called to testify before the learned trial judge, but his evidence on discovery was put in at the trial, and his story is that so long as his interest was paid, and it was regularly paid for a couple of years, he did not bother about the property at all. He saw that the fence had been removed, that a sidewalk had been built along the strip, but he considered that it did not concern him at all so long as his interest was paid. There was of course a good deal of talk about the future of Pandora Avenue, for at the time there was quite a boom in real estate in Victoria, but Bailey's position seems to be this, that when he lent the money

the property was assessed at a value of from $75,000 to $80,000, that he thought he had a gilt edge security, and it only was when the interest payments stopped and very high taxes were imposed on the property for the widening, that he concerned himself with the matter.

With all deference, I cannot think that from Bailey's evidence a fair inference can be drawn that Bailey assented to the dedication by Moody of a strip of his property as a part of the highway. As I have said, the assent of Bailey was merely inferred by the learned trial judge from the circumstances, and in a matter of inference this court is in as favourable a position as was the learned trial judge. Thinking as I do that Bailey, by the registration of his mortgage after obtaining a certificate from the Registrar that the property was clear of charges, acquired a title which was unaffected by the expropriation scheme of the City of Victoria, I would not without the clearest evidence assume that Bailey assented to anything which would deprive him of his security as to any portion of the land covered by his mortgage. The City of Victoria acted with extreme carelessness in this matter. It paid Moody, obtained a conveyance from him and neglected to register it. It passed an expropriation by-law and failed to publish it as required by statute. It attempted to register this by-law, and when registration was refused, it did not appeal from the refusal as it could have done. The allegation that there was dedication by Moody appears to have been an afterthought, and was only made by an amendment. I would not under these circumstances come to the assistance of the city so as to affect in any way a security obtained for a *bonâ fide* advance of money made on the faith of the public register.

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In arriving at this conclusion I have given due consideration to the fact that the finding of the learned trial judge that Bailey assented to the dedication was concurred in by a majority of the learned judges of the Court of Appeal. But I do not think that the great weight which is generally given to concurrent findings of fact precludes me in a matter of this kind from expressing my own judgment as to the inference drawn by the learned judges. In *Montgomerie & Co., Ltd.*, v. *Wallace-James* (1), the House of Lords decided that there was no law or settled practice of that House to prevent it from differing even from two concurrent judgments of fact, and that the House could not decline the duty of formally expressing its own judgment. Of course, as stated by Lord Macnaghten in *Johnston* v. *O'Neill* (2), adopting the dictum of Lord Watson in *Owners of the "P. Caland"* v. *Glamorgan Steamship Co.* (3),

> a court of last resort ought not to disturb concurrent findings of fact by the courts below, unless they can arrive at—I will not say a certain, because in such matters there can be no absolute certainty—but a tolerably clear conviction that these findings are erroneous.

Here I feel convinced that the finding that Bailey assented to a dedication by Moody is erroneous, may I say so with all possible respect for the learned judges who thought otherwise. Moreover, as I have said, this is a matter of inference and does not rest upon the credibility of witnesses, and the recent case of *Dominion Trust Co.* v. *New York Life Ins. Co.* (4), is an authority for the proposition that

> where the question is as to the proper inference to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate court.

(1) [1904] A.C. 73.
(2) [1911] A.C. 552, at p. 578.
(3) [1893] A..C 207.
(4) [1919] A.C. 254.

The appeal should, in my opinion, be allowed and the respondents' action dismissed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellants: *John R. Green.*

Solicitor for the respondents: *R. W. Hannington.*

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J. J. DAVIDSON (PLAINTIFF).....APPELLANT;

AND

G.B.C. SHARPE (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Sale—Action for rescission—Judgment—Election—New Action on personal covenant.

An action had been instituted in British Columbia by a vendor, the appellant, against a purchaser, the respondent, a resident of Ontario, for the balance of the purchase price and for the cancellation of the agreement for sale of land situated in the Province of British Columbia, for default in payment. Judgment was given for the plaintiff on both grounds. The judgment was not satisfied and a second action was instituted in Saskatchewan against the respondent, then resident there, which was based principally on the respondent's personal obligation on his covenant for payment in the agreement of sale.

Held, Idington J. dissenting, that the obtaining of the judgment in British Columbia amounted to an election on the part of the vendor for cancellation of the agreement of sale and that he was no longer at liberty to sue upon the covenant.

Judgment of the Appeal Court (12 Sask. L.R. 183) affirmed, Idington J. dissenting.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) affirming the judgment of the trial court, (2) which dismissed the appellant's action.

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*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 12 Sask. L.R. 183; [1919] 2 W.W.R. 76; 46 D.L.R. 256.
(2) [1919] 1 W.W.R. 469.

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DAVIDSON v. SHARPE.

By an agreement in writing dated February 4, 1913, the appellant sold to the respondent certain land in British Columbia for $24,500, payable in instalments. The respondent paid $5,500 cash but made default in paying the first instalment due. The appellant then took an action in British Columbia against the respondent then living in Ontario, asking for an account to be taken of the amount due under the agreement, and for payment of that amount within a time to be fixed, and, in default of payment, that the contract be cancelled and the moneys paid be forfeited to the appellant. The British Columbia court made the order as asked and fixed two months as the delay during which the respondent should pay. The respondent failed to pay, and the appellant entered judgment for the amount due. Later on, the appellant brought the present action in Saskatchewan on the judgment obtained in British Columbia and, in the alternative, on the personal covenant to pay in the agreement. The action on the judgment failed before all the courts because the respondent was not a resident of British Columbia at the time of the institution of the first action.

Schull, for the appellant.

Gregory K.C., for the respondent.

IDINGTON J. (dissenting).—The appellant, by an agreement datcd 4th February, 1913, sold, and respondent agreed to buy, certain lands in British Columbia for the sum of $24,500, of which $5,500 was paid in cash and the balance was to be paid in instalments which the respondent covenanted to pay appellant.

The agreement provided that time was to be of the essence of the contract and that as often as default should happen in making the payments the vendor

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(the appellant) might give the vendee (the respondent) thirty days' notice in writing demanding payment thereof and that in case such default should continue, the agreement should, at the expiration of such notice, be null and void and the vendor have the right to re-enter upon said lands, and any payments theretofore made might be retained by the vendor as liquidated damages and the vendor be entitled to re-sell said lands.

It was further provided that this notice should be well and sufficiently given if given the vendee, or mailed at Vancouver post office in British Columbia under registered cover addressed to George B. C. Sharpe, Oak Bay, B.C.

The further payments besides the cash payment fell far short of the requirements of the agreement.

No such notice as thus provided for was ever given.

The respondent left British Columbia without actually moving his household effects into the dwelling house on said lands. The premises were unoccupied by either party thenceforward.

On the 26th October, 1916, the appellant issued a writ of summons from the Supreme Court of British Columbia to recover from respondent the sums then due. And in the special indorsement set forth her claim as follows:—

> The plaintiff's claim is to have an account taken of what is due to the plaintiff for interest, cost, charges and expenses under and by virtue of the covenants contained in certain articles of agreement dated the fourth day of February, one thousand nine hundred and thirteen, whereby the plaintiff agreed to sell to the defendant and the defendant agreed to purchase from the plaintiff that certain parcel or tract of land and premises situate, lying and being in the district of Victoria, in the Province of British Columbia, and known and described as lots 45 and 46 and the south half of lot 41 in 'Block' numbered "D," being subdivision of Block D, section 22, in said Victoria District at the price of $24,500, payable with interest as therein mentioned;

and for an Order that the defendant do pay to the plaintiff the amount so found due, together with the plaintiff's costs, to be taxed within such time as this court may order.

And for an order that in default of payment of the amount so found due within such time that the agreement be declared null and void and cancelled

And that all moneys paid thereunder be forfeited to the plaintiff and that the said defendant do stand absolutely barred and foreclosed of all right, title and interest of in and to the said lands and agreement.

And also in the event of such default, for such damages as the plaintiff may have suffered by reason of the defendant's failure to perform the said agreement.

That writ of summons was duly served by personal service on respondent in Toronto in Ontario.

There was no appearance entered by the respondent.

An exemplification of judgment was got and admitted as evidence herein at the trial hereof which is an action in the Supreme Court of Saskatchewan to recover on said judgment the amount thereof or alternatively to recover on the said agreement the amount due for unpaid instalments. Omitting the formal parts of the exemplification that judgment is expressed in the following terms:—

IN THE SUPREME COURT OF BRITISH COLUMBIA.

Between:

JOSEPHINE JULIE DAVIDSON,
WIFE OF JOHN L. DAVIDSON,
Plaintiff,

and

GEORGE B. SHARPE,

of the city of Toronto, in the Province of Ontario.
Defendant.

B.C. L.S.
$1.00.

Dated the 15th day of June, A.D. 1915.

In pursuance of the Order of the Honourable the Chief Justice made the 1st day of February, 1915, and in pursuance of the Registrar's Certificate herein dated the 4th day of March, 1915.

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IT IS ORDERED AND ADJUDGED that the plaintiff do recover against the defendant the sum of $14,185.15, together with costs taxed at the sum of $131.95.

By the Court,
A. B. POTTINGER,
District Registrar.

Upon that judgment I respectfully submit that the appellant was entitled to recover in the Supreme Court of Saskatchewan judgment herein.

It is urged by respondent that the court in British Columbia so entering judgment had no jurisdiction by reason of the respondent having left the province of British Columbia at the time of service of said writ.

Inasmuch as the parties hereto were in British Columbia when the contract was made and was to be performed and hence breach there and that it was made in respect of land there, I have no doubt of the jurisdiction or of the right to assert it by service of writ beyond the jurisdiction.

I should have preferred in such a case, however, to have evidence that Order XI of the Rules of the Supreme Court of British Columbia had been duly complied with by leave of a judge of that court having been duly obtained.

However, I think that the presumption exists and must prevail that all that was duly complied with and none the less so, because the objection, as presented here, was not relative to any defect in that regard but upon broader grounds which I hold untenable in this case.

The more serious question raised is that upon which the courts below proceeded in dismissing the action.

It is this, that upon an application, in course of the proceedings, to the learned Chief Justice of the Supreme

Court of British Columbia he made an order of reference to the registrar of the court to take the accounts between the parties and directed that judgment might be entered against the defendant for the amount so certified to be due to the plaintiff—and then proceeded to declare as follows:—

> And this court doth further order that upon the defendant paying to the plaintiff what shall be certified to be due to her as aforesaid within two months after the date of the Registrar's Certificate at such time and place as shall thereby be appointed the plaintiff do convey the lands, heriditaments and premises comprised in the said Agreement for sale free and clear of and from all encumbrances done by her or any persons claiming by, from or under her and deliver up all deeds, writings, in her custody or power relating thereto, to the defendant or to whom he shall appoint;
>
> But in default of the defendant paying to the plaintiff what shall be certified to be due to her as aforesaid by the time aforesaid that the defendant thenceforth do stand absolutely barred and foreclosed of and from all right, title, intcrest and equity of redemption of, in and to the said agreement and of, in and to the said lands, hereditaments and premises, and that the said agreement be thereupon cancelled and ended and all monies paid thereunder forfeited to the plaintiff and that the defendant do deliver to the plaintiff possession of the said lands, hereditaments and premises which are set out and described in the said agreement.

It is to be observed that the certificate of the registrar fixing the amount due was dated, as appears from the recital in the judgment of which exemplification is adduced in evidence, on the 4th of March, 1915, and that the judgment sued upon is entered the 15th June, 1915, a month or six weeks after this declaratory order of the Chief Justice, if adhered to and operative, must have put an end to any further right to proceed.

How can we say that this latter judgment sued upon was a nullity as in effect the courts below have done?

What right have we to impose, without an appeal in due course, our notions of law and fact, upon the appellant and his judgment and declare it was and is a mere nullity?

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How do we know that nothing was done in the meantime to rectify the possible mistake of such an alleged election or that the purpose of the appellant was to elect to rescind the agreement?

Had there been evidence adduced of the entry having been, according to the practice recognized by the courts there, (or argument adduced herein to shew that as matter of law it was) a mere error on the part of those concerned, the way might have been made open to us to apply our view of the election alleged to have been made, as a final determination of the matter.

That however could not enable us to be quite sure of the facts as to whether or not there had been any amendment to the original order of reference enabling the plaintiff to revoke the alleged election. It would have been quite competent for the court there, for any good reason, to have made such an amendment.

Can there be a doubt that the judgment sued upon stands in full force and is exigible in British Columbia?

I respectfully submit that, so long as it is so, it seems to me absurd to hold that upon the production of an exemplification thereof it cannot be recoverable in other provinces.

I am unable to understand how we can herein declare that the provision for rescission of purchase stood valid and conclusive despite the later record of the court quite inconsistent therewith if we have regard to the maxim of *omnia praesumuntur rite et solemniter esse acta.*

Moreover the parties chose by their agreement expressly to provide a mode by which it should become null and the consequence thereof, and that mode was not followed or anything like it which we should be able to say was a substantial compliance therewith.

The decision of the Supreme Court of Saskatchewan in the case of *Standard Trust* v. *Little* (1) relied upon below does not seem in this regard to be in point.

Whether there was in fact incorporated in the agreement of purchase there in question a specific mode as here existed of terminating the vendee's rights, does not appear. For all that appears the court had to proceed upon the relative rights of the vendor and purchaser, before the court, when default made and that the court adopted the not unusual mode of dealing with a defaulting purchaser according to general principles of law. Moreover the order or judgment was one consistent complete whole not leaving it open to surmise of what the court had determined. Here the alleged intention has to be gathered from the separate and inconsistent pieces of judicial proceedings of which the latest is a complete judgment which does not put appellant to an election.

Again there is much reason for saying that a lien such as a vendor's lien might be looked upon as a mortgage has been by courts of equity, and therefore, a charge of that kind which might be foreclosed and that a decree *nisi* of foreclosure was what was intended.

If that was the conception of the court in using the word "foreclosed" in the order above quoted, then there was no final order and there remained the option of the plaintiff prosecuting a foreclosure suit to abandon his proceedings therefor and follow his remedy on the personal obligation.

These are only surmises of what may have developed as law in the local court.

I prefer assuming some such kind of development to that of construing this foreclosure judgment as a final

(1) 8 Sask. L.R 205; 31 W.L.R. 769.

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rescission of the agreement and especially so when we find the same court ignoring what had transpired and pronouncing the complete, self-contained, comprehensive judgment herein sued upon, which was recovered after the lapse of time given by the earlier order had expired.

The cases cited are beside the question.

I prefer holding that the court which, after all that it had declared was to take place in two months and which if effective could not permit of a judgment such as sued on being entered over three months later, has in doing so found good reason, either on new facts presented or something otherwise said or done which, within its practice, enabled it, if it saw fit, to proceed to enter judgment, and that its doing so was deliberate.

There is nothing in the evidence to warrant any one in holding otherwise and the presumption is in favour of the judgment being duly entered and meaning what it says.

I therefore conclude that the appeal should be allowed with costs throughout and the judgment be entered accordingly.

DUFF J.—This appeal should be dismissed with costs.

ANGLIN J.—Practically conceding that the personal judgment of the Supreme Court of British Columbia, on default of appearance against the defendant, who appeared on the face of the proceedings in that court to have been a resident of Ontario and was served there with process, is of no avail outside of British Columbia, counsel for the appellant rested his appeal on the ground that his alternative cause of action—the defendant's personal obligation on his covenant

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for payment in the agreement for sale—is open to him in Saskatchewan. I agree that merger cannot be pleaded as a defence; *Smith* v. *Nicolls*; (1) *Bank of Australasia* v. *Harding* (2). But the appellant is met by the order of the Chief Justice of British Columbia, pronounced in the action brought in that province granting the relief there sought by him, viz., the taking of accounts, a personal judgment for the amount to be certified thereon as due by the defendant, an order for conveyance by the plaintiff on payment thereof within two months, and in default foreclosure absolute and cancellation of the agreement. It has been held by the courts of Saskatchewan that by accepting this order the appellant elected to take the remedy of cancellation in the event of default of payment within the time fixed by the order and that he thereby relinquished all right thereafter to recover any part of the purchase money. Counsel for the appellant on the other hand contends that the order taken in the Supreme Court of British Columbia was in the nature of an order *nisi*, similar in its effect to the ordinary judgment granted in a suit for foreclosure of a mortgage after trial to be followed by a final order before the equity of redemption is extinguished. This latter view however seems to ignore the essential difference between a judgment for foreclosure in a mortgage action and an order or judgment for cancellation of an agreement for sale due to the difference between a mortgage and such an agreement.

The trial judge after the conclusion of the trial offered the plaintiff an opportunity to obtain evidence on commission

(1) 5 Bing. N.C. 208.

(2) 9 C.B. 661.

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to ascertain the law in British Columbia as to whether the order or judgment cancelled or has the effect of cancelling the agreement therein referred to or does such an order or judgment preclude the plaintiff from enforcing her judgment or suing for the purchase money under the said agreement, default having been made by the defendant in the payment of the amount found due.

The plaintiff declined to take advantage of the indulgence thus extended. The learned judge was therefore justified in assuming that the order of the Chief Justice of British Columbia would have the same effect in that province as the like order made by an Alberta Court would have within its jurisdiction. Nothing has been brought to our attention, nor am I aware of anything, that indicates the difference in this respect between the law which obtains in British Columbia or the practice of its courts and the law and practice of the English courts or of the courts of other provinces of Canada whose juridical systems are based on English law.

The relations of mortgagor and mortgagee in English courts of equity are anomalous. *Platt* v. *Ashbridge* (1). "Once a mortgage always a mortgage" is a doctrine so deeply rooted in our system of equity that after the period for redemption fixed by an ordinary judgment for foreclosure has expired the mortgagor's right to redeem *de plano* still subsists until a further and final order of foreclosure has been obtained. Even after such final order has been made our courts of equity regard the mortgage as still unextinguished and unsatisfied so long as the mortgagee retains the land. He may at any time enforce the personal obligation of the mortgagor on his covenant, thereby opening the foreclosure and revesting in the mortgagor his right to redemption

(1) 12 Gr. 105, at p. 106.

as it was before the judgment; and the courts maintain a corresponding jurisdiction to allow the mortgagor after final order, under exceptional circumstances raising an equity in his favour, to redeem on proper terms. When the mortgagee in any way as owner alters his relation to the land he elects to take it and foregoes his debt—but not until then. Sir George Jessel states the doctrine very clearly in *Campbell* v. *Holyland* (1); see too *Trinity College* v. *Hill* (2). *Mutual Life* v. *Douglas* (3), is a recent instance of the mortgagee's right after foreclosure to enforce the covenant being upheld. The development of the equity jurisdiction in regard to the foreclosure of mortgages is outlined by Griffith C.J. in *Fink* v. *Robertson* (4).

By taking a foreclosure judgment the mortgagee does not take the property for his debt. The judgment, notwithstanding its absolute form, is construed as merely authorizing him to do so. The foreclosure judgment in the mortgage action is merely a means of enforcing the mortgage contract, which it deals with as subsisting; whereas the judgment for rescission or cancellation of a contract between vendor and purchaser is a judgment not for the enforcement but for the extinguishment of the contract. When the vendor sought and obtained a judgment fixing a period for payment and providing that on default

> the agreement shall be cancelled and at an end and all monies paid thereunder forfeited to the plaintiff,

he elected in my opinion, on that event happening, to take the property in satisfaction of so much of the purchase money as then remained unpaid. If he had

(1) 7 Ch. D. 166.
(2) 10 Ont. App. R. 99, at. pp. 109-10.
(3) 57 Can. S.C.R. 243.
(4) 4 Com. L.R. 864.

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intended to reserve his right of election until after default had been made, his proper course would have been to ask, in lieu of the relief granted by the order in that event, for a reservation of liberty to apply for further relief. (Seton on Decrees (7 ed) pp. 2171 and 2220-1).

Instead of waiting until default had occurred under the judgment ordering the defendant to perform his contract and then applying for its rescission the plaintiff sought and obtained in advance the order usually made after such default—which may be for immediate rescission, *Clark* v. *Wallis* (1), or for rescission after the lapse of a further short period and may in the latter event apparently issue at the time of the application, *Simpson* v. *Terry* (2), or only on the expiry of the further time so allowed. *Foligno* v. *Martin* (3). The order in the case at bar, although issued in the first instance instead of after default in payment under a judgment of the court, is similar in form to that pronounced in *Simpson* v. *Terry* (2), and I cannot doubt that, on default happening under it, it operated to put an end to the agreement just as the order in *Simpsno* v. *Terry* (2) did.

Mr. Justice Lamont states the law very clearly and accurately, if I may say so, in delivering the judgment of the Court en Banc in *Standard Trust* v. *Little* (4)

The anomalies introduced by courts of equity in regard to the relations between mortgagor and mortgagee do not exist in regard to vendor and purchaser. A judgment or order declaring that on the happening of a certain event an agreement for sale shall be

(1) 35 Beav. 460.
(2) 34 Beav. 423.
(3) 16 Beav. 586.
(4) 8 Sask. L.R. 205.

cancelled and at an end means precisely what it says and not merely that the plaintiff shall thereupon be entitled to have it cancelled and put an end to. When the purchaser under the order of the learned Chief Justice of British Columbia made default the agreement ceased to exist and the foundation for any right of personal recovery from the purchaser (except for costs) was gone. The purchaser thereafter had no further right to the land and the court has no jurisdiction to restore him to his former position. The vendor has the land. He cannot have the purchase money also.

Should the plaintiff attempt to recover under the personal judgment of the Supreme Court of British Columbia which he issued after default in payment under the Chief Justice's order, I have little doubt that the defendant could on application have his right to do so restricted to the costs of the action. *Jackson* v. *Scott* (1). Indeed it would seem to be altogether probable that what was intended by the learned Chief Justice of British Columbia was that personal judgment against the defendant should issue forthwith upon the amount due being ascertained and certified and should be enforceable as to the debt and interest during the two months allowed for payment by the purchaser, and that if the matter had been brought to his attention he would not have sanctioned the issue of the judgment taken out from the Registrar's office after the two months allowed for payment had expired and purporting to be in pursuance of his order.

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

(1) 1 Ont. L. R. 488.

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BRODEUR J.—An action had been instituted in British Columbia by a vendor against a purchaser for the balance of the purchase price and for cancellation of the deed of sale in case of default of payment.

A decree was pronounced by the British Columbia courts declaring that the judgment should be entered against the purchaser for a certain amount which he should pay within two months and that

> in default of the defendant paying to the plaintiff what shall be certified to be due to her as aforesaid by the time aforesaid that the defendant thenceforth do stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of in and to the said agreement and of in and to the said lands, hereditaments and premises and that the said agreement be thereupon cancelled and ended and all moneys paid thereunder forfeited to the plaintiff and that the defendant do deliver to the plaintiff possession of the said lands, hereditaments and premises which are set out and described in the said agreement.

The purchaser has made default in payment.

A new action, which is the present one, has been instituted on the covenant, in Saskatchewan, and it is contested by the purchaser on the ground that, the agreement having been cancelled by the British Columbia judgment, no claim can be made by the plaintiff for the payment of the purchase price.

On the other hand, it is contended by the vendor that the judgment was not a final order or foreclosure but rather an order *nisi*.

The Saskatchewan courts held that the British Columbia judgment amounted to an election on the part of the plaintiff to take cancellation or to a rescission in the event of default in payment.

The decree is absolute in its terms. It provides that the deed is cancelled if within two months the purchaser does not pay the amount due.

The original action might have demanded only the amount due without asking for cancellation and if

the plaintiff had been unable to recover his debt then he could have asked for the cancellation of the agreement. But his action, as instituted before the British Columbia Courts looks to me as an election on his part to take back the property sold, unless the defendant pays the purchase price.

The authorities say that if a contract providing that on the happening of a certain event it shall be void and that it may be rescinded by the party injured, that the contract is not void for both parties, but simply voidable at the request of the party that suffers. Fry, Specific Performance, (5th ed.,) sec. 1046.

The stipulation in a contract of sale that the deed would become null and void if the buyer failed to make any payment is exclusively in the interest of the seller, who has a right to choose between the rescission of the contract and its execution.

But when a judgment has been rendered on such a clause pronouncing that the failure to pay within two months would bring about the rescission of the contract; and when such a decree has been taken by the vendor himself it seems to me that it constitutes on his part an election of his right to cancel. He could not then later on proceed to collect the amount which had been originally promised to him by the covenant, since he has agreed that the agreement was cancelled.

The appeal should be dismissed with costs.

MIGNAULT J.—The whole question here is as to the effect of a judgment obtained in British Columbia by the appellant against the respondent.

The appellant had made an agreement with the respondent for the sale of certain lands in British

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Columbia, and on this agreement, in October, 1914, the appellant took against the respondent, who then lived in Ontario and made default, an action in British Columbia, in which her claim is stated as follows:—

> The plaintiff's claim is to have an account taken of what is due to the plaintiff for interest, cost, charges and expenses under and by virtue of the covenants contained in certain articles of agreement dated the fourth day of February, one thousand nine hundred and thirteen, whereby the plaintiff agreed to sell to the defendant and the defendant agreed to purchase from the plaintiff that certain parcel or tract of land and premises situate, lying and being in the District of Victoria in the Province of British Columbia and known and described as lots 45 and 46 and the south half of lot 41 in Block numbered D, being Subdivision of Block D, section 22, in said Victoria District, at the price of $24,500, payable with interest as therein mentioned; and for an order that the defendant do pay to the plaintiff the amount so found due together with the plaintiff's costs to be taxed within such time as this court may order.
>
> And for an order that in default of payment of the amount so found due within such time that the agreement be declared null and void and cancelled.
>
> And that all moneys paid thereunder be forfeited to the plaintiff and that the said defendant do stand absolutely barred and foreclosed of all right, title and interest of in and to the said lands and agreement.
>
> And also in the event of such default, for such damages as the plaintiff may have suffered by reason of the defendant's failure to perform the said agreement.

On this action the following order was made on the first of February, 1915, which in every respect agrees with the claim stated by the appellant:

> Upon the application of the plaintiff herein and upon hearing counsel in support of the application and upon hearing read the affidavit of Mr. M. C. Caple sworn and filed herein:
>
> This court doth order that the following accounts be taken by the Registrar of this court namely:—
>
> 1. An account of what is due to the plaintiff under and by virtue of the agreement for sale in the pleadings mentioned and for her costs in this action, such costs to be taxed by the taxing Master.
>
> 2. An account of the rents and profits of the hereditaments comprised in the said agreement for sale received by the plaintiff or by any other person or persons by the order of or for the use of the plaintiff or which without the wilful default of the plaintiff might have been so received.

And let what shall appear to be due on taking account No. 2 be deducted from what shall appear to be due to the plaintiff on account No. 1 and let the balance be certified by the said Registrar, and let judgment be entered against the defendant for the amount so certified to be due to the plaintiff.

And this court doth further order that upon the defendant paying to the plaintiff what shall be certified to be due to her as aforesaid within two months after the date of the Registrar's certificate at such time and place as shall thereby be appointed the plaintiff do convey the lands, hereditaments and premises comprised in the said agreement for sale free and clear of and from all incumbrances done by her or any person claiming by, from, or under her, and deliver up all deeds or writings in her custody or power relating thereto to the defendant or to whom he shall appoint.

But in default of the defendant paying to the plaintiff what shall be certified to be due to her as aforesaid, by the time aforesaid, that the defendant thenceforth do stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of, in and to the said agreement, and of, in and to the said lands and hereditaments and premises, and that the said agreement be thereupon cancelled and ended, and all monies paid thereunder forfeited to the plaintiff and that the defendant do deliver to the plaintiff possession of the said lands, hereditaments and premises which are set out and described in the said agreement.

An account of moneys due by the respondent to the appellant having been taken, the appellant obtained on the 15th June, 1915, a judgment against the respondent for $14,185.15 and costs, which judgment was rendered in pursuance of the order of the 1st February, 1915.

The respondent did not pay this amount to the appellant within the two months mentioned in the order, nor at any time since, and the appellant now sues the respondent in Saskatchewan, where he resides, claiming the amount of the judgment of the 15th June, 1915, and in the alternative sues on the agreement for sale for the amount due thereunder. The respondent claims that no action lies for the purchase price, because the agreement is now cancelled by virtue of the order of the 1st February, 1915, the appellant having elected to have the agreement cancelled in default of payment.

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Looking at the matter from every possible angle, I fail to see how the appellant can escape from the effect of the order she obtained and of her election for cancellation of the agreement in default of payment. I do not think that she can answer the contention of the respondent by referring to the effect which is given to a covenant for cancellation inserted in an agreement for sale when the purchaser fails to pay the purchase price. Such a covenant in an agreement for sale, I take it, gives the vendor the right to elect either to claim cancellation of the agreement or the payment of the purchase price, but until the vendor has elected to have the agreement cancelled, his right to claim the price is not taken away. Here, on the contrary, the appellant elected to have the agreement cancelled by her action and by the order she obtained from the British Columbia Court, should the respondent not pay the amount found to be due to the appellant within two months from the date of the registrar's certificate. The rule *una via electa non datur regressus ad alteram*, sometimes expressed as follows: *quod semel placuit in electionibus amplius displicere non potest*, which is the principle contended for by the respondent, precludes the appellant from now obtaining judgment for the purchase price.

The appellant argues that the order she obtained is no more than a rule *nisi*, calling upon the respondent to shew cause why the agreement should not be cancelled should he fail to pay within two months. I do not think this construction can be placed on the order, for by its very wording the agreement is thereupon (that is to say on the default of the respondent) cancelled and ended.

I may add that in so far as the appellant's action

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upon the personal condemnation she obtained against the respondent in British Columbia is concerned, she cannot enforce this condemnation against the respondent in Saskatchewan inasmuch as the respondent was not domiciled in nor a resident of British Columbia when the action was taken there, and did not appear therein or in any way acquiesce in the jurisdiction of the British Columbia Court. See Halsbury, Laws of England, Vo. Conflict of Laws, No. 422.

In my opinion, the appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Christie & Co.*

Solicitors for the respondent: *Seaborn, Pope, Gregory & Kent.*

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*Oct. 27.
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*Feb. 3.

THEATRE AMUSEMENT COMPANY (PLAINTIFF)..... APPELLANT;

AND

J. D. REID AND A. F. DRACKETT (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Landlord and tenant—Goods subject to lien-note—Distress for rent—Refusal to deliver to lien-holder—Conversion—Damages—"Act respecting Distress for Rent and Extra Judicial Seizure," R.S., Sask. (1909) *c.* 51, *s.* 4—"*Act respecting Conditional Sales of Goods,*" *R.S. Sask.* (1909), *c.* 145.

The appellant held an unpaid vendor's lien on certain chattel property in a theatre occupied by F. as tenant of the respondent R. The lien was invalid as against execution creditors of F. because of a defect in the affidavit of *bona fides*. These goods were first destrained under a distress warrant, issued out of the Police Magistrate's Court, to satisfy claims for wages. Later on the same day, the respondent R. issued a distress warrant for rent to the respondent D., who seized the same chattels. A few days later and before the first seizure was abandoned, the appellant asked the respondent D. to deliver up possession of the goods, which demand was refused. After the police seizure was abandoned, the appellant took this action in damages for conversion of its property, alleging that if it had been able to obtain possession prior to execution the defect in its lien would have been cured.

Held, Duff J. dissenting, that, under the circumstances, the refusal of D. to surrender the goods did not amount to conversion.

Per Anglin, Brodeur and Mignault JJ.—The evidence does not establish that the respondents were in a position to give possesion of the goods at the time the only demand for possession was made by the appellant.

Judgment of the Court of Appeal (12 Sask. L.R.174) affirmed, Duff J. dissenting.

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*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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THEATRE AMUSEMENT CO. v. REID.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) reversing the judgment of the trial judge (2) and dismissing the appellant's action.

The material facts of the case are fully stated in the above head-note and in the judgments now reported.

Schull, for the appellant.

Gregory K.C., for the respondent.

IDINGTON J. The respondent Reid as landlord issued to his co-respondent a distress warrant most carefully worded so as to restrict him to the seizure only of what could be lawfully destrained for rent admittedly due and owing said landlord, and seizure was made thereunder accordingly.

Amongst other things taken thereunder were goods which the tenant had acquired from appellant under a conditional bargain and sale which was intended to secure appellant, the vendor, any unpaid balance of the price.

There had been very substantial payments made by said tenant on account of the price and thereby a very substantial interest in the goods had become vested in him before the seizure. Indeed enough to pay the rent.

The appellant claimed from said bailiff after said seizure possession of said goods and, because the goods were not delivered over to him, brings this action claiming there was a conversion thereof by virtue of the demand and refusal.

At common law he could not have a shadow of

(1) 12 Sask. L.R. 174; [1919] 2 W.W.R. 63; 46 D.L.R. 498.
(2) 12 Sask. L.R. 174; [1919] 1 W.W.R. 482.

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ground for making such claim. For not only were the goods of strangers liable to distress but the retention of the possession by the landlord when destrained was his only security and, so far as not modified by statute, is the law yet.

Needless to refer in detail to all the changes and modifications for none of them dispense with the necessity for continuation of possession by the landlord till his seizure has been prosecuted or abandoned or the goods replevied.

And under and by virtue of the statutory provision of the legislature of Saskatchewan, where all this took place, the respective rights of the landlord and such a vendor are expressly provided for by section 4 of the "act respecting distress for rent, &c.," as follows:—

> A landlord shall not distrain for rent on the goods and chattels, the property of any person except the tenant, or person who is liable for the rent, although the same are found on the premises; but this restriction shall not apply * * * to the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase, or by which he may or is to become the owner thereof upon the performance of any condition * * *

As I understand this section, the landlord had a perfectly legal right to seize and enforce by sale all the interest the tenant had which is thus made answerable for the rent due and would have sufficed to pay same.

Unfortunately for appellant, its lien or rights of property in the goods was not such as protected it against other creditors because not verified by the necessary affidavit in its behalf when registering it. And the sheriff for other creditors seized the goods which were afterwards duly sold thereunder, and the respondent Reid as landlord was satisfied thereout as the law provides.

The appellant conceived the idea that in law the

landlord was bound to abandon the goods to it; and its assumption and claim is that if he had done so the creditors could not have succeeded.

Its duty, seeing there was enough in the tenant's interest in the goods to satisfy the rent, was to have tendered the rent and then got possession and it might have held as against the creditors for both rent and amount of lien or balance of price.

It was so ill advised, as to imagine it could get the goods, despite the above quoted statute, and perhaps defeat the landlord's claim. It has thereby lost its only chance.

The action is one only for conversion based only on said demand and refusal.

In my opinion, the judgment appealed from should stand and this appeal be dismissed with costs.

DUFF J. (dissenting).—The questions raised by this appeal are accurately stated in Mr. Gregory's factum filed on behalf of the respondent; they are:—(a). Had the defendant Reid a right to seize Findlay's interest in the chattels for rent? (b). If he had that right, was he bound to deliver up possession to the plaintiff, assuming the plaintiff's interest was greater than, or paramount to his interest? (c). If he had the right to seize, is he liable to damages?

Before proceeding to discuss these questions it is desirable to point out that a point somewhat discussed upon the argument, namely, whether the defendant's dealings with the goods amounted to conversion is entirely disposed of by the concession made at the trial and the findings of the learned trial judge and that no such point could properly be raised either in this court or in the Court of Appeal for Saskatchewan.

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Mr. Gregory, at the trial, states the issues as follows:—

I think, perhaps, my Lord, if Mr. Schull and I discuss the issue before your Lordship it will save a little time. I understand the only issue that is raised in this case is whether when we had an interest in those goods, when we went in there and seized, whether we are guilty of conversion or trespass which will entitle them to damages simply because they also had an interest in the goods; that is the whole issue of the case. It may be so or not that their interest may be paramount to ours; the full bench has decided we have an interest in these goods and having that interest, the whole question for you to decide is whether that interest—whether their interest being larger than ours, we are bound to give up at their demand our possession in the goods, and having not done so, whether we are liable for damages.

And the finding of the learned trial judge (1) is as follows:

I find from the evidence, that the defendant Drackett was in possession under defendant Reid's warrant, of the goods and chattels in question therein at the time Bourdon, the plaintiff's bailiff, demanded possession thereof, and that Drackett refused to give up possession or surrender the said goods to Bourdon, and I also find from the evidence that the defendant Reid approved of and confirmed the action of his bailiff and agent, Drackett.

The subsidiary question as to possession under a police warrant was raised at the trial as affecting the amount of damages. That point I will discuss when dealing with the third point.

Coming then to question A as stated above, in my judgment, the Saskatchewan statute is clear upon that and that the respondent had undoubtedly the right to seize Findlay's interest. The point of substance in the case arises upon question B. With great respect, I am unable to agree with the view of the courts below as to the construction of sec. 4 of ch. 51, R.S.Sask. (1909). I think the interest which may be seized and held or sold under that section is only the interest of the tenant and that the purchaser of the

(1) [1919] 1 W.W.R. 482, at p. 483.

interest takes it subject to all its infirmities and if the interest is of such a character as to enable the owner of some paramount interest to take possession of the chattel out of his hands in given circumstances then the purchaser takes subject to that infirmity as well as others. This, it appears to me, must equally apply where the landlord, instead of selling, exercises his right to hold the goods distrained as his pledge for rent. He is of course not obliged to sell. If the landlord sees fit to hold, that which he is entitled to hold is the interest of the tenant subject, as in the case of the purchase, to all the infirmities of that interest, subject that is to say, to any paramount interest or right of possession.

It is not a very convincing suggestion that the landlord who has initiated proceedings looking towards a sale is entitled to retain possession until the sale takes place. The landlord is pledgee with a statutory right of sale. His right to retain possession of the goods can be no greater and no less after he has decided to sell than during the period, which may be an indefinite one, when he is holding the goods as pledgee merely.

This brings us to question C, the question of damages. The first point to consider is the point argued in the appellant's factum; that at the time of the demand the goods were under seizure under police court warrant. The evidence upon this point is extremely meagre and I think it is much open to question whether the possession of the respondent was ever interrupted. However that may be, the learned trial judge finds, and the evidence amply supports his finding, that the police seizure was abandoned befors the 1st Oct., 1917, the day on which the appellant'e

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action was commenced. There can be no doubt that at the time the action was commenced the respondents were holding possession under a claim of right and denying the appellant's right of possession. That is amply proved by the letter written by the respondent's solicitor on the 29th Sept. and by the concession made at the trial by Mr. Gregory in the passage already quoted.

The next point, on the question of damages, arises in this way. The sheriff having taken possession of the goods on the 3rd of Oct. under a writ of execution and the right of the execution creditor under that writ having been held to be paramount to that of the appellant company under their unregistered lien note, the appellant now contends that this result is owing to the fact that by resisting them in the exercise of their rights the respondent prevented them getting possession of the goods and thus curing the defect in their security arising from the non-registration of the lien note.

I think this contention is well founded. In my judgment, the "Act respecting Conditional Sale of Goods," (R.S. Sask. [1909] ch. 145) would not have operated to prejudice the common law right of the appellant company if the respondent had given up possession of the goods before or at the time of the issue of the appellant company's writ. The legal position then is this: The respondent, having wrongfully converted the appellant's goods is *prima facie* responsible for the value of those goods at the time of the conversion. Moreover, the seizure by the sheriff was, in the circumstances actually existing, the direct and immediate consequence of the respondent's wrong.

ANGLIN J.—Under a registered agreement in writing

the plaintiff held an unpaid vendor's lien on certain chattel property in a theatre occupied by one Findlay (the purchaser of the chattels) as tenant of the defendant Reid. It is *res judicata* that the plaintiff's lien was invalid as against execution creditors of Findlay because of a defect in the affidavit of *bona fides* required by section 2 (3) of ch. 145 R.S.Sask. The plaintiff alleges that if it had been able to obtain possession of the chattels by seizure prior to their being taken in execution the defect in its lien note would have been cured and its title perfected and that such possession was wrongfully withheld from it by the defendants and an execution creditor was thus enabled to seize and defeat its claim to the goods *pro tanto*. It accordingly sues for damages for conversion of its property by the defendants, the landlord and his bailiff.

Assuming, but without so deciding, that the plaintiff, under its lien note had a paramount right which, notwithstanding the exception in favour of landlords made by the proviso to section 4 of the "Act respecting Distress for Rent and Extra-judicial Seizures" (R.S. Sask. c. 51), would have entitled it to possession of the goods although held by the defendants under a lawful distress for rent due by Findlay, that the bailiff Drackett was in error in refusing to recognize such paramount right of the plaintiff, and that actual possession, if obtained when the plaintiff's bailiff demanded it, would have enabled it to hold the goods against creditors of Findlay who might subsequently obtain judgments (but see *Grand Trunk Pacific Ry. Co.* v. *Dearborn* (1), I am nevertheless of the opinion that the plaintiff cannot succeed in its claim for damages for conversion of them by the defendants,

(1) 58 Can. S.C.R. 315.

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because the evidence does not establish that at the time of the only demand for possession made on its behalf the defendants were in possession of the goods, or that a withdrawal of the landlord's claim would have enabled the plaintiff to obtain possession.

The facts on this aspect of the case are in a narrow compass. On the 24th or 25th of September a constable acting under a distress warrant issued out of the Police Magistrate's Court of the city of Moosejaw distrained the chattels in question to satisfy claims for wages prosecuted in that court. An inventory of the goods was made and signed by the distraining constable and by one Lucien Plisson, who was the caretaker of the theatre. The police, I infer from Plisson's evidence, did not think it necessary to shut down the theatre and therefore allowed Plisson to keep the keys and left him in charge, apparently without taking from him anything (except his signature to the inventory) in the nature of an attornment or formally appointing him their representative in possession. Later on the same day the landlord's bailiff came to distrain. He found Plisson in apparent possession and upon being informed by him of the earlier police seizure and being shewn the notice of seizure and inventory, he told Plisson that the priority of the police claim would be considered later. He did not ask for the keys of the theatre. He made an inventory, however, prepared a notice of distress addressed to Findlay, and took from Plisson an undertaking in writing to "look after" and "conduct" the premises "as heretofore * * * at the usual rate of pay." On the 27th of September Plisson locked up the theatre, held the keys for a short time and then handed them over to the police—he says "as a matter of

protection." After the police had been given the keys the plaintiff's bailiff, Burdon, on the 29th of September demanded them from Plisson, but of course he did not obtain them. Burdon then saw the landlord's bailiff, Drackett, not at the theatre but at his office, informed him that he had a warrant and lien and demanded possession of the goods in the theatre. Drackett said "We don't recognize your claim." Burdon made no further effort to secure possession of the goods. The police held the keys until the second of October when the solicitor for the wage-earners appears to have concluded, for reasons not stated, that the Police Court distress could not be maintained against the plaintiff's lien and he instructed the police to abandon the seizure. They thereupon notified Drackett that he could have the keys and he then got them for the first time. On the following day he handed them over to the sheriff on his demand for possession under a writ of execution obtained in the meantime by the wage-earners in a civil action. For what it may be worth Plisson deposes that

Drackett never got possession (of the theatre) as far as I can see;

and Drackett says that when Burdon was demanding possession of the goods from him

they were under seizure by both the police and myself.

On the foregoing facts I am of the opinion that it has not been shewn that the defendants had possession of the goods when Burdon made his demand on the 29th of September or that they could then have given him actual possession such as the plaintiff claims would have cured the defect in its title under its lien note and that therefore, however mistaken or even wrongful may have been Drackett's refusal to recognize the plaintiff's claim, it cannot be held either that

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it amounted to a conversion of the goods or that it was the cause of the plaintiff's failing to obtain such possession as it now asserts would have enabled it to defeat the execution under which the sheriff obtained possession.

Solely on this ground the appeal, in my opinion, fails and should be dismissed with costs.

BRODEUR J.—This is an action in damages by the appellant against the respondent for conversion.

A man named Findlay was the lessee of a theatre in Moosejaw and Reid, the respondent, was the lessor. The theatre furnishings had been purchased from the appellant by Findlay who had given the latter a lien note.

On or previous to the 24th of September, 1917, a police constable, acting under distress warrant issued out of the Police Magistrate's Court, seized and took possession of those furnishings.

On the same day, Reid, the lessor, issued a distress warrant to his corespondent Drackett who went on the premises and apparently seized and took possession of the same chattels. A few days later, the appellant company, the holder of the lien on the goods, asked the respondent, the lessor, to deliver up possession to him of the goods. This was refused and the present action in damages for conversion was instituted.

Under ordinary circumstances, when a person detains goods so as to deprive the person entitled to the possession of them of his dominion over them, it is a conversion. *Burroughes v. Bayne* (1). But in this case the claim is made by the respondent that as lessor he had

(1) 157 English Rep. 1196; 5 H. & N. 296.

the right to seize the interest of Findlay in those chattels. The evidence shows that the goods had been sold to Findlay for $3,450 by the appellant, that a sum of $1,650 cash had been paid and that the lien note had been given for the balance $1,800. By a judicial sale of this equitable interest of Findlay there might be realized a sum sufficient to cover the rent due, about $900.

According to the provisions of the common law a landlord could distrain for arrears of rent upon all goods found upon the premises. By statutory provisions, ch. 51 R.S.Sask., section 4, it was provided that the landlord could not distrain on goods which did not belong to the lessee, though they were found on the premises; but the statute declared that this restriction should not apply to

> the interest of the tenant in any goods on the premises in the possession of the tenant, under contract for purchase or by which he may or is to become the owner thereof upon performance.

There is no doubt that under the provisions of this statute, Reid, as landlord, could seize the interest of his tenant, Findlay, in the chattels in question and have it sold. This is not a case of taking a person's goods wrongfully in execution. Under the statute he could exercise some rights in regard to those goods. If the landlord had the right to seize and sell Findlay's interest in the goods, he could take possession of them to exercise his right of distraint. How could he sell the equitable interest of Findlay without shewing the goods at the judicial sale?

Besides, in order to make a demand and refusal sufficient evidence of conversion, the party who refuses must, at the time of the demand, have it in his power to deliver up the article demanded in the

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condition in which the delivery is demanded. *Latter* v. *White* (1).

The previous seizure which had been made by a wage earner and in execution of a judgment of the police Magistrate's Court, the fact that a police constable had possession of these same goods by virtue of the writ of execution of this latter court would not have given Reid the absolute right of handing over the chattels to the appellant. Suppose Reid had handed possession as far as he was concerned, that would not have given the possession to the appellant company and prevent it from suffering the damages they claim having suffered. These wage earners had a superior right to the one which the appellant seeks to exercise as it was decided in a former trial.

For all these reasons I am of the opinion that the appellant is not entitled to recover damages from the respondent. His appeal should be dismissed with cost.

MIGNAULT J.—In my opinion, this appeal fails because it has not been shewn that Drackett, Reid's bailiff, had possession of, and could have delivered to the appellant, the goods covered by the latter's lien note when the appellant demanded possession of the same. I do not think it necessary to express any opinion on the question whether, under the Saskatchewan Statute, R.S.Sask. ch. 51, section 4, the respondents could have witheld possession of the goods as against the appellant, in order to distrain and sell the interest of the tenant therein.

Appeal dismissed with costs.

Solicitors for the appellant: *Schull & Schull.*

Solicitors for the respondent: *Seaborn, Pope & Gregory.*

(1) L.R. 5 H.L. 578.

HOSPICE DESROSIERS (SUPPLIANT).....APPELLANT;

AND

HIS MAJESTY THE KING (DEFENDANT).....RESPONDENT.

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*Nov. 12.
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ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Principal and agent—Undisclosed principal—Judgment against agent—Action against principal—Civil law cases—English decisions—Arts. 716, 727 C.C.

Under the Quebec civil law, the recovery of a judgment against the agent, who had contracted in his own name, will not, as long as it remained unsatisfied, affect the creditor's right to pursue the principal afterwards discovered. Idington J. dissenting.

Per Anglin, Brodeur and Mignault JJ.—English decisions should not be cited as authorities in cases from the Province of Quebec which do not depend upon doctrines derived from English law.

Judgment of the Exchequer Court of Canada (18 Ex. C.R. 461) reversed, Idington J. dissenting.

APPEAL from the decision of the Exchequer Court of Canada (1) dismissing the petition of right of the appellant.

The appellant sold hay to one McDonnell and sued him for the recovery of the purchase price. During the trial, McDonnell declared that he had bought the hay on behalf of the Imperial Government. The appellant obtained judgment against McDonnell. Later on the appellant discovered sufficient facts to establish that McDonnell had bought hay as agent of the Crown

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*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 18 Ex. C.R. 461.

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on behalf of the Dominion of Canada. The appellant then filed a petition of right against the Crown before the Exchequer Court of Canada, which was dismissed.

E. F. Surveyer K.C. and *L. E. Beaulieu K.C.* for the appellant.

F. J. Laverty K.C. and *O. Gagnon* for the respondent.

IDINGTON J. (dissenting)—I agree with the reasoning of Mr. Justice Audette in the Exchequer Court; and all the more so that instead of adopting, for the first time, a novel rule to be peculiar to Quebec we should, so far as we can, when applying relevant law which in its substance is identical with that of the other provinces wherein the law is founded on and is English law, aim at a degree of uniformity in its administration instead of deciding in a way that will tend to produce confusion and unjustifiable expense.

For obvious reasons I feel we should not only abstain from invading, but conform to, the settled jurisprudence of Quebec.

In this case there is no settled jurisprudence of Quebec in regard to the question raised by this appeal.

And, so far as the principles applicable thereto are concerned, the rule adopted in English decisions is in accord with reason and justice, as well as that practical business sense which always tends to minimize the operation of the purely litigious spirit.

Moreover there appears in the statement of defence a pretty clear statement from which I infer that the transactions in question were, if at all, entered into by the Dominion of Canada, as the agent of the Imperial Government, which would constitute the respondent itself a mere agent.

The allegation I admit might have been made more complete in that regard.

Are we entitled to so decide in such a way the legal novelty submitted, that hereafter it may be said this court has laid down as law, that no matter how numerous the principals or chain of agents concerned in bringing about a contract, a litigious third party may select one after another of such agents and principals and sue to judgment unless and until one or other of numerous judgments so recovered has been satisfied, and that with costs? I submit we should not run any such risks but accept that jurisprudence, even if not absolutely binding, which manifestly in principle violates nothing in law or justice.

For the foregoing reasons and those assigned by the learned judge appealed from, I am of the opinion that this appeal should be dismissed with costs.

DUFF J.—I am of the opinion that this appeal should be allowed.

ANGLIN J.—The sole legal question raised by the defence in this action which might properly be disposed of before the trial, under R. 126 of the Exchequer Court, is whether under the Civil Code of Quebec the mere recovery in the courts of that province of judgment on a contract against an agent, who had entered into it in his own name, debars the plaintiff's right of recovery against the principal. Following *Priestly* v. *Fernie*, (1) and *Kendall* v. *Hamilton*, (2) Mr Justice Audette has held that it does. With deference, in applying these authorities the learned judge would seem to have attributed to the Quebec judgment ob-

(1) 3 H. & C. 977. (2) 4 App. Cas. 504.

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tained by the plaintiff against the agent, McDonnell, consequences dependent in English law upon views held with regard to the nature of the liability of the principal and the agent in such cases and the effect of a judgment upon the contract sued upon which do not obtain in the Quebec system of jurisprudence. The reasons for his acceptance of these English decisions as authority on this question of the civil law of Quebec appear in the following paragraph of his judgment:

> I was, at the argument, referred to no jurisprudence of the Province of Quebec upon the subject in question, and after research I have been unable to find any. In the absence of the same I take it, as Arts. 1716 and 1727 are different from the Code Napoleon and are borrowed from both Pothier and the English law, that general principles of the English law governing such doctrine should also be adopted in questions flowing from such doctrines and which are a sequence from the same, as Strong J. seems to have found in the case above mentioned.

In the case in this court to which the learned judge alludes *V. Hudon Cotton Co.* v. *Canada Shipping Co.* (1) Mr Justice Strong alone expressed the view—already taken by the majority in the court of King's Bench, Dorion C. J. and Ramsay J. dissenting (2), that the liability of the principal, even where he is undisclosed and the agent contracts in his own name, created by Art. 1727 C.C., and put beyond controversy by the concluding clause of Art. 1716 C.C., imports a correlative or reciprocal right on his part to sue upon the contract as recognized in English commercial law. Fournier J. (p. 405) and Henry J. (p. 414) were of the contrary opinion. Fournier J. (p. 409) notes, as did Dorion C. J. at page 362, that while Pothier explicitly asserts the right of action of the third party

(1) 13 Can. S.C.R. 401. (2) 2 Dor. Q.B. 356.

against the principal, "he gives none to the principal against the third party". "Obligations", Nos. 82, 447 and 448; "Mandat", No. 88. The other three members of this court (Ritchie C. J., Taschereau and Gwynne JJ.), dismissed the appeal on what they deemed an admission of liability in the proceedings, expressing no views on the point dealt with by Mr. Justice Strong.

But, with respect, I find nothing in that learned judge's opinion to sustain the sweeping inference drawn by Mr. Justice Audette in the passage I have quoted. On the contrary, alluding to Pothier as the source of the doctrine embodied in Arts. 1727 and 1716 of the Quebec Civil Code, he merely notes, *en passant*, that in the particular matter with which he is dealing—the principal's right to enforce the contract, which in his opinion should "by an extensive construction" be held to be involved—the law of Quebec, as he views it, corresponds with English rather than with modern French law. In the latter notwithstanding that the language of Art. 1998 C.N. seems quite as comprehensive as that of Art. 1727 C.C., a contract made by an agent in his own name imposes no direct liability on his principal (28 Laurent No. 62). The commissioners themselves in much the same way signalize the fact that Pothier's view upon the liability of the principal coincides with English, Scotch and American law. 6th Rep. 312. To each comment—that of Strong J. and that of the commissioners—the maxim *expressio unius est exclusio alterius* would not seem inapplicable.

In English law the liability of the principal and the agent in a case such as that at bar is alternative. The contract being one and entire creates but a single debt (though not a single cause of action as in the case

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of a joint liability since, in addition to the facts constituting the cause of action against the agent, his authority from the principal must be proved as part of the cause of action against the latter, *Cooke* v. *Gill*, (1) on which but one of the two may be held liable as principal. Yet the agent, having contracted in his own name, is bound as a principal; and the undisclosed principal is likewise bound because the agent in fact acted by his authority. But both cannot be liable as principals simultaneously and jointly. Imposing the status of principal on the former involves according that of agent to the latter. The agent as such is not liable. Correlatively, treating the latter as principal involves a rejection of his agency, and by implication a relinquishment of any claim against the real principal. Either may be pursued; not both.

The conclusive operation of a judgment against the agent to debar the recourse against the principal, though often referred to—and with high authority—as the consequence of an irrevocable election of remedies (1 Hals. L. of E. No. 445; 7 Ibid. No. 937; *Morel Bros. & Co.* v. *Westmoreland*, (2) depends rather upon the doctrine of English law that the single debt arising out of the contract has been merged in the judgment—*transit in rem judicatam*—as Lord Cairns points out in *Kendall* v. *Hamilton*, (3), and Vaughan-Williams L. J., in *Hammond* v. *Schofield*, (4) See too, *Sullivan* v. *Sullivan*, (5) and 13 Hals. L. of E. No. 470 *in fine*. Although the application of the doctrine of election is readily defensible where, as here, the principal is known as such to the plain-

(1) L.R. 8 C.P. 107 at page 116.
(2) [1904] A.C. 11.
(3) 4 App. Cas. 504 at p. 515.
(4) [1891] 1 Q.B. 453 at p. 457.
(5) 45 Ir. L.T. 198 at p. 200.

tiff before he takes his judgment against the agent, it is not so where that knowledge is lacking; and yet the judgment is then equally conclusive in its effect. *Kendall* v. *Hamilton* (1) A man can scarcely be held to have elected between two remedies of the existence of one of which he is in fact ignorant and is not presumed in law to be cognizant. The fact that, if the judgment against the agent is subsequently set aside as the result of an adjudication that it was erroneously pronounced (*Partington* v. *Hawthorn*), (2) the alternative right to sue the principal revives (although the same result apparently does not ensue if the judgment be vacated merely by consent, *Hammond* v. *Schofield*, (3) per Wills, J.; *Cross & Co.* v. *Matthews*, (4) I Hals. L.of E. p. 209, note p.) presents another difficulty, since a valid election between remedies once made is irreversible. *Scarfe* v. *Jardine*, (5). On the other hand, while, at first blush, such a decision as that of the Court of Appeal in *French* v. *Howie*, (6) where a judgment for part of the plaintiff's claim entered against the agent on admissions, under a special rule of a court allowing that to be done without prejudice to the plaintiff's right to proceed with the action to recover balance of his claim, was held to debar a suit against the principal, is perhaps more easily upheld under the doctrine of election than under that of merger, it is equally maintainable on the principle that there can be but one judgment for a single and entire debt, to which the entry of a judgment for part of a claim permitted by the rule of court is merely a special exception

(1) 4 App. Cas. 504.
(2) 52 J.P. 807.
(3) [1891] 1 Q.B. 453 at p. 455.
(4) 91 L.T. 500.
(5) 7 App. Cas. 345, at p. 360.
(6) [1906] 2 K.B. 674: [1905] 2 K.B. 580.

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statutory in its nature. But the conclusive character of a judgment against one of the two parties alternatively liable for a single debt, which likewise extends to the case of joint liability as understood in English law (*King* v. *Hoare*, (1) approved in *Kendall* v. *Hamilton*, (2) is not found in a judgment against one of two debtors who are liable severally, or jointly and severally, since here there are two debts and the judgment on one is no bar to an action on the other, *Lechmere* v. *Fletcher*, (3) *Isaacs & Son* v. *Salbstein*, (4) Nothing but satisfaction or release will extinguish a debt which has not passed into judgment.

Now under the Quebec Civil Code the principal and the agent who has contracted in his own name seem to be severally liable as an English lawyer understands that phrase; and the merger implied in the maxim *transit in rem judicatam*, as understood in English law, has no application in the legal system of that province.

Arts. 1727 and 1716 C.C. read as follows:—

1727.—The mandator is bound in favour of third persons for all the acts of his mandatory, done in execution and within the powers of the mandate, except in the case provided for in Art. 1738 of this title, and the cases wherein by agreement or the usage of trade the latter alone is bound.

1716.—A mandatory who acts in his own name is liable to the third party with whom he contracts, without prejudice to the rights of the latter against the mandator also.

I agree with Mr. Surveyer's contention that the concluding word, "also", of Art. 1716 C.C. is more consistent with the idea of a dual recourse successive or simultaneous, than with a single optional recourse.

(1) 13 M. & W. 494 at p. 503.
(2) 4 App. Cas. 504.
(3) 1 Cr. & M. 623 at pp. 633-5.
(4) [1916] 2 K.B. 139 at pp. 151, 153, 154-5.

The purpose seems to be to create cumulative obligations for the fulfilment of a single contract, which can be discharged only by satisfaction, release or the expiry of a period of limitation.

The learned council also referred to Art. 1108 C.C. found under the heading "Debtors jointly and severally obliged", which reads as follows:—

> Legal proceedings taken against one of the co-debtors do not prevent the creditor from taking similar proceedings against the others.

But the undisclosed principal and his agent would seem not to be joint and several debtors within the group of Articles 1103-1120 C.C. They satisfy the definition contained in Art. 1103 C.C. The fact that they are "obliged differently" does not exclude them. The difficulty presented by the inconsistency of the obligation of indemnification legally inherent in their relationship (Art. 1720 C.C.) with Arts. 1117-8 C.C. appears to be met by Art. 1120 C.C. But the obligation to the creditor is not strictly a joint obligation. That of the agent arises directly *ex contractu*. That of the principal is imposed on him by law as a consequence of his mandate to the agent. Hence Pothier's designation of it as "accessorial". I therefore doubt the direct applicability of Art. 1108 C.C.; but of that of the principle which it embodies—quite unnecessarily, says Langelier (Vol. IV, p. 33)—I have no doubt.

The commissioners in referring to Art. 1727 C.C. (6th Rep. p. 12) expressly state that that article is based on Pothier's statement of the mandatary's liability where the agent has contracted in his own name and without disclosing the relationship and reject Troplong's view to the contrary, adding that (in this respect) "English, Scotch and American Law coincides" with Pothier's view. See too p. 87 of the

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text, s. II Art. 23. In dealing with Art. 1716 C.C., at p. 10 of the same report, the commissioners note that it has no counter part in the Code Napoleon and "that the group of which it is a member delcare (s) useful rules of undoubted authority in our law"—"contiennent des régles utiles qui ne souffrent aucune difficultè dans notre droit" (sec. II). At. p. 85, s. II Art. 14, the authorities on which the article is based are cited as follows:—

> Pothier, Mandat. No. 88; Paley, Prin. & Agent, Nos. 371,372; Storey, Agency, 266, 163, 269; Troplong, Mandat, Nos. 522 et seq., contra, as to last clause.

Paley is cited for the first clause of the article as is also Storey, par. 163 and Troplong. The passage from Pothier, however, and par. 266 and the concluding words of par. 269 of Storey bear on the question immediately under consideration and leave little room for doubt that the liability intended to be created was a several liability of both the principal and the agent as co-debtors (each being "obliged to the same thing in such manner that each of them singly may be compelled to the performance of the whole obligation and that the performance by one discharges the other towards the creditor", (Art. 1103 C.C.) and to that extent having the characteristics of the joint and several liability of the civil code) but neither the alternative nor the joint liability of the English law.

Pothier (Mandat, No. 88) is in the following terms:

> Quoique ce soit pour l'affaire qui fait l'objet du mandat, et en se renfermant dans les bornes du mandat, que le mandataire a fait quelques contrats avec des tiers: lorsque c'est en son propre nom qu'il a contracté, et non pas en sa seule qualité de mandataire d'un tel, procureur ou fondé de procuration d'un tel, c'est, en ce cas, le mandataire qui s'oblige envers ceux avec lesquels il a contracté; c'est lui qui se rend leur débiteur principal. Mais il oblige *conjointement* avec lui son mandant pour l'affaire duquel il parait que le contrat se fait; le man-

dant, en ce cas, est censé accéder à toutes les obligations que le mandataire contracte pour son affaire; et de cette obligation accessoire du mandant nait une obligation qu'on appelle *utilis institoria*, qu'ont contre le mandant ceux avec lesquels le mandataire a contracté pour l'affaire du mandant.

And Story (On Agency No. 266):

In the next place, a person contracting as agent will be personally responsible, where, at the time of making the contract, he does not disclose the fact of his agency; but he treats with the other party as being himself the principal; for, in such a case, it follows irresistibly, that credit is given to him on account of the contract. Thus, if a factor or broker, or other agent, buy goods in his own name for his principal, he will be responsible to the seller therefor in every case where his agency is not disclosed. But we are not therefore to infer that the principal may not also, when he is afterwards discovered, be liable for the payment of the price of the same goods; for, in many cases of this sort, as we shall hereafter abundantly see, the principal and the agent may both be *severally* liable upon the same contract.

The concluding sentence of par. 269 of Story on Agency reads as follows:—

But it by no means is to be taken as a natural or necessary conclusion, that, because the agent is personally bound, therefore the principal is exonerated; for we shall presently see that both may in many cases be equally bound, if not in form, at least in substance, by the contract, so that a suit may be brought by or against *either* of them.

The same author in Par. 270 says:—

Where the agent contracts in his own name he adds his own personal responsibility to that of him who has employed him.

In Par. 163 he had referred to Pothier's view that the obligation incurred by the principal is accessorial, citing "Obligations," Nos. 447-9, where the sense in which that learned writer uses the phrase "obligation accessoire" is fully explained.

Story, as will have been noted, speaks of the obligation as several while Pothier describes the two debtors as liable "conjointement"; and much was made of Pothier's use of this latter word in argument here, counsel for the respondent maintaining that it imports joint liability as known in English law. But under the

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civil law an obligation is "conjointe" whenever there is plurality either of creditors or of debtors; Baudry-Lacantinerie, Obligations, No. 1107. Ordinarily it entails a division of the right or of the liability, so that in the one case each creditor may recover an equal share of the debt, but no more, from the common debtor and in the other each debtor is liable for an equal share of the debt, but no more, to the common creditor. (26 Dem. 105, 110, 112). There are as many distinct credits or debts as there are creditors or debtors. This is obviously not the sense in which the word "conjointement" is used by Pothier.

But it also clearly excludes the alternative liability of the English law, since it is the antithesis of "disjunctive" liability, Baudry-Lacantinerie, No. 1107 (n), which is most rare in modern civil law, 26 Dem. 112. In Pothier's text it merely signifies simultaneous liability upon the same obligation (26 Dem. 107), each debtor being liable for the whole. But how? Jointly or severally? "Severally" says Story, using the word as an English lawyer, in par. 266 above quoted, cited by the commissioners.

The passage quoted from par. 269 in which he speaks of the creditor's right to bring suit "against" either of them serves to make it clear that the joint liability of the English law was not contemplated. Storey may in this latter passage have intended to indicate the liability to be alternative as it is understood in English law; but, if he did, the fact that the commissioners explicitly state that Art. 1727 C.C., which imposes the liability on the mandator, is based on the doctrine taught by Pothier makes it probable that Story was not so understood by them. Pothier's conjoint accessorial liability of the principal is not a disjunctive

alternative liability. His comparison of it with the liability of a surety while indicating the distinctions between the two, makes this reasonably clear. The principal and the surety are several debtors. An unsatisfied judgment against the principal does not preclude a judgment against the surety. (Arts. 1956 and 1958 C.C.). Art. 1716 C.C. read in the light of the commissioners' report and the texts they cite was, it seems reasonably clear, intended to assert neither the joint nor the alternative liability of the English law, but a several liability of the principal and the agent subject to the latter's right, and the former's obligation, of indemnification. (Art. 1720 C.C.)

In Vol. 5 of Langelier's Cours de Droit Civil, at p. 304, we read under Art. 1716:—

> Lorsque le mandataire a contracté en son propre nom, ceux avec qui il a contracté ont le droit de le tenir responsable personnellement, mais peuvent-ils aussi s'en prendre au mandant? Notre article répond dans l'affirmative. Les tiers peuvent-ils alors poursuivre et le mandant et le mandataire? L'affirmative ne me paraît pas douteuse. D'abord il n'y a pas de doute que les tiers peuvent poursuivre le mandataire, puisque notre article le dit en toutes lettres. Et comme ce même article leur réserve leur recours contre le mandant, cela veut dire qu'ils peuvent poursuivre les deux et pour le tout.

In *Huot* v. *Dufresne*, (1) the judgment of the Court of Review contains this "considérant":—

> Considérant que celui qui contracte avec un mandataire qui agit personnellement a recours contre ce mandataire, mais que, s'il découvre ensuite que ce mandataire agissait pour un autre, il a aussi recours contre ce tiers pour qui ce mandataire agissait, et ce, sous les dispositions du dit article 1716 du Code Civil.

In *Wilson* v. *Benjamin*, (2) in the judgment of the Superior Court we read:—

> Considérant que le mandataire qui agit en son propre nom est responsable envers les tiers avec qui il contracte, sans préjudice aux

(1) 19 R.L. 360, at p. 363. (2) M.L.R. 5 S.C. 18, at p. 19.

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droits de ces derniers contre le mandant qui est responsable envers eux pour tous les actes de son mandataire faits dans l'exécution et les limites du mandat, excepté dans le cas de l'article 1738 du Code Civil et dans le cas où, par la convention, ou les usages du commerce le mandataire est seul responsable.

We have not been referred to and I have not found any other decisions in Quebec in which the nature of the liability of the principal and agent in such a case as this has been considered. Those referred to by Mr. Justice Audette bear very remotely on the question under consideration. On the other hand, though not dealing with the precise question before us, the authorities now cited seem to indicate that the liability is several and the remedies cumulative, and that the recovery of a judgment against the agent will not, so long as it remains unsatisfied, affect the creditor's right to pursue the principal. Apart from authority the terms of Art. 1716 C.C. seem plainly to imply these consequences.

The idea of the merger of the debt under a contract in a judgment obtained upon it is foreign to the Quebec system of Jurisprudence. *Rocheleau* v. *Bessette*, (1) *Turner* v. *Mulligan*. (2) As Mr. Justice Hall says, in delivering the judgment of the Court of King's Bench in the former case:

> As the consensus of both minds was necessary to create the contract, so both must consent before its nature can be changed, although the creditor may be free, within the limitation of the law to exercise his own choice of remedies, and the jurisdiction in which he will enforce them. The judgment which he may obtain from a particular tribunal does not create the debt, but only declares its existence and orders its payment. That it has not extinguished the debt is apparent from the fact that the creditor may renounce it by notice only to the debtor, and without the latter's consent, and thereupon the original debt may be sued upon anew, either in the same or an other jurisdiction. Clearly this could not be the case if the judgment had effected

(1) Q.R. 3 Q.B. 96, at pp. 98-9: 3 S.C. 320. (2) Q.R. 3 Q.B. 523.

novation and the original debt had been thereby extinguished. It is true that a judgment produces many of the effects of a new obligation * * * but these are only in recognition and qualification and extension of the original and still existing debt, and not in substitution and extinguishment of it. See too Langelier, Vo. 4, p. 33.

While the Quebec law recognizes the maxim *nemo debet bis vexari pro eadem causâ* in so far as it will not, speaking generally, permit a defendant against whom a plaintiff holds a judgment to be again sued by him for the same cause while that judgment subsists. By Art. 548, C.C.P. it is expressly provided that

a party may on giving notice to the opposite party renounce either a part only or the whole of any judgment rendered in his favour, and have such renunciation recorded by the prothonotary; and in the latter case the cause is placed in the same state as it was in before the jufgment. 20 Laurent, Nos. 136 et seq.

It is therefore abundantly clear that in Quebec there is no merger of the debt in the judgment such as takes place under English law.

The maxim, *una via electa non datur regressus ad alteram*, has but a restricted application in French law, (8 Huc. No 328; 17 Laurent, No. 139; 13 Baudry-Lacantinerie et Barde, Nos. 916-7-8; but see Arts. 1541-2 C.C.) and the renunciation of a right or a remedy is *de droit étroit*. "Il faut pour cela que les faits d'où on l'induit le supposent necessairement."

I am for these reasons of the opinion that English decisions holding that a judgment against the agent who has contracted in his own name debars recovery against the principal are not in point and that the defence denying the right of the plaintiff to proceed against the defendant as mandator under Art. 1727 C.C. expressly preserved by Art. 1716 C.C., is not good in law. This case affords an excellent illustration of the danger of treating English decisions as authorities

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in Quebec cases which do not depend upon doctrines derived from the English law.

The learned judge further expressed the view that the defendant was probably not liable under Art. 1736 C.C. That defence is not raised in the plea of the Attorney General and would therefore seem not to have been open for determination under Rule 126. But, if it were, I should incline to the view that His Majesty the King cannot in any part of the British Dominions properly be regarded as resident in another country, and that the Crown in right of the Dominion, which is sued in this section, is resident in all parts of Canada.

I would allow the appeal and set aside the order of the 12th February, 1919, with costs here and in the Exchequer Court.

BRODEUR J.—La question que nous avons à décider dans cette cause est de savoir si celui qui a obtenu jugement contre un mandataire a le droit de poursuivre aussi le mandant.

Ceci nous amène à examiner la portée des articles 1716 et 1727 du code civil.

L'article 1727, sous la rubrique *Des obligations du mandant envers les tiers*, est dans les termes suivants:

> Le mandant est responsable envers les tiers pour tous les actes de son mandataire faits dans l'exécution et les limites du mandat; excepté dans le cas de l'article 1738, et dans les cas où, par la convention ou les usages du commerce, le mandataire est seul responsable.
>
> Le mandant est aussi responsable des actes qui excèdent les limites du mandat, lorsqu'il les a ratifiés expressément ou tacitement.

En confiant la gestion de ses biens à un agent, une personne devient par là même responsable des actes de ce représentant; et ce dernier peut se décharger de toute responsabilité s'il fait connaître son mandat aux

tiers avec qui il contracte. Cependant si pour des raisons particulières le mandataire ne déclare pas qu'il représente une autre personne, alors, dit l'article 1716, il est responsable envers les tiers avec qui il contracte et ce sans préjudice aux droits de ces derniers contre le mandant.

Dans le cas qui nous occupe, le mandataire McDonnell n'a pas jugé à propos, lorsqu'il a acheté des marchandises de l'appelant, de lui faire connaître qu'il représentait la Couronne; et alors, en vertu de l'article 1716, il ne peut pas y avoir de doute quant à sa responsabilité envers Desrosiers; et ce dernier était justifiable de prendre une action contre McDonnell et de le faire condamner à payer le foin qu'il lui avait vendu et livré.

Mais lors de l'audition de la cause, McDonnell a déclaré pour la première fois qu'il n'agissait pas alors pour son bénéfice personnel; mais qu'il était simplement le mandataire de la Couronne. Jugement a été rendu cependant contre lui; et je suppose que Desrosiers n'ayant pas pu obtenir de lui paiement de ce jugement présente maintenant une pétition de droit réclamant de la Couronne le montant du foin qu'il avait vendu à McDonnell.

La cour inférieure a décidé que l'action devait être renvoyée parce que Desrosiers, ayant décidé de poursuivre et de prendre jugement contre McDonnell, il n'avait pas le droit de poursuivre plus tard le mandant, c'est-à-dire la Couronne, s'appuyant en cela sur les décisions rendues en Angleterre dans les causes de *Priestly* v. *Fernie* (1) et de *Kendall* v. *Hamilton*. (2) Elle s'est basée également sur l'opinion isolée du juge

(1) 3 H. & C. 977.

(2) 4 App. Cas. 504.

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Strong dans la cause de *Hudon* v. *Canada Shipping Co.* (1)

Dans le cas actuel, je suis d'opinion que les décisions rendues en Angleterre ne peuvent pas s'appliquer et ce pour deux raisons; premièrement, parce que le code a des dispositions formelles sur la matière; et, en second lieu, parce que le droit *d'élection* qui existe en Angleterre ne peut pas être invoqué dans Québec, étant donné que c'est absolument contraire aux principes fondamentaux du code civil.

L'article 1727 du code civil déclare formellement que le mandant est responsable envers les tiers pour les actes de son mandataire faits dans les limites de son mandat. L'article ne distingue pas entre le cas où le mandataire a dénoncé sa qualité d'agent ou non. Le mandant doit exécuter les obligations que son mandataire a contractées, que ce dernier fût connu du tiers comme représentant du mandant ou non. La loi ne fait pas de distinction; et dans tous les cas le mandant est responsable envers le tiers pour tous les actes de son mandataire. Cet article est confirmé par l'article 1716 C.C. qui dit que si le mandataire agit en son propre nom, s'il ne dénonce pas sa qualité, alors il est aussi responsable lui-même envers les tiers, et ce sans préjudice aux droits que ces derniers peuvent avoir contre le mandant.

Ces deux articles, suivant moi, se complètent. Nous avons donc là pour ces tiers deux débiteurs, le mandant et le mandataire; le mandant parce qu'il est d'ordinaire responsable des actes de son mandataire, et le mandataire parce qu'il n'a pas jugé à propos de dénoncer sa qualité d'agent.

(1) 13 Can. S.C.R. 401.

L'intimé dans son factum nous dit que les codificateurs déclarent en termes formels

> that they refuse to adopt the doctrine of the Roman and *civil law* and prefer that laid down by the English, Scotch and American law, with whom Pothier coincides.

Je ne sais pas où l'on a pris cette déclaration des commissaires qu'ils avaient refusé d'adopter la règle du *droit civil*. Il est bien vrai que les commissaires ont déclaré, en combattant l'opinion de Troplong, que cette opinion de Troplong était en harmonie avec la doctrine du droit romain; et ils ajoutent:

> Mais elle est en opposition directe avec l'opinion de Pothier qui est d'accord avec les lois anglaise, écossaise et américaine. L'article soumis est basé sur l'exposé de la règle de Pothier et comprend tous les actes du mandataire soit qu'il ait agi en son propre nom ou en celui du mandant.

Il n'est nullement question dans ce rapport des commissaires qu'ils avaient refusé d'adopter les principes de la loi civile; au contraire, ils prennent le texte de leur code en reproduisant la doctrine du droit civil telle qu'énoncée par Pothier. Ils ne disent pas, comme le prétendent les savants avocats dans leur factum, qu'ils préfèrent adopter la loi anglaise, avec laquelle Pothier coïncide; mais ils adoptent au contraire la règle de Pothier qui est d'accord avec les lois anglaises.

Je dois ajouter que Pothier n'a pas été le seul sous l'ancien droit qui ait exprimé cette opinion, mais on la trouve également exprimée dans Domat, livre 1er., tit. 15, sec. 2, n° 1.

C'était donc la règle du droit civil qui était reconnue dans la province de Québec quand le code a été rédigé; et d'ailleurs les codificateurs n'ont pas donné cette règle comme étant de droit nouveau mais comme étant la loi qui régissait alors le contrat du mandat.

Maintenant quelle est la règle de Pothier? Nous la

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trouvons dans son traité sur le mandat, au n° 88, dans les termes suivants:

Quoique ce soit pour l'affaire qui fait l'objet du mandant, et en se renfermant dans les bornes du mandat, que le mandataire a fait quelques contrats avec des tiers; lorsque c'est en son propre nom qu'il a contracté, et non pas en sa seule qualité de mandataire d'un tel, procureur ou fondé de procuration d'un tel, c'est, en ce cas, le mandataire qui s'oblige envers ceux avec lesquels il a contracté; c'est lui qui se rend leur débiteur principal. Mais il oblige *conjointement* avec lui son mandant, pour l'affaire duquel il paraît que le contrat se fait: le mandant, en ce cas, est censé accéder à toutes les obligations que le mandataire contracte pour son affaire; et de cette obligation accessoire du mandant nait une obligation qu'on appelle *utilis institutoria*, qu'ont contre le mandant ceux avec lesquels le mandataire a contracté pour l'affaire du mandant.

Au n° 449, obligations, il discute longuement et clairement cette question et énonce là le principe de la manière qui suit:

Pour qu'il y ait lieu à cette obligation accessoire du commettant il faut que le préposé ait contracté en son propre nom, quoique pour les affaires du commettant; mais lorsqu'il contracte dans la qualité de facteur ou de fondé de procuration de son commettant, ce n'est pas lui qui contracte, c'est son commettant qui contracte par son ministère (n° 74): le préposé, en ce cas, ne s'oblige pas; c'est le commettant seul qui, par le ministère de son préposé contracte une obligation principale.

Lorsque le préposé contracte en son nom, pour qu'il oblige son commettant, il faut que le contrat concerne les affaires auxquelles il est préposé, et que ce préposé n'ait pas excédé les bornes de sa commission. * * *

"Les préposés obligent leurs commettants tant que leur commission dure; et elle est toujours censée durer jusqu'à ce qu'ils aient été révoqués, et que la révocation ait été connue du public.

Comme on le voit, il énonce le principe que le mandataire qui contracte en son propre nom s'oblige comme débiteur principal mais qu'il oblige en même temps son commettant comme débiteur accessoire, vu que ce dernier est censé, en lui donnant son mandat, avoir consenti par avance à tous les engagements qu'il contracterait et s'en est tenu responsable.

Maintenant, que l'on traite ces obligations conjointes du mandant et du mandataire comme obligations accessoire et principale ou qu'on les appelle obligations conjointes sous l'économie de notre loi, quelle est la nature du droit d'action que possède le tiers? Est-il obligé, comme dans le droit anglais, de faire un choix, de poursuivre soit l'un ou l'autre, ou bien s'il a le droit de poursuivre les deux?

Les obligations conjointes donnent au créancier le droit de poursuivre l'un et l'autre des débiteurs. L'article 1108 C.C. le déclare formellement:

> Les poursuites faites contre l'un des co-débiteurs n'empêche pas d'en exercer de pareilles contre les autres.

Je retrouve également le même principe énoncé dans Pothier.

Je suis donc d'opinion que les décisions rendues en Angleterre invoquées par le jugement *a quo* n'ont pas d'application dans notre droit et que Desrosiers avait le droit de poursuivre non seulement McDonnell mais son mandant.

Pour ces raisons, l'appel doit être maintenu avec dépens de cette cour et de la cour inférieure.

MIGNAULT J.—Dans ses notes de jugement, l'honorable juge de la cour d'Echiquier (M. le juge Audette) s'est exprimé comme suit:

> I was, at the argument, referred to no jurisprudence of the Province of Quebec upon the subject in question, and after research I have been unable to find any. In the absence of the same, I take it that as Art. 1716 and 1727 are different from the Code Napoleon and are borrowed from both Pothier and the English law, that general principles of the English law governing such doctrine should also be adopted in questions flowing from such doctrine and which are a sequence from the same, as Strong J. seems to have found in the case above mentioned.

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Avec toute déférence possible, qu'il me soit permis de dire que je ne partage pas l'opinion du savant juge. Si les articles 1716 et 1727 du code civil étaient empruntés à la fois de Pothier et du droit anglais, ce ne serait pas une raison de dire que les principes généraux du droit anglais doivent être adoptés pour résoudre les questions auxquelles ces articles donnent lieu. Je ferais plutôt prévaloir la doctrine de Pothier et de l'ancien droit français, d'autant plus que les codificateurs ne disent pas que ces articles sont *empruntés* au droit anglais, mais, au sujet de l'article 1727 C.C, ils font remarquer que cet article est basé sur l'exposé de la doctrine de Pothier, laquelle, ajoutent-ils, *est d'accord avec* les lois anglaises, écossaise et américaine. Il me semble respectueusement qu'il est temps de réagir contre l'habitude de recourir, dans les causes de la province de Québec, aux précédents du droit commun anglais, pour le motif que le code civil contiendrait une règle qui serait d'accord avec un principe du droit anglais. Sur bien des points, et surtout en matière de mandat, le code civil et le *common law* contiennent des règles semblables. Cependant le droit civil constitue un système complet par lui-même et doit s'interpréter d'après ses propres règles. Si pour cause d'identité de principes juridiques on peut recourir au droit anglais pour interpréter le droit civil français, on pourrait avec autant de raison citer les monuments de la jurisprudence française pour mettre en lumière les règles du droit anglais. Chaque système, je le répète, est complet par lui-même, et sauf le cas où un système prend dans l'autre un principe qui lui était auparavant étranger, on n'a pas besoin d'en sortir pour chercher la règle qu'il convient d'appliquer aux espèces bien diverses qui se présentent dans la pratique journalière.

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L'espèce que nous devons juger est intéressante. L'appelant avait vendu du foin à un nommé McDonnell. Ayant poursuivi ce dernier en recouvrement du prix, McDonnell déclara à l'enquête qu'il avait acheté le foin pour le gouvernement impérial. L'appelant ne se désista pas de son action, mais obtint jugement contre McDonnell. Il allègue qu'après le jugement il put retracer certains éléments de preuve tendant à établir les relations de McDonnell avec la Couronne. Il présenta alors une pétition de droit devant la cour d'échiquier, et la Couronne objecta qu'ayant fait option d'exercer son recours jusqu'à jugement contre le mandataire, l'appelant ne pouvait maintenant poursuivre la Couronne. Cette objection a été maintenue et la pétition de droit de l'appelant a été renvoyée. De là le présent appel.

Il s'agit des articles 1716 et 1727 du code civil, qui ne se trouvent pas au code Napoléon et qui se lisent comme suit:

1716. Le mandataire qui a agi en son propre nom est responsable envers les tiers avec qui il contracte, sans préjudice aux droits de ces derniers contre le mandant.

1727. Le mandant est responsable envers les tiers pour tous les actes de son mandataire faits dans l'exécution et les limites du mandat; excepté dans le cas de l'article 1738, et dans le cas où, par la convention ou les usages du commerce, le mandataire en est seul responsable.

Le mandant est aussi responsable des actes qui excèdent les limites du mandat, lorsqu'il les a ratifiés expressément ou tacitement.

Comme je l'ai fait remarquer, les codificateurs disent que l'article 1727 C.C. qui complète l'article 1716 C.C. est basé sur la doctrine de Pothier. Ils citent aussi, sous l'article 1716 C.C., Story, on Agency, no. 266. Recourons donc à ces deux auteurs, car ils fournissent le meilleur commentaire de ces deux articles et indiquent quelle a été l'intention du législateur.

Pothier dit, dans son traité du Mandat, n° 88:

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Quoique ce soit pour l'affaire qui fait l'objet du mandat, et en se renfermant dans les bornes du mandat, que le mandataire a fait quelques contrats avec des tiers; lorsque c'est en son propre nom qu'il a contracté, et non pas en sa seule qualité de mandataire d'un tel, procureur ou fondé de procuration d'un tel, c'est, en ce cas, le mandataire qui s'oblige envers ceux avec qui il a contracté; c'est lui qui se rend leur débiteur principal. Mais il oblige conjointement avec lui son mandant, pour l'affaire duquel il paraît que le contrat se fait; le mandant, en ce cas, est censé accéder à toutes les obligations que le mandataire contracte pour son affaire; et de cette obligation accessoire du mandant, naît une obligation qu'on appelle *utilis institoria*, qu'ont contre le mandant ceux avec lesquels le mandataire a contracté pour l'affaire du mandant.

Et Story, Agency, n° 266, dit:

In the next place, a person contracting as agent will be personally responsible, where, at the time of making the contract, he does not disclose the fact of his agency; but he treats with the other party as being himself the principal; for, in such a case, it follows irresistibly that credit is given to him on account of the contract. Thus, if a factor or broker, or other agent, buy goods in his own name for his principal, he will be responsible to the seller therefor in every case where his agency is not disclosed. But we are not therefore to infer, that the principal may not also, when he is afterwards discovered, be liable for the payment of the price of the same goods; for, in many cases of this sort, as we shall hereafter abundantly see, the principal and agent may both be severally liable upon the same contract.

Il en est autrement dans le droit anglais, et là on décide que celui qui a traité avec un mandataire contractant en son propre nom sans dévoiler le nom de son mandant, peut poursuivre l'un ou l'autre, mais non pas les deux, et que s'il prend un jugement contre le mandataire, il ne peut ensuite exercer un recours contre le mandant: *Priestly v. Fernie.* (1) C'est sur l'autorité de cette décision que l'honorable juge Audette a renvoyé la pétition de droit de l'appelant.

Le raisonnement de Lord Bramwell dans cette cause et de Lord Cairns dans *Kendall* v. *Hamilton*, (2) est certainement très fort, et j'aurais été disposé

(1) 3 H. & C. 977 at p. 982. (2) 4 App. Cas. 504.

à l'accepter comme raison écrite si après mûre réflection, je n'étais arrivé à la conclusion que le texte même des articles 1716 et 1727 C.C., interprété à la lumière des passages de Pothier et de Story que j'ai cités, ne permet pas d'accueillir la solution que le droit anglais adopte.

Ainsi l'article 1716 dit que la mandataire qui agit en son propre nom est responsable envers les tiers avec qui il contracte, "sans préjudice aux droits de ces derniers contre le mandat". Donc le recours du tiers contre le mandataire ne préjudicie pas à son recours contre le mandant. Et Pothier et Story indiquent clairement que l'un et l'autre sont débiteurs envers le tiers qui, dans ces circonstances, a traité avec le mandataire.

L'article 1727 C.C. contient une expression qui demande à être bien entendue. Il rend le mandant responsable envers les tiers pour tous les actes de son mandataire faits dans l'exécution et les limites du mandat,

excepté dans les cas de l'article 1738 (le cas du facteur qui a son commettant dans un autre pays), et dans les cas où par la convention * * * le mandataire est seul responsable.

En effet, il va sans dire que la convention peut rendre le mandataire seul responsable à l'exclusion du mandant, mais dans les cas ordinaires où le mandataire contracte en son propre nom, pas plus que dans l'espèce, cette stipulation expresse ne se trouve pas au contrat.

Feu Sir François Langelier, dans son *Cours de droit civil*, tome 5, p. 304, enseigne que dans le cas de l'article 1716 C.C., le tiers peut poursuivre le mandant et le mandataire. Il dit:

Lorsque le mandataire a contracté en son propre nom, ceux avec qui il a contracté ont droit de le tenir responsable personnellement,

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mais peuvent-ils aussi s'en prendre au mandant? Notre article répond dans l'affirmative. Les tiers peuvent-ils alors poursuivre et le mandant et le mandataire? L'affirmative ne me paraît pas douteuse. D'abord il n'y a pas de doute que les tiers peuvent poursuivre le mandataire. puisque notre article le dit en toutes lettres. Et comme ce même article leur réserve leur recours contre le mandant cela veut dire qu'ils peuvent poursuivre les deux, et pour le tout.

L'appelant cite aussi une décision de la cour de revision dans une cause de *Huot* v. *Dufresne*, (1) où se trouve le motif suivant:

> Considérant que celui qui contracte avec un mandataire qui agit personnellement, a recours contre ce mandataire, mais que, s'il découvre ensuite que ce mandataire agissait pour un autre, il a aussi recours contre ce tiers, pour qui ce mandataire agissait, et ce, sous les dispositions dudit article 1716 du Code Civil.

Il y a, dans le droit anglais, une raison de décider qui manque dans le droit civil, car celui qui poursuit l'un des deux débiteurs conjoints et obtient un jugement contre lui ne peut ensuite poursuivre l'autre débiteur. Rien de tel n'existe dans le droit civil.

Pour ces raisons je crois que c'est à tort que la pétition de droit de l'appellant a été renvoyée. J'infirmerais donc le jugement dont est appel avec dépens, et je renverrais la cause à la cour d'échiquier pour y être procédé sur la pétition de droit de l'appelant.

Appeal allowed with costs.

Solicitors for the appellant: *Letourneau, Beaulieu, Marin & Mercier.*

Solicitors for the respondent: *Rainville & Gagnon.*

(1) 19 R.L. 360 at p. 363.

DAME ANNIE CURLEY (PLAINTIFF) . . APPELLANT; 1919 *Nov. 13.

AND 1920 *Feb. 3.

OSMOND LATREILLE (DEFENDANT) . . RESPONDENT

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

Negligence—Master and servant—Use of motor car—Disobedience—"Joy ride"—Act in course of employment—Master's liability—Civil law cases—English decisions—Arts. 1053 *and* 1054 *C.C.—Art.* 1384 *C.N.—(Que.)* 3 *Geo.* V., *C.* 19, *S.* 3.

The respondent's chauffeur, while using his master's automobile for purposes of his own in violation of instructions and driving the car at excessive speed, killed the appellant's son. The negligence of the chauffeur was admitted; there was no evidence of want of care on the respondent's part in engaging him and some evidence was adduced that the master had exercised reasonable supervision.

Held, Brodeur J. dissenting, that the master was not liable, as, at the time of the accident, the chauffeur was not "in the performance of the work for which he was employed". (Art. 1054 C.C.).

Per Anglin, Brodeur and Mignault JJ.—English decisions can be of value in Quebec cases involving questions of civil law only when it has been first ascertained that in the law of England and that of Quebec the principles upon which the particular subject matter is dealt with are the same and are given the like scope in their application, and even then not as binding authorities but rather as *rationes scriptae.*

Judgment of the Court of King's Bench (Q.R. 28 K.B. 388) affirmed, Brodeur J. dissenting.

APPEAL from the judgment of the Court of King's Bench, Appeal Side, Province of Quebec (1), reversing the judgment of the Superior Court

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*Present:—Idington, Duff, Anglin, Brodeur and Mignault, JJ.

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sitting in review, to which the case had been submitted by the trial judge, sitting with a jury, and dismissing the appellant's, plaintiff's, action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Callaghan for the appellant.

Robertson K.C. for the respondent.

IDINGTON J.—My appreciation of the facts presented in evidence herein leads me to the conclusion that the learned trial judge misdirected the jury. if our decision in the case of *Halparin* v. B*ulling* (1), is to be followed as good law. The misdirection accounts for the inconsistencies that exist in some of the answers to the questions submitted.

The Court of Appeal in accord with the interpretation which it has adopted of these findings has seen its way to their reconciliation, as it were, and in doing so apparently suggests there has, arising from such misdirection, been only a misapprehension of the verdict.

I am not prepared to deny either their right or duty to do so in this particular case and say they have erred. A new trial would be the only alternative and under a proper direction that would seem to be a hopeless expedient as far as plaintiff's ultimate success would be concerned.

With great respect, I cannot agree with the law as laid down by the Court of Review, and do agree in the main with the opinions of the judges in the

(1) 50 Can. S.C.R. 471.

Court of King's Bench in favour of allowing the appeal there and dismissing the action.

I therefor think this appeal should be dismissed with costs.

DUFF J.—I am of the opinion that this appeal should be dismissed with costs.

ANGLIN J.—The facts out of which this action arises appear in the report of it in the Court of King's Bench, (1) and in the opinions of my brothers Brodeur and Mignault, which I have had the advantage of reading. While they differ in their conclusions, both my learned brothers hold the view that the question of law which is presented viz., the scope of the restriction upon the responsibility of masters for injuries caused by their servants implied in the words of Art. 1054 C.C. "in the performance of the work for which they are employed."—"dans l'exécution des fonctions auxquelles ces derniers sont employés"—must be determined not upon the authority of cases decided in English courts dealing with the question when a servant or workman will be deemed to have acted "in the course of his employment" but in the light of civil law authorities which deal with them and with the corresponding words of the C.N. Art 1384 "dans les fonctions etc.". English decisions can be of value in Quebec cases involving questions of civil law only when it has been first ascertained that in the law of England and that of Quebec the principles upon which the particular subject matter is dealt with are the same and are given the like scope in their application, and even then not as binding

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authorities but rather as *rationes scriptae:* and it is only on that footing and for purposes of comparison that I shall refer to them. I therefore cannot accede to the view that his case is concluded against the appellant by our recent decision in *Halparin* v. *Bulling* (1).

It must not be forgotten however that modern French authorities hold much the same position.

> Though entitled to the highest respect and valuable as illustrations they are not binding authority in Quebec. *McArthur* v. *Dominion Cartridge Co.* (2).

But the articles of the Quebec civil code dealing with offences and quasi-offences (1053-1056) having been based on the Code Napoleon (Rap. des cod. Vol 1 p. 16) in considering their purview and determining their interpretation, French authorities dealing with the corresponding articles of that Code—at all events those ante-dating the enactment of the Quebec civil code, and especially those cited by the codifiers as the foundation on which they worked—must undoubtedly be given great weight. Yet in dealing even with these authorities it must be borne in mind that they

> are useful only in so far as they explain what may be ambiguous or doubtful in the Canadian Code; they cannot control its plain letter or express provisions. *Herse* v. *Dufaux* (3).

I do not find in the verbal differences between the French version of Art 1054 C.C. (dans l'exécution des fonctions) and Art 1384 C.N. (dans les fonctions) support for the view that it was intended that the scope of the master's responsibility in such a case as that now before us should be more restricted under the former than it is under the latter. Pothier in

(1) 50 Can. S.C.R. 471. (2) [1905] A.C. 72 at p. 77.
(3) L.R. 4 P.C., 468 at p. 489.

dealing with this subject uses the phrase "dans l'exercice des fonctions" (Obligations, No. 121) and that is the meaning ascribed to the somewhat elliptical words of the C.N. (dans les fonctions) by all the authors who discuss it. The phrases "l'exercice des fonctions" and "l'exécution des fonctions" in themselves express very much the same idea. It may be however that the English version which in this instance appears to have been the original text (Preface to McCord's Civil Code 1 ed. p. ix) under which the authorities are cited by the codifiers (1st Rep. p. 61) and which is at least of equal authority with the French text, by its terms "in the performance of the work for which they are employed" unequivocally indicates a restriction of the master's responsibility to injuries resulting from acts done by his servant "in the course of his employment"—("au cours de l'exécution de ses fonctions" 3 Langelier p. 479, "dans le cours de ses fonctions" S. 1861.1. 439) as that limitation is understood and applied in English law.

The codifiers in their report (1st Rep. p. 16) allude to the departures in Arts. 1053-1056 C.C. from the text of the French code stating

> that the wording has been changed to obviate certain objections raised to the latter,

but we are not informed what these objections were and I find nothing in the works of our commentators which throws light on this important point.

We are met at the threshold of this case by the fifth finding of the jury that the chauffeur Lauzon at the time of the accident was

> performing work for which he was engaged by the defendant,

although, in answer to the 7th question, they also found that he was

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in possession of the motor vehicle without the knowledge and consent of the defendant and in disobedience of the defendant's order.

In the view of the scope and effect of the last paragraph of Art. 1054 C.C. taken by the Court of Review and by my brother Brodeur, there would probably be no difficulty in maintaining the fifth finding; Lauzon was engaged by the defendant as chauffeur and was undoubtedly driving his master's car. But it is scarcely reconcilable with the interpretation given to that paragraph by the Court of King's Bench and by my brother Mignault; "joy-riding" was not work for which he was employed.

The 7th finding is supported by a body of testimony of which the weight and reliability is above suspicion. Lauzon's whole evidence, on the other hand, is most unsatisfactory. The 6th and 7th findings of the jury would seem to imply the view that he told a fairy tale—that he was not testing the automobile at all, but simply "joy-riding". The only corroboration of his story relates to its later stages and comes from the witness Leblanc, one of the companions of his "joy-ride", whose testimony appears to be even less trustworthy than that of Lauzon himself. In cross-examination he is involved in a series of contradictions.

The majority of the judges in the Court of King's Bench disbelieved Lauzon's story where it is in conflict with that of the witnesses Gauthier and Desenfants, who say that he brought the defendant's automobile into the Laurier garage about 9.15 o'clock on the evening in question. *Falsus in uno falsus in omnibus.* They regarded his story as so highly improbable that they found little difficulty in discrediting it.

After carefully reading all the evidence, although a verdict can be considered as against the weight of

evidence only if it is such as a jury viewing the whole of the evidence could not reasonably find (Art. 501 C.C.P.), I am not prepared to say that the learned appellate judges below were not well advised in rejecting Lauzon's account of the evening's occurrences and taking the view that he returned with the defendant's automobile to the garage as directed by the defendant's son, that he subsequently took it out again in violation of his master's orders and purely for his own purposes and that he was engaged in so using it when he killed the plaintiff's son: or, assuming the law of Quebec to be as stated by the majority of the Court of King's Bench, that they erred in setting aside or ignoring the 5th finding of the jury and directing the entry of a judgment under Art. 508 (3) C.C.P. different from that rendered by the Court of Review on the reserved case. I cannot but think that the jury was led to make its 5th finding by the concluding direction of the learned trial judge, in reply to the question of a juror, quoted by Cross and Carroll J.J.:

Le juré; Si le jury est d'avis que Lauzon avait pris la voiture sans permission du défendeur, d'après vous, dans ce cas-là, il ne remplissait pas les fonctions pour lesquelles il était engagé. Est-ce que je dois comprendre que c'est cela que vous dites?

Le juge: Le chauffeur, malgré qu'il n'ait pas le consentement de son patron et agisse contrairement à ses instructions, peut encore être dans l'exercice de ses fonctions.

* * * * * *

Mtre Duranleau: Le juré, dans sa question au juge, a posé le cas suivant: le chauffeur, après avoir conduit la machine au garage, la reprend, sans permission et contrairement aux instructions de son patron, pour faire une course pour ses fins personnelles; le patron est-il responsable?

Le juge: Si une personne penêtre dans un endroit fermé où une auto est gardée, et, sans autorité de la part du propriétaire et hors sa connaissance, s'en empare, ou bien si elle s'empare de la machine lorsqu'elle est sous la garde d'une tierce personne et cause des dommages, dans l'usage de cette machine, le propriétaire dans ce cas n'est

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pas responsable des dommages; mais si l'automobile est encore sous le contrôle du chauffeur et qu'il s'en sert pour ses fins personnelles contrairement aux instructions de son patron, il abuse de ses fonctions, mais je suis d'opinion que dans ce cas le propriétaire est responsable.

There can be little doubt that that direction was understood by the jury as implying a statement of the law such as is involved in the following illustration given by Acting Chief Justice Archibald in delivering the judgment of the Court of Review.

> Where an owner of a car leaves his chauffeur in possession and in a position to use the car as he may deem fit, the result would be different because the owner of the car is responsible for the conduct of the man whom he is supposed to know. Take for example as an illustration that the owner has a private garage, and he instructs his chauffeur that his car is to be within the garage and the door locked by ten o'clock each evening but the owner leaves the chauffeur in possession of the key; the chauffeur, taking advantage of that, opens the garage, takes the car out, and damages result. The owner might easily have demanded of his chauffeur that he should deposit the key with him at night. I think there is no question that the owner would be responsible in such a case.

With great respect, I venture to agree with Mr. Justice Cross that this is "plainly a mistake."

I have outlined the view of the facts bearing on the vital question on which the Court of King's Bench proceeded. To complete the statement of what seems to be material, however, I should add that upon the evidence it was part of Lauzon's duty to have placed the defendant's automobile in its proper position on the second floor of the garage when he brought it in, and that until he had done so it could scarcely be said that it had passed from his custody into that of the proprietor of the garage. While the automobile was in the garage from about 9.15 until 9.40 on the evening in question it remained on the ground floor. In view of these latter circumstances it is perhaps not of great moment, except as affecting his credibility, whether Lauzon actually brought the car into the garage or

not, or whether he started on his *promenade d'agrément* (joy-ride) from the garage or from a point distant some 200 yards from it. In either case he certainly set out "on a frolic of his own" in the sense of that term as used by Baron Parke in *Joel* v. *Morrison* (1), and adopted by Jervis C. J. in *Mitchell* v. *Crassweller* (2), or as put by Cockburn C.J. in *Storey* v. *Ashton* (3) he

started on an entirely new and independent journey which had nothing at all to do with his employment.

On the other hand it is equally clear that according to the opinion of the Cour de Cassation in *Picon* c. *Peltier* (4), Lauzon having been ordered to take the automobile to the garage

s'acquittait donc bien d'un acte de son service encore qu'il n'exécutat pas cet ordre strictement, puisqu'au lieu de ramener de suite la voiture il s'en servait pour faire une promenade. (Note)

As put in the text of the Arret,

Carrière, placé sous l'autorité de Picon, ne conduisait l'automobile que parce que ce dernier la lui avait confiée pour accomplir un service commandé; qu'il appartenait d'ailleurs à Picon de surveiller l'exécution de son ordre.

The French court extends the doctrine of the English deviation cases such as *Venables* v. *Smith* (5); (see also *Williams* v. *Koehler & Co.*, (6); and *Chicago Consolidated Bottling Co.* v. *McGinnis* (7); and treats as merely an abuse of the employment what would in England be regarded as something clearly outside its course, there having been, to quote from the syllabus of the latter American case,

(1) 6 C. & P. 501, at p. 503.
(2) 13 C. B. 237, at p. 246.
(3) L.R. 4 Q.B. 476, at p. 480.
(4) D. 1908. 1. 351.
(5) 2 Q. B. D. 279.
(6) 41 N.Y., App. D. 426.
(7) 86 Ill. App. 38.

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a turning away from the master's service and an entering upon an affair which is the affair of the servant only.

In the direction of Erskine, J., in *Sleath* v. *Wilson* (1), disapproved in *Storey* v. *Ashton* (2), views somewhat similar to those which prevailed in *Picon* c. *Peltier* are expressed. On the other hand the arguments which prevailed before the Cour de Cassation were unsuccessfully urged on the Court of Common Pleas by Sergeant Shee for the plaintiff in *Mitchell* v. *Crassweller* (3). The case at bar is indistinguishable from the French case. *Storey* v. *Ashton* (1) and *Mitchell* v. *Crassweller* (3), on the one hand, and *Picon* c. *Peltier*, on the other, illustrate the distinct cleavage between the views of the limit on the master's responsibility for misconduct of his servant in England and France. It is interesting to compare the recent case of *Irwin* v. *Waterloo Taxi-Cab Co.* (4).

Responsibility for damage caused by a thing which he has under his care (Art 1054 C.C. par. 1) arises only when the occurrence is due to the thing itself, not when it is ascribable to the conduct of the person by whom it is put in motion, controlled or directed, D. 1918, 2. 7; D. 1912, 2.255. See, too, D. 1907, 2. 17.

The finding of negligence against Lauzon is unchallenged and unchallengeable. It is equally clear that there is no evidence of any want of care on the defendant's part in engaging him such as might render him lible under Art. 1053 C.C.; and, in so far as the sixth finding of the jury imputes absence of reasonable supervision to the defendant, it is likewise without support in the evidence. On the contrary he has, in

(1) 9 C. & P. 607, at p. 612.
(2) L. R. 4 Q. B. 476.
(3) 13 C. B. 237, at p. 243.
(4) [1912], 3 K. B. 588.

my opinion, discharged any burden of proof which the Quebec statute, 3 Geo. V. c. 19, may have cast upon him in this regard by shewing that his supervision of Lauzon was all that could reasonably be expected in the absence of any ground to suspect him of misconduct. I agree with the comments upon that finding made by Cross and Pelletier JJ. and my brother Mignault. Failure by the defendant to exercise due supervision over his chauffeur was in no sense the proximate cause of the plaintiff's son being killed. No supervision that could reasonably be exacted would have prevented Lauzon joy-riding on the night in question. On the other hand to a claim under the concluding paragraph of Art. 1054 C.C., the most vigilant supervision would not avail as a defence except perhaps in regard to the burden of proof on the actual facts. Sec. 3 of 3 Geo. V. c. 19, which replaced Art. 1406 of the R.S.Q., affords the plaintiff no assistance.

The head note in *Woo Chong Kee* v. *Fortier* (1), cited by the respondent is misleading. As pointed out by Mr. Justice Greenshields, at p. 361, 3 Geo. V. c. 19, s. 3. was not in force at the date of the accident there in question. As soon as it appeared that the defendant owned the automobile driven by Lauzon the amended statute put upon him the onus of proving either that the accident was not attributable to any fault of Lauzon or facts sufficient to establish that Lauzon was not engaged at the time in the performance of work for which he was employed. But see *Boyle* v. *Ferguson* (2), on the latter point. The real difficulty with which we are confronted is to determine whether, on the facts as above stated,

(1) Q. R. 45 S.C. 365. (2) [1911] 2 Ir R. 489 at p. 496.

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Lauzon was, as a matter of law, engaged "in the performance of the work for which he was employed."—"au cours de l'exécution de ses fonctions"—when he killed the plaintiff's son.

In view of the verbal differences between the Quebec code and the C. N. already adverted to, Quebec authority on the question under consideration would be of exceptional value. Unfortunately there is a dearth of it. The particular aspect of the master's responsibility presented by the case at bar does not seem to have directly engaged the attention of the Quebec Courts in any reported case brought to our notice, and the commentators do not discuss it. But such passing allusions as we do find seem to indicate a tendency to interpret the restrictive words of the Quebec code as the equivalent of the phrase "in the course of their employment as servants" as used in such English cases as *Storey* v. *Ashton* (1), rather than in the sense given to the words "dans les fonctions, etc." of the C.N. by the Cour de Cassation in *Picon* v. *Peltier* (2).

Thus in *Turcotte* v. *Ryan* (3), the liability of the master, Desjardins, was upheld by Fitzpatrick C. J., delivering the judgment of this court, on the view that the plaintiff had been injured by his co-defendant Turcotte while the latter was in Desjardins' service and "during the course of his employment," and by Lavergne J., speaking for the majority in the Court of King's Bench

puisque c'est dans l'exercice de ses devoirs comme employé de Desjardins que Turcotte a été la cause de cet accident.

(1) L. R. 4 Q. B. 476. (2) D. 1908. 1. 351.
(3) 39 Can. S.C.R. 8; Q.R. 15 K.B. 472.

And in *Trudel* v. *Hossack* (1), the immunity of the master from liability under Art. 1054, C.C. was rested by Würtele J., who delivered the judgment of the Court of Queen's Bench, not on the fact that the servant Frenette was not engaged as a driver or even that he had taken his master's horse out surreptitiously, but on the ground that he "was not in the performance of any work for his master."

In the authorities cited by the codifiers (1st Rep. p. 61) we find little to throw light on this question. Thus Pothier merely says that masters are not responsible for

> délits ou quasi-délits (of their servants) qu'ils commettent hors de leurs fonctions; (Obligations, No. 121).

In Massé et Vergé, sur Zachariae, No. 628, we are told that:

> En principe, la responsabilité des maîtres et des commettants, à l'égard du dommage causé par les domestiques ou préposés, n'est pas limitée au cas où les actes dommageables rentraient dans les termes du mandat ou de la fonction; pour que le maître ou le commettant soient responsables, il suffit que les actes dommageables du domestique ou du préposé se rattachent à l'objet de leur mandat, et qu'ils aient eu lieu à l'occasion de son exécution. Orléans, 21 déc. 1834, S. V. 55, 2, 661; Cass. 13 déc. 1856, S. V. 57, 1. 442, et Paris, 8 oct. 1856, S.V. 57, 2, 445.

Toullier says:

> C'est commander une action que d'y employer un domestique ou de charger tout autre préposé de la faire pour soi. L'action devenant alors le fait du maître ou des commettants, il en doit répondre comme de son propre fait.

I have read all the French authorities cited in the judgments below, by my learned colleagues from Quebec, and in the factums, and a great number of others. There is no doubt that the tendency in recent years of the French courts and the text writers has

(1) Q.R. 4 Q.B. 370, at p. 373.

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been to hold the master answerable for any wrong committed by his servant while in his employment, unless the act complained of be wholly foreign to his functions as servant. They hold the master liable if the servant's act be in any way connected with his employment. Sainctelette in his work "Responsabilité des Propriétaires d'Automobiles," p. 223 thus sums the matter up:

> Nous avons jusqu'à présent supposé que le domestique ou le préposé dont il s'agissait était un mécanicien, un chauffeur, c'est-à-dire une personne dont les fonctions habituelles consistent précisément à s'occuper de l'entretien et de la conduite de l'automobile; c'est ce qui nous a permis de dire que lorsque ce préposé se sert de l'automobile à l'insu de son maître ou contre sa défense, il commet un abus des fonctions, mais non pas un acte qui y soit totalement étranger.

And the modern authorities which the learned writer cites certainly go far to bear out his conclusion.

I have already referred to *Picon* c. *Peltier* (1). In *Paterson* c. *Bibien* (2) a chauffeur who, contrary to orders, had taken his master's automobile out for his own purposes by his negligence in driving caused injury to one Bibien, a comrade whom he had taken for a drive. The Cour de Cassation, reversing the Cour d'Appel, held the owner not responsible—but solely on the ground that Bibien knew that the chauffeur was driving for his own purposes and not on account of his master and had entrusted himself to the care of the chauffeur personally and individually and not in his capacity as the servant of Paterson. The court treats the case as one of "l'exercice abusif du mandat," and expressly states that the court below was well advised in refusing to relieve the master on that ground. In the foot note, however, the editor of the report says:

(1) D. 1908. 1. 351. (2) D. 1904. 1. 70.

Faudrait-il donner la même solution si le dommage avait été causé à un tiers complétement étranger au préposé? Par exemple, en se plaçant dans les hypothéses de la présente espèce, faudrait-il décharger le maître de toute responsabilité si l'accident avait été causé par le conducteur de l'automobile, non pas à un camarade qu'il emmenait en promenade, mais à un passant qu'il aurait renversé? La question parait plus délicate et cependant il semble que—d'après la jurisprudence—la solution doit être la même dans les deux hypothèses.

Referring to the same case the reporter in his foot note to *Picon* c. *Peltier* (1) says:

Dans ce cas en effet on ne pouvait considérer que le mécanicien accomplisait un acte de son service.

In the report of this case in the Gazette du Palais (2), the reporter in his foot note cites as in point the case of *Daubert* c. *Salles* (3), where it was held that

Le maître n'est pas responsable de l'usage nuisible fait par son domestique d'une chose qui lui appartient, alors que, d'une part, le maître n'a commis aucune faute en laissant cette chose à la disposition du domestique, et que, d'autre part, le domestique, en faisant usage de cette chose, n'a point accompli un acte de ses fonctions.

A mistress had directed her servant to take some wine from her table and throw it away because she found it unfit to drink. The servant took it to the kitchen and there gave some of it to a visitor to drink. The wine was poisoned and killed the visitor. In an action by his widow against the mistress the latter was held not liable on the ground that the servant had acted outside the scope of her functions as such, and the decision was upheld by the Cour de Cassation. Although the case would seem to have been one of pure accident, actionable fault on the part of the servant appears to have been assumed. The fact that the wine of which she made use belonged to her mistress and was entrusted to her to be thrown out and was

(1) D. 1908. 1. 351. (2) 1904. 1. 140.
(3) D. 1861. 1. 439.

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therefore in her lawful custody as servant, the purpose for which it was given her not having yet been accomplished, did not suffice to render the mistress liable. As the court puts it:

> Ce n'est pas par suite et dans le cours de ses fonctions de domesticité que la servante a fait boire le vin empoisonné. (Compare 1 Rolle Abr. 95, s. 3.)

Laurent in commenting on this case says:

> On ne dira pas qu'une invitation est un service auquel le maître emploie ses domestiques.

Neither is joy-riding work for which a chauffeur is engaged. The principle underlying the decision of this case very closely approaches, if indeed it is not precisely that upon which the respondent would maintain the judgment of the Court of King's Bench in the case at bar. What connection was there between "the work for which (Lauzon was) employed" (la fonction à laquelle il était employé) and what he was doing when he killed the plaintiff's son except the fact that it was his master's automobile that he was using for his own purposes, having taken advantage of its being in his custody to do so?

It is interesting to compare with these cases the decision in *The Coupé Co.* v. *Maddick* (1), where the defendant having hired a carriage and horses from the plaintiff, his coachman, instead of taking them, as was his duty, to the stables, drove for his own purposes in another direction and in so doing negligently injured the horses and carriage. The master was held liable, but for breach of contract as bailee. In *Sanderson* v. *Collins* (2), however, while the decision in *Coupé Co.* v. *Maddick* (1) was

(1) [1891] 2 Q.B. 413. (2) [1904] 1 K. B. 628.

regarded as not maintainable on the ground above stated, (compare Arts. 1767, 1769, 1200, 1150, 1071 and 1072 C.C.) it was suggested by Collins, M.R., with some doubt, (p. 632) that it might perhaps be upheld on the ground that the act done was within the scope of the coachman's authority since

he was entrusted with the carriage and horses for the purpose of driving them.

In *Sanderson* v. *Collins* (1) the master was held not liable, however, for an injury negligently done to a borrowed carriage by his coachman who had taken it out for his own purposes wtihout his master's knowledge because in doing so the coachman had not been acting in the course of his employment.

In *Irwin* v. *Waterloo Taxi-Cab Co.* (2), a driver for the defendant company, by order of the general manager, whom he was bound to obey, drove him in a cab which the manager had no right so to use, upon his private business and in so doing negligently injured the plaintiff. The driver was held to have been acting in the course of his employment and the plaintiff therefore recovered against the company. This case might not have been so decided in England 50 or 60 years ago. Both Vaughan Williams L. J. and Fletcher-Moulton L.J. dwell on the fact of the driver's belief that he was discharging his duty; he knew nothing of the limitation on the manager's right to use the company's cars. Compare an arrêt cited by Demolombe, Vol. 31, No. 617, where the court gave some weight to the fact that the servant could not have supposed he was acting *dans ses fonctions*. A contrary view appears to have prevailed in *Clark* v. *Buckmobile Co.* (3).

(1) [1904] 1 K.B. 628. (2) [1912] 3 K.B. 588.
(3) 107 N.Y. App. Div. 120.

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In a case which Sainctelette cites at p. 219 from the work of Imbrecq "L'automobile devant la Justice" (which is not in the Supreme Court Library) a master was held responsible where, having sent his chauffeur to drive a friend from Paris to Rouen, the chauffeur after reaching Rouen killed two persons while using the automobile in joy-riding with some companions. The court, however, laid some stress on the facts that the return journey from Rouen to Paris would have taken at least two days and that the accident happened on the second day of the stay at Rouen, wherefore the chauffeur should be regarded as having been still "dans l'exercice de ses fonctions."

Some French authors state the master's responsibility in very broad terms. The passages from Baudry-Lacantinerie et Barde (Obligations No. 2911) quoted by my brother Mignault, and from Dalloz (1874. 2. 52) quoted by my brother Brodeur, are examples. Larombière tells us that:

> Le maître cesse d'être responsable, quand le fait n'a aucun rapport avec les fonctions du domestique et qu'il a été commis en dehors de son service. Art. 1384, No. 12.

The same author (Art. 1384 C.N. par. 10, *in fine*) says:

> Il suffit qu'il (le fait) s'y (aux fonctions) rattache directement par des circonstances de temps, de lieu et de service pour que la responsabilité du maître soit engagée; et cette responsabilité a lieu dans tous les cas semblables.

Other writers are inclined to give a wider scope to the restrictive condition imposed by the code and to treat as "en dehors des fonctions" acts which the former would regard as merely "l'exercice abusif des fonctions."

Demolombe in discussing Art. 1384 of the C.N. (Vol. 31 No. 617) cites with approval a decision of

the "Tribunal Civil de la Seine" in which the important statement is made that the responsibilities imposed by this articles on masters and employers "sont de droit étroit." See also S. 1875. 2.36. The learned author also says:

Toujours faut-il que le fait ou l'acte quelconque du domestique ou du préposé rentre dans la nature des fonctions auxquelles il est employé et qu'il l'ait commis comme tel, en sa qualité de domestique ou de préposé.

On this statement of the law the vital question in the present case would appear to be: Was Lauzon at the moment of the accident in control of the car in the capacity of servant to the defendant?

Laurent (Vol. XX, No. 582) says:

L'article exige une condition pour que les commettants soient responsables du fait de leurs préposés, c'est que le dommage ait été causé dans les fonctions auxquelles ils les ont employés. De là suit que si le dommage a été causé en dehors de ces fonctions, les commettants cessent d'être responsables. Cette condition est une conséquence du motif sur lequel la responsabilité des commettants est fondée. Ils choisissent un préposé pour remplir certaines fonctions; c'est en accomplissant ce service que le préposé cause un dommage par un délit ou quasi-délit; la loi présume que le dommage est causé par la faute du commettant, parce qu'il a fait choix d'un préposé malhabile, inprudent ou méchant. La présomption de faute et, par suite, la responsabilité du commettant supposent donc que c'est *dans le service* que le dommage a été causé. Si le préposé a causé le dommage en dehors de son service, la raison de la responsabilité du commettant cesse, on ne peut pas lui reprocher d'avoir fait un mauvais choix, car le dommage causé n'a rien de commun avec le service pour lequel le commettant a choisi le préposé et dès qu'il n'y a plus de présomption de faute, la responsabilité de l'article 1384 n'a plus de raison d'être.

Un seul et même fait peut donc engager la responsabilité du commettant ou ne pas l'engager suivant qu'il est commis dans le service ou en dehors du service.

A writer in the Revue Trimestrielle, 1917, at pp. 134-5 says:

Le préposé rend le patron responsable s'il fait un acte même abusif ou délictueux dans le sens de la fonction. Mais lorsque le préposé va contre sa fonction, le patron n'est plus responsable.

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Laurent (Vol. XX No. 586) cites with approval the following passage from a judgment of the Court of Appeal of Paris (D. 1852 2. 240):

> Une seule condition existe à cette responsabilité des maîtres et commettants, c'est que le dommage ait été causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés, ce qui doit s'entendre surtout des abus commis dans l'accomplissement de ces fonctions, quasi-délits, délits ou crimes même. Pourvu que le fait dommageable se rattache à la fonction, qu'il n'en soit qu'une extension abusive, la condition de la loi existe et la responsabilité des maîtres est encourue.

But since the only limit on the responsibility of the master is that implied in the condition that the damage must arise in the performance of the work for which the servant is employed (Toullier Vol. XI No. 282) he is at all events entitled to insist that this condition of a responsibility admittedly severe shall be really fulfilled. Fuzier-Hermann, Rep. vbo. Responsabilité Civil; No. 718; S. 1904, 2. 298.

M. Wahl in an article in Revue Trimestrielle, 1908, at p. 14, says that the ground of the decision in *Picon* c. *Peltier* (1) was that at the moment of the accident the master "n'avait pas abdiqué son devoir de surveillance." The learned writer had, however, stated his own view in these terms:

> Mais l'article 1384, cesse d'être applicable lorsque le conducteur en se servant de l'automobile agissait à l'insu de son patron et en son nom personnel. Dans ce cas le patron n'est pas tenu des conséquences de l'accident qu'il n'a pu empêcher et qui n'est pas arrivé dans l'exercice des fonctions du conducteur.

But the authority cited for this proposition is *Paterson* c. *Bibien* (2) above referred to.

The value of the French decisions as authorities is much weakened by the prevalent view that whether a servant is or is not acting "dans les fonctions" is

(1) D. 1908. 1. 351. (2) D. 1904. 1. 70.

regarded as a pure question of fact to be conclusively determined by the "juges du fond." Thus we read in Baudry-Lacantinerie et Barde, Obligations, No. 2195.

Les auteurs ne sauraient poser de règle ni formuler des présomptions dont le législateur ne parle pas. Il s'agit d'une pure question de fait; elle est donc abandonée à l'appréciation des juges du fond.

The same view is expressed by Laurent, Vol XX, No. 585.

C'est une question de fait: il faut en laisser la décision au juge, sans vouloir le lier par des présomptions que la loi ignore.

See also S. 1904. 2. 298, note (4-5); Garsonnet Traité de Procédure, XL, Vol. 1, p. 162; Labori Rep. Vbo. Resp. Civ. No. 174.

With respect, the question is one of mixed law and fact—a question of fact only within certain limits. Addison on Torts (8th ed.) p. 122. What work was the servant employed to perform, what was he actually doing, and for whose benefit or on whose account was he acting, are no doubt, questions of fact. But, these facts being ascertained—and their ascertainment usually presents comparatively little difficulty—whether what the servant actually did was "in the performance of the work for which he was employed" depends entirely upon the proper interpretation of these latter words; and that is a question of law.

Toute la difficulté est de préciser le sens qu'il convient de donner à ce membre de phrase. S. 1892. 1. 569. Notes (1 & 2).

If there be no conflict in the evidence the question whether a servant whose wrongful act caused injury to a stranger was acting within the scope of his employment, is for the court; but, if there be conflict, then the question is for the jury. *Barmore* v. *Vicksburg, etc. Ry. Co.* (1). But whether the act causing

(1) 85 Miss. 426.

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injury is so connected with the course of the employment as to engage the responsibility of the master or is such a departure from it as relieves him, must as a question of degree be determined by a jury properly instructed by a judge who correctly directs himself. Clark and Lindsell on Torts (Can. ed. p. 76). See, however, *Joseph Rand* v. *Craig* (1).

It may be of some assistance in determining how far English cases may be helpful as affording *rationes scriptae* to compare the views taken by the French and English courts of some comparatively elementary phases of the subject under consideration though not directly bearing upon the point immediately before us.

The basis on which the liability of the master rests is substantially the same in both countries. Although Demolombe's view was that it depends solely on the master's faculty of choice of his servant (Vol. XXXI, Nos. 610-611), nearly all the other authors base it as well on the master's right of control by orders and instructions; and this double basis of responsibility is now well established in the French courts.

Si, en effet, l'article 1384 soumet les commettants à l'obligation de répondre du fait de leurs préposés, ce n'set pas seulement parce qu'ils les ont choisis, c'est encore parce qu'ils ont le droit de leur donner des ordres et des instructions sur la manière de remplir les fonctions auxquelles ils les emploient. Larombière, art. 1384, No. 11.

S. 1887. 1. 456, and note. See, too, S. 1893. 1. 217. note (3); Sourdat, t. 2. No. 887; Baudry-Lacantinerie et Barde (Oblig.) No. 2912; *Turcotte* v. *Ryan* (2), per Lacoste C.J.

(1) [1919] 1 Ch. 1.

(2) Q.R. 15 K.B. 472, at p. 478.

Since the decision in *Limpus* v. *The London General Omnibus Co.* (1), as pointed out by Fletcher-Moulton L.J. in *Smith* v. *Martin and Kingston-upon-Hull Corporation* (2):

> The real question is whether it was an act done in the course of the (servant's) employment and not whether it was within the scope of the authority given to her.

The question is not one of authority: *Smith* v. *North Metropolitan Tramways Co.* (3).

Blackstone indicated the same test in his commentaries (Lewis 1 ed. Vol. 1, p. 431), when he said:

> If the servant by his negligence does any damage to a stranger, the master shall answer for his neglect; but the damage must be done while he is actually employed in his master's service, otherwise the servant shall answer for his own misbehaviour.

In *Lloyd* v. *Grace, Smith & Co.* (4), Lord Macnaghten says:

> The expressions "acting within his authority," "acting in the course of his employment," and the expression "acting within the scope of his agency" (which Story uses) as applied to an agent, speaking broadly, mean one and the same thing. What is meant by those expressions is not easy to define with exactitude. To the circumstances of a particular case one may be more appropriate than the other. Whichever is used it must be construed liberally, and probably, as Sir Montague Smith observed, the explanation given by Willes J. is the best that can be given.

Blackstone (Lewis ed.) Vol. 1, p. 430, states the principle in these terms:

> As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given or implied; *nam qui facit per alium facit per se.*

See, too, Wood, Master & Servant, No. 279.

But if delegation of authority is to be taken as the basis of the master's liability, by liberality of

(1) 1 H. & C. 526.
(2) [1911] 2 K.B. 775, at p. 782.
(3) 55. J.P. 630.
(4) [1912] A.C. 716 at p. 736

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construction, implied authority must be made to cover all acts in the course of the employment. Wood, Master & Servant, No. 280.

The House of Lords, by its decision in *Lloyd* v. *Grace, Smith & Co.* (1), dispelled the notion that it is also essential that the servant should be acting "for his master's benefit." *Joseph Rand* v. *Craig*, (2). Appropriate as these words are in some cases, "in a general statement of the law they are out of place," says Lord Macnaghten. His Lordship proceeds to point out that in the very case in which Willes, J. had used the phrase "for his master's benefit", *Barwick* v. *English Joint Stock Bank* (3), that eminent judge also said

> In all the cases it may be said as here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in.

The master's faculty of choice is here plainly indicated as a basis of liability, as it was in the classic passage from the judgment of the same distinguished judge in *Bayley* v. *Manchester Rly. Co.* (4), subject to the qualification that what was done by the servant, however wrongful, was done not from any

> caprice of the servant but in the course of his employment. Wood, Master & Servant, No. 288.

As put in *Marion* v. *Chicago Railway Co.* (5).

> The mere purpose of the employee to serve his employer has not a tendency to bring the act within the scope of his employment. Compare D. 1860. 1. 49.

(1) [1912] A.C. 716.
(2) [1919] 1. Ch. 1. at p. 6.
(3) L.R. 2 Exch. 259.
(4) L.R. 7 C.P. 415.
(5) 59 Iowa, 428.

In *Quarman* v. *Burnett* (1) Baron Parke put the liability of the master for the consequences of the servant's negligence on the ground that it was

> he who has selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey.

See, too, Smith on Master & Servant (5 ed.), p. 284, Addison on Torts (8 ed.) pp. 122 and 129, *Duncan* v. *Findlater* (2) per Lord Brougham.

In France and England, therefore, the applicability of the maxim *respondeat superior* in these cases would appear to rest on identical grounds. It arises out of the legal relation between the master and the servant.

The master is liable in both countries alike, notwithstanding that he was unable to prevent the particular act which caused the injury (31 Demolombe, No. 611; 20 Laurent, No. 584; 4 Aubry et Rau, No. 447; Fuzier-Hermann, Vbo. Resp. Civ. No. 480; Marcadé, Art. 1384, No. 3; S. 1885. 1. 21; Smith on Master and Servant (5 ed.), p. 284; Pollock on Torts (10 ed.), pp. 88-9); because he selected the servant (Fromageot "De la Faute", pp. 145, 150) and although the act was done in direct violation of his orders as to the manner in which the work should be performed—(31 Demolombe, 612; Sourdat, Responsabilité (4 ed.) t. 2, No. 888; *Bayley* v. *Manchester, etc.* (3). "If the servant is acting within the scope of his employment, however much he may have abused his authority, however improperly and blunderingly he may have acted, the defendants are liable: per Black-

(1) 6 M. & W. 499, at p. 509. (2) 6 Cl. & F. 894, at p. 910.
(3) L.R. 8 C.P. 148.

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burn J. (1); *Limpus* v. *Gen. Omnibus Co.* (2); *Whitehead* v. *Reader* (3); *Whatman* v. *Pearson*) (4); and is an illegal or even criminal act. S. 1873. 2. 42; S. 1851, 2. 359; *Dyer* v. *Munday* (5). But there is no liability in either country where the illegal or criminal act is done wantonly for some purpose of the servant himself and not in the discharge of his duties; S. 1885, 1, 21; 20 Laurent No. 582, 2nd paragraph.

La condition rigoureusement imposée par la loi pour qu'il y ait responsabilité des maîtres est que le fait dommageable se soit produit dans les fonctions auxquelles leurs domestiques étaient employés. S. 1875, 2. 36. *Limpus* v. *General Omnibus Co.* (2); *Cheshire* v. *Bailey* (6); *Croft* v. *Allison* (7); *Joseph Rand* v. *Craig* (8).

In France the owner of a public conveyance was held civilly liable for a criminal assault committed by his driver on a girl of 13 sent in his carriage from a railway station to a convent (D. 1873. 3, 7). This decision appears to have been rested on breach of a contract to conduct the girl directly to the convent as well as on the ground that the act of the servant was "*dans l'exercice de ses fonctions.*" The owner of an apartment was likewise held responsible where his concierge had aided in the seduction of a young girl by receiving letters for her and introducing young men into her room (S. 57. 2.445). Larombière, however, condemns this latter arrêt (Art. 1314, No. 9), as does also Demolombe (Vol. 31, N. 618). In England the master would probably have been held not liable in both these cases on the ground that the wrongful acts were committed "exclusively for the servant's private ends." Pollock (10 ed.), p. 99; *Richards* v.

(1) L.R. 8 C.P. 148, at p. 154.
(2) 1 H. & C. 526, at p. 539.
(3) [1901] 2 K.B. 48.
(4) L. R. 3 C.P. 422.
(5) [1895] 1 Q.B. 742.
(6) [1905] 1 K.B., 237.
(7) 4 B. &Ald. 592.
(8) [1919] 1 Ch. 1.

West Middlesex Water Works Co. (1). But it would be otherwise if the act, though actually forbidden, were done in the master's interest. *Mousell Brothers, Ltd.*, v. *London & North Western Rly. Co.* (2). Compare S.73.2.42, where a railway company was held liable for its servant's act in smuggling tobacco for his own purposes,

alors que ce délit n'a eu lieu et n'a été possible qu'à l'occasion de ses fonctions et de sa qualité.

The master is likewise liable in both countries if the particular act causing damage, though not actually one for which the servant was engaged, is connected with (se rattache aux fonctions) and was committed while the servant is occupied in performing (à l'occasion de) work for which he was employed. Massé et Vergé sur Zachariae, par. 628 (2); 20 Laurent, No. 583; Fuzier-Hermann, Rep. vbo. Resp. Civ. No. 669. But curious differences have developed in the application of this ground of liability. A fire caused by the carelessness of a workman in throwing a lighted match on the floor while smoking at his work, has been held in France to render the master liable on the ground that smoking while working in a place where he was surrounded by inflammable material was "une grave imprudence" and the damage was caused "dans les fonctions." S. 1847. 2. 283; See also S. 1896. 1.91. In England under the like circumstances the master was held not liable (*Williams* v. *Jones* (3), by the majority of the Court of Exchequer (Erle C. J. Keating and Smith JJ.) on the ground that the lighting of the pipe was not in any way connected with the work for which the servant was employed. Mr.

(1) 15 Q.B.D. 660 at pp. 662, 663. (2) [1917], 2 K.B. 836.
(3) 3 H. & C. 602.

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Justice Keating suggests that the firing of squibs or matches indulged in as a pastime during working hours would not be more clearly unconnected with the employment. But Blackburn J., dissenting, viewed the case as one of negligence in the course of the employment imputable in law to the master and entailing liability upon him. Mellor J., also dissenting, viewed it as negligence in the use of the shed where the workman was engaged, which had been loaned by the plaintiff to the defendant. The view taken by the majority however, prevailed in *Woodman* v. *Joiner* (1).

Again in France it has been held that the servant's act which causes injury must arise directly out of his employment and the master was held not liable where one workman mischievously flashed the sun's rays from a mirror in the eyes of another, who in his annoyance broke the mirror, whereupon the former threw some of the pieces of broken glass at him and thus destroyed his right eye. Inadequate supervision was the basis of the claim; but the court held that the workman's act which had caused the damage

ne se rattache point en lui-même au service dont il était chargé, n'avait aucun rapport avec le service qui lui était assigné. S. 1904, 2, 908.

On the other hand in England it has been held that where a clerk using a lavatory intended for employees failed to turn off a tap after washing his hands upon quitting work and thus caused a flood, the master was liable because although washing his hands may not have been within the scope of the clerk's employment it was incident thereto. *Ruddiman* v. *Smith* (2). In an earlier case where a clerk had caused

(1) 10 Jur. N.S. 852. (2) 60 L.T. 708.

similar damage in using a lavatory which he was not permitted to use, the master was held not responsible; *Stevens* v. *Woodward* (1). But Grove J. expressed the opinion that if a housemaid, whose duty it was to attend the lavatory and wipe out the basin, but who was expressly forbidden to use it, had done so and left the tap open,

her act of using the basin and omitting to turn off the water would be so incidental to her employment that the master would be liable.

In France the fact that in order to commit the act causing injury the servant was obliged to enter a chamber to which his duties did not take him and to open a moveable not belonging to him has likewise been held to preclude the master's responsibility; S. 1894. 2.16. An act of the kind sanctioned but done beyond the limits of the property upon which the servant was authorized to perform such acts has been held in both countries not to entail liability on the master: *Bolingbroke* v. *Swindon Local Board* (2); S. 1873. 2. 8.

I confess my inability to appreciate what substantial ground of distinction relevant to the course of the employment or "l'exécution des fonctions" exists between the case where the master loans his conveyance to his servant to use for his own purposes and that in which the servant, taking advantage of the opportunity afforded by his custody of or access to it, surreptitiously appropriates it. Indeed there would almost seem to be more reason for holding the master liable in the former class of cases than in the latter, since he was privy to the servant's use of his property. Yet in *Narcisse* c. *Voisin* (3) it was held that:

(1) 6 Q.B.D. 318. (2) L.R. 9 C.P. 575.
(3) S. 1869. 2.42.

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L'accident causé par l'imprudence d'un domestique pendant qu'il conduisait la voiture et le cheval de son maître, n'engage pas la responsabilité de celui-ci, si la voiture et le cheval étaient conduits, non par ses ordres ou dans son intérêt, mais pour le compte du domestique lui-même, auquel ils avaient été prêtés pour son usage personnel.

To the same effect is the decision in *Cormack* v. *Digby* (1), although the servant who had borrowed his master's horse and carriage for the day voluntarily brought home some meat from town for the master. Compare *Rayner* v. *Mitchell* (2). But in *Patten* v. *Rea* (3), where the horse and rig were being used in the master's business, the fact that the servant was at the same time going on private business of his own did not avail to relieve the master from liability. In *Boyle* v. *Ferguson* (4), where the master was held answerable, the servant had general authority to use his master's motor-cars for his own pleasure as well as for the master's business and a jury was allowed to infer user for the latter purpose.

On the other hand Sainctelette, at p. 219 of his treatise, cites the case of a workman employed in a garage who fraudulently took out an automobile at night to amuse his friends and while so doing killed a policeman. The master was held liable.

The identity of the ground of liability of the master for damages caused by fault of his servant in the French and the English law and the similarity of the principles on which this branch of the law is administered in the two countries point to the conclusion that, notwithstanding some differences in the views prevalent in each as to the degree of connection with the work assigned which is requisite and as to when an entry on an enterprise of the servant's own will be

(1) 9 Ir. C.L. 557.
(2) 2 C.P.D. 357.
(3) 2 C.B. N.S. 606.
(4) [1911] 2 Ir. R. 489.

deemed a mere deviation from the strict execution of duty and when it will amount to such an interruption of the course of employment as to put the servant *en dehors d ses fonctions* and the master's responsibility in abeyance, in seeking the true interpretation of the provision of the Quebec code under discussion one may not improperly take into consideration, in a case such as that before us, the reasoning on which the English courts have dealt with analogous cases. After careful comparison of all the authorities available the only reasonable conclusion seems to me to be that the limitation of the master's responsibility which it was intended to impose by the words "dans les fonctions auxquelles ils les ont employés" was intended to be substantially the same as that which English courts understand to be imposed by the restriction which they formulate in the phrase "in the course of the employment."

The Cour de Cassation formerly held that a domestic servant in the house of his master should be conclusively reputed to be acting in the course of his employment (dans ses fonctions): S. 1860. 1.1013. But it has since abandoned this doctrine, which created a legal presumption of responsibility entirely outside the text of the code, and has recognized that the master cannot be held responsible for a wrongful act committed in his house by his servant when not "dans l'exercice de ses fonctions"; S. 1885, 1.21 In a more recent decision it has been held that domestic servants in the house of their master are *prima facie* reputed to be acting "dans l'exercice des fonctions auxquelles ils sont employés"; D. 1893, 2.296. Compare *Boyle* v. *Ferguson* (1); *Stewart* v. *Baruch* (2).

(1) [1911] 2 Ir. R. 489, at p. 496.

(2) 103 N.Y. App. Div. 577, at p. 580.

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It would almost seem as if the same court, impelled no doubt by the motive which has prompted legislation in Quebec and elsewhere subjecting owners of automobiles to special burdens greater than the common law would impose, has been disposed to hold the owner of an automobile liable for any use made of it by his chauffeur taking advantage of the control which his duties give him, however foreign to the work for which he is actually employed and however contrary to orders which in an English court would be regarded as limiting the sphere of the employment. It is possible, although unlikely, that there may be a reaction in regard to this particular application of Art. 1384 C.N., and that the French Courts may ultimately reach the conclusion that the imputation of responsibility to the master in a case such as *Picon* c. *Peltier* (1) is "en dehors de toute texte" and involves legislative rather than judicial action. But it must be conceded that if the text of the Quebec code were identical with that of the Code Napoléon and we were bound in interpreting it to treat modern decisions of the Cour de Cassation as binding us in cases arising under the civil code, as we do judgments of the Privy Council and House of Lords in cases from the other provinces, we would probably find ourselves compelled to allow this appeal.

We find not a little support, however, in French authors and jurisprudence for what seems to me the more reasonable view taken by the English courts in regard to the particular phase of the master's responsibility under consideration, as illustrated in such cases as *Storey* v. *Ashton* (2), and *Rayner* v. *Mitchell*

(1) 1908. 1. 351. (2) L.R. 4 Q.B. 476.

(1). (See also *McCarthy* v. *Timmins*, (2); *Cavanagh* v. *Dinsmore*, (3). Thus it is not disputed that the responsibility imposed by Art. 1054 C.C. is "de droit étroit" and that the condition attached to it must actually exist in the case of the master:

Dans certains de ses applications (says Planiol referring to the master's responsibility for acts of his servant Vol. 2. No. 911), cette responsabilité est véritablement inique; c'est l'exagération d'une idée admise à la légère par Pothier et fondée sur un état social disparu.

As Demolombe puts it the act for which the master may be held must be committed by the servant "comme tel en sa qualité." It must either be committed in discharging, or be directly connected with, the work for which he is employed, S. 1904, 2, 298. The master is not responsible when the servant "va contre sa fonction." Rev. Trim. 1917, 135—where the servant "en se servant de l'automobile agissait à l'insu de son patron et en son nom personnel." M. Wahl Rev. Trim. 1908, p. 14.

Pour que l'accident peut engager la responsabilité (du maître), il faudrait que le cheval et la voiture eussent été conduits par ses ordres ou dans son intérêt. S. 1869. 2, 43.

Notwitstanding the comparatively recent decision in *Picon* c. *Peltier* (4) and what has been stated in some of the other recent French cases, I am not satisfied that it is even yet conclusively settled in France that when a chauffeur, who takes advantage of the fact that he has the custody of his master's automobile to start out with it without his master's knowledge and contrary to his orders "on a frolic of his own," while so using it by his fault injures a third person, the master is responsible for the damage. In English law he certainly is not.

(1) 2 C.P.D. 357.
(2) 178 Mass., 378.
(3) 19 N.Y.S.C. 465.
(4) 1908. 1. 351.

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The case at bar must be determined in the last analysis, however, upon the interpretation of the provision of art. 1054, of the Civil Code of Quebec, which admittedly states the condition of the defendant's responsibility, I find no ambiguity or uncertainty in the phrases "in the performance of the work for which they are employed" and "dans l'exécution des fonctions auxquelles ils sont employés," when they are read together, as they must be. As applicable to this case both alike exclude the defendant's liability. Lauzon was acting neither "dans l'exercice de ses fonctions" nor "à l'occasion de cet exercice" but "en dehors de ses fonctions"—"en dehors de son service"—during his joy ride on the night in question. So far as they may be considered, English authorities uphold this conclusion and French modern authorities, even were we bound by them, although on the whole ad verse, are not uniform in forbidding it. I rest my conclusion, however, upon my opinion that according to its "plain letter and express provision" Art. 1054 C.C. excludes the defendant's liability and that recourse to authority should therefore be unnecessary, *Herse* v. *Dufaux* (1).

I would dismiss the plaintiff's appeal.

BRODEUR J. (dissenting).—Cette cause présente une intéressante question concernant la responsabilité de la faute d'autrui. Il s'agit de savoir si un propriétaire d'automobile est responsable d'un accident causé par son chauffeur qui, ayant reçu l'ordre de reconduire la voiture au garage, s'en est servi pour faire une promenade d'agrément au cours de laquelle cet accident est survenu.

(1) L.R. 4 P.C. 468, at p. 489.

Le jury a été favorable à la demande. La cour de révision a maintenu le verdict du jury et a condamné le propriétaire de l'automobile. La cour d'appel (1) a renversé ce jugement en se basant principalement sur la cause de *Halperin* v. *Bulling* (2), décidée par la Cour Suprême au sujet d'un accident survenu dans des circonstances à peu près semblables et où nous avons jugé que, suivant la décision rendue en Angleterre dans la cause de *Storey* v. *Ashton*, (3), le propriétaire de l'automobile n'était pas responsable.

J'ai dit dans cette cause de *Halparin* v. *Bulling* (2) que je me considérais lié, par la jurisprudence anglaise, vu que cette cause provenait du Manitoba, mais que notre décision ne devrait pas être considérée comme un précédent dans Québec, vu que la responsabilité du maître en droit civil repose sur des principes différents.

Il s'est soulevé dans la présente cause quelques difficultés sur l'interprétation du verdict du jury et sur la question de savoir si le chauffeur était "dans l'exécution des fonctions auxquelles il était employé". Mais en prenant la version la plus favorable au défendeur intimé Latreille, c'est-à-dire celle donnée par la cour d'appel, (1) je considère qu'il a engagé sa responsabilité. Voici ce que dit la cour d'appel (1) pour arriver à sa conclusion que le chauffeur Lauzon n'était pas dans l'exercice de ses fonctions:—

> It is proved.... that the said Lauzon on the night in question had driven the motor car to different places in the city in violation of his employer's orders, at one of which places he took supper and was afterwards in the act of giving three of his personal friends a ride in the car when about midnight he drove the car against respondent's son and killed him.

(1) Q.R. 28 K.B. 388 (2) 50 Can. S.C.R. 471.
(3) L.R. 4 Q.B. 476.

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Il est admis de tous que le nommé Lauzon était à l'emploi du défendeur comme chauffeur de son automobile et qu'il désobéissait aux ordres de son patron quand il a fait la course au cours de laquelle l'accident est survenu.

Ces faits prouvés et admis, il reste à savoir s'ils constituent en droit un cas de responsabilité pour le propriétaire. C'est la question que nous avons à décider.

Je considère que la cour d'appel a fait erreur en s'autorisant d'une décision anglaise pour juger la présente cause. Les textes du droit civil et de la jurisprudence anglaise peuvent paraître à première vue avoir beaucoup de similitude. Mais il est toujours dangereux d'aller chercher dans le droit anglais des autorités ou des décisions qui se seront inspirées d'un système propre à ce corps de loi mais qui seraient absolument étrangères aux principes généralement suivis dans le droit civil. Voici nous dit-on deux textes de loi indentiques. Le maître est responsable des actes de son serviteur "in the performance of the work", dit l'article 1054 du code civil. Les auteurs dans le droit anglais disent "in the course of his employment in his master's service" (Smith, Master & Servant, 6th. Ed. p. 263) et la jurisprudence anglaise dans la cause classique de *Barwick* v. *English Joint Stock Bank* (1), jugée en 1867, se sert de l'expression "in the course of the service and for the master's benefit". On prétend que les termes sont identiques et qu'alors la cour d'appel a bien jugé la présente cause en appliquant notre décision de *Halparin* v. *Bulling* (2).

S les termes sont identiques, si la loi est la même

(1) L. R. 2 Ex. 259.

(2) 50 Can. S.C.R. 471.

dans les deux pays, comment s'expliquer alors cette différence considérable dans l'application des mêmes textes au sujet du compagnon de travail(fellow servant). En Angleterre et dans les provinces anglaises, on ne donne pas de recours contre le patron quand un employé est blessé par son compagnon de travail; et cependant ce compagnon de travail est bien dans l'exercice de ses fonctions, "in the course of his employment and in his master's service". Smith, op. cit. p. 263.

La cause de *Priestly* v. *Fowler* (1), énoncé cette jurisprudence qui est encore suivie en Angleterre et dans les provinces anglaises du Canada où il n'y a pas de droit statutaire. Celui qui oserait invoquer une telle jurisprudence sous notre droit civil serait bien mal venu à ce faire, car elle est entièrement opposée aux principes élémentaires de la responsabilité. Aubry & Rau, 4ème éd., vol. 4., p. 760.

Cependant les textes sont à peu près dans les mêmes termes. Alors pourquoi cette différence dans les deux pays? C'est que la théorie de la responsabilité de la faute d'autrui repose en Angleterre et dans Québec sur des principes bien différents. En Angleterre, une personne est responsable de sa propre faute, mais ce n'est qu'à une période assez récente (1867) que l'on a donné, dans des termes que Pollock considère classiques, les cas où le patron est responsable des actes de son employé. On ne s'est pas départi dans le droit commun de la doctrine du "common employment" énoncée dans *Priestly* v. *Fowler*.(1)

La responsabilité du patron pour la faute de son employé n'est appliquée qu'avec réticence et circonspection, l'on dirait presqu'à regret. Il a fallu

(1) 3 M. & W. 1.

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l'intervention du Parlement, sur la pression des organisations ouvrières, sous forme d'"Employers Liability Act" et de "Workman's Compensation Act" pour étendre la responsabilité du maître. Mais là où ces actes n'ont pas été adoptés et quand il ne s'agit pas d'ouvriers industriels, on est encore régi par les vieux principes de la doctrine du "common employment" ou "fellow servant", principes qui répugnent à notre idée de la responsabilité sous le droit civil.

Maintenant sur quoi cette jurisprudence anglaise est-elle basée? Pollock on Torts, 8ème édition, p. 77, discute cette queston et dit:

> No reason for the rule, at any rate, no satisfactory one, is commonly given in our books.

Si nous consultons, au contraire, la doctrine du droit civil sur la matière, nous voyons là quelle est la raison de la responsabilité du maître pour les actes de son serviteur. Elle repose sur le principe que le maître ne doit employer que de bons serviteurs.

Pothier, dans son Traité "Des obligations," No. 121, dit que le responsabilité a été établie

> pour rendre les maîtres attentifs à ne se servir que de bons domestiques.

Nous retrouvons le même principe énoncé dans Demolombe, vol. 31, No. 610, Colmet de Santerre, vol. 5, No. 36, et dans Laurent, vol. 20, No. 582.

Les auteurs du Code Napoléon ont consacré cette doctrine. Ils sont même plus sévères à l'égard des maîtres qu'à l'égard du père de famille. Ce dernier, sous l'empire du Code Napoléon et sous notre code (Art. 1054 C.C.) peut éviter d'être tenu responsable des fautes de son enfant en prouvant qu'il n'a pu empêcher le fait qui a causé le dommage.

Nous trouvons dans Locre, Vol. 6, p. 280, les raisons pour lesquelles les auteurs du Code Napoléon frappaient plus sévèrement le maître que le père dans le cas de la responsabilité de la faute d'autrui.

La responsabilité du maître existe en France et dans Québec, même dans le cas où le serviteur a agi de son propre mouvement, sans ordres ni instructions de son maître.

Aubry, & Rau, vo. 4, 4ème. éd. p. 759; Touillier, vol. 11, p. 284; Larombière, art. 1384.

Cette responsabilité existe également dans le cas où le serviteur a abusé de ses fonctions. C'est la présente cause. Demolombe, vol. 31, No. 614; Laurent, vol. 20, No. 506; Revue Trimestrielle, 1917, p. 134.

Comme dit Demolombe, qui a écrit toujours avec la plus grande modération, la responsabilité du maître ne cesse que dans le cas où

> le fait qui a produit le dommage n'a pas de rapport avec les fonctions auxquelles il (le préposé) était employé

ou, comme dit Dalloz, 1874. 2, 52,

> dans le cas où la faute ne se rattache pas aux fonctions d'une manière quelconque par des circonstances de temps, de lieu et de service.

Quelles étaient les fonctions de l'employé Latreille? C'était d'être chauffeur de son automobile. Il en avait la conduite et le contrôle. Il est vrai qu'il avait, le soir en question, désobéi à ses ordres; mais cette désobéissance n'enlevait pas la responsabilité du maître. Pourquoi? Parce que ce serviteur était un mauvais serviteur; et alors, comme disent Pothier et les autres auteurs, le maître a eu tort d'engager un mauvais serviteur et de lui confier une machine dont son serviteur pouvait se servir pour ses propres fins.

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Des décisions ont été rendues en France sur des cas analogues. Je citerai entr'autres celle rapportée dans Dalloz, 1908. 1, 351, qui a été rendue par la Cour de Cassation dans la cause de *Picon* v. *Peltier*. Le jugé est comme suit:—

> Les maîtres ou commettants sont responsables non seulement du dommage causé par leurs domestiques ou préposés dans l'exercice normal ou régulier des fonctions auxquelles ceux-ci sont employés, mais encore du dommage résultant de l'abus de ces fonctions. (C. Civ. 1384.)
>
> Ainsi le propriétaire d'une voiture automobile est civilement responsable d'un accident causé par le fait du mécanicien préposé par lui à la conduite de cette voiture, dans le cas même où ce mécanicien, ayant reçu de son maître l'ordre de reconduire la voiture au garage, s'en est servi pour faire une promenade d'agrément au retour de laquelle l'accident est arrivé.

Le note publiée sous cette décision n'est pas signée; mais elle est fort intéressante. Les citations qui y sont faites démontrent que cette décision de la Cour de Cassation est conforme à la jurisprudence et à la doctrine.

Sainctelette, qui est un auteur recherché, a écrit tout un traité sur la "Responsabilité des propriétaires d'automobiles". Voici ce qu'il dit aux numéros 188 et 189 de cet ouvrage:—

> Ainsi, je donne l'ordre à mon chauffeur de m'attendre à la porte d'une maison où je viens d'entrer; en dépit de mes instructions il profite de mon absence momentanée pour faire avec ma voiture une course personnelle ou un tour de promenade. Ou bien supposons que je charge mon mécanicien de conduire dans ma voiture un de mes amis à une ville voisine, et que je lui recommande de revenir aussitôt; mon chauffeur, une fois la course faite, s'attarde dans cette ville, y mène joyeuse vie, promène ses amis dans mon automobile et finit par causer un accident. Ou bien encore je suppose que, devant m'absenter de chez moi pour faire un voyage, je défends à mon chauffeur de sortir avec l'automobile durant mon absence; à peine suis-je parti qu'il viole la défense que je lui ai faite. Enfin, supposons qu'à la fin de la journée, n'ayant plus besoin de la voiture, j'enjoigne à mon mécanicien de la reconduire au garage; il en profite pour faire une promenade d'agrément au cours de laquelle il cause un accident.

Suis-je ,dans ces différents cas, responsable du fait de mon mécanicien? Autrement dit, a-t-il agi dans l'exercice de ses fonctionse, ou bien, au contraire, l'accident s'est-il produit *en dehors* de ses fonctions? Notons bien que le chauffeur n'avait pas reçu mandat de se servir de la voiture et que s'il l'a fait, c'est à l'insu de son maître, et parfois au mépris d'une défense formelle. Peut-on dire, dans ces conditions, que la faute commise par le préposé, en dehors de tout travail commandé et même en violation d'instructions reçues est réputé se rattacher aux fonctions au point d'engager la responsabilité du commettant?

189.—La jurisprudence pose un principe que les maîtres ou commettants sont responsables, non seulement du dommage causé par leurs domestiques ou préposés dans l'exercice normal et régulier de leurs fonctions, mais encore de celui qui résulte de l'abus de ces fonctions.

Le dommage qui ne se rattache aux fonctions que par un abus qui en est fait engage la responsabilité du commettant. Il s'en suit que ce dernier est responsable lorsque le préposé a agi non seulement sans autorisation, mais encore au mépris d'une défense formelle qui lui aurait été faite. Dans ces cas la responsabilité civile du commettant découle, en droit, de cette idée qu'il a mal choisi son préposé ou qu'il n'a pas suffisamment veillé à la bonne exécution de son ordre ou au respect de la défense qu'il a faite.

Il me semble qu'il vaut bien mieux pour nos cours dans Québec suivre ces opinions que celles qui ont été énoncées dans une jurisprudence où à regret on semble reconnaître aux victimes du serviteur quelques droits contre son maître, et où l'on déclare encore que le maître ne saurait être responsable de la faute du compagnon de travail qui l'aurait blessé.

Mais, on dit, l'article 1054, C.C. n'est pas absolument dans les mêmes termes que l'article correspondant du Code Napoléon. Il n'y a pas de différence en tant que le sujet qui nous occupe est concerné. On dit dans le Code Napoléon que les maîtres sont responsables du dommage causé par leurs domestiques *dans les fonctions* auxquelles ils les ont employés. Notre article dit "dans l'exécution des fonctions."

Je ne vois pas dans ces termes une différence qui puisse influer sur le litige actuel. Le serviteur dans notre cas est chauffeur d'automobile. C'est là sa

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fonction et c'est dans l'exercice de cette fonction qu'il a causé l'accident. Les auteurs en France d'ailleurs en discutant le sujet se servent presque toujours de l'expression "dans l'exercice des fonctions."

Voyez Demolombe, au vol. 31, No. 614, qui, en donnant la première condition sous laquelle on peut réclamer dit

> Il faut, 1° que le fait soit l'un de ceux dans lesquels consiste *l'exercice* même de la fonction à laquelle il (le serviteur) est employé.

On a discuté en France la question de savoir si un dommage causé à l'occasion des fonctions pouvait engager la responsabilité. Mourlon est d'avis que non. Laurent, Beaudry-Lacantinerie et Aubry & Rau sont d'une opinion contraire.

Mais l'accident qui nous occupe n'a pas eu lieu à l'occasion, comme dans le cas souvent cité du cocher qui par malice frappe quelqu'un avec son fouet, mais je suis d'opinion que Lauzon a commis sa faute dans l'exercice de ses fonctions comme chauffeur d'automobile.

Nos codificateurs se sont inspirés du Code Napoléon pour rédiger notre article 1054, comme ils le disent dans leur rapport dont voici le texte:—

> Les articles du chapitre III des délits et quasi-délits correspondent aux articles du code français, sauf quelques changements dans les termes pour obvier aux objections soulevées contre eux.

On réfère évidemment au mot "préposés" qui se trouve au Code Napoléon et que l'on a remplacé dans notre code par le mot "ouvriers".

Pour toutes ces raisons, je crois que la Cour d'Appel (1) a erré en basant son jugement sur une décision rendue sous le droit anglais et sous un système qui n'a pas pour le maître la même sévérité que le code civil.

(1) Q.R. 28 K.B. 388.

Il s'agit dans notre cas de bien se pénétrer de l'esprit de la loi, de ses motifs et de son but. On les trouve dans le caractère et l'opinion de ses rédacteurs et dans les esprits de ses jurisconsultes. Nous avions tout cela dans Pothier, dans le Code Napoléon, dans les commentateurs, dans le rapport de nos codificateurs, et dans notre code même, qui a été préparé avant que la jurisprudence anglaise avec ses termes plus ou moins certains et définis ait déterminé le cas où le serviteur pourrait engager la responsabilité de son maître. Nous savons dans le droit français sur quoi repose la responsabilité du maître; et Pollock nous enseigne, au contraire que dans la jurisprudence anglaise

> No reason for the rule, at any rate no satisfactory one, is commonly given.

N'est-il pas plus rationel, dans ces circonstances, de suivre la jurisprudence française telle qu'énoncée par la Cour de Cassation en 1908? Je remarque avec une certaine appréhension la tendance qui existe de juger les causes de Québec à la lumière des précédents anglais. Les remarques que je viens de faire dans la présente cause et l'esprit de la loi dans les deux systèmes nous démontrent combien il est dangereux de sortir d'un système pour aller chercher dans un autre des précédents qui reposent parfois sur des principes assez faiblement reconnus et parfois opposés, malgré que le texte pût paraître à peu près identique.

Pour ma part, je préfère baser ma décision sur la décision de la Cour de Cassation, parcequ' elle a été rendue sous une loi que nos codificateurs déclarent eux-mêmes avoir adoptée.

L'appel devrait être maintenu avec dépens et le jugement de la Cour de Révision rétabli.

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MIGNAULT J.—Il y a dans cette cause une question intéressante quant à la portée du dernier alinéa de l'article 1054 du code civil qui se lit comme suit:

> Les maîtres et commettants sont responsables du dommage causé par leurs domestiques et ouvriers, dans l'exécution des fonctions auxquelles ces derniers sont employés.

L'alinéa 3 de l'article 1384 du Code Napoléon dit:

> Les maîtres et commettants (sont responsables) du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés.

On enseigne en France que les dispositions qui rendent une personne responsable du fait d'un autre étant fondées sur une présomption légale de faute, doivent par cela même recevoir une interprétation stricte. Baudry Lacantinerie et Barde, Obligations, No. 2938.

Il y a quelques différences d'expressions entre notre article et la disposition correspondante du code français. Ainsi le mot "ouvriers" n'a pas, dans le langage ordinaire, un sens aussi étendu que l'expression "préposés." Ajoutons qu'alors que l'article 1384 C.N. dit "dans les fonctions", &c., notre article emploie une expression un peu moins générale en disant "dans l'exécution des fonctions" &c., sens que la version anglaise rend encore plus précis en disant: "in the performance of the work for which they are employed".

Je viens de signaler les différences d'expressions entre le dernier alinéa de notre article 1054 et l'alinéa 3 de l'article 1384 du code civil français. Il importe maintenant de déterminer si notre article doit recevoir la même interprétation que l'article 1384. En d'autres termes, pouvons-nous, avec notre texte, accueillir ici les solutions de la doctrine et de la jurisprudence françaises fondées sur le texte du code Napoléon?

Ces solutions peuvent se résumer brièvement. Ainsi MM. Baudry-Lacantinerie et Barde, (Obligations, t. 4 No. 2914), disent:—

> Mais ces expressions "dans les fonctions auxquelles ils ont été employés" ne signifient pas que les faits à raison desquels les maîtres et commettants peuvent être déclarés civilement responsables doivent constituer l'exercice même des fonctions des domestiques ou des préposés. La condition exigée par la loi se rencontre lorsque les faits dommageables ont été accomplis soit dans l'exercice de ces fonctions soit même à l'occasion de cet exercice, et alors même que le dommage résulte d'un abus des dites fonctions.

Et au numéro 2911, les mêmes auteurs enseignent que

> Le maître ou le commettant serait responsable même du fait dommageable que le domestique ou le préposé aurait commis non seulement à son insu et sans son ordre, mais aussi malgré sa défense la plus formelle. Le motif de la loi conduit à cette solution, car la circonstance que nous supposons maintenant ne fait point disparaître la faute dont le maître ou le commettant s'est rendu coupable en choisissant mal son domestique ou son préposé.

Ainsi, en France, la responsabilité du maître est engagée dans la plupart des cas où la faute de son domestique ou préposé cause un tort à autrui, et le maître n'échappe à cette responsabilité que lorsqu'il appert que le fait incriminé est entièrement étranger aux fonctions du domestique ou préposé.

Etant donné que l'interprétation stricte s'impose en cette matière, je ne puis me convaincre que le texte de notre article nous autorise à accueillir toutes les solutions que je viens d'indiquer. Ainsi, dans la province de Québec, le maître et le commettant sont responsables du dommage causé par leurs domestiques et ouvriers *dans l'exécution des fonctions auxquelles ces derniers sont employés*, ou, pour citer la version anglaise de l'article 1054, C.C., "*in the performance of the work for which they are employed*". Ceci me paraît clairement exclure la responsabilité du

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maître pour un fait accompli par le domestique ou ouvrier à l'occasion seulement de ses fonctions, si on ne peut dire que ce fait s'est produit dans l'exécution de ses fonctions. Il peut souvent être difficile de déterminer si le fait dommageable est accompli dans l'exécution des fonctions ou seulement à leur occasion, mais s'il appert réellement que ce fait n'a pas été accompli dans l'exécution des fonctions du domestique ou ouvrier, nous nous trouvons en dehors de notre texte. L'abus des fonctions, si le fait incriminé s'est produit dans l'exécution de ces fonctions, entre au contraire dans ce texte et entraîne la responsabilité du maître. Il va sans dire que le maître ou commettant ne peut, comme les autres personnes mentionnées en l'article 1054 C.C., repousser la responsabilité en faisant voir qu'il n'a pu empêcher le fait qu'il a causé le dommage.

Dans la rédaction du dernier alinéa de l'article 1054 C.C. les codificateurs me paraissent s'être inspirés de la doctrine de Pothier (édition Bugnet) "Obligations," No. 121, qui dit:—

> On rend aussi les maîtres responsables du tort causé par les délits et quasi-délits de leurs serviteurs ou ouvriers qu'ils emploient à quelque service. Ils le sont même dans le cas auquel il n'aurait pas été en leur pouvoir d'empêcher le délit ou quasi-délit, lorsque les délits ou quasi-délits sont commis par les dits serviteurs ou ouvriers dans l'exercice des fonctions auxquelles ils sont employés par leurs maîtres, quoique en l'absence de leurs maîtres, ce qui a été établi pour rendre les maîtres attentifs à ne se servir que de bons domestiques.
>
> A l'égard des délits ou quasi-délits qu'ils commettent hors de leurs fonctions, les maîtres n'en sont point responsables.

On me permettra de faire encore une observation générale parce que plusieurs des honorables juges de la cour d'appel me paraissent avoir assimilé notre droit, quant à la responsabilité des maîtres et commettants, au droit anglais sous l'empire duquel on

décide que le maître est responsable du fait dommageable accompli par son serviteur "in the course of his employment", expression qui, dans leur opinion, rend la même idée que "dans l'exercice des fonctions auxquelles ces derniers sont employés" ou, pour citer encore la version anglaise de l'article 1054 C.C. "in the performance of the work for which they are employed". Et ayant constaté, à leur avis, une identité de signification, les savants magistrats ont cité quelques décisions anglaises, et notamment l'arrêt rendu par cette cour dans la cause de *Halparin* v. *Bulling* (1) qui venait de la province du Manitoba.

Il est quelquefois dangereux de sortir d'un système juridique pour chercher des précédents dans un autre système, pour le motif que les deux systèmes contiennent des règles semblables, sauf bien entendu le cas où un système emprunte à l'autre une règle qui lui était auparavant étrangère. Alors même que la règle est semblable dans les deux, il est possible qu'elle n'ait pas été entendue ou interprétée de la même manière dans chacun d'eux, et, comme l'interprétation juridique—je parle bien entendu de celle qui nous oblige—fait réellement partie de la loi qu'elle interprète, il peut très bien arriver que les deux règles, malgré une apparente similitude, ne soient pas du tout identiques.

Je ne fonderai donc pas les conclusions que je crois devoir adopter en cette cause sur aucun précédent tiré du droit anglais, pas même sur la cause de *Halparin* v. *Bulling* (1), mais je me baserai uniquement sur le texte de l'article 1054 C.C. La revue très complète que mon honorable collègue, M. le juge Anglin,

(1) 50 Can. S.C.R. 471.

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fait de la jurisprudence tant française qu'anglaise démontre combien il vaut mieux s'en tenir au texte de notre article, texte qui ne prête à aucun équivoque, que de chercher à dégager une règle ou un principe d'une infinité d'arrêts d'espèce. Il me semble d'ailleurs bien inutile de chercher cette règle, puisque nous l'avons en des termes très clairs dans notre code civil, et si la jurisprudence française et les opinions d'auteurs qu'invoque mon honorable collègue, M. le juge Brodeur, vont au delà de cette règle, c'est la règle elle-même, et non cette jurisprudence et ces opinions, que nous devons suivre et appliquer.

Dans l'espèce, je suis d'opinion que Lauzon n'était pas dans l'exécution des fonctions auxquelles il était employé quand il a tué Elliott. La réponse du jury à la question 5 est une réponse que le jury ne pouvait raisonnablement donner en examinant toute la preuve (art. 501 C.P.C.). Le témoignage de Lauzon porte le cachet de l'invraisemblance et même de l'absurdité, et malgré ma répugnance à intervenir dans une matière de ce genre, je suis forcé de dire qu'aucun jury ne pouvait dans l'espèce raisonnablement arriver à la conclusion que Lauzon, lors de l'accident,

was performing work for which he was engaged by the defendant.

Il ne s'agit pas ici d'un cas d'abus, par le serviteur, des fonctions que son maître lui a confiées, mais d'un acte accompli entièrement en dehors de ces fonctions, et pendant qu'avec des copains semblables à lui, il se donnait le luxe d'un "joy-ride" à une vitesse effrénée à travers les rues de Montréal. Pour cela, il a sorti l'automobile de son maître du garage où il l'avait entrée, et son prétexte que, quand il a tué Elliott, il essayait, "testait", la machine, est une histoire

absurde et invraisemblable que le jury ne pouvait raisonnablement croire.

Je n'ai pas perdu de vue la disposition de l'article 1406 des statuts revisés, 1909, tel qu'amendé par la loi 3 Geo. V. ch. 19, sect. 3. Avant cet amendement l'article 1406 rendait le propriétaire d'un véhicule moteur responsable de tous accidents ou dommages causés par son véhicule-moteur dans un chemin public ou place publique. On a sans doute trouvé trop rigoureux cet article qui créait une responsabilité absolue à la charge du propriétaire, même dans le cas d'un pur accident, et l'amendement impose au propriétaire ou conducteur le fardeau de la preuve que la perte ou le dommage n'est pas dû à la négligence ou à la conduite répréhensible du propriétaire ou du conducteur. Cette loi ne modifie pas à mon avis le droit commun quant à la responsabilité de sa propre faute (art. 1053 C.C.) ou de la faute d'autrui (art. 1054 C.C.) mais elle oblige le défendeur à prouver qu'il n'est pas dans les conditions d'où découlerait, d'après le droit commun, sa responsabilité pour le fait dommageable.

Il est vrai que le jury, quand on lui pose la question 6,

Was the said accident due to the fault and negligence or want of care of the defendant or his driver? If so, in what did the said fault or negligence consist?

répond (je cite cette réponse textuellement)

as no evidence was produced to the contrary, we find that the defendant was negligent in omitting to satisfy himself from time to time as to whether the chauffeur or driver had car out against orders; but particularly throw blame on the driver for his want of competence in the way of driving, as in his evidence he said that something was wrong with the car, and in spite of that driving on St. Lawrence Boulevard at excessive rate of speed, not stopping behind stationary street car and pass same on left hand side, all contrary to the vehicle laws of the Province of Quebec.

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Mais puisqu'il s'agit de savoir si le défendeur était personnellement en faute, il convient de dire que la faute que le jury reproche au défendeur, c'est de ne pas s'être enquis de temps à autre si le chauffeur avait sorti son automobile contre ses instructions, ce n'est pas d'avoir employé un chauffeur incompétent, et le jury ne trouve le défendeur coupable de cette faute que parce qu'aucune preuve au contraire n'avait été faite. Or la preuve constate que le défendeur a pris des renseignements au sujet de son chauffeur avant et après l'avoir engagé et qu'il a donné des instructions au propriétaire du garage de ne pas laisser sortir l'automobile après dix heures du soir. Il n'y a rien au dossier, pas plus que dans les réponses du jury, qui fasse voir que le défendeur ait été coupable d'une faute ayant un rapport quelconque avec l'accident, et en supposant même que la preuve constaterait que le défendeur n'a pas surveillé son chauffeur—et elle ne le constate pas—rien n'aurait justifié le jury à dire que la surveillance la plus complète aurait empêché Lauzon de faire sa tournée folle le soir de l'accident.

Je suis donc d'avis de renvoyer l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellants: *Laflamme, Mitchell & Callaghan.*

Solicitors for the respondent: *Busteed & Robertson.*

NAPOLEON GAUVREAU (DEFENDANT) APPELLANT; 1919

*Nov. 12, 13.

AND 1920

*Feb. 3.

CHARLES NEIL PAGE (PLAINTIFF)

RESPONDENT.

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

Highways—Dedication—User—Prescription—"Chemin de tolérance"—Municipal road—Constitutional law—"Municipal and Road Act of Lower Canada," (C.) 1855, 18 Vict., c. 100, s. 41, s. ss. 8 and 9—Arts. 749 and 750, Municipal Code.

The appellant dug a well and laid a water pipe on a certain road and the respondent took against him an action *négatoire de servitude*, alleging ownership in the land. The appellant's plea was that the road had been a public highway for over forty years and thus became the property of the corporation either by dedication or by prescription of thirty years; he also invoked the prescription of ten years enacted by the statute 18 Vict. c. 100; and he further alleged that he had obtained the permission of the Municipal Council.

Held that there had been no dedication, as the existence of the necessary *animus dedicandi* on the part of the respondent or his predecessors in title has not been established, and that the prescription of thirty years could not be invoked as the possession of the public as owner was neither exclusive nor unequivocal.

Semble, per Anglin J., that, under the law of Quebec, a highway may be created by dedication. Brodeur J., *contra* and Mignault J., *dubitante*.

Per Anglin, Brodeur and Mignault JJ.—The sub-sections 8 and 9 of 18 Vict. c. 100, s. 41 are applicable only to roads which have been in existence and in public use for ten years before the first of July, 1855. *Harvey* v. *The Dominion Textile Co.* (59 Can. S.C.R. 508) followed.

Present:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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Per Anglin, Brodeur and Mignault JJ.—Even if the road was a *chemin de tolérance* subject to articles 749 and 750 of the former municipal code, the ownership of the land still remained in the respondent and the appellant had no right to do the works complained of. Judgment of the Court of King's Bench (Q.R. 27 K.B. 490) affirmed.

APPEAL from a judgment of the Court of King's Bench, Appeal side, Province of Quebec(1) reversing the judgment of the Superior Court, Roy J., and maintaining the respondent's action.

The appellant and the respondent both lived in St. Octave-de-Metis, in the province of Quebec. In that village two roads crossed at right angle, the main road or maritime road and the church road or Kempt road. The grand-father of the respondent was the owner of a property having both roads as boundaries; and, having constructed his residence at a certain distance from these roads, he opened a road communicating with both and passing in front of his house. This small road was always opened at both ends, except during winter; and it was fenced on each side except in front of the house. Until thirty years ago, the respondent kept a store at his house, where was also the post office of the village. The public was using this small road continually, either to go to the store or post office, or to shorten the distance from the maritime road to the church road. The road was kept in order by the respondent except in the summer of 1916 when the corporation made small repairs. When the cadastral plan was prepared in 1878, an official number was given to this small road on the official plans, after the surveyor had obtained from the father of the respondent particulars as to these lands.

F. Roy K.C. for the appellant.

L. St. Laurent K.C. for the respondent.

(1) Q.R. 27 K.B. 490.

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Idington J.

IDINGTON J.—This appeal was well presented and counsel on either side seems to have left nothing unnoticed either in law or fact. Therefore, we have had some very interesting questions presented for our consideration which would, if the case had to turn upon some of them, involve further investigation of the basis upon which the law of dedication rests in the Province of Quebec, and much municipal legislation might have to be considered if it were necessary to follow that line of thought.

The Court of King's Bench has held that there was no dedication under the peculiar circumstances existent for over forty years under which the public were permitted to use this alleged public highway, or lane as I think it might more properly be called. I cannot see that the court below erred at all in reaching such conclusion and for that reason alone the appeal should be dismissed. The many other interesting questions I have referred to need not therefore be examined.

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

ANGLIN J.—While I incline to the view that it is sufficiently established that under the law of Quebec a highway may be created by dedication (Chavigny de la Chevrotière v. Cité de Montréal; (1) Mignerand dit Myrand v. Légaré; (2) Rhodes v. Perusse (3); Harvey v. Dominion Textile Co. (4); I am clearly of the opinion that the evidence in this case falls short of what would be necessary to establish the existence

(1) 12 App. Cas. 149, at p. 157.
(2) 6 Q.L.R. 120 at p. 122.
(3) 41 Can. S.C.R. 264, at p. 273.
(4) 59 Can. S.C.R. 508.

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of the necessary *animus dedicandi* on the part of the plaintiff or his predecessors in title. The position of the house and barns on the plaintiff's property sufficiently accounts for the opening of the lane or road in question as a private way; and whatever significance might otherwise be attached to the absence of gates at the ends of the road, where it abuts on the two highways, the facts that the Post Office was located in the plaintiff's house for many years down to 1881 and that Henry Page kept a store there sufficiently account for any user of the road during that period by persons seeking access to that building and for its having been left open as it was, without ascribing to the owner an intention to dedicate it to the public as a highway. Such an intention is not to be presumed from acts of user which admit of another equally probable or even more probable explanation.

For the same reason the user shewn during this period would not avail to support title by prescription. The possession of the public was neither exclusive nor unequivocal. It was concurrent with the owner's user for his private purposes.

Moreover the cadastral plan drawn up in 1881 in accordance with a survey made in 1878 based on information supplied by the Pages affords evidence of an assertion of ownership of the road by them. It is given a cadastral number on this plan. One act of this kind by the owner is of much more weight upon the question of intention than many acts of enjoyment. *Poole* v. *Huskinson*; (1) *Chinnock* v. *Hartley District Council*. (2) After 1881 many acts of interruption of user by the owner are shewn by the evidence.

(1) 11 M. &. W. 827 at p. 830. (2) 63 J.P. 327 at p. 328.

Moreover, if the road in question became a highway by dedication, the ownership of the soil would have remained in the plaintiff and the defendant could not justify sinking a well and carrying a pipe under the surface of the road.

I discussed the purview and operation of the statute 18 Vict. ch.100, very fully in *Harvey* v. *Dominion Textile Co.*, (1) and I adhere to the view there expressed. That statute does not apply to a road first opened in 1847.

If Arts. 749 and 750 of the Municipal Code apply, since they deal with roads established in a particular manner, they must be regarded as exceptions to Art. 752, which deals with municipal roads generally and effect must be given to their explicit provisions that the property in the land over which roads within their purview are carried continues vested in the owner or occupant. Although, therefore, Arts. 749 and 750 should apply to the road here in question, the defendant was nevertheless a trespasser in digging a well and laying a water pipe in it. Permission of the Municipal Council could not authorize such an invasion of the plaintiff's property.

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

BRODEUR J.—Il s'agit dans cette cause de savoir si une route communément appelée "Chemin Page" et qui porte le n° 6 sur le cadastre de la paroisse de St-Octave de Métis est la propriété de la corporation municipale ou de l'intimé Page.

L'appelant, avec l'autorisation des autorités municipales, a creusé un puits sur le bord de cette route

(1) 59 Can. S.C.R. 508.

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et y a posé des conduites d'eau. Une action négatoire de servitude est maintenant instituée contre lui par l'intimé Page qui prétend que lui et ses auteurs ont toujours été propriétaires de cette route. L'appelant dit, au contraire, que la corporation municipale en est devenue propriétaire par abandon (*dedication*), par prescription trentenaire ou par la prescription décennale édictée par l'Acte 18 V., ch. 100.

Abandon (*dedication*).

Dans une cause de *Harvey* v. *Dominion Textile Co.* (1) je me suis demandé si cette doctrine de la *common law dedication* du droit anglais pouvait être invoquée dans la province de Québec; et, sans exprimer d'opinion définitive, j'avais alors donné quelques-uns des motifs qui me portaient à croire qu'elle était contraire aux textes formels du code civil. Après avoir considéré de nouveau la question en la présente cause, j'en suis arrivé à la conclusion que cette doctrine n'y a pas force de loi.

La "*dedication*" est le résultat d'une situation particulière à l'Angleterre, qui ne se retrouve même pas en Ecosse. Aussi la Chambre des Lords dans la cause de *Mann* v. *Brodie*, jugée en 1885 (2) a refusé d'appliquer à l'Ecosse les principes de la *dedication*.

Lord Blackburn, dans cette cause de *Mann* v. *Brodie*, (2) nous indique clairement les circonstances suivantes qui ont donné lieu à cette doctrine. En Angleterre, l'acquisition d'un droit pouvait se faire par prescription; mais la prescription ne pouvant s'opérer que par possession immémoriale, la preuve en était pratiquement impossible; et alors au moyen de fictions légales appelées "lost grant", "presumed grant" ou "dedication" on est venu au secours de ceux qui

(1) 59 Can. S.C.R. 508. (2) 10 App. Cas. 378.

apparemment étaient les véritables propriétaires du droit mais qui étaient incapables de produire de titre.

La *"dedication"* n'a pas cependant été accueillie avec beaucoup d'enthousiasme. Mais, comme le dit Lord Blackburn dans cette cause de *Mann* v. *Brodie,* (1) si on a réussi au moyen de la *dedication* à se débarrasser de la théorie défectueuse de la prescription

an opposite evil of establishing public rights of way on very short usurpation has sometimes been incurred.

Et c'est pour cela que la jurisprudence en Angleterre a décidé qu'il fallait pour qu'il y eut *"dedication"* que l'intention de donner au public le droit de jouir de sa propriété comme chemin fut bien évidente. *Poole* v. *Huskinson* (2).

Voilà les circonstances qui ont donné lieu à cette théorie de la *dedication* et Lord Blackburn, toujours dans cette cause de *Mann* v. *Brodie,* (1) disait de cette théorie du droit anglais qu'elle n'était pas la

perfection of reason or such as ought to be introduced in the law of Scotland,

et alors la Chambre des Lords décidait la cause de *Mann* v. *Brodie* (1) en appliquant la prescription de quarante ans, telle qu'elle existait en Ecosse. Voir *Macpherson* v. *Scottish* (3).

Dans la province d'Ontario et dans les autres provinces de droit anglais, la théorie de la *"dedication"* est en force. Les lois municipales de Québec ont, je le sais, copié en grande partie celles d'Ontario. Mais il ne faudrait pas conclure de là que toutes les lois anglaises sur la matière, et notamment la doctrine de la *"dedication"*, sont devenues incorporées dans

(1) 10 App. Cas. 378. (2) 11 M. & W. 827, at p. 830.
(3) 13 App. Cas. 744, at p. 746.

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notre législation et que nous ne devons pas rechercher si dans l'exercice de certains droits nous ne violons des principes élémentaires de nos propres lois telles que nous les retrouvons dans notre code civil ou encore dans notre code municipal. Si la Chambre des Lords ne voulait pas, dans la cause de *Mann* v. *Brodie*, (1) introduire en Ecosse la théorie de la *"dedication"* parce qu'elle était basée sur des circonstances que l'on ne retrouvait pas en Ecosse, il me semble que nous sommes justifiables de voir si nous ne violentons pas quelques principes de notre droit an l'appliquant ici. Ainsi, dans Québec comme en Ecosse, nous avons une prescription à période déterminée. Elle est de quarante ans en Ecosse: elle est de trente ans chez nous (art. 2242 C.C.). Si en raison d'une période certaine dans la prescription en Ecosse la Chambre des Lords refusait d'y introduire la *"dedication"*, n'y a-t-il pas raison de faire la même chose pour une cause dans Québec.

Les corporations municipales sont régies par les lois affectant les individus, dit l'article 356 du code civil. Elles ne peuvent devenir propriétaires que de la manière édictée par les lois spéciales qui les régissent ou par la loi commune (article 358 C.C.). Le code municipal n'indique nulle part que la *"dedication"* est reconnue et acceptée. Les seuls articles qui peuvent s'en rapprocher sont les articles 749 et 750 de l'ancien code municipal qui sont maintenant l'article 464 du nouveau code et dont je reparlerai plus loin.

L'appelant Gauvreau prétend qu'il y a eu de la part de Page abandon ou donation du terrain sur lequel est assis le chemin. Or peut-on faire une donation d'immeubles sans titre? L'article 776 du code civil déclare que les actes portant donations

(1) 10 App. Cas. 378.

entre vifs doivent être notariés à peine de nullité. Cette disposition formelle du code dispose, je crois, de la prétention de l'appelant. Si on s'avise de considérer l'établissement de la route comme une servitude sur le terrain de l'intimé, on se trouvere encore en contravention formelle avec l'article 549 du code civil qui déclare que nulle servitude ne peut s'établir sans titre.

Mais on dit: La théorie de la *"dedication"* est acceptée dans Québec par une série de décisions qui remontent à la cause de *Myrand* v. *Légaré*, (1) et qui comprennent *De la Chevrotière* v. *La cité de Montréal*, (2) décidée par le Conseil Privé, et *Rhodes* v. *Perusse*, (3) décidée par cette cour.

La cause de *Myrand* v. *Légaré* (1) soulevait à la fois la question de la prescription trentenaire, celle de l'application de l'acte 18 V., ch. 100, et celle de la *"dedication"*. Le jugé, tel que nous le retrouvons dans les rapports judiciaires, est

que tout chemin ouvert et fréquenté comme tel sans contestation par le public pendant l'espace de dix ans et au delà doit être considéré comme un chemin public et avoir été également reconnu chemin public suivant l'esprit de la loi.

On a évidemment appliqué dans cette cause la loi de 1855, 18 V., qui y est d'ailleurs discutée longuement. Incidemment dans ses notes l'honorable juge-en-chef a mentionné avec approbation la prescription trentenaire et a déclaré aussi qu'une propriété privée peut devenir propriété publique par la *dedication*. Mais ce dernier point ne paraît pas être celui sur lequel a été décidé la cause. C'est un *obiter dictum*.

Dans la cause de *De la Chevrotière* v. *La Cité de Montréal*, (1) Lord Fitzgerald, après avoir discuté un

(1) 6 Q.L.R. 120. (2) 12 App. Cas. 149.
(3) 41 Can. S.C.R. 264.

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statut spécial qui avait été invoqué et qui a servi de base à la décision, dit les paroles suivantes, que je considère aussi comme *obiter dictum:*

> There has been made out independently of any statutory provision an ample case of user on the one side and dedication or abandonment on the other which would constitute the place in question a public place over which the public at large had rights which the law would give effect to independently of the provisions of any statute.

Dans la cause de *Rhodes* v. *Pérusse* (1), l'honorable juge-en-chef de cette cour, qui a rendu le jugement de la majorité de la cour, a discuté la question de prescription trentenaire qui se soulevait et la question de *"dedication"*; mais la rue dont il s'agissait avait été ouverte en vertu d'une obligation formelle imposée par la Couronne au concessionnaire. Il ne s'agissait pas là d'une donation par le propriétaire d'une partie de son terrain, mais de l'exécution d'une obligation de sa part.

Dans aucune de ces causes, on ne paraît pas avoir décidé formellement si un propriétaire peut faire donation de sa propriété pour un chemin sans qu'il fasse un acte à cet effet.

S'il n'y avait aucune disposition formelle dans nos codes sur la matière, je comprendrais la force de l'opinion que la *"dedication"* peut être invoquée. Mais les corporations municipales sont régies, comme je l'ai déjà dit, par les lois affectant les individus; et elles n'ont pas d'autres privilèges que ceux qui leur sont reconnus formellement par la loi et les droits incompatibles avec une disposition de nos lois ne sauraient être réclamés par elles.

Je pourrais référer sur ce point à la discussion lumineuse faite par Sir Louis-Hyppolite Lafontaine dans la célèbre cause de *Wilcox* v. *Wilcox.* (2)

(1) 41 Can. S.C.R. 264. (2) 8 L.C.R. 34.

En admettant même que la "*dedication*" existerait dans Québec, je crois que la preuve qui a été faite en la présente cause ne démontre pas clairement que les Page, grand-père, père et fils, aient jamais eu l'intention d'abandonner leur terrain à la corporation municipale.

Je serais d'opinion que cette preuve démontre tout au plus que cette route a été occupée comme chemin de tolérance sous les dispositions des articles 749 et 750 de l'ancien code municipal (art. 464 du nouveau code). Cette route est clôturée de chaque côté, à l'exception d'un petit espace où se trouvent la maison et ses dépendances, elle n'a pas été habituellement fermée à ses extrémités et elle a toujours été entretenue par le propriétaire. Elle a, en d'autres termes, les traits caractéristiques d'un chemin de tolérance et serait par là même un chemin public; mais, comme le disent ces articles, la propriété de ce chemin appartiendrait au propriétaire, l'intimé. L'appelant ne pouvait donc pas avec la simple permission de la corporation municipale y creuser un puits et le relier au moyen d'un tuyau avec sa maison. C'étaient là des actes de propriété qui demandaient l'autorisation du propriétaire du sol.

PRESCRIPTION TRENTENAIRE.

En vertu de l'article 2242 du code civil, les droits et actions dont la prescription n'est pas autrement réglée se prescrivent par trente ans. Or, dit l'appelant, le public a eu possession de ce chemin depuis plus de trente ans; par conséquent, il y a prescription.

L'article 2193 C.C. nous énonce les conditions requises pour prescrire au moyen de la possession. Il faut qu'elle soit

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continue et non interrompue, paisible, publique, non équivoque et à titre de propriétaire.

La possession qui a été prouvée dans la présente cause réunit plusieurs des conditions nécessaires; mais elle me paraît équivoque et manque alors d'une qualité essentielle. Le propriétaire a toujours fait lui-même tous les travaux d'entretien, de réparation et de construction sur ce chemin.

La situation serait différente si la corporation municipale avait elle-même fait ses travaux ou en avait ordonné l'exécution. (Proudhon, Domaine public, vol. 2, p. 369). Cette route était utilisée non-seulement par le public; mais le propriétaire l'utilisait surtout pour l'exploitation de sa ferme et de son magasin. Dalloz, vo. Prescription n° 333, dit en parlant de la prescription que les corporations municipales peuvent invoquer:

> Pour prescrire contre un de ses habitants des terres vaines et vagues, une commune a besoin d'une possession *ut universi* et exclusive; la possession simultanée du propriétaire fait obstacle à cette prescription.

Beaudry-Lacantinerie, vol. 25, n° 289, en discutant cette question de possession, dit:

> Des actes de jouissance qui ne porteraient que sur des produits isolés d'un fonds ou sur certains avantages d'un fonds ne constitueraient encore qu'une possession équivoque, insuffisante pour faire acquérir par prescription la propriété du fonds; tels seraient certains faits de passage, de puisage, de dépôt de matériaux.

Dalloz, Répertoire, vo. Prescription n° 203; Aubry & Rau, 5e édition, p. 137, par. 181 et p. 538, par. 217.

PRESCRIPTION DÉCENNALE.

L'appellant invoque à l'appui de la prescription décennale, la loi 18 V., ch. 100, s. 41. s.s. 9. Les sous-sections 8 et 9 reliées ensemble par la conjonction *et*, se lisent comme suit:

8. Tout chemin déclaré grand chemin public par un procès-verbal, règlement ou ordre d'un grand-voyer, préfet, commissaire, ou conseil municipal, légalement dressé et en vigueur au moment où cet acte entrera en opération, sera considéré comme chemin suivant l'esprit de cet acte, jusqu'à ce qu'il en soit autrement ordonné par l'autorité compétente;

9. Et tout chemin ouvert et fréquenté comme tel par le public sans contestation de son droit, pendant l'espace de dix années, ou plus sera censé avoir été légalement reconnu comme grand chemin public par quelque autorité compétente comme sus-dit, et être un chemin suivant l'esprit de cet acte.

Cette sous-section 9 fait partie de l'Acte des Municipalités et des Chemins. Après plusieurs tentatives plus ou moins fructueuses d'établir des autorités municipales dans le Bas-Canada, la législature, en 1855, a adopté cette loi des municipalités et des chemins, qui a établi l'organisation municipale qui est encore maintenue, dans ses grandes lignes, dans la province de Québec. Le législateur, par cette loi, mettait l'administration de la voirie sous le contrôle des autorités municipales et il créait en même temps les conseils municipaux. Jusque vers cette époque l'administration de la voirie avait été faite par le grand voyer, et le législateur a jugé à propos d'enlever cette juridiction à cet officier pour la mettre entre les mains de personnes qui seraient élues directement par le peuple.

On voulait évidemment, par les textes que nous venons de citer, déterminer quels étaient les chemins qui allaient tomber sous le contrôle de ce nouveau corps public qui s'appelait le conseil municipal.

Par la sous-section 8, tous les chemins dont on avait les procès-verbaux devraient être considérés comme chemins publics; et quant à ceux au sujet desquels on ne pourrait pas produire d'ordonnance, alors le fait qu'ils avaient été ouverts pendant dix ans serait considéré comme une preuve suffisante de leur qualité de chemins publics.

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La loi de 1855 était refondue en 1861; mais on ne trouve là aucune trace de la sous-section 9 de la section 41 de l'acte de 1855. Nous ne la retrouvons pas non plus dans le code municipal, fait en 1870. Pourquoi? C'est que, suivant moi, cette disposition de la loi de 1855 n'avait été faite que pour affecter les chemins alors existants; et il n'y avait pas lieu, par conséquent, de continuer à l'insérer dans les statuts. C'était une loi essentiellement temporaire.

Dans la présente cause, la preuve ne démontre pas que la route en question existait en 1845, c'est-à-dire dix ans avant la loi de 1855. Par conséquent, l'appelant ne peut pas s'autoriser de cette loi pour invoquer la prescription décennale.

Dans ces circonstances, j'en suis venu à la conclusion que le jugement de la cour d'appel qui a maintenu l'action négatoire de servitude de l'intimé doit être confirmé avec dépens.

L'appelant devra avoir jusqu'au 15 juin prochain pour combler le puits et enlever les tuyaux.

MIGNAULT J.—L'intimé poursuit l'appelant, par action négatoire, alléguant qu'il est propriétaire des lots 2, 3 (partie) 4, 5, 6, 6a et 7 du cadastre de St-Octave-de-Métis; que l'appelant est propriétaire d'un immeuble contigu, et qu'il exerce sans droit une servitude de puisage d'eau sur l'immeuble de l'intimé; et l'intimé demande que son immeuble soit déclaré franc et clair de toute telle servitude et qu'il soit fait défense à l'appelant de l'exercer à l'avenir.

L'appelant conteste cette action, et allègue que les lots 6 et 6a où se trouvent le puits et les tuyaux d'aqueduc de l'appelant n'appartiennent pas à l'intimé, et sont depuis plus de quarante ans un chemin public

par "dédicace", usage par le public et destination de l'intimé et de ses auteurs, et il conclut au renvoi de l'action. Par un amendement, l'appelant invoque à l'encontre de l'action de l'intimé la prescription trentenaire, sans dire au profit de qui cette prescription serait acquise.

L'action de l'intimé a été renvoyée par la cour supérieure, mais ce jugement fut infirmé par la cour d'appel, (1) et l'appelant nous demande de rétablir le jugement de la cour supérieure.

La seule question discutée par ces arrêts est la question, qui assurément n'est pas nouvelle, de savoir si le terrain où l'appelant prétend exercer le droit de puisage d'eau, est devenu un chemin public par la destination du propriétaire, ou par la prescription trentenaire, et toutes les décisions, très nombreuses, de nos tribunaux sur la destination comme moyen d'établir un chemin public ont été citées. C'est la seule défense que l'appelant oppose à l'action de l'intimé, et cette défense lui était ouverte, car si elle est bien fondée, et si le terrain en question n'appartient pas à l'intimé, son action négatoire, fondée sur son droit de propriété, manque absolument de base juridique.

Aussi brièvement que possible—(1) car j'ai dit que la question telle que posée n'est pas nouvelle—j'exposerai les conclusions que je crois devoir adopter.

Et d'abord la prescription trentenaire—si vraiment on peut l'invoquer sous le code civil de la province de Québec comme moyen d'établir un chemin public—ne me paraît pas avoir été acquise dans l'espèce. Cette prescription est nécessairement fondée sur la possession, laquelle, aux termes de l'article 2193 C.C., doit être continue et non interrompue, paisible, publi-

(1) Q.R. 27 K.B. 490.

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que, non équivoque et à titre de propriétaire. Le public qui circule librement dans un chemin ne peut être regardé, à mon avis, comme ayant possédé ce chemin, et si même il avait une sorte de possession, on ne pourrait dire, surtout dans l'espèce soumise, que cette possession est non équivoque et à titre de propriétaire. C'est tout au plus une possession promiscue, et aucun de ceux qui passent dans le chemin ne fait par là un acte de propriétaire. Notre loi écarte la prescription comme mode d'acquisition des servitudes, tandis que le code Napoléon l'admet avec certaines restrictions, ce qui peut probablement expliquer quelques opinions d'auteurs en France; et je ne puis croire que par des actes de passage répétés, qui seraient impuissants à créer la servitude de passage, et qui ne seraient pas la possession exigée par l'article 2193, on puisse transformer, par la prescription, un terrain particulier en un chemin public. D'ailleurs la prescription doit être plaidée et ne peut l'être à mon avis que par celui au profit de qui elle a couru, et l'appelant n'est pas dans ce cas.

Mais envisageant la prescription qu'invoque l'appelant comme se confondant réellement avec la destination du terrain en question comme chemin public, je vais en quelques mots expliquer les circonstances de l'espèce.

Il y a à St-Octave-de-Métis deux chemins qui se croisent à angle droit, le chemin de front ou chemin maritime et la route de l'église ou chemin Kempt. Le grand-père de l'intimé, Henry Page, avait un terrain donnant sur les deux chemins, et ayant construit une résidence à quelque distance de ces chemins, il ouvrait une route communiquant aux deux et passant devant sa maison qui existe encore. Cette route paraît avoir

toujours été ouverte aux deux bouts, sauf qu'on prétend que Page la fermait en hiver en plantant des piquets aux deux entrées, et elle était clôturée de chaque côté, si ce n'est devant la maison et la grange de Page où il n'y avait clôture que d'un côté. Jusqu'à il y a environ trente ans le bureau de poste de la localité était dans la maison de Page, et celui-ci y tenait également un magasin. Le public passait librement dans ce chemin, tant pour atteindre la magasin et le bureau de poste, que pour raccourcir la route quand on allait du chemin maritime au chemin Kempt et réciproquement. Le chemin a toujours été entretenu par les Page, mais, dans l'été de 1916, la municipalité a envoyé quelqu'un pour y étendre un peu de sable. Quand le cadastre de la paroisse fut préparé en 1877 ou 1878 par le témoin Lepage, William Page, fils de Henry Page et père de l'intimé, lui fournit des renseignements au sujet de ces terrains, et Lepage donna un numéro sur le plan officiel au chemin, en raison, dit-il, des renseignements qu'il reçut de Page.

En 1881, William Page a vendu à la mère de l'appelant un emplacement situé à l'angle du chemin Page et du chemin maritime, qui est le terrain desservi par l'aqueduc dont l'intimé se plaint. L'acte de vente décrit l'emplacement comme étant

le long de la petite route se trouvant sur la propriété du demandeur.

Cette petite route est celle qu'on allègue être devenue un chemin public, et l'intimé prétend que la description qu'en fait l'acte démontre que William Page réclamait, en 1881, la propriété de ce chemin.

Tels sont assez brièvement les faits saillants sur lesquels on se base pour soutenir que le chemin Page est devenu chemin public par destination du propriétaire. Il n'y a pas de controverse quant à ces faits,

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et tout dépend des conclusions ou inférences qu'il convient d'en tirer.

La création d'un chemin public par destination ou par "dédicace", comme on l'appelle, a été reconnue en la province de Québec, peut-être à tort, par une longue suite d'arrêts, mais elle suppose nécessairement, comme tout acte d'abandon de droits, une volonté non équivoque du propriétaire du terrain d'abandonner ce terrain au public. Cette volonté non équivoque me paraît manquer ici, car l'ouverture de la route s'explique par la situation de la maison de Henry Page et par le fait qu'il y tenait un magasin et le bureau de poste, et il devait nécessairement, tant pour ses propres besoins que pour permettre à sa clientèle et au public de se rendre à son magasin et au bureau de poste, établir une voie de communication pour y arriver. Que l'on ait souvent passé tout droit pour raccourcir la route entre le chemin maritime et le chemin Kempt n'empêche nullement que l'intention de Page n'ait été seulement de donner accès chez lui et démontrerait tout au plus que Page ne contrôlait pas rigoureusement la circulation dans son chemin.

On invoque dans cette cause, comme on le fait d'ordinaire, la loi 18 Vict., ch. 100, art. 9. Dans la cause de *Harvey* v. *Dominion Textile Co.* (1) mon honorable collègue, M. le juge Anglin, a démontré d'une manière satisfaisante à mon avis que cette loi qui date de 1855—si vraiment ce n'est pas une disposition d'une nature purement transitoire—ne peut s'appliquer qu'aux routes qui ont été ouvertes au public dix ans avant sa passation. J'accepte cette interprétation et il s'ensuit que cette loi ne peut être invoquée dans l'espèce.

(1) 59 Can. S.C.R. 508.

Mais je crois que nous sommes en présence ici d'un cas où les articles 749 et 750 (le second étant la répétition du premier) du code municipal de 1870 s'appliquent, et que le chemin en question a tous les caractères du chemin de tolérance dont parlent ces articles. Mais, observation capitale qu'il convient de faire, le terrain d'un tel chemin reste la propriété de celui qui l'a ouvert, tandis que sous l'article 752 du code municipal le terrain des chemins municipaux ordinaires appartient à la municipalité. Il faut avouer que la comparaison du texte des articles 749 et 750 et de l'article 752 de l'ancien code municipal (arts. 464 et 466 dans le nouveau code) n'est pas très satisfaisante, car le chemin de tolérance est un chemin municipal (art. 749) et pourtant, à la différence des chemins municipaux mentionnés à l'article 752, son emplacement reste la propriété de celui qui l'a ouvert. Mais étant donné ici que les articles 749 et 750 s'appliquent, il en résulte que l'intimé est propriétaire du terrain de cette route, et que le public (tant que le chemin n'est pas légalement fermé, et il n'est pas nécessaire ici de dire si le propriétaire, comme il a été jugé, peut le fermer), a seulement le droit d'y passer. Ce droit de passer dans cette route ne donne pas à l'appelant le droit d'y creuser un puits et d'y poser des tuyaux d'aqueduc. Il s'ensuit que le moyen de défense que l'appelant oppose à l'action de l'intimé est mal fondé.

Une question que je réserve, et sur laquelle il n'est pas nécessaire que je me prononce maintenant, est de savoir si on peut invoquer la doctrine d'origine anglaise de la "dédicace" dans les localités auxquelles le code municipal s'applique. En d'autres termes, y a-t-il, dans ces localités, d'autre "dédicace" que celle que reconnaissent les articles sus-cités du code municipal?

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Cette question est importante et je n'aurais certainement pas la prétention de la résoudre avant qu'elle ait été le sujet d'une discussion complète devant nous. Il est regrettable que les parties, au lieu de soulever ce grand débat, n'aient pas pu s'entendre à l'amiable, car c'est la tentative de l'appelant de s'approvisionner d'eau potable qui a donné lieu à ce procès. L'intimé ne paraît souffrir aucun préjudice par suite du puits et des tuyaux d'aqueduc de l'appelant, et avec un peu de bonne volonté et sans sacrifier aucun droit réel, les parties auraient pu vivre ensemble en bons voisins. Mais chacune d'elles s'en tient à ses droits stricts et absolus, et comme l'appelant ne peut acquérir une servitude sans titre, et qu'il n'a pas réussi à contester le droit de propriété de l'intimé, sa défense doit être renvoyée. Je suis donc d'avis de confirmer le jugement de la cour d'appel avec dépens. Le délai donné par cette dernière cour pour remplir le puits, enlever les tuyaux et remettre le terrain dans le même état qu'auparavant devrait être étendu jusqu'au 15 juin 1920.

Appeal dismissed with costs.

Solicitors for the appellant: *Tessier & Côté.*

Solicitors for the respondent: *Gagnon, Sasseville & Gagnon.*

MARY H. HENDERSON, SUING ON BEHALF OF HERSELF AND ALL OTHER SHAREHOLDERS OF J. B. HENDERSON & CO. (PLAINTIFF).....APPELLANT;

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*Nov. 24, 25.
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*Feb. 3.

AND

WILLIAM STRANG AND OTHERS (DEFENDANTS).....RESPONDENTS.

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

Company—Payment for shares—Loan to shareholders—Action by shareholder.—Status.

A company, with a capital of $100,000, was formed to take over the business of J. B. H. & Co., in Toronto. S., a merchant of Glasgow, Scot., subscribes for $51,000 worth of the stock, it being agreed, as evidenced by a by-law of the company, that the money paid for it should be deposited with the firm of S. & Son, Glasgow, and used to finance the company's purchases in Europe. S. sent to Toronto his cheque for $51,000 and it was indorsed by the company and remitted to the Glasgow firm. Some years after J. B. H. started a new business, and his wife, a shareholder in the company, brought an action, on behalf of all shareholders, to compel S. to pay the $51,000 to the company, and for a declaration that S., who had been president of the company since its organization, had never qualified as a director and all the acts of the company were, therefore, illegal and void.

Held, that the plaintiff, a minority shareholder, could not maintain the action against the will of the majority after acquiescence in and benefit from the operations of the company and the agreement as to the disposition of the cheque for $51,000.

Held, also, Davies C.J. dubitante and Duff J. expressing no opinion that the cheque for $51,000 accepted by the company as such

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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constituted a valid payment by S. for his 510 shares and its remittance to the firm of S. & Son was not a loan by the company of the amount to S., a shareholder, prohibited by sec. 29 of the Companies Act.

Judgment of the Appellate Division (45 Ont. L.R. 215) reversing that at the trial (43 Ont. L.R. 617) affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment of the trial judge (2) in favour of the plaintiff and dismissing the action.

The facts of this case are stated in the above headnote.

Hellmuth K.C. and *Birmbaum* for the appellant.

Nesbitt K.C. and *Langmuir* for the respondents.

THE CHIEF JUSTICE.—At the close of the argument in this case I was not satisfied with the soundness of the judgment appealed from. Subsequent consideration of the facts has not removed my doubts, but as I am not clearly convinced that the judgment is unsound I will not dissent from the judgment now proposed, dismissing the appeal.

IDINGTON J.—The appellant suing as a shareholder, as she does, asking the court to interfere with the internal management of a corporate company's affairs, must clearly establish that what she complains of is either something done *ultra vires* the powers of the company or such an oppressive and unjust exercise of the powers of the majority shareholders for the promotion of an advantage to themselves to the peculiar detriment of the minority, or that what is complained of is fraudulent.

(1) 45 Ont. L.R. 215. (2) 43 Ont. L.R. 617.

Whether or not there may be (of which I am doubtful) possible cases of an exceptional character founded on grounds beyong those I specify, in which the court can find any jurisdiction for giving relief to a single shareholder suing as appellant, does not matter, for those put forward herein either rest upon some one of the grounds I specify or fail entirely.

The J. B. Henderson & Co., Limited, now in question, and in which appellant is a shareholder was incorporated on the 23rd September, 1909, under and by virtue of the first part of the (Dominion) Companies Act, ch. 79 of the R.S.C., 1906, for the following purposes and objects:—

(a) To purchase, acquire and take over the business heretofore carried on at the said City of Toronto by the said James Black Henderson under the name, style and firm of J. B. Henderson & Co. as Commission Agents and Dry Goods Merchants, and the good will thereof and the stock-in-trade, furniture and effects of the same.

(b) To carry on the business, both wholesale and retail of general dry goods merchants, drapers, haberdashers, milliners, dressmakers, tailors, furriers, lacemen, clothiers, hosiers, glovers and general outfitters.

(c) To acquire, purchase, hold, sell, dispose of, supply, manufacture and produce all manner and kind of goods, wares and merchandise dealt in or appertaining or incidental to the business or any part of the business aforesaid, and to carry on as aforesaid the business of commission agents in all the lines of goods hereinbefore mentioned.

(d) To acquire any business of the nature or character which the company is authorized to carry on and the good-will thereof.

(e) To act as agents for traders, dealers and manufacturers of any goods, wares or merchandise of the nature or description hereinbefore mentioned.

(f) To purchase, acquire, hold, lease and dispose of patent rights and licenses and such motive and manufacturing powers or any interest therein as may be considered desirable or necessary for or in connection with the aforesaid objects of the Company.

(g) To pay out of the funds of the Company the costs of and incidental to the incorporation, promotion and organization of the Company. The operations of the Company are to be carried on throughout the Dominion of Canada and elsewhere.

The capital stock of the said company was to be $100,000, divided into one thousand shares of $100 each.

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The respondent, William Strang, a merchant in Glasgow, Scotland, subscribed for a single share on the 20th Nov., 1909, at Toronto.

The husband of the appellant, who was the James Black Henderson referred to above, subscribed on the 15th Sept., 1909, for $23,500, and she, next day, for $1,000.

Three other persons subscribed on said 15th Sept. for the respective sums of $5,000, $100, and $100.

No more was ever subscribed, except by said William Strang, who later subscribed for a sum which, with his first for one share, made a total of $51,000.

The stock in trade and goodwill of the Henderson business was taken over at the sum subscribed by him.

There were by-laws passed and directors elected constituting a Board consisting of the said William Strang, said J. B. Henderson, and one McJanet, who was an employee of the company, who had subscribed the said $5,000. Of these Strang was elected president and Henderson vice-president.

By-laws were duly adopted for carrying on the business.

The foregoing outline presents all the leading features of the kind of company which this was, and how it started about its business.

The said William Strang gave his cheque to the order of the company for the full amount of his stock in May, 1910. That cheque was duly acknowledged as payment for said shares and kept by said company in charge of its officers in Toronto and a stock certificate was issued by them on 25th August, 1910, to Strang for the full amount of his five hundred and ten shares.

The cheque was then duly indorsed over by said

Henderson, as vice-president, to the order of William Strang & Co., a firm carrying on business in Glasgow.

If that is not payment then there might be something to complain of.

I agree with the learned trial judge and two of the learned judges in the Court of Appeal that it was payment.

And it was none the less so because the cheque was so indorsed over to the firm which agreed to hold themselves liable for the due application of the amount to meet the engagements of the company in Great Britain and elsewhere abroad, in order to facilitate, both by cash advances and credits, the purchases and other dealings of the company in carrying on its business.

Nor was it less a payment because those thus getting it in due course chose, instead of going through the form of presenting it and getting the cash, to adjust the matter by a debit and credit account in their ledger.

The said firm seems to have had not only ample means but also credit in the commercial world to accomplish all that was had in view by all concerned.

In the result this mode of handling the business was continued for six or seven years on the most friendly and satisfactory terms to all concerned.

The business as a result became (when the war stress is considered) a more prosperous concern than the firm of Henderson & Co. could have hoped for, but for the aid thus furnished.

Then there arose personal differences with Henderson, who, with two other persons, started in Toronto a business of their own.

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This suit seems to have been instituted by Henderson's wife to wreck the incorporated company and serve the ends of him and his new firm.

And, as part of the scheme for doing so, the pretension is set up not only that there never was a payment of stock but also that as an incident of so holding the courts appealed to are also bound to hold that Strang never was qualified to act as a director and hence all done by the board null and void.

With a holding that the cheque so indorsed over, as already stated, not to him but to his firm, was a complete payment, these pretensions all fall.

One more claim is made in that alternative, and it is that the court must order the payment by said firm of the money to the company.

Why? For what end? Evidently not even the solemn, formal mockery of handing it back to officers who are in the result virtually the nominees of the man attacked, and who is a majority shareholder in the company, but apparently the petty purpose of wasting money in law costs and exchange and embarrassing the management of the business.

It is claimed the money thus held subject to calls to answer the requirements of the business abroad and for no other purpose, was a loan to William Strang and not to the firm, who are, inconsistently enough, also sued for its recovery, and therefore *ultra vires* as being in breach of the section of the Companies Act (sec. 29) which provides that

> the Company shall in no case make any loan to any shareholder of the Company.

There was in no sense, such as comprehended in the statutory provision, a loan to William Strang, or indeed to any one else, but simply a mode adopted

of carrying on the business of the company in the most economical and advantageous way possible to all concerned. And to execute that purpose, evidenced thereby, a system was adopted of making good reciprocally to each party concerned therein on a fair and equitable basis by due allowances on either part in the way of interest, instead of dividends and remittances thereof and cross remittances of earnings from money on deposit.

To any one reading the long agreement providing for every contingency that is therein set forth, nothing but an honest business effort to deal justly and conformably to the law is manifest.

If there had been anything in the way of simulation, as a basis of fraud in violation of the enactment invoked, it would have developed, in the actual operation of the scheme for years of accounting, something which appellant could have put forward to demonstrate that as fact beyond peradventure there was a basis furnished for the court to lay hold of and act upon to prevent a violation of the statutory law invoked.

In the numerous accounts kept, rendered and produced in evidence there is nothing pointed to of that sort such as would support such a contention.

Indeed counsel quite properly admitted there was no fraud, but insisted that the mere form was bad and hence *ultra vires*.

I submit we must ever attempt to grasp, if we can, the substance, and not pursue the mere shadowy forms as a basis of action.

The appellant having acted for many years upon this assumption of an honest observance of the law, and recognized the course adopted as such, can hardly

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be permitted now to turn round and say that those co-operating with her for years were doing something else and she innocent.

They are both in the same relative position towards each other whether good or bad, legal or illegal.

And if illegal she cannot be heard now to plead ignorance but must be held responsible for the position in which her husband, for example, has placed her. And that is to disqualify her from maintaining this action even if it had been well founded otherwise, as I hold it is not.

The appeal should be dismissed with costs.

DUFF J.—I think this appeal should be dismissed on the short ground that the appellant, by her conduct, has precluded herself from attacking the transaction she now seeks to impeach.

Assuming the transaction to be *ultra vires*, she could only maintain her status by shewing that the ends of justice required that she should be permitted to sue in her own name in opposition to the wishes of the majority of the shareholders.

Under the circumstances disclosed by the evidence I am forced to the conclusion that the appellant's claim has no foundation of substantial justice and that she has not made good her right to maintain the action in her own name.

ANGLIN J.—The material facts of this case, as I read the evidence, are accurately and succinctly stated in the judgment of Mr. Justice Riddell.(1) For the reasons assigned by that learned judge, I am of the opinion that the shares allotted to Wm. Strang have been fully paid up and that for the sum of $51,000 in question the firm of Wm. Strang and Son, and not

(1) 45 Ont. L.R. 215 at p. 220.

Wm. Strang as the holder of unpaid shares, is accountable to the J. B. Henderson Company. I cannot view all that took place—the forwarding of Wm. Strang's cheque to the company—the entry of payment in its books—the indorsement of the cheque over to it by Wm. Strang & Son—the solemn agreement executed by the members of that firm fixing the terms on which the $51,000 represented by the cheque should be held and dealt with by them—as the mere sham and attempted evasion of the statute which the learned Chief Justice of the Common Pleas seems to consider it. A very substantial change was effected in the rights and obligations both of the company and of the firm of Wm. Strang & Son sufficient to put the reality of the transaction beyond question. The company's rights under the agreement against Wm. Strang & Son in respect of the $51,000 are consistent only with that sum being its property held for its benefit and purposes, as defined in that document, and therefore inconsistent with the company not having received payment of that amount from Wm. Strang, or with his being still its debtor for the same sum in respect of unpaid shares.

Without expressing a concluded opinion upon it, I incline, with all the appellate judges, to the view that if the transaction between the company and Wm. Strang & Son should be regarded as a loan, it would not be in contravention of s. 29 (2) of the Company's Act, R.S.C., 1906, c. 79. But, for the reasons given by the learned Chief Justice of the Common Pleas, I concur in his view, which is also that of Britton and Riddell JJ., (1) that that transaction was not a loan but a "deposit on special terms," as Mr. Justice

(1) 45 Ont. L.R. 215, at p. 220.

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Riddell puts it, and as such entirely outside the statutory prohibition.

I agree with the learned trial judge in his disposition of the grounds of claim which he has designated (b), (c), (d), and (f). (1)

I would merely add that, if this action might have been maintainable by the J. B. Henderson Company, the evidence warrants an inference, if not of actual participation at least of such acquiescence by the present plaintiff in the acts which she now impeaches that "the necessity for the court doing justice", (*Russell* v. *Wakefield Water Works Co.* (2); *Towers* v. *African Tug Co.*(3); *Fullerton* v. *Crawford* (4); would appear not to require that she should be allowed as a shareholder, suing on behalf of herself and all other shareholders (other than the individual defendant) of the defendant company, to assert its rights.

I would dismiss the appeal.

BRODEUR J.—I concur with my brother Anglin.

MIGNAULT J.—The two main questions here are the following:—

1. Did the respondent, William Strang, pay for the 510 shares which he agreed to take in J. B. Henderson & Co., Limited?

2. Was the agreement signed on the 24th August, 1910, between J. B. Henderson & Co., Limited, and William Strang and Son, *ultra vires* of the company?

On the first question, the finding of the learned trial judge was that William Strang did pay for his shares, the learned judges of the Appellate Division

(1) 43 Ont. L.R. 617.
(2) L.R. 20 Eq. 474, 480.
(3) [1904] 1 Ch. 558.
(4) 59 Can. S.C.R. 314.

being equally divided as to this payment, although they all agreed that the judgment should be reversed.

The facts of the case are not at all complicated, although a great mass of evidence both documentary and by witnesses has been placed in the record. It appears that for some years Mr. James Black Henderson of Toronto was the Canadian purchasing and selling agent of the Scotch firm of William Strang & Son, of Glasgow, Scotland, composed of Mr. William Strang and four of his brothers. In the summer of 1909, Henderson was in rather poor health, and William Strang being in Toronto, it was decided to form a joint stock company to take over Henderson's business, under the name of J. B. Henderson & Co., Limited. William Strang desired to have a controlling interest in this company, which was natural as it was to handle his firm's goods, and upon its formation, with a capital of $100,000, he subscribed for 510 shares, representing $51,000, at par. Henderson, on the other hand, sold to the new company his stock-in-trade and good will for $23,500, taking in payment 235 fully paid shares. The other stock subscribers were W. G. McJanet, 50 shares or $5,000.00; Albert E. Weston, one share or $100.00; Robina Stark, one share or $100.00, and Mrs. J. B. Henderson (Henderson's wife, the present plaintiff) ten shares or $1,000.00.

All parties fully recognized that the authorized capital of the company was more than it required to carry on its business, and as its purchases of goods were almost entirely to be made in Europe, and principally from the firm of William Strang & Son, it was also evident and fully admitted by the interested parties that adequate financial arrangements would have to be made in Europe in order to buy goods there on the most advantageous terms.

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Several schemes were devised and discussed and finally it was agreed that the stock subscribed by all save William Strang would be issued as preference stock, entitled to a six per cent dividend, and that Willlam Strang's stock would be issued as common stock. And as to William Strang's stock, inasmuch as he was advised that it would have to be paid, he agreed to send over to the company his cheque for $51,000.00, or its equivalent in sterling, it being understood that the company would indorse the cheque and remit it to William Strang & Son as a special deposit free from interest, where it would serve to finance purchases made by the company on the European market, the company paying interest at six per cent. on all sums withdrawn by it, or advanced by William Strang & Sons on account of purchases made by the company. William Strang was not to be entitled to interest on his $51,000.00, and no dividend was to be payable on his common stock until the six per cent. on the preference stock had been paid, and then the latter stock would rank equally with the common stock on any dividend that might be declared.

This arrangement was duly carried out and authorized by a by-law of the company and by a contract made by it with William Strang & Son. The question now is—and it must be remembered that this question is raised, not by a creditor of the company, but by a shareholder—whether what was done is equivalent to a payment by William Strang of the stock subscribed by him.

Had William Strang's cheque been cashed by the company, and had the latter immediately remitted the sum of $51,000 to William Strang & Son as a special deposit in accordance with the arrangement

made, it could not have been contended that William Strang had not paid for his stock, whatever opinion might be entertained with regard to the deposit of this sum with William Strang & Son. But by cashing William Strang's cheque and remitting the proceeds to William Strang & Son, the company would have incurred expense for exchange and brokerage, and this expense it avoided and absolutely the same result was attained by indorsing over William Strang's cheque to William Strang & Son. There is no question whatever as to the absolute good faith of all the parties, and this being so, I cannot but think that William Strang paid for his stock as effectually as he would have done had his cheque been cashed by the company and the proceeds remitted to William Strang & Son. And, in my opinion, this conclusion is fully supported by the decision of the Judicial Committee in *Larocque* v. *Beauchemin* (1).

I am therefore of opinion that William Strang paid for his shares.

The question whether the arrangement arrived at was *ultra vires* of the company should, in my judgment, be answered in the negative. I cannot look upon the deposit of William Strang's cheque with William Strang & Son as being a loan to a shareholder. It was what it purported to be, a mere deposit for the benefit of the company, in order to secure the most advantageous terms for its purchases on the European market. And moreover the firm of William Strang & Son was, by the law of Scotland, duly proved in this case, a legal entity entirely distinct from William Strang personally.

(1) [1897] A.C. 356.

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I also fail to see in such a deposit, although it was of a large part, even the greater part, of the company's capital, anything beyond the powers of the company. Two things must be remembered here. First there is no suggestion of bad faith or fraud, nor of any prejudice suffered by the creditors of the company or by its shareholders, all of whom agreed to the arrangement. Secondly, the firm of William Strang & Son is a legal entity distinct from William Strang personally. Had that firm been a corporation or a bank—and had it acted as banker as well as vendor in its relations with the company—I cannot imagine that it could be contended that by making a deposit of the sum paid by William Strang for his shares under such an arrangement, the company exceeded its powers. And inasmuch as the firm of William Strang & Son is an entity distinct from William Strang personally, in the absence of any suggestion of fraud, I cannot see that William Strang's interest in the firm—whatever it may be—affects the validity of the transaction any more than it would have affected it had this firm been a corporation or a bank in which William Strang had shares. The stipulation that the company should pay six per cent. interest on any withdrawals out of the sum of $51,000 would have been very objectionable if the contract had been made with William Strang personally for it would have given Strang interest on his common stock if the company took possession of its own moneys, irrespective of the declaration of any dividend. But this stipulation was made with a third party, and the appellant does not suggest any intent to defraud creditors of the company or its shareholders.

The contention is however made in the appellant's factum that the agreement entered into was wholly for

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the benefit of William Strang as majority shareholder, and that it was oppressive on the minority shareholders. I cannot view it as such. On the contrary, I think that the arrangement was most advantageous for the company, and, if any shareholders derived therefrom more benefit than others, it was the minority shareholders, whose stock was preference stock entitled to a dividend of six per cent. before any distribution of profits and in such distribution or dividend the holders of the preference stock shared on the same basis as William Strang, holder of the common stock. It is obvious, moreover, that the company through this arrangement was enabled to purchase its goods on the European market on much better terms than if the settlement for each purchase had to be made separately by the acceptance and negotiation of drafts through the vendor's bank. After nine years only, on account of some trouble between Henderson and Strang, is the complaint made that this contract was *ultra vires*, and this complaint is by a shareholder who has benefitted thereby and not by a creditor of the company. In my opinion, in view of the circumstances of the case, this appeal should not be entertained.

As a consequence, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant:

Watson, Smoke, Smith & Sinclair.

Solicitors for the respondents:

Osler, Hoskin & Harcourt.

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*Nov. 17

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*Mar. 8.

THE OTTAWA ELECTRIC RAILWAY COMPANY.....APPELLANTS;

AND

THE TOWNSHIP OF NEPEAN AND OTHERS.....RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA.

Railway Board—Ottawa Electric Ry. Co.—Tariff of rates—Agreement with City—Britannia extension—Separate rates—Powers of Board.

In establishing a tariff of rates for carriage of passengers on the cars of the Ottawa Electric Ry. Co. the Board of Railway Commissioners should consider the portion of the line from Holland Avenue to Britannia separately from the rest and fix the rates therefor without regard to the conditions of carriage on the remainder of the system.

Held, per Duff, Brodeur and Mignault JJ., Davies C.J. contra, that under its agreement with the City of Ottawa, made in 1893, establishing five cents as the maximum of fares for the carriage of passengers within the city limits, the right of the company to charge any rate up to that maximum was not, prior to the enactment of sec. 325 (5) of the Railway Act of 1919, subject to the control of the Board.

Per Anglin J. The power conferred on the company by earlier provincial legislation to fix its rates of fare was continued by the Dominion Acts of 1892 and 1894 and thus became as to the City of Ottawa of 1893 the subject of "a Special Act" which, under sec. 3 of the Railway Act of 1906 overrides the general jurisdiction of the Railway Board over fares and tolls.

APPEAL from a decision of the Board of Railway Commissioners for Canada by leave of the Board on questions of law.

The following questions were submitted by the Board for the opinion of the Court.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin Brodeur and Mignault JJ.

"(1) Whether upon the proper construction of the agreements with the City of Ottawa and the Village of Hintonburgh the statutes relating to the Ottawa Electric Railway Co. and the relevant provisions of the Railway Acts, the Board was right in disallowing the tariff of the Company filed providing for payment of additional fare for carriage upon the extension from Holland Avenue notwithstanding that the Board has found as a fact that the Company did not require additional revenue.

"(2) Also whether upon the proper construction of the said agreements and statutes for the purpose of computing the toll to be charged to passengers upon the said extension the point of commencement of the said extension should be considered to be at Holland Avenue or at the former westerly limit of the Village of Hintonburgh now the City of Ottawa.

"(3) Has the Board the right to treat the Company's operations as a whole and continue the existing tariff; or must the Board permit the filing of tariffs on a mileage basis covering services on the Britannia line without reference to the larger part of the system covered by municipal agreements."

By virtue of an agreement with the City of Ottawa the company could not exact a higher rate than five cents for carrying passengers within the city limits but they asked the Board to sanction a higher rate for the part of the line running to Britannia. This the Board refused to do on the ground that as the system as a whole was profitable additional revenue was not required.

The court heard counsel on these questions and ordered a re-argument on three others, namely:—

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"(1) Has the Board of Railway Commissioners authority to reduce the company's charge for passenger services within the City of Ottawa below the fare of 5 cents now charged for any such service?

"(2) If the first question is answered in the negative, has the Board power to require the company to provide a service partly within and partly beyond the limits of the City of Ottawa for a charge not exceeding 5 cents?

"(3) In passing upon the questions raised upon this appeal, is the court in any respect governed by section 325 of the Railway Act of 1919?"

Chrysler K.C., for the appellants.

Denison K.C., and *Wentworth Greene*, for the Township of Nepean.

J. E. Caldwell, for the Village of Westboro.

F. B. Proctor, for the City of Ottawa.

THE CHIEF JUSTICE.—This is an appeal from the order or judgment of the Board of Railway Commissioners rejecting an application of the appellant company for leave to charge a higher rate than the existing one upon that portion of their railway known as the Britannia section or extension.

All the facts necessary for our decision on the questions of law referred to us are stated very fully in the reasons of the Chief Commissioner, Sir Henry Drayton, with which the rest of the Board concurred. Three questions are asked by them for us to answer. They are as follows:—

(1) Whether upon the proper construction of the agreements with the City of Ottawa and the Village of Hintonburgh the statutes relating to the Ottawa Electric Railway Company and the relevant provisions of the Railway Acts, the Board was right in disallowing the

tariff of the company filed providing for payment of additional fare for carriage upon the extension from Holland Avenue, notwithstanding that the Board has found as a fact that the company did not require additional revenue.

(2) Also, whether upon the proper construction of the said agreements and statutes for the purpose of computing the toll to be charged to passengers upon the said extension the point of commencement of the said extension should be considered to be at Holland Avenue or at the former westerly limit of the Village of Hintonburgh now the City of Ottawa.

(3) Has the Board the right to treat the company's operations as a whole and continue the existing tariff; or must the Board permit the filing of tariffs on a mileage basis covering services on the Britannia line without reference to the larger part of the system covered by Municipal agreements.

It appears clear to me that when exercising its statutory powers in fixing the rates which a company may charge, the decision of the Board is final and we have no right to interfere or express any opinion upon it unless it clearly appears either (1) that the Board in exercising its judgment has refused to consider facts which it ought to have considered or (2) has considered facts which it should not have considered, or (3) has admittedly proceeded on a view of facts rightly taken into consideration which is erroneous at law.

In the case before us the Board determined that it should not consider the Britannia extension as a separate entity but should consider it as an extension of the main city line and form its conclusions on the rate question with reference to the operations of the whole line.

If the Railway Commissioners were obliged, as was contended by Mr. Chrysler, to consider this extension as a separate entity, they found that the present rates which the company sought permission to raise were not fair and reasonable, and would, therefore, in such case presumably have permitted some raise to be made.

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If, on the other hand, they had to consider the application to raise the rates in the Britannia section with reference to the operations of the entire line and as a mere extension of it as they determined it was, then their decision is one with which we have no right to interfere or express any opinion upon.

I am of opinion that in so deciding they acted within their legal rights and that this court has no jurisdiction to interfere.

The question, therefore, to determine is whether or not the Britannia extension was to be considered as part of the company's main line or as a separate entity. That, I take it, is a legal question and one which the Board rightly determined. The application to Parliament for the power and privilege of constructing this extension was made by the company on the express ground that it was an extension merely of their city lines, and in the statutes passed it was so recited and enacted. I cannot in the face of the express words of the statute, construe it as a separate entity. It is true that the main charter of the company limits the fares which they charge on their city lines to the *then existing city limits* and that such limitation does not embrace the Britannia section which was outside of those limits. But that by no means disposes of the question whether the Board had the right to disallow the application to be allowed to charge on the Britannia extension higher rates than those now existing; that is a question which, the Board having taken into its consideration all the facts it was obliged to consider and not having considered any facts which it had no right to consider, was in its absolute discretion and judgment. Mr. Chrysler pressed upon us the admitted fact that the Britannia extension was,

in part, constructed upon the company's own private property and not upon the streets or roads. It does not appear to me that this fact makes any difference in determining the question of an increase of the rates whether the extension was to be treated and considered as a separate entity or not. The Board determined not to consider it such and, I think, was right in so doing. But when it has so decided after considering everything it was bound to consider, this court has no right to interfere with its conclusions.

In reaching the conclusions I have stated and disallowing this appeal I do not wish to be understood as affirming or agreeing with the statement of the Chief Commissioner of the Railway Board in delivering the reasons of the Board for making the order disallowing the proposed new tariff, to the effect that the Board had no authority to reduce the company's charge for passenger services within the City of Ottawa below the five cents now charged for such service. As I understand the language of the Chief Commissioner, he holds that even if the rate of five cents was held by the Board to be an unfair and unreasonable one the Board was powerless to reduce it because the Dominion Parliament has confirmed the agreement between the company and the Corporation of the City of Ottawa which provided that rate as a maximum one. The question is simply as to the meaning of the agreement so confirmed. That agreement, it seems to me, merely establishes five cents as a maximum rate which the company in no case or under no circumstances can exceed. The Board itself with all its statutory powers could not in the face of this express prohibition agreement, allow a higher tariff rate than five cents. But I respectfully submit in exercising

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its statutory powers and determining whether the rate of five cents, or even a lower rate than that, was or was not a "fair and reasonable rate," the action of the Board is unfettered by the prohibition against charging more.

The question is not, of course, directly before us on this reference, but I am anxious not to be considered as agreeing with the conclusions of the Chief Commissioner on the point, concurred in as they were by the other members of the Board, and as such a conclusion was necessarily an important factor in deciding whether in disallowing the proposed new tariff the operations of the railway as a whole had a right to be considered by them.

At the second argument of this reference before us the question whether this court was in any respect governed by section 325 of the Railway Act of 1919 was debated.

In the view I take of the jurisdiction and powers of the Railway Board over the Ottawa Electric Railway Company being ample to justify their order, and also to fix the fares it may or may not charge, I do not deem it necessary to invoke the aid of the legislation of 1919. The previous legislation was quite sufficient, in my opinion, to give the Board jurisdiction and to justify its order now under appeal. If that legislation of 1919 was applicable I do not see how any question as to the validity of the Board's action could arise.

In the year 1894, the then two independent street railways in Ottawa were united, and the agreement made between them was ratified by Parliament as also the agreement between the united companies and the City of Ottawa by 57 & 58 Vict. ch. 86.

Section 7 of that Act is as follows:—

The lines of street railway constructed by the said companies, or either of them, are hereby declared to be works for the general advantage of Canada, and the said "The Ottawa Electric Railway Company" is hereby declared to be a body corporate subject to the legislative authority of the Parliament of Canada.

From and after the passage of that legislation the now appellant the Ottawa Electric Railway Company, became, in the words of the statute, a body corporate subject to the legislative authority of the Parliament of Canada and its works were declared to be for the general advantage of Canada. The company, therefore, had all the benefit of the general railway legislation of the Dominion then or thereafter passed and became subject in all respects to the same.

In 1906, such a general Act was passed, the 314th section of which is as follows:—

314. The company or the directors of the company, by by-law, or any officer of the company thereunto authorized by by-law of the company or directors, may from time to time prepare and issue tariffs of the tolls to be charged, as hereinafter provided, for all traffic carried by the company upon the railway, or in vessels, and may specify the persons to whom, the place where, and the manner in which, such tolls shall be paid.

2. Such tolls may be either for the whole or for any particular portions of the railway.

3. All such by-laws shall be submitted to and approved by the Board.

4. The Board may approve such by-laws in whole or in part, or may change, alter or vary any of the provisions therein.

5. No tolls shall be charged by the company until a by-law authorizing the preparation and issue of tariffs of such tolls has been approved by the Board, nor shall the company charge, levy or collect any money for any service as common carrier, except under the provisions of this Act.

Then, section 323 enacts as follows in its first part:—

323. The Board may disallow any tariff or any portion thereof which it considers to be unjust or unreasonable, or contrary to any of he provisions of this Act, and may require the company, within a

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prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed

Under this legislation the Board, in my opinion, has full and ample powers to control the rates of the company on its main lines and its extensions, and, finding that the company had a revenue of at least 15% from its works as a whole, was acting within its rights when it rejected the company's application for leave to charge a higher rate than the existing one upon the Britannia section or extension of their lines of railway.

I am unable to appreciate the argument that the powers granted to the companies by the provincial legislature to make by-laws regulating the rates which might be charged for the carriage of passengers became vested in the united companies under the name of the Ottawa Electric Railway by the Act of the Parliament of Canada which declared the work to be for the general advantage of Canada, and that the General Railway Act did not take away or impair those rights or powers. It seems to me that the contention is fully met by section 6 of the Railway Act of 1906, which reads as follows:—

6. Where any railway, the construction or operation of which is authorised by Special Act passed by the legislature of any province, is declared, by any Act of the Parliament of Canada, to be a work for the general advantage of Canada, this Act shall apply to such railway, and to the company constructing or operating the same, to the exclusion of such of the provisions of the said Special Act, as are inconsistent with this Act, and in lieu of any general railway Act of the province.

Under any construction of these various Acts the power to control and disallow any proposed tariff of rates as being "unjust and unreasonable"

remained in the Railway Board under section 323 of the Railway Act and applied to the tariff of rates now under review.

The power of the common law courts over rates charged by a common carrier were practically transferred by section 323 of the Railway Act above quoted to the Board of Railway Commissioners.

I would, therefore, answer the first question, under the circumstances I have stated above, in the affirmative construing the phrase "right in disallowing the tariff" in question as meaning "within its right." Whether the decision was right or wrong is not for me to pass on; I merely say the Board was within its right in deciding as it did.

My answer to the first part of the third question is in the affirmative, and, to the latter part, in the negative.

The appeal, therefore, should be dismissed with costs.

IDINGTON J.—There existed in Ottawa in the early part of 1894, two street railways, respectively owned by separate corporate companies whose early history and relations with the City of Ottawa concern, or at all events should concern, us very little for the purpose of determining the questions raised by this appeal.

Suffice it to say that in said year there were agreements entered into between the said companies whereby the assets of the one were to be sold to the other and between both and the City of Ottawa, presented to the Parliament of the Dominion with a petition to confirm same and vest the properties which had been theretofore and were then held by either in the appellant.

Parliament, by 57 & 58 Vict. ch. 86, sec. 1, ratified the said agreement between the said companies, and

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by section 2, the said agreement between them and the City of Ottawa.

Then by section 3 of said Act, it enacted as follows:—

3. The franchises, powers and privileges heretofore or hereby granted to or conferred upon the said companies, or either of them, and which are hereby authorized to be transferred to the said united company, shall be exercised and enjoyed by the said united company, subject to the terms, provisoes and conditions contained in the said agreement with the Corporation of the City of Ottawa.

Section 6 provided as follows:—

6. The name of the Ottawa City Passenger Railway Company is hereby changed from 'The Ottawa City Passenger Railway Company' to 'The Ottawa Electric Railway Company,' but such change in name shall not in any way impair, alter or affect the rights or liabilities of the company, nor in any wise affect any suit or proceeding now pending or judgment existing either by or in favour of, or against the said company, which, notwithstanding such change in the name of the company, may be prosecuted or continued, completed and enforced as if this Act had not been passed.

And section 7 of the same Act declared as follows:—

7. The lines of street railway constructed by the said companies, or either of them, are hereby declared to be works for the general advantage of Canada, and the said 'The Ottawa Electric Railway Company' is hereby declared to be a body corporate subject to the legislative authority of the Parliament of Canada.

That legislation beyond doubt constituted the appellant and the said lines of railway, in the language just quoted, "works for the general advantage of Canada" and subjected the appellant as the new corporate owner of same and said works to the future railway legislation of the Dominion, unless when expressly exempted therefrom.

The Dominion Parliament by the Railway Act of 1906, section 5, provided as follows:—

5. This Act shall, subject as herein provided, apply to all persons, companies and railways, other than Government railways, within the legislative authority of the Parliament of Canada.

The said Railway Act, 1906, provides, by section 314, as follows:—

314. The company or the directors of the company, by by-law, or any officer of the company thereunto authorized by by-law of the company or directors, may from time to time prepare and issue tariffs of the tolls to be charged, as hereinafter provided, for all traffic carried by the company upon the railway, or in vessels, and may specify the persons to whom, the place where, and the manner in which, such tolls shall be paid.

2. Such tolls may be either for the whole or for any particular portions of the railway.

3. All such by-laws shall be submitted to and approved by the Board.

4. The Board may approve such by-laws in whole or in part, or may change, alter or vary any of the provisions therein.

5. No tolls shall be charged by the company until a by-law authorizing the preparation and issue of tariffs of such tolls has been approved by the Board, nor shall the company charge, levy or collect any money for any service as a common carrier except under the provisions of this Act.

Section 323 of said Act reads in first part as follows:—

323. The Board may disallow any tariff or any portion thereof which it considers to be unjust or unreasonable, or contrary to any of the provisions of this Act, and may require the company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed.

The foregoing outlines of so much of the legal history of appellant as can be made relevant to any of the questions herein submitted, when taken in connection with said section 323 of said Act, contains all the law to which we should have regard in answering same.

Indeed I hold that the lastly quoted part of section 323 contains all that is relevant in this particular case, for the Board finds that the appellant has a revenue of at least 15% from its works, as a whole. That renders it impossible to say, as matter of law, that the ruling is "unjust and unreasonable" and hence in any

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way such a violation of said section 323 as to furnish any ground of complaint on the appellant's behalf.

If it is not possible to hold that in law there has been something unjust or unreasonable done by the Board in reaching its judgment, or in the application of any of the statutes to which I have referred, then it hardly seems possible that there can be any question of law proper for this court to be called upon to decide.

I may briefly state some other facts which it is said give rise to the doubt of the correctness in law of the conclusion reached by the Board.

It seems that the appellant's railway extends from a point some short distance east of Ottawa to Britannia-on-the-Bay to the west of said city, with numerous divergent parts and branches running over many of the city streets.

As inevitably happens in every large business enterprise, there are some parts of this railway which do not pay as well as others; and indeed are a burden, according to the absurd view that the feeders to serve the system are entirely useless and that all the persons passing over same would in any event pass over the other central part and pay a fare.

The part of the said railway extending from Ottawa to Britannia-on-the-Bay was authorized by Parliament, by the statute of 1899, ch. 82, expressly enacting that the company might as an extension to its then existent railway, construct and operate, etc., such a branch.

An agreement referred to in the questions I am about to quote had been entered into between the appellant and the Village of Hintonburgh specially providing for its franchise in that part of its line.

That agreement has expired, and can hardly be said as matter of law to have anything to do with the questions raised, especially when the maximum limit of basis fixed thereby is adhered to by appellant.

The Board, however, for some reason not very apparent in so plain a case, has submitted the following alleged questions of law on which appellant bases this appeal, and asks to find that what has been done by the Board is in law unwarranted :—

(1) Whether upon the proper construction of the agreements with the City of Ottawa and the Village of Hintonburgh, the statutes relating to the Ottawa Electric Railway Company and the relevant provisions of the Railway Acts, the Board was right in disallowing the tariff of the company filed providing for payment of additional fares for carriage upon the extension from Holland Avenue, notwithstanding that the Board has found as a fact that the company did not require additional revenue.

(2) Also, whether upon the proper construction of the said agreements and statutes for the purpose of computing the toll to be charged to passengers upon the said extension the point of commencement of the said extension should be considered to be at Holland Avenue or at the former westerly limit of the Village of Hintonburgh now the City of Ottawa.

(3) Has the Board the right to treat the Company's operations as a whole and continue the existing tariff; or must the Board permit the filing of tariffs on a mileage basis covering services on the Britannia line without reference to the larger part of the system covered by Municipal agreements.

I am unable to understand the argument that in law there is such an imperative legal distinction, between the part of the company's line beyond Holland Avenue, and those other parts of same, which must of necessity become effective and so operate as an imperative mandate in relation to the defining or fixing of rates that there must be different rates east of that line from those west thereof, which conflicts with conclusions reached by the Board. The mathematical distinction I can grasp but that we have to

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deal with must be one so founded in law as to affect this case.

To urge that a separate and distinct line of treatment thereof in regard to the question of fares for passage over it because it was authorized and built at a different time from some other part, seems to me, with great respect, a very idle argument. And it does not seem to me to be improved by a reference to the question of whether the power of expropriation existed before or was first enforced by a particular clause in the legislative history of the appellant.

The same sort of argument would lead to holding as matter of law that the Hintonburgh part of the line must be treated as a thing separate from the rest of the lines in fixing fares, and so on throughout the system.

I can understand the question of the delimitation of rates as evidenced by agreements between appellant and municipal bodies being a matter of fact which probably the Board of Railway Commissioners should examine in reaching a determination as to any tariff of tolls. When the Board has done so and examined all else in the way of facts bearing upon the questions raised by the proposed imposition of a tariff, I fail to see how any question of law arises. It is not for us to pass upon the question of whether or not the proper construction of the agreements and the relevant provisions of the Railway Acts, as a matter of law, lead to the allowance or disallowance of the proposed tariff when we find that the Board, even assuming as well founded appellant's contention relative to the construction of said agreements and statements, has found as fact that the company did not require

additional revenue and hence it was neither just nor reasonable to impose further rates.

I could understand the question of law being put as to whether or not the rates of fares named in such agreements and legislative validation thereof must be held to have been thereby in law imperatively and definitely determined for all time. But when we find the Board and counsel for appellant have assumed that to be law (which I much doubt but pass no opinion upon) and acted upon such assumption, there seems nothing but mere questions of fact involved in what remains for consideration.

There is much to be said for the true legal aspect of the whole matter involved having been reduced, by the Parliamentary legislation above recited, to a mere question of what would be in the opinion of the Board be a just and reasonable tariff, regardless of the agreements in question, and especially so when we find they seem in this regard to have merely arrived at a maximum tariff.

Evidently this part of the agreement though for even that and many other purposes validated by the preceding legislation, may be held to have been overridden by the later legislation constituting the Board and assigning it such powers as it has, constituting it absolute master of the whole question of rates or tolls, provided always as a test of the due discharge of such duties as entailed thereby that it has duly considered all that is involved as fact in such like agreements.

Let us assume that there had, instead of a highly profitable investment such as appellant's has turned out, resulted an enterprise that could not be made productive of a fair profit without discarding the limitation in these agreements; could it be said that

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the Board under the legislation conferring such an absolute power long after the agreements had come into existence, would be powerless to grant any relief? The questions as presented and the argument thereon do not permit me to feel at liberty to answer definitely this question.

I, therefore, merely submit it as an illustration of what might have been a possible solution of much that is involved in what has been considered, and suggesting a reason why the questions submitted cannot be answered in a more helpful way than I am compelled to.

Holding the view I have expressed as to the first question, it seems self-evident that the answer to the second question is not involved in the disposition of the question before the Board and hence needs no answer.

As to the third question I cannot conceive of any rule of law that would prevent the Board from considering the company's operations as a whole, and if it saw fit to disallow the proposed tariff, or any portion thereof which it considered to be unjust, or unreasonable, or contrary to the provisions of the Railway Act, it was entirely within its province. So far as the doing so can be said to raise any question of law, I have no hesitation in answering affirmatively.

As to the second branch of the third question, raising the point of whether or not the Board must permit the fixing of tariffs on a mileage basis, I may point out that the appellant's factum distinctly disavows desiring to raise such a question and insists that

> there was no question before the Board as to whether the tolls should be based upon mileage, or upon a flat rate.

That seems to eliminate so far as this appellant is concerned in this appeal, the only other possible question of law raised by the third question for our decision.

It is only as a basis of appeal by way of which an appellant may seek to get relief that we can consider any such question. However willing we should be to aid the Board we cannot properly so interfere unless incidentally to the determination of something in respect of which an appellant seeks relief.

With great respect I submit the questions submitted (save the first part of the third question) do not raise or distinctly state any definite question of law actually relevant to the matters in issue between those concerned, upon which a ruling is desired, and can be properly made.

The first part of the third question should be answered in the affirmative.

I think, therefore, following our view expressed in the case of *Canadian Pacific Railway Co.* v. *Regina Board of Trade* (1) the appeal should be dismissed with costs.

After I had written the foregoing the majority of the court decided to direct a re-argument (which has been had) upon certain stated questions. In deference, however, to suggestions made in that argument, which was not directed on the grounds upon which I proceeded and hence has not changed my opinion, I may be permitted to point out that the declaration, contained in the above quoted section 7 of the Dominion Act, 57 & 58 Vict. ch. 86, that, so long ago as 1894, the works of the appellant were thereby declared to be for the general advantage of Canada; and hence

(1) 45 Can. S.C.R. 321.

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by such declaration withdrawn, by virtue of Item No. 10 of section 92 of the British North America Act, from any control of, or incidental to, their operation either by virtue of any legislation of Old Canada or the legislation of the Province of Ontario.

Such, I think, must be held to be the result of the decision of the Judicial Committee of the Privy Council in the case of *Toronto* v. *The Bell Telephone Co.* (1). Unfortunately that case was not referred to in either argument herein.

By the express language of the above quoted section 7, as well as the necessities of the situation created by the other provisions of the said Act a new corporate entity, composed of two such previously existent, is created and that is declared to be subject to the legislative authority of the Parliament of Canada.

The result of the said legislation, viewed in light of said decision, seems to have been to give predeterminate effect to the Act of Parliament wherever conflict arises between the respective enactments.

We are not left to depend alone upon such reasoning for this conclusion was adopted by the enactment of section 6 in the Railway Act of 1906, which reads as follows:

> 6. Where any railway, the construction or operation of which is authorized by a special Act passed by the legislature of any province, is declared, by any Act of the Parliament of Canada, to be a work for the general advantage of Canada, this Act shall apply to such railway, and to the company constructing or operating the same, to the exclusion of such of the provisions of the said Special Act as are inconsistent with this Act, and in lieu of any general railway Act of the province.

Hence beyond peradventure all the subsequent undertakings of the new creation such as the new branch, declared by the later Act authorizing it, to be

(2) [1905] A.C. 52.

an extension, and that extension which is now in question, must be governed in every respect by the Dominion Railway Act, and not by any legislation of the Ontario legislature either as to fares or otherwise.

This evidently was the view held by the appellant itself otherwise it never should have troubled the Board of Railway Commissioners by filing with it a proposed new tariff of fares.

The point made by Mr. Denison of counsel for one of the respondents, that at common law the common carrier was as between him and any one of the public, not entitled to charge any fare beyond what was just and reasonable, was well taken.

Besides those cases he referrred to I find the case of *Interstate Commerce Commission* v. *Baltimore & Ohio Rd. Co.* (1) which proceeds upon a distinct holding of such a view as the basis upon which the legislation there in question proceeded. See also *Harris* v. *Packwood* (2).

Our Railway Act in making a statutory provision for the determination of what rates are chargeable, also proceeds upon the same basis of what is just and reasonable.

I therefore repeat that I can see nothing else to test the jurisdiction of the Board so long as it has not gone beyond its statutory authority and has not failed to consider all relevant facts.

DUFF J.—The questions submitted should, in my opinion, be disposed of as follows:—

The first question: This question is not answered since it involves questions of fact within the exclusive

(1) 145 U.S.R. 263. (2) 3 Taun. 264.

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competence of the Board of Railway Commissioners. So far as it involves a question of law it is covered by the answer given to the first part of the third question.

The second question: At Holland Avenue.

The third question: First member. No. Second member: Yes; though not necessarily on a mileage basis.

My reasons for these conclusions can be stated briefly. They are based upon two propositions which appear to me clearly established.

First. I concur fully with the opinion of the Chairman of the Board as to the effect of the statute of 1894. By force of that statute and the scheduled agreements the rights and obligations of the Ottawa Electric Railway Co. in relation to the fares chargeable in respect of the services provided for or contemplated by the agreement between the Street Railway Companies and the City—services which may with sufficient accuracy be referred to as City services—were to be governed by the agreement itself; and consequently the Ottawa Electric Company did not on the passing of the Railway Act of 1903 (see s. 3) become in respect of such fares subject to the jurisdiction of the Board of Railway Commissioners touching the matter of the regulation of rates.

Second. As regards the Britannia extension on the other hand, authorized by the Act of 1899, I can find nothing in that statute excluding this line from this jurisdiction of the Board and I think that on the passing of the Railway Act of 1903 the provisions of that enactment on the subject of the regulation of rates became applicable to it.

The first of these propositions seems to involve this consequence: The fares exigible under the statute

and agreement of 1894 must be taken to be a just remuneration, neither too much nor too little, for the city services; and it seems to follow that in determining what is a just and reasonable remuneration for the services performed on the Britannia lines the proceeds derived from the city services must be left out of account. That is to say that in determining what is just and reasonable in respect of the Britannia lines, you must start with the hypothesis that everything paid in respect of city services has been fully earned by the performance of those services.

The point may be illustrated by a reference to one example of the manner in which the existing tariff operates. Under that tariff the company is entitled to charge a maximum fare of five cents for transport from the corner of Laurier Avenue and Charlotte Street to Britannia, a charge which the company, by the Act and agreement of 1894 is nevertheless entitled to make for that part of the service which is performed within the city. In other words, under existing conditions, so long as the Britannia line is kept in operation and this service is maintained, the company is obliged to give, for a fare of five cents, the city service (for which by law it is entitled to receive a fare of five cents) plus the service from Holland Avenue to Britannia; and that appears to be the necessary consequence of treating the operations of the company as a whole and maintaining the existing tariff.

I think it is not permissible to do this because thereby full effect is denied to the legal rights of the company under the statute and agreements of 1894.

I must mention that in answering these questions we are governed by the law as it stood before the enactment of the Railway Act of 1919.

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ANGLIN J.—This case comes before us by leave of the Board of Railway Commissioners granted under s.s. 3 of s. 56 of the Railway Act, R.S.C., c. 37, as enacted by 9 & 10 Ed. VII., c. 50, s. 1. The Board is thereby empowered to grant a right of appeal

upon any question which *in the opinion of the Board* is a question of law.

It may therefore be that this court should not decline to pass upon any question leave for the submission of which as a question of law has been given by the Board, however difficult or even impossible it may be to find in it such a question. On the other hand if a question formulated by the Board is susceptible of more than one interpretation, inasmuch as it must be assumed that the Board did not intend to ask the opinion of the court on anything other than a question of law, the court should put upon it any construction at all admissible that presents such a question. If on no possible interpretation can a question of law be found, it would seem reasonable to assume that there had been some mistake in the drafting of the question in respect of which leave has been given, and on that assumption the Board might be asked to reconsider it and, if possible, to state it in a form which would present an issue of law. I should have been disposed to adopt this course in regard to the first question in the present case were it not for the fact that I incline to the view that it was probably intended by it to cover substantially the same ground as is covered by the first member of the third question, and in the latter may be found a question of law. It would not seem to be practicable to answer the first question submitted on this appeal without reviewing the discretion of the Board exercised upon considerations which are in no sense matters of law.

Itis beyond the function which s. 56 (3) of the Railway Act contemplated should be exercised by this Court to determine

> whether * * * the Board was (or was not) right in disallowing the tariff of the Company filed providing for payment of additional fare for carriage upon the extension from Holland Avenue.

Should there be no legal obstacle to the adoption of the course decided upon by the Board, there may be error in the determination of some matter of fact or in the exercise of the wide discretion entrusted to it by the statute, neither of which can be made the subject of an appeal to this court. I find it difficult to conceive of any case in which the court may properly be asked whether any action taken by the Board is or is not "right," unless where the law peremptorily requires that some particular course should be taken in regard to the subject matter of the question.

The facts out of which the questions submitted arise appear in the order of the Board granting leave to appeal. Mr. Chrysler contends that the finding of the learned Chief Commissioner, that the company has a statutory right, not subject to the control of the Board, created by the confirmation of its agreement of 1893 with the City of Ottawa by the Dominion Act of 1894 (c. 86), to charge any rate of fare fixed by it, not exceeding five cents, for the carriage of each adult passenger within the then limits of the City of Ottawa, constitutes such a legal requirement and compels the allowance by the Board of some additional rate for carriage on the Britannia extension, admittedly beyond those limits, and precludes that tribunal from taking into account in fixing such rate the company's profits on the operation of so much of its system

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as is covered by the agreement. If the Chief Commissioner's finding is right, or must be assumed to be so on this appeal, I am, with respect, of the opinion that the learned counsel's conclusions would seem necessarily to follow. Otherwise the company would be obliged to expend in the operation of an extension found to be unprofitable (par. "r") income derived from other portions of its system to which, *ex hypothesi*, it has an absolute statutory right: To put it otherwise—having by statute a right to be paid five cents for carrying a passenger, who embarks in Ottawa, to the former city limits, it would be compelled to carry him gratis beyond those limits—and for an additional three miles should he desire to travel to the Britannia terminus. The same result would ensue in the case of a passenger boarding one of the company's cars at some point on the extension to be carried to a place within the City of Ottawa as it stood in 1893. The only traffic on the Britannia extension for which the company would receive any remuneration would be that having both its point of origin and its point of destination on the extension itself. If it is beyond the jurisdiction of the Board directly to control the company's tolls within the limits of the Ottawa of 1893, it cannot, in my opinion, do so indirectly by refusing to the company reasonable remuneration for the traffic on the Britannia extension, considered by itself.

Mr. Chrysler argued that the Board has not submitted to the court the question whether the company has or has not the statutory right which the Chief Commissioner has found it enjoys with regard to the rates of fare within the city of Ottawa as it stood in 1893-4, and that that matter is therefore not subject

to review here. It is quite true that the question is not formulated in explicit terms. But the first member of the third question submitted

> has the Board the right to treat the company's operations as a whole and continue the existing tariff?

treating the word "right" used in it as meaning power or jurisdiction—necessarily involves it. I find nothing else in the statutes and agreements referred to in the first question, and recited in the statement of facts embodied in the order of the Board, that could possibly exclude that right. They include the statute and agreement on which the Chief Commissioner bases his finding that a statutory right to a five cent fare for each adult passenger carried within the limits of the Ottawa of 1893, over which the Board has no power of regulation or control, is vested in the company. We cannot in answering the first member of the third question propounded ignore this feature of the case before us which appears to me to be so vital that it is virtually the turning point in its determination and presents, if not the sole, at least the most obvious and most important question of law to be found in the entire submission. Somewhat paradoxically upon this question the appellant company upholds the finding of the Chief Commissioner while the respondents maintain that it is wrong.

Although, for reasons presently to be stated, of the opinion that the company has a right not subject to the control of the Board to fix a rate of fare not exceeding five cents for each adult passenger, except as provided by clause 49 of the agreement of 1893, carried by it within the then limits of Ottawa, with respect, I fail to find in the confirmation by the statute of 1894 of clause 46 of the agreement of 1893 sufficient ground

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for that conclusion. On the contrary, if the company's right rested on that contract and statute alone, while it could not claim any fare exceeding five cents (except for the traffic specifically provided for by clause 47) for the carriage of a passenger within the limits of the Ottawa of 1893, its right to demand fares up to that figure would, in my opinion, be subject to the control of the Board. Clause 46 is purely restrictive in its terms. Had the company intended to stipulate for a right to charge any fare fixed by it not exceeding five cents, it is scarcely conceivable that that right would not have been expressed in positive terms such as are found in clause 47 dealing with the special rates of fare between 12 o'clock midnight and 5.30 a.m. Moreover, the fact that its right to collect and fix fares within the Ottawa of 1893 existed independently of and antecedently to the contract of that year and the statute of 1894, as I shall now endeavour to demonstrate, renders it wholly unnecessary to import by implication into clause 46 of that contract the positive provision which the contracting parties would seem to have deliberately omitted from it.

The Ottawa City Passenger Railway Company was incorporated by the Parliament of the late Province of Canada in 1866 and by section 8 of that statute (c. 106) its directors were empowered to make by-laws touching (*inter alia*)

> the fares to be received for passengers and freight transported over the railway or any part thereof.

The franchise conferred was to construct and to operate by animal power a street railway on certain specified streets and others to be agreed upon in the City of Ottawa and adjoining municipalities. The work

being purely local and provincial passed, at Confederation, under the control of the legislature of Ontario. That body in 1868 amended the company's charter (c. 45) by declaring applicable to it certain sections of the Consolidated Railway Act of 1859 (c. 66), *inter alia* those with respect to "Powers," and expressly excluding the application of other clauses of the same Act, *inter alia* sections 118 and 151 relating one to the reduction of tolls by the legislature and the other to the approval of tariffs by the Governor-in-Council. Under the heading "Powers" it was by section 9 of the Consolidated Railway Act provided that

> the company shall have power and authority * * * tenthly * * * to regulate * * * the tolls and compensation to be paid and to receive such tolls and compensation.

S.s. 1 of s. 31 of ch. 170 of R.S.O. 1887 (The Ontario Railway Act) applied to the Ottawa City Passenger Railway Company, but s. ss. 9, 10, 11 and 12 of the same section did not. R.S.O. 1887, c. 2, s. 10.

No other change in the statutes affecting the company was made prior to 1892. It would therefore appear that at that time under the provincial statutes governing it one of the "powers" of the company was to regulate its tolls—a power which it would probably exercise through directors' by-laws passed under sec. 8 of the Act of 1866—without control by the legislature or by the Governor-in-Council under sections 118 or 151 of the Consolidated Railway Act of 1859, or the corresponding sections of c. 170 of the Revised Statutes of Ontario, 1887. The Ontario Street Railway Act of 1883 (46 Vict., c. 16) (R.S.O. 1887, c. 171) by its 24th section provided that

> nothing in this Act contained shall apply to or affect any street railway company existing or incorporated before the 1st of February, 1883.

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In 1892 the company desiring to extend its line across the Union Bridge and into the City of Hull sought and obtained from the Dominion Parliament an Act (c. 53) empowering it to do so, (s. 1) declaring it to be a work for the general advantage of Canada (s. 6), conferring on it the additional right to use motive power other than animal power, except steam (sec. 3), making applicable to the new lines of which the construction was thereby authorized the Acts of 1866 and 1868 and "the powers thereby conferred," and providing that the "operation" of the railway "by any new or additional powers conferred by this Act," should be subject to the provincial law in relation to street railways (s. 6).

"Operation" in this statute in my opinion does not include the fixing or regulation of fares. It refers to the working of the railway—how the cars should be run—control of the tracks, motive power and equipment. *Bedford Bowling Green Stone Co.* v. *Oman* (1); *Minneapolis Street Railway Co.* v. *City of Minneapolis* (2). A reference to the clauses of the Dominion Railway Act (R.S.C. 1906, c. 37) included in the fasciculus headed "Operation" will serve to indicate the purview of that term as understood by the Parliament of Canada.

By sec. 13 of the Act of 1892 it was provided that

> nothing in this Act shall in any way impair any of the powers which the company has at the passing of this Act.

Ordinarily I should incline to think that the word "powers" in such a section would not include the right to fix rates. But that right was conferred by the Act of 1868 as a "power and authority;" and by the Act of 1868 it was confirmed as one of the "powers"

(1) 134 Fed. R. 441-450. (2) 155 Fed. R. 989-1000.

under sec. 9 of the Consolidated statute of 1859 incorporated with the Act of 1868. Furthermore, in the Dominion Act of 1892, while secs. 92 and 93-98 of the general Railway Act (51 V., c. 29) are expressly made applicable to the company, there is no reference either to sec. 223 empowering the company to fix tolls or to secs. 11 (k) and 227 and 228 providing for the control of tolls by the Railway Committee of the Privy Council and the Governor-in-Council respectively. The proper conclusion from these circumstances appears to me to be that the "power" of fixing and regulating its rates of fare free from the control of the Lieutenant-Governor-in-Council, which the company possessed under the provincial legislation affecting it, was continued unimpaired by the operation of secs. 6 and 13 of the statute of 1892, notwithstanding the declaration thereby made that the company's undertaking was a work for the general advantage of Canada, and that that right thus became the subject of a "Special Act" excluding the application of inconsistent provisions of the general Railway Act (51 V., ch. 29, ss. 3 and 6), if they would otherwise have been applicable to it as a street railway.

Such was the position of the Ottawa City Passenger Railway Company in regard to the imposition and control of tolls at the time of the agreement of 1893 and the statute of 1894 confirming it, so much canvassed at bar. The Ottawa Electric Street Railway Company, then absorbed by and amalgamated with the Ottawa City Passenger Railway Company, had been incorporated in 1890 and was subject to the Ontario Street Railway Act (R.S.O. 1887, c. 171). But the only statutory provision affecting its tolls was that contained in s. 9 of that Act, limiting the

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maximum fare to be charged by it to five cents for any distance not exceeding three miles and one cent for each additional mile. It seems very clear to me, therefore, that the sole office of the first member of clause 46 of the agreement of 1893—

> no higher fare than five cents shall be charged for the conveyance of one passenger from one point to another on the said line and branches thereof within the present city limits

was so to limit the company's right to fix its rates of fare conferred by the provincial Acts of 1866 and 1868 and confirmed by the Dominion Act of 1892, and not otherwise subjected to statutory control or restriction, that thereafter the ordinary fare for the carriage of an adult passenger within the then city limits should not exceed five cents,—a concession which the company no doubt made in consideration of countervailing benefits and advantages obtained by it under the agreement. That, in my opinion, is the entire scope and purpose of the part of clause 46 now under consideration and it therefore becomes quite unnecessary to consider the effect of its confirmation by the statute as creating a statutory right in favour of the company.

The Act of 1894 continues the existence of the "Ottawa City Passenger Railway Company" under the name of the "Ottawa Electric Railway Company" (s. 6) and sanctions its absorption of the Ottawa Electric Street Railway Company (s. 1), declaring that the lines of street railway of both companies are works for the general advantage of Canada and that the Ottawa Electric Railway Company is subject to the authority of the Parliament of Canada (s. 7). But any effect which these latter provisions might otherwise have had under sec. 6 of the Railway Act

of 1903 c. 58; (R.S.C. 1906, c. 37, s. 6) is excluded by secs. 3 and 11, to which, as well as to sec. 13 of the Act of 1892, the provisions of sec. 3 of the Railway Act of 1903 would seem to apply. Secs. 3 and 11 of the Act of 1894 are as follows:—

(3) The franchises, powers and privileges heretofore or hereby granted to or conferred upon the said companies, or either of them, and which are hereby authorized to be transferred to the said united company, shall be exercised and enjoyed by the said united company, subject to the terms, provisoes and conditions contained in the said agreement with the corporation of the City of Ottawa.

(11) Nothing in this Act shall in any respect impair any of the powers which the said Ottawa City Passenger Railway Company shall have immediately prior to the date appointed for this Act to take effect.

Under these provisions the power or privilege of the Ottawa City Passenger Railway Company to fix and regulate its rates of fare conferred by the legislation of 1866 and 1868 and confirmed by the statute of 1892 are again preserved for the benefit of the continuing corporation, the Ottawa Electric Railway Company. As provisions made by the Parliament of Canada inconsistent with the jurisdiction over tariffs and tolls then possessed by the Governor-in-Council and the Railway Committee of the Privy Council and now vested in the Board of Railway Commissioners by the Railway Act, they override the latter (s. 3 of c. 37, R.S.C., 1906). There is no reference to the general Railway Act in the statute of 1894.

The construction of the Britannia branch by the Ottawa Electric Railway Company was authorized by a Dominion statute of 1899 (c. 82) "as an extension of its present railway." Neither the agreement of 1893 between the City of Ottawa and the appellant company. nor the (now expired) agreement of the company

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with the Village of Hintonburgh applies *proprio vigore* to this extension. The former is explicitly confined in its operation to the City of Ottawa of 1893; the latter to lines of railway constructed on streets of the village. No part of the Britannia extension is within the Ottawa of 1893 and the short portion of it within the former village of Hintonburgh is constructed not on streets but on a private right of way. The fact that the company was authorized by the statute of 1899 to construct the line from Holland Avenue west to Britannia-on-the-Bay "as an extension of its present railway" does not bring that extension within the terms of agreements explicitly confined in their operation the one to territory within which no part of it is constructed and the other to property over which it does not pass; nor does it, in my opinion, as a matter of law preclude the sanction by the Board of a tariff of fares for that extension distinct from that in force for the rest of the company's system.

Sec. 3 of the Act of 1899 reads as follows:

> Sections 90-172, both inclusive, of the Railway Act and such of the other sections as are applicable, shall apply to the company with respect to the said extension.

It is common ground that as to the Britannia branch the jurisdiction of the Board of Railway Commissioners over tariffs and tolls conferred by the general Railway Act is unfettered. But I cannot find in the mere description of this branch as an "extension" anything entitling the Board in the exercise of that jurisdiction to disregard the effect of any rights which the company may have to fix and regulate tolls on its lines within the limits of the City of Ottawa of 1893 independently of the Board's supervision and control. If, in order

to treat the company's operations as a whole and continue the existing tariff,

the Board must disregard such a right of the company, either directly or indirectly, in my opinion it may not do so. It follows that the Board should

permit the filing of tariffs * * * covering service on the Britannia line without reference to the larger part of the system covered by the municipal agreements * * *

though not necessarily on a mileage basis.

On the proper construction of the relevant agreements and statutes I am of the opinion that the Britannia extension commences at Holland Avenue since from that point westerly the company's tracks are laid on a private right of way and not on public streets and it is "from some point on its present railway" (of which the terminus was then at Holland Avenue) that the company was by the Act of 1899 authorized to construct and operate its line to Britannia-on-theBay.

While it would seem to follow from what I have said that it is not possible to hold as a matter of law that the order of the Board disallowing the tariff in question was not "right" and the respondents may therefore be entitled to ask the court to decline to answer the first question in the affirmative, in view of the facts and finding in paragraph "r" of the order allowing the appeal the company is entitled to such fares and on such basis as the Board may deem reasonable and just in respect of traffic on its Britannia branch irrespective and independently of the rates of fare prevailing on the rest of its system. As the learned Chief Commissioner said in delivering the opinion of the Board in this case:

Under the Railway Act the same company may have different rates on different parts of its system where traffic and operating conditions and construction costs are dissimilar, for example, railway

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tolls are justifiably higher in a mountainous district where cuttings and grades are heavy and as a result the cost of construction and operation is greater than in other districts. Again the tolls may be greater where traffic density and diversity differ.

Rates on a branch or lateral line may be justified, although higher than those of a main line, with greater traffic and although owned by the same company.

The fact that a flat rate of fare prevails throughout the rest of the company's system does not as a matter of law in my opinion preclude the authorization of an additional fare, either on a mileage or "measured" basis or as a flat rate, on the Britannia extension.

I would, for the foregoing reasons, without answering the first question, answer the second question: "At Holland Avenue;" and to the first member of the third question my answer would be: "No;" and to the second member thereof: "Yes, though not necessarily on a mileage basis."

In reaching these conclusions I have entirely put out of consideration s.s. 5 of sec. 325 of the Railway Act of 1919. That provision is not retroactive. The statute was passed on 7th July 1919; the decision of the Board was pronounced on 25th of February 1919; and leave for this appeal was granted on 14th of April 1919. The answers to the questions before us, therefore, in nowise depend on s.s. 5 of sec. 325 and I refrain from expressing any opinion whatever either upon its construction or upon the scope of its application.

On the whole the appeal succeeds and the appellants should have their costs.

BRODEUR J.—The appellant company operates within the city limits of Ottawa a street railway proper, and beyond city limits it runs a suburban railway called the Britannia line.

This suburban railway is constructed upon a private right of way and passes through the territories of the respondents, the township of Nepean and the village of Westboro.

The rates within the City of Ottawa are fixed by a contract which was confirmed by Parliament.

The Railway Company has filed before the Railway Board a tariff asking for larger fares than those charged heretofore on the Britannia line and the municipalities interested including the City of Ottawa have applied for the disallowance of the proposed tariff and it was disallowed on the 25th February 1919. The Ottawa Electric Company dissatisfied with the order of the Board, obtained on the 14th of April 1919 leave from the Board to appeal to this Court upon the following questions:—

1. Whether upon the proper construction of the agreement with the City of Ottawa and the Village of Hintonburgh, the Statutes relating to the Ottawa Electric Railway Company, and the relevant provisions of the Railway Acts, the Board was right in disallowing the tariff of the company filed providing for payment of additional fare for carriage upon the extension from Holland Avenue notwithstanding that the Board has found as a fact that the Company did not require additional revenue.

2. Also whether upon the proper construction of the said agreements and statutes for the purpose of computing the toll to be charged to passengers upon the said extension the point of commencement of the said extension should be considered to be at Holland Avenue or at the former westerly limit of the Village of Hintonburgh now the City of Ottawa.

3. Has the Board the right to treat the company's operations as a whole and continue the existing tariff; or must the Board permit the filing of tariffs on a mileage basis covering services on the Britannia line without reference to the larger part of the system covered by municipal agreements?

These questions arise out of certain facts which the Board stated in their order granting leave.

The Board has found as a fact that the operation of the Britannia line, considered by itself, is not remunerative, but that the operation of the lines of the railway

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as a whole, including those within the City of Ottawa, are returning to the company adequate profits. The Board has found also that within the city limits on the street railway proper it could not reduce nor increase the rates because they have been the subject of an agreement with the city which has been approved and confirmed by Parliament (1894, ch. 8 6, s.2) and that the Board's jurisdiction is bound by this special Act.

Though the Railway Commissioners thought they could not change alter or reduce the city rates, they decided, however, that the profits made by the company under its contract should be utilized to cover the deficit incurred in the operation of the Britannia extension and they ordered the company to operate at a loss its suburban line. This decision does not seem to me satisfactory. If the contract with the city has the effect asserted by the Board it is then binding to all intents and purposes and this part of the system should have been left alone and the profits or losses made in connection with it should not have been considered in the determination of the rates to be paid on some other part of the system. In other words the company's operations should not have been treated as a whole.

When the company was incorporated in 1866 by the legislature of the Province of Canada (ch. 106) it was declared by sec. 8 that the directors would have the power to make by-laws touching

> the fares to be received for passengers and freight transported over the railway or any part thereof.

We find also another provision in this statute of 1866 giving the right to the company to lay their tracks on certain streets.

These two provisions give more extensive powers than those which would be granted to-day, for Parliament would not give the power to a railway company to lay tracks on a particular street without the consent of the municipality, and as far as the rates are concerned Parliament would not to-day give a railway company the right to fix its rates without the control of the Railway Board. But in 1866 the street railways were new ventures which were treated most liberally by our legislators.

The appellant company had then the power under its charter to fix its rates without being bound to submit them to the Government and it could lay its tracks upon certain streets within the City of Ottawa.

The line of railway being a provincial line fell after Confederation under the legislative control of the Province of Ontario. But in 1892 the company being desirous to connect its railway with a line situate in another province, its undertaking was declared by the Federal Parliament under the provisions of s.s. 10 of s. 92 of the British North America Act to be a work for the general advantage of Canada (1892, ch. 53).

In 1893 the Railway Company made a contract with the City of Ottawa in which it was stipulated that it could run its cars upon some other streets than those mentioned in the Act of Incorporation of 1866 and the railway company agreed by clause 46 that

> no higher fare than five cents shall be charged for the conveyance of one passenger from one point to another on the said lines and branches thereof within the present city limits * * *

and that it could amalgamate with an electric street railway company then in existence under its present name.

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This contract was ratified and confirmed by the Canadian Parliament in 1894 and by the Special Act then passed it was declared that

> the franchises, powers and privileges heretofore or hereby granted to or conferrred upon the * * * company shall be exercised and enjoyed

under its new company name (1894, s. 3, ch. 86) and by sec. 11 of the Act it was also declared that

> othing in this Act shall in any respect impair any of the powers which the said * * * company shall have immediately prior to the date appointed for this Act to take effect.

This Act came into effect on the first of June 1894.

What is the effect of this legislation of 1894?

First, it ratifies and confirms the agreement with the City of Ottawa by which a flat rate not exceeding five cents should be charged for the conveyance of a passenger in the day time. It becomes a binding contract for the city, for the company and also for the public by which this fare of five cents would be considered a reasonable rate. This provision forms part of the special Act of the Railway Company.

At the same time Parliament in declaring that the powers possessed by the railway company would not be impaired, but on the contrary these powers would continue to be exercised and enjoyed by the company, confirms and ratifies the power that the company possessed by its Act of Incorporation of 1866 to fix its rates subject, of course, to the new rates fixed in its agreement with the city.

It seems to me that as a result of this legislation of 1894, the company was the only authority that could deal with the rates within the city of Ottawa provided it should not charge more than five cents.

The general provisions of the Railway Act giving the Board the power to deal with the rates would certainly not affect the lines of the appellant company within the city limits since sec. 3 of ch. 37 of the R.S.C. declares that the Railway Act should be construed as incorporated with the special Act and where the provisions of the Railway Act and of the special Act relate to the same subject matter, the provisions of the special Act will override those of the general Act.

The Parliament of Canada having by the special Act of the appellant company dealt specifically with the tolls within the City of Ottawa, the subject matter of these tolls could not be considered by the Board of Railway Commissioners, whether they are profitable or not.

In 1899 the Parliament of Canada authorized the appellant company to build a suburban line outside of the city limits on private rights of way as an extension of its street railway. It was provided by this new Act that certain sections of the Railway Act were applicable

> and such of the other sections as are applicable, shall apply to the company with respect to the said extension.

It may be claimed that under the provisions of the Act of 1894 the tolls to be charged on the suburban or extension line shall be under the control of the Railway Company itself but the question of jurisdiction of the Board in that regard has not been raised, and both parties agree that the Board has jurisdiction to fix the rates on the suburban railway. But it is claimed on the part of the appellant that these rates on the extension line should be determined without regard to the profits or losses made on the city lines

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because the latter are not under the control of the Board.

I fully concur with this view of the appellant. The special Act of 1894 fixed the rates for the city limits and these rates cannot be disturbed by the Board since they form part of an Act which overrides the general powers of the Board under the Railway Act. The Board having come to the conclusion that the rate on the Britannia line was not remunerative it was its duty to grant to the appellant company a remunerative rate on this part of the line and it should not have taken into consideration the profits made on some other part of the line which did not come under its jurisdiction.

The first question which is submitted to us involves questions of fact, which, of course, have to be dealt with exclusively by the Board. We have no authority to decide whether the rates asked for by the company are fair and just. So far, however, as this question No. 1 involves a question of law, it is covered by the answer I give below to the first part of the third question.

We are asked by the second question submitted to us to state whether the tolls to be charged on the extension line should be computed from Holland Avenue where the extension begins.

If the extension line was built on the streets with the consent of the city, special tolls could be charged only from the city limits, but the extension line is not built on the streets but on a private right of way. Then I would declare in answer to the second question that the point of commencement of the extension line should be considered for toll purposes to be at Holland Avenue.

I would answer in the negative the first part of the third question and in the affirmative the second part of it. As a result of these answers the appellant's contentions are generally sustained.

The appeal should be allowed with costs.

MIGNAULT J.—This is an appeal by leave on three questions of law from the decision of the Board of Railway Commissioners for Canada disallowing a tariff of tolls filed by the appellant. The only point involved is as to the extension of the appellant's line from Holland Avenue in the former Village of Hintonburgh, now a part of the City of Ottawa, to Britannia-on-the-Bay in the Township of Nepean, but to answer the questions submitted it is necessary to consider the statutes and contracts under which the appellant carries on its operations.

All the facts found by the Board are stated in the order granting leave to appeal, as well as in the opinions given by the learned Chief Commissioner, and it will be sufficient to give briefly my reasons for the answers which I make to the questions submitted.

The appellant now stands in the place of two Ottawa street railway companies, the Ottawa City Passenger Railway Company, incorporated in 1866, by an Act of the Province of Canada (29 & 30 Vict., ch. 106), and the Ottawa Electric Street Railway Company, incorporated in 1891 by letters patent of the Province of Ontario. These two companies amalgamated in 1894, forming what was termed the united company under the name of the Ottawa Electric Railway Company. Previously to the amalgamation, in 1892, an Act was passed by the Dominion Parliament (55 & 56 Vict., c. 53) declaring the undertaking of the Ottawa

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City Passenger Company to be a work for the general advantage of Canada, conserving its charter powers, and authorizing it to extend its lines to the City of Hull, in the Province of Quebec. After the amalgamation an Act was passed by the Dominion Parliament, in 1894 (57 & 58 Victoria, ch. 86), ratifying the amalgamation, and confirming the contract entered into between the City of Ottawa and the Ottawa City Passenger Railway Company and the Ottawa Electric Street Railway Company and the appellant was declared a body corporate subject to the legislative authority of the Parliament of Canada. It is under this contract and this statute that the appellant carries on its operations in so far as the City of Ottawa, as it then was, is concerned.

It may be added that, in 1895, the appellant entered into a contract with the then village of Hintonburgh, adjoining Ottawa on the west, for the extension of its lines, under which the appellant extended its railway as far as Holland Avenue in the said village. This contract has now expired.

In 1899, by the Dominion statute, 62 & 63 Vict., ch. 82, sec. 1, it was enacted that the appellant

> may, as an extension of its present railway, construct and operate by means of electricity or other motive power, except steam, a double or single track, iron or steel railway, with the necessary side tracks, switches and turn-outs for the passage of cars, carriages and other vehicles adapted to the same, from some point on its present railway in the municipalities of Hintonburgh or Nepean in the County of Carleton, to some point at or near Bells Corners in the Township of Nepean.

The railway referred to in this enactment as the *present* railway of the appellant did not extend further west than Holland Avenue in the Village of Hintonburgh and the extension from that point to Britannia-on-the-Bay, which I understand is to the east of Bells

Corners, was constructed, not on a street or road, but on a private right of way acquired by the appellant.

The statute of 1899 declared that sections 90 to 172, both inclusive, of the Railway Act (then that of 1888) and such of the other sections of the said Act as are applicable shall apply to the appellant with respect to the said extension.

The appeal having been argued on November 17, 1919, this court, on December 22, 1919, ordered a re-argument on the following questions:

(1) Has the Board of Railway Commissioners authority to reduce the Company's charge for passenger services within the City of Ottawa below the fare of 5 cents now charged for any such service?

(2) If the first question is answered in the negative, has the Board power to require the Company to provide a service partly within and partly beyond the limits of the City of Ottawa for a charge not exceeding 5 cents?

(3) In passing upon the questions raised upon this appeal, is the Court in any respect governed by section 325 of the Railway Act of 1919?

The re-argument took place on February 3 and 4, 1920, and was of a very exhaustive character.

The principal question discussed was as to the effect of clause 46 of the contract with the city of Ottawa which reads as follows:

No higher fare than five cents shall be charged for the conveyance of one passenger from one point to another on the said line and branches thereof within the present city limits, and for children under ten years of age no higher fare than three cents shall be charged, except between the hours of twelve o'clock midnight and five-thirty a.m.

The question was also discussed whether the Board, of Railway Commissioners could reduce the maximum rate of five cents for passengers provided for the city of Ottawa.

It is argued that clause 46 is purely negative, that it in no way determines any toll or fare which the company may charge, that its object was not to empower the company to exact tolls, the power to do so being conferred on the directors by the statute of

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1866, but merely to restrict the exercise of this power, so that in any event the company could not demand more in the day time than five cents per adult passenger, and that in so far as the fixing of tolls and the control of the Board is concerned, the whole matter was left where it was before the contract, so that the directors can by by-law regulate the tolls to be charged, subject to the control of the Board, these tolls however not to exceed the maximum stipulated in clause 46 of the contract.

"I cannot so construe the contract. It is true that clause 46 is negative in form, such negative form being usual in agreements of this kind, and it is also true that the directors derive their power to regulate tolls from the charter the company obtained from the legislature. But the whole object, or at least the main object, of the contract was to oblige the company to operate a street railway in the City of Ottawa, the city receiving from the company an annual payment based on the mileage of the latter's lines, and for this service the company was to be remunerated by tolls charged for the carriage of passengers. So the fixing of a maximum fare by the contract necessarily implies that the company may charge any fare, provided it does not exceed the maximum, and within these limits, and during the life of the contract, the city cannot contend that the fare charged is not just and reasonable. This contract was ratified and confirmed by Parliament, the latter thus recognizing that the fixing of fares had been treated as a matter of agreement between the city and the company, and unquestionably the contract binds both the city as representing the public interested in the railway service and the company for the term of its duration,

with the consequence that the power of interference of the Railway Board—which can be exercised only on the ground that the tolls charged are unfair and unreasonable—is excluded by the recognition by the city and by Parliament that up to the maximum stipulated by clauses 46 and following of the contract, any tolls charged by the company while the contract is in force are fair and reasonable.

I am therefore of opinion that, properly construed, clause 46 of the contract authorizes the appellant to charge five cents per passenger during the hours mentioned, or any lower rate; and also, inasmuch as the contract was ratified and confirmed by Parliament and the ratification and confirmation was accompanied by the declaration (sec. 3) that the franchises, powers and privileges conferred on the original companies should be exercised and enjoyed by the appellant, subject to the terms, provisoes and conditions contained in the agreement with Ottawa, my opinion is that the Board of Railway Commissioners cannot for the services contemplated in this agreement, reduce, no more than it can increase, the maximum rate provided by the contract. In coming to this conclusion, I also rely on section 3 of the Railway Act (R.S.C., 1906, ch. 37), the statute of 1894 being a special Act overriding the provisions of the Railway Act in so far as is necessary to give effect to such special Act.

This disposes of question 1, submitted by the court for re-argument, which question should be answered in the negative. I may add that this is also the opinion expressed by the learned Chief Commissioner.

Mr. Dennison argued however that the statute of 1894 is a private Act, which cannot prevail over a

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public Act like the Railway Act. This argument is answered by section 13 of the Interpretation Act (R.S.C. 1906, ch. 1) as well as by section 3 of the Railway Act, for surely the statute of 1894 is a special Act within the meaning of that section.

Question 1 being answered in the negative, question 2 requires a reply, and I am of opinion that this reply must also be in the negative. In so far as service outside Ottawa is concerned, it cannot be considered as covered by the charge made for the City of Ottawa under the contract and statute of 1894. By the City of Ottawa I mean the territory described in the contract.

Question 3, in so far as this appeal is concerned, should be answered in the negative. This section was enacted subsequently to the order of the Board, but the power it confers on the Board, should the question now come before it, possibly renders the discussion of this appeal of somewhat an academic interest. I may add that I do not wish to be understood as placing a construction on section 325 of the Railway Act of 1919.

I now come to the questions submitted by the Board which are the subject of this appeal. And here I must note the following findings of fact of the Board in paragraphs (r) and (s) of the order allowing the appeal:

(r) The Board has found, as a fact, that the operation of the Britannia extension considered by itself is not remunerative, and that if the operation of this line can be so considered it is clear that the company is entitled to an increased remuneration for the service it performs thereon.

(s) The Board has also found that the operation of the lines of this railway as a whole including those within the City of Ottawa have returned or are returning to the company adequate profits. The

company contends that inasmuch as the receipts from the lines within the city of Ottawa are the result of the operations of the company under a schedule of rates limited by the agreement with the city and confirmed by the Act of Parliament such favourable result is not a valid reason under the Railway Act for disallowing a tariff which will give the company power to collect additional fares upon the Britannia extension.

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I may add that the contracts with Ottawa and Hintonburg in nowise apply to the Britannia extension, which is governed by the statute of 1899. The respondents, however, contend that the contract with Hintonburgh applied to the extension from Holland Avenue up to the Western limits of the former village, a distance of some 1900 feet. I think this contention cannot be sustained, because the contract with Hintonburg refers to a railway to be built on the streets of the village, and this extension was built, not on any street, but on the private right of way of the appellant from Holland Avenue to the West, and because the statute of 1899, which governs the extension, gives authority to the appellant to construct the said extension, from some point on the then present railway of the appellant in the village of Hintonburgh and the most westerly point of the said railway was at Holland Avenue. The extension was constructed under the authority given by this statute.

I cannot doubt, moreover, in special reference to paragraph (r) of the order granting leave to appeal, that the Board can consider by itself the operation of the Britannia extension from Holland Avenue to Britannia-on-the-Bay.

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The answers I would give to the questions submitted, are contained in the formal judgment of the court, and in my opinion the appeal should be allowed with costs.

Appeal allowed with costs.

Solicitor for the appellants: *F. H. Chrysler.*

Solicitor for the respondent Township of Nepean: *Wentworth Greene.*

Solicitor for the respondent Village of Westboro: *F. H. Honeywell.*

Solicitor for the respondent City of Ottawa: F. *B. Proctor.*

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*Mar. 17, 18, 19,.

*Apr. 6.

IN THE MATTER OF

PRICE BROTHERS AND COMPANY

AND

THE BOARD OF COMMERCE OF CANADA.

Constitutional law—Parliament—Order-in-Council—Newsprint—"Necessary of life"—Measures necessitated in real war—"War Measures Act, 1914"—"The Board of Commerce Act," 9 & 10 Geo. V., c. 37—"The Combines and Fair Prices Act, 1919," 9 & 10 Geo. V., c. 45, 9 & 10 Geo. V., c. 63.

The appellant appeals from an order of the Board of Commerce of Canada dated 6th of February, 1920. The Board, after declaring newsprint to be "a necessary of life", by clause 1 prohibits the appellant from taking any price exceeding $80 per ton for newsprint, and declares that any price in excess of that sum "shall be deemed to include unfair profit;" by clause 2, it forbids the appellant accumulating and witholding from sale any quantity of newsprint beyond an amount reasonably required for the ordinary purposes of its business; and by clause 4, the appellant is required by the Board to furnish at certain times and at fixed prices defined quantities of newsprint to designated purchasers.

Held, Brodeur J. expressing no opinion, that clauses 1 and 2 of the order had not been made by the Board in the exercise of jurisdiction conferred on it by "The Combines and Fair Prices Act," as newsprint could not be deemed to be "a necessary of life." *Ejusdem generis* rule applied.

Per Brodeur J.—"The Combines and Fair Prices Act" is *ultra vires* of the Parliament of Canada.

Held also, that clause 4 of the order could not have been deemed necessary "by reason of the existence of real * * * war * * * for the security, defence, peace, order and welfare of Canada," and that an order-in-council purporting to confer on the Paper Controller jurisdiction to make it therefore, transcended the power vested in the Governor-in-Council by s. 6 of the "War Measures Act, 1914,". Mignault J. dissenting.

PRESENT:—Sir Louis Davies C.J., and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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Per Idington J.—The control of newsprint has to do neither with "trading, exportation, importation, production and manufacture," nor with the "appropriation, control, forfeiture and disposition of property and of the use thereof," and is therefore not within the ambit of s. 6 of the "War Measures Act, 1914." "Pulp and Paper Control" was improperly reserved from the repeal, on December 20th, 1919, of orders-in-council passed under that statute.

Per Anglin J.—While the statute 9 & 10 Geo. V., c. 63, purports to confirm certain orders-in-council therein creited, it neither vests, nor authorizes to be vested, in the Paper Controller for future exercise, powers wider than might be conferred under the "War Measures Act, 1914."

APPEAL by the appellant, Price Brothers and Company, Limited, from an order of the Board of Commerce, dated the 6th of February, 1920, by leave of Mr. Justice Anglin in Chambers granted under s. 41 (2) of "The Board of Commerce Act," 9 & 10 Geo. V., c. 37. The order purports to have been made by the Board in the exercise of jurisdiction conferred on it by "The Board of Commerce Act" and "The Combines and Fair Prices Act," and also of jurisdiction formerly exercised by Mr. R. A. Pringle K.C., as Paper Controller, which the Governor-in-Council purported to vest, in a modified and extended form, in the Board of Commerce, by order-in-council dated the 29th of January, 1920.

Lafleur K.C. and *Geoffrion K.C.* for the appellant. The Order is beyond the powers of the Dominion Parliament to make or authorize and alternatively the Parliament has not in fact authorized the making of such order.

Biggar K.C. for the Attorney General of Canada. The Dominion Government is competent, in war or in peace, to regulate the channels through which a

particular commodity shall move and to fix the price at which it is to be dealt in.

THE CHIEF JUSTICE.—I take no part in this judgment, having been sworn in as Administrator of the Government during the argument.

IDINGTON J.—This appeal is launched pursuant to an order of my brother Anglin under and by virtue of section 41, ss. 2 of "The Board of Commerce Act," against an order of said board dated 6th February, 1920, which ordered and declared as follows:—

1. That any price on the sale of roll newsprint exceeding eighty dollars per ton car lots shall be deemed to include an unfair profit and the said company is hereby, and until the further order of this board, restrained and prohibited from the making or taking of unfair profits for or upon the holding or disposition of said necessary of life, to wit, newsprint; that is to say at any price which is to be deemed as aforesaid to include an unfair profit.

2. That the said company be and it is hereby restrained and prohibited from accumulating and witholding from sale as aforesaid any quantity beyond amounts aforesaid of the said necessary of life, namely, newsprint.

And further specifically directed the appellant forthwith not later than the 10th February, 1920, to ship free on board cars one car standard newsprint as described consigned to the Montreal Star newspaper at Montreal, at the price of $80 a ton, and thereafter weekly as prescribed; and each of two other publishing companies in Montreal, quantities of paper as described at same price and on same terms.

The order recites as follows:—

That Price Brothers and Company, Limited, hereinafter called the company, are under obligation to supply newsprint to Canadian publishers at the rate of eleven thousand two hundred and fifty tons per annum at prices heretofore lawfully fixed:

And that the company is now supplying newsprint to Canadian publishers at the rate of approximately two thousand five hundred

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tons per annum, but has not delivered further supplies in Canada under its said obligation;

And that newsprint is a necessary of life under "The Combines and Fair Prices Act;"

And that the said company is accumulating and witholding from sale the said necessary of life beyond an amount thereof reasonably required for the ordinary purpose of the business of the said company;

And the undersigned deeming it expedient in exercise of the powers and authority of the Board of Commerce under "The Board of Commerce Act" and under "The Combines and Fair Prices Act," and under and by virtue of the order of His Excellency the Governor General in Council concerning paper control dated 29th January, 1920, and numbered P.C. 230 to order and declare as herein set forth.

The said order in council dated 29th January, 1920, is as follows:—

His Excellency the Governor in Council, on the recommendation of the Minister of Finance, is pleased to order and it is hereby ordered that until the publication of a Proclamation by the Governor General in Council under the authority of the "War Measures Act, 1914," declaring that war no longer exists the Board of Commerce of Canada, shall—

(a) have, exercise and perform all powers, jurisdiction, authority and duties which were heretofore or are exercisable by the Commissioner and Controller of Paper, provided that the Orders of said Board with respect to newsprint paper, sulphate and sulphide, shall be effective and have the force of law as and when made and shall not require confirmation by Order in Council, nor shall the exercise by said Board of any of said powers or the performance by said Board of any of said duties, be subject to appeal except as by the Board of Commerce Act provided;

(b) be appointed such Commissioner and Controller of Paper;

(c) have jurisdiction; power and authority to direct, require and compel shipment by manufacturers of newsprint paper of such quantities of newsprint paper as, in the opinion of the Board, are necessary and can be provided from any paper mill or persons, place or places in Canada;

(d) shall have power and jurisdiction to order and direct that the breach or non-observance by any person or corporation of any order or direction which the said Board may make or give under authority of this Order shall entail the same consequences and liability for the same penalties as are provided by section 20, subsection (2) of the Combines and Fair Prices Act, including the cumulative responsibilities of co-directors and associate directors and officers of companies and corporations, and that all other provisions of law as to the jurisdiction of courts and otherwise as to procedure to enforce orders as set forth in the said Acts shall apply to all matters hereunder; and shall have all

powers and authority to continue and carry on to completion all business and proceedings now pending in the office of the Commissioner and Controller of paper.

The "War Measures Act" of 1914 was assented to on the 22nd August, 1914, and the only war then in existence and to which it doubtless related, was that which shortly before that time had begun with Germany and Austria.

Practically that ended with the Armstice of 11th November, 1918, but it must be held in law to have existed until the signing of the Treaty of Peace.

That was declared by an Imperial Proclamation to have taken place on the 29th of June, 1919. The assent of Germany had been given the day before, and later that of Austria was given on the 10th day of September, 1919.

The 6th section of the "War Measures Act" is that which enabled the Governor in Council to

make from time to time such orders and regulations as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada.

and that specifically assigns a number of subject matters as within the classes of subjects intended to be comprehended therein.

True the section provides for and anticipates a possibly wider range of subjects, but for the present purpose I have not heard of any such having arisen.

That which we have to deal with, if by any reasonable possibility at all within the operative ambit of the Act, I think must fall within subsection (e) which reads as follows:—

(e) trading, exportation, importation, production and manufacture;

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It certainly is not covered by either "exportation" or "importation." Nor can it fall within such "trading" as conceivably within the range of what a war measure often has to deal with and forbid or enforce if reason is at all applicable as I hold it must be to deal sensibly with the madness of war and all implied therein.

I have much difficulty in seeing how anything in subsec. (e) can apply to the mere direction of selling newsprint paper by a manufacturer thereof to a person wishing to use it. Indeed, after much consideration, I cannot think how that purely business transaction of a very ordinary type can be said to have any relevancy to the matters therein specified of possibly vital importance in many ways conceivable in a state of war.

Subsection (f) appropriation, control, forfeiture and disposition of property and of the use thereof,

clearly extends only to the taking and using of private property in such a way as the authorities concerned may require to meet the exigencies of the case.

The entire item certainly does not cover anything comprehended in what we have to consider in way of regulating the private dealings between parties carrying on their respective businesses.

Indeed the argument of counsel referred only to the possibilities of mystery and secrecy which might arise and could not reasonably ever be disclosed, but in fact the time therefor has ceased and it is hard to conceive that it ever existed in relation to what is here in question. Nothing forbidding the disclosure in a free country would seem to have existed in that which is involved herein.

Then, from the point of view of the "War Measures Act," we come to the order in council of 20th December, 1919, which I submit recognizes to the fullest extent the termination of the war, yet strangely excepts from the general operation of all such orders and regulations as needed therefor and are to be repealed, the item of "pulp and paper control"—with eight other items.

I can conceive of problems in way of liquidation, as it were, of such items as "internment operations' and "trading with the enemy," requiring a reservation, but I am quite unable to conceive how the item of "Pulp and paper control" can fall therein or thereunder.

Each transaction relative thereto had been already liquidated by the delivery of paper and payment therefor.

In the last desperate resort, as it were, the justification for the order is rested upon "The Combines and Fair Prices Act," and the powers of the Board of Commerce thereunder.

Section 16 of said Act reads as follows:—

> 16. For the purposes of this part of this Act, the expression "necessary of life" means a staple and ordinary article of food (whether fresh, preserved, canned, or otherwise treated) clothing and fuel, including the products, materials and ingredients from or of which any thereof are in whole or in part manufactured, composed, derived or made, and such articles of any description as the Board may from to time by special regulation prescribe.

I am unable to understand how newsprint can under such a definition of "necessaries of life" fall thereunder, or anything the Board of Commerce by any due observance of the *ejusdem generis* rule, which must be adhered to, in the interpretation and construction thereof, may see fit to include within the definition, can be held as falling thereunder.

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I am, therefore, of the opinion that the order in council now in question cannot be properly maintained and hence that this appeal should be allowed with costs.

DUFF J.—A careful review of all the considerations presented on the argument has only confirmed my opinion that the fourth paragraph of the order impeached on the appeal cannot be sustained as emanating from any authority given by the "War Measures Act, 1914."

In this connection the sole point requiring examination is that which arises out of Mr. Biggar's contention in his admirable argument that orders-in-council made by the Governor-General in Council professedly under the authority of section 6 of that Act are not judicially revisable. I think such orders are reviewable, in this sense that when in a proper proceeding the validity of them is called into question, it is the duty of a court of justice to consider and decide whether the conditions of jurisdiction are fulfilled and if they are not begin fulfilled, to pronounce the sentence of the law upon the illegal order.

One of the conditions of jurisdiction is, in my judgment, that the Governor-in-Council shall decide that the particular measure in question is necessary or advisable for reasons which have some relation to the perils actual or possible of real or apprehended war—(I leave the case of insurrection out of view as having no relevancy) or as having some relation to the procution of the war or the objects of it.

The recitals of the order of the 20th December are I think in themselves sufficient to constrain any court to the conclusion that the order of the 29th January

was not preceded or accompanied by any such decision.

As to the first and second paragraphs of the order of the Board of Commerce, I adhere without any doubt whatever to the opinion expressed in the course of the argument that the classes of articles which the Board is authorized to bring by regulation within the category "necessaries of life" do not comprehend articles which are not necessarily by reason of their value required for some purposes connected with the physical life of the individual.

ANGLIN J.—Price Bros. & Co., Limited, appeal from an order of the Board of Commerce, dated the 6th of February, 1920, by leave of a judge of this court granted under s. 41 (2) of "The Board of Commerce Act," 9 & 10 Geo. V., c. 37. The order purports to have been made by the Board in the exercise of jurisdiction conferred on it by "The Board of Commerce Act" and "The Combines and Fair Prices Act." (9 & 10 Geo. V., c. 45) and also of jurisdiction formerly exercised by Mr. R. A. Pringle, K.C., as Paper Controller, which His Excellency the Governor-in-Council purported to vest, in a modified and extended form, in the Board of Commerce by order-in-council dated the 29th of January, 1920.

While several questions are formulated in the petition on which leave to appeal was obtained, they all seem to resolve themselves into one—the power of the Board to make the impugned order. Three clauses of it—Nos. 1, 2 and 4—are especially challenged. Clause No. 1 prohibits the appellant from taking any price exceeding $80 per ton for newsprint, declaring that any price in excess of that sum "shall be deemed to include unfair profit." Clause No. 2

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forbids the appellant accumulating and withholding from sale any quantity of newsprint beyond an amount reasonably required for the ordinary purposes of its business. These two clauses are upheld by counsel representing the Attorney General of Canada on the ground that newsprint was rightly declared by the Board to be "a necessary of life" within s. 16 of "The Combines and Fair Prices Act", and that as such the Board was empowered to deal with it as it did in those clauses.

The argument covered a wide field, the constitutionality of both statutes involved being challenged and various questions discussed as to the construction and sufficiency of the findings of fact in the order. In the view I take of the matter, however, it seems necessary only to consider on this branch of the case whether the finding or declaration that newsprint is a necessary of life within s. 16 of "The Combines and Fair Prices Act" can be upheld. If it cannot, the jurisdiction of the Board to make clauses 1 and 2 of its order cannot be maintained under that Act and "The Board of Commerce Act;" so far as they may be supported under any powers vested in the Board as Paper Controller they may be more conveniently considered with clause 4, which, it is common ground, can be supported only under the latter powers.

By clause 4 the appellant is required to furnish at certain times to named purchasers and at fixed prices defined quantities of newsprint. The appellant challenges the power of Parliament to confer jurisdiction to make such an order on the ground that it involves an undoubted invasion of the field of "property and civil rights" assigned by the B.N.A. Act to the legislative jurisdiction of the provinces; and it also maintains

that the orders-in-council under which the Board has acted were not authorized by the "War Measures Act, 1914," (5 Geo. V., c. 2) under which they purport to have been made. I find it unnecessary to pass upon the alleged invasion of provincial rights and therefore refrain from any expression of opinion upon it. *Citizens Ins. Co.* v. *Parsons* (1).

By sec. 5 of the "War Measures Act, 1914," it is enacted that war (by which, I take it, is meant the "real war" during which, only, under sec. 3, s. 6 is in force) declared to have existed since the 4th day of August, 1914,

> shall be deemed to exist until the Governor-in-Council by proclamation published in the *Canada Gazette* declares that it no longer exists.

It is common ground that such a proclamation has not yet been made or published. Therefore "real war" is still existing for the purposes of s. 3; and s. 6 is consequently still in force.

Now s. 6 empowers the Governor-in-Council to make such orders and regulations

> as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada;

and in particular in regard to

> trading, exportation, importation, production and manufacture

and

> appropriation, control, forfeiture and disposition of property and of the use thereof.

Assuming the validity of this legislation both as being restricted to a field within s. 91 of the B.N.A. Act and as not involving a delegation of powers beyond

(1) 7 App. Cas. p. 96, at p. 109.

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the competence of Parliament, whether the orders-in-council on which the Board must rely to justify the exercise of the powers which it asserts as Paper Controller are within its purview must still be considered.

In view of the provisions of the statute, 9 & 10 Geo. V., c. 63, I think the validity of the orders-in-council therein recited is probably not now open to question on the ground that they transcend the jurisdiction which the "War Measures Act, 1914," purports to confer on the Governor-in-Council; and it may also perhaps be assumed that Parliament thereby recognized the office of "Commissioner and Controller of Paper" as one not personal to Mr. Pringle but as an office which would continue, should he resign or be removed therefrom, and might thereupon be filled by appointment of the Governor-in-Council. But, having regard to the apparent purpose of that statute, to its title and recital and to the use in s. 1 of the past participle "begun" and the omission of any such future perfect adjectival phrase as "which shall have been begun," I cannot think it was intended thereby to enlarge the scope of the jurisdiction intended to be conferred on the Governor-in-Council by the "War Measures Act, 1914," or to enable the Paper Controller to exercise powers greater or more extended than under that Act the Governor-in-Council is authorized to vest in him, or to extend his powers further than might be necessary to carry to completion and final disposition work begun by him within powers for conferring which the "War Measures Act, 1914," rightly construed may be invoked as authority. In particular, I cannot regard the statute of 1919 (c. 63) as repealing or dispensing with the condition expressed in s. 6 of the "War Measures Act" that

orders and regulations made thereunder must be such as the Governor-in-Council

> may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, or welfare of Canada.

If that Act was designed to authorize the Paper Controller, whether directly or through the medium of an order-in-council, to interfere with property and civil rights, as the Board purports to do by the order appealed from, its constitutionality would certainly call for very grave consideration.

Passing over as not material several intervening orders-in-council—one of the 7th of July, 1919, one of the 1st of December, 1919, one of the 15th December, 1919, and two of the 5th of January, 1920, providing means for making orders of the Paper Controller effective, one of the 30th of December, 1919, approving orders of the Controller fixing prices on newsprint from the 1st of January to the 1st of July, 1920, two of the 22nd of January, 1920, accepting Mr. Pringle's resignation and appointing Mr. R. W. Breadner in his stead and one of the 29th of January accepting Mr. Breadner's resignation, we come to the vitally important order-in-council—that of the 29th of January, 1920, appointing the Board of Commerce as Paper Controller with extended powers and jurisdiction. The approval of the Governor-in-Council, theretofore required before orders of the Paper Controller became effective, was thereby dispensed with, and the appeal to the Paper Controller Tribunal, established under order-in-council of the 16th of September, 1918, was abolished. In lieu thereof the orders and acts of the Board as Paper Controller were made subject to

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appeal only as provided by "The Board of Commerce Act," under which the present appeal is brought. In adition to

> all powers, jurisdiction, authorities and duties * * * heretofore exercisable by the Commissioner and Controller of Paper,

the Board was expressly vested with

> jurisdiction, power and authority to direct, require and compel shipment by manufacturers of newsprint paper of such quantities of newsprint paper as, in the opinion of the Board, are necessary and can be provided from any paper mill or persons, place or places in Canada.

I shall assume that the terms of this order-in-council, if valid, are wide enough to clothe the Board with power to make its order of the 6th of February, now appealed from. To support that order, so far as it depends on the Board's jurisdiction as Paper Controller, it is essential that the order-in-council now under consideration should be maintained. In so far as it provides for the appointment of the Board as Paper Controller and purports to confer on it powers necessary to carry to completion matters begun by the Paper Controller before the 7th of July, 1919, (when c. 63 of the statutes of that year was assented to) its validity may be assumed. But the Board's order of the 6th of February is not restricted to such matters. On the contrary it deals with distinctly new matters—matters not theretofore begun—the fixing of the price of newsprint and its accumulation by Price Bros. from the date of the order until the 15th of March and the supply of that commodity by Price Bros. in fixed quantities and at fixed prices to certain consumers for future periods. Can the validity of an order-in-council passed on the 20th of January, 1920, under the "War Measures Act, 1914," conferring power to make such an order be maintained?

The common knowledge possessed by every man on the street, of which courts of justice cannot divest themselves, makes it impossible to believe that the Governor-in-Council on the 29th of January, 1920, deemed it

> necessary or advisable for the security, defence, peace, order, (or welfare of Canada * * * by reason of the existence of real or apprehended war, invasion or insurrection

to confer on the Paper Controller such powers as the Board has purported to exercise by its order now in appeal. Advisability or necessity, however great, arising out of post-war conditions is not the same thing as, and should not be confounded with advisability or necessity

> by reason of the existence of real or apprehended war.

Real war had long since ceased, although, in a fictitious sense, the continued existence of it for some purposes is provided for by s. 5 of the "War Measures Act, 1914." That in passing the order-in-council of the 29th of January, 1920, the Governor-in-Council was actuated by any apprehension of war, invasion or insurrection is not suggested.

If further evidence were needed that the Governor-in-Council was apprised that emergency legislation by orders-in-council was no longer necessary or advisable by reason of the existence of war, it is furnished by his own order-in-council of the 20th of December, 1919, which recites that "so far as affects the question under consideration" (i.e., the duration of emergency legislation by orders-in-council) the provisions of the Defence of the Realm Act (Con.), 1914, of the United Kingdom (5 & 6 Geo. V., c. 8) and of the "War Measures Act,

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1914", while varying considerably, "were enacted for the same purposes"—that a legal committee appointed in England by His Majesty's Government had reported that the legislative powers conferred on the Government by the former Act

> can be exercised only during the war and that the orders and regulations made by the Government under the statute could not have any valid operation after the termination of the war,

and also that

> the powers are given by reason of the national emergency and vest the Executive with an authority so wide that we think it must have been intended only to exist during the existence of the emergency.

The order-in-council of the 20th of December further recites that:

> It must be realized that although no proclamation has yet been issued declaring that the war no longer exists actual war conditions have in fact long ago ceased to exist, and consequently existence of war cannot longer be urged as a reason in fact for maintaining these extraordinary regulations as necessary or advisable for the security, defence, peace, order, and welfare of Canada.

It is true that, while many orders-in-council passed under the "War Measures Act, 1914," were repealed by the order-in-council containing these recitals, the orders-in-council respecting "Pulp and Paper Control" were directed to remain in force, as were those respecting some eight other subjects; but this may have been—probably was— because, as in the case of "Internment Operations" for instance, it was necessary to carry to completion and wind up work and undertakings begun during the war and still unfinished.

In view of the foregoing facts, however, in my opinion it cannot be suggested, without imputing bad faith to

the Governor-in-Council, that in making the order-in-council of the 29th of January, 1920, he professed to do something which he

> deemed necessary or advisable for the * * * security, defence, peace, order and welfare of Canada by reason of the existence of real or apprehended war, invasion or insurrection.

It is noteworthy that, under the opening paragraph of that order-in-council, the powers which it purports to confer on the Board are to be exercised not so long as the Governor-in-Council deems necessary for the security, etc., of Canada by reason of the existence of war, but

> until the publication of a proclamation by the Governor-in-Council under the authority of the "War Measures Act, 1914", declaring that the war no longer exists.

A very strong indication is thus afforded that the Governor-in-Council must have acted in January, 1920, under the erroneous impression—I say it with all respect—that until the actual publication of a peace proclamation in the Canada Gazette his legislative powers under s. 6 of the "War Measures Act" were absolute and unqualified and were not subject to the condition that their exercise must be deemed by him

> necessary or advisable for the security, etc. of Canada by reason of the existence of real or apprehended war, invasion or insurrection.

Confronted with the alternatives of an imputation of bad faith or of finding that there has been an attempted exercise of power through overlooking, or under a mistaken view as to the effect of, a condition requisite

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for its exercise imposed by the Act conferring it, I have no hesitation in choosing the latter.

I am therefore of the opinion that the order appealed from exceeds any powers which it was competent for the Governor-in-Council on the 29th of January, 1920, to confer on the Paper Controller, and cannot be supported under the Board's jurisdiction to discharge the duties of that office.

On the other branch of the case I am of the opinion that the Board erred in declaring newsprint to be a "necessary of life" under s. 16 of "The Combines and Fair Prices Act" and that it therefore exceeded its jurisdiction as administrator of that Act in making the order appealed from. Sec. 16 is as follows:—

> 16. For the purposes of this part of this Act the expression "Necessary of life" means a staple and ordinary article of food (whether fresh, preserved, canned or otherwise treated), clothing and (*sic*) fuel, including the products, materials and ingredients from or of which any part thereof are in whole or in part manufactured, composed, derived or made, and such other articles of any description as the Board may from time to time by special regulation prescribe.

The following three rules of construction are so well known that it seems almost pedantic to re-state them; but their co-ordination and relations *inter se* are perhaps not always equally well understood.

Lord Wensleydale's golden rule, that the grammatical and ordinary sense of words is to be adhered to unless that would lead to some absurdity, repugnance or inconsistency so great as to convince the court that the intention could not have been to use them in that ordinary signification, applies to general words, as to other words. *Generalia verba sunt generaliter intelligenda*, 3 Inst. c. 21, p. 76; *Attorney General* v. *Mercer* (1).

(1) 8 App. Cas. 767, at p. 778.

On the other hand general words must be restricted to the fitness of the subject matter (Bacon's Maxims, No. 10) and to the actual apparent objects of the Act (*River Wear Commissioners* v. *Adamson* (1), following the intent of the Legislature to be "gathered from the necessity of the matter and according to that which is consonant to reason and good discretion." *Stradling* v. *Morgan* (2); *Cox* v. *Hakes* (3).

Where general words are found, especially in a statute, following an enumeration of persons or things all susceptible of being regarded as specimens of a single genus or category, but not exhaustive thereof, their construction should be restricted to things of that class or category (*Reg.* v. *Edmunston* (4), unless it is reasonably clear from the context or the general scope and purview of the Act that Parliament intended that they should be given a broader signification.

Recent applications of the rule last stated, and usually known as the *ejusdem generis* rule, are to be found in the judgments in the House of Lords in *Stott (Baltic) Steamers, Ltd.*, v. *Marten* (5), and the judgment of Sankey J. in *Attorney General* v. *Brown* (6).

At first blush the words "of any description" appended to the general words "other articles" would almost seem to have been inserted to indicate an intention to exclude the application to this section of the *ejusdem generis* rule, and to require that the general words "other articles" should here be given their ordinary general construction. Yet, although no authority has been cited where that rule has been

(1) Q.B.D. 546; 2 App. Cas. 743, at pp. 750-1, 757-8.
(2) Plowden 199.
(3) 15 App. Cas. 506, at pp. 517-8.
(4) 28 L.J.M.C. 213.
(5) [1916] 1 A.C. 304.
(6) 36 Times L.R. 165.

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applied notwithstanding the addition of the words "of any description" to such general words as "other articles," it has frequently been acted on where the equally comprehensive word "whatsoever" (see Stroud's Judicial Dictionary, 2 ed., p. 223) has been appended to similar general words, such as "other persons." Thus, in construing the phrase" no tradesman, artificer, workman, labourer, or other person whatsoever" of the Sunday Observance Act of 1677 it has been held that a farmer (*Reg.* v. *Cleworth* (1), a barber (*Palmer* v. *Snow*) (2) and a coach proprietor (*Sandiman* v. *Breach*) (3) are not within its purview. In *Fish* v. *Jesson* (4), a devise of "all debts, accounts, reckonings and demands whatsoever," made to a servant, was held not to include a trunk belonging to the testator in his hands at the date of the will and at the death of the testator which contained jewels, medals, etc. Again in *Harrison* v. *Blackburn* (5), the description in a bill of sale—

> all the household goods, furniture, stock-in-trade, and other household effects * * * in and about the dwelling-house and all other personal estate whatsoever

of the assignor—was held not to carry his term or interest in the house. In *Ystradyfodwg & Pontypridd Main Sewerage Board* v. *Bensted* (6), Lord Halsbury referred to

> a very familiar canon of construction that, where you have a word which may have a general meaning wider than that which was intended by the legislature, when you find it associated with other words which shew the category within which it is to come, it is cut down and overridden according to the general proposition which is familiarly described as the *ejusdem generis* principle.

(1) 4 B. & S. 927.
(2) [1900] 1 Q.B. 725.
(3) 7 B. & C. 96.
(4) 2 Vern., 114.
(5) 34 L.J.C.P., 109.
(6) [1907] A.C. 264, at p. 268.

In the present case far from indicating that an application of the restrictive rule would probably defeat the object of the statute or that there is good reason for believing that the legislature intended the general words it has used to bear a more extended meaning than if restricted to things similar in kind to those by the enumeration of which they are preceded, consideration of the character of the Act and of the context as a whole rather leads to the contrary view—that Parliament cannot have meant that words the "other articles" should bear their ordinary broad signification. In the first place, if they did, the enumeration of articles of food, clothing and fuel was quite unnecessary and the restriction to articles "staple and ordinary," the careful particularization of

the products, materials and ingredients from or of which any thereof are in whole or in part manufactured, composed, derived or made

and the specification, in the case of food,

whether fresh. preserved, canned or otherwise treated,

serve no purpose. If the words "other articles of any description" mean "anything whatsoever," the section may be paraphrased thus: "Necessary of life" means any article of any description which the Board of Commerce may from time to time by special regulation declare to be such. Can it be that that is what Parliament intended? *Re Stockport Ragged, Industrial and Reformatory Schools* (1).

Moreover, if s. 17, taken with s. 28, should be regarded as an enactment in the nature of criminal law—as counsel representing the Attorney General contended, and I incline to think rightly—the Board would thus be enabled by its mere declaration to

(1) [1898] 2 Ch. 687, at p. 696.

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render criminal the accumulation or withholding from sale, to the extent stated in s. 17, of any article whatever, however little likely to be regarded as a necessary of life as that term is ordinarily understood. It is to me inconceivable that Parliament meant to confer such wide and unheard of powers. I rather think that no one would be more surprised and shocked than the legislators themselves were they informed that they had done so. I am therefore satisfied that Parliament must have intended that the words "other articles of any description" in sec. 16, notwithstanding their obvious and emphasized generality, should receive a much more restricted construction; and no other restriction that can be put upon them occurs to me which has so much to commend it, as being probably that which Parliament had in mind, as that embodied in the well-known maxim *noscuntur a sociis*. Parliament was dealing with articles of food, clothing and fuel. It had these present to its mind. It must be taken to have been fully cognizant of the legal maxim just quoted and of its embodiment in the *ejusdem generis* rule of construction so frequently acted on by the courts. What more natural than that it should have meant "other articles" to comprise only things which like food, clothing and fuel are requisite to maintain the physical health and vitality of the human body? Medicines have been suggested as falling within such a category; and there are, no doubt, some few other things essential to the life, health and sustenance of the body which are not strictly articles of food, clothing or fuel for which Parliament thought it well to provide. I cannot conceive of any genus or category that would include newsprint with articles of food, clothing and fuel.

Nor, in my opinion, had there been no definition whatever of the term "necessary of life," would the Board have been justified in treating newsprint as such.

Even restricted as I think it should be, the discretion vested in the Board by its mere declaration to constitute criminal offences in regard to matters not specified by Parliament may seem open to some objection. But it is certainly much less objectionable than the unlimited and unqualified power for which counsel representing the Attorney General contended.

I am for these reasons of the opinion that the order appealed from cannot be sustained either under the jurisdiction of the Board of Commerce as administrator of the Combines and Fair Prices Act or under that which it may lawfully exercise as Paper Controller.

The appeal should be allowed with costs.

BRODEUR J.—This is an appeal by Price Brothers & Co. from an order of the Board of Commerce passed on the 6th of February 1920, by which they were restrained from accumulating newsprint and were ordered to sell their goods to three Montreal publishers.

This order was made under the provisions of the "War Measures Act" of 1914 and under "The Board of Commerce Act" and "The Combines and Fair Prices Act of 1914.

It is contended on the part of the appellants that the Board was without jurisdiction for making such an order and that it was beyond the powers of the Dominion Parliament to make or authorize it.

The Attorney General upholds the legality and the validity of the order and claims that the power of the Federal Parliament to look after the defence of the country rendered valid any legislation passed for the

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purpose of regulating the channels through which a particular commodity should move and the price at which it could be sold. He would consider that the Federal Parliament could then secure to newspapers an adequate supply of paper, and that such legislation would be a measure of defence.

The "War Measures Act" of 1914 on which the order in question is based was very wide. But it never contemplated that the price at which newspapers would be supplied with their raw material should be fixed by the Government or by some other authority.

The Act contemplated measures that would be rendered necessary for the defence of the country, as the censorship of the news, the arrest, detention and deportation of undesirable persons or of enemy subjects, the levy of an army, the control of the transport by land, air and water, the control of the food for war purposes and maintaining the forces. But it seems to me that it requires a great deal of imagination to include in those war measures the supply of newsprint to the press, and especially the exact price at which the newspapers should be supplied with paper.

It is certainly not what Parliament intended to authorize when they gave the Governor-in-Council the power to pass orders-in-council of the nature of defensive measures.

Besides these powers could be exercised only during the war. We have in the record proclamations stating formally that in the opinion of the Government the state of war has ceased to exist. The order which is attacked being posterior to the declarations made that the war is at an end, it was passed at a time when the power, if it ever legally existed, had ceased to have force and effect.

It is contended by the Attorney General that the Federal Parliament, in view of its power to regulate trade and commerce, could pass the legislation embodied in the acts in question.

The words "regulation of trade and commerce" may cover a very large field of possible legislation and there has been much discussion as to their limits. They were first considered in the *Parsons Case* (1) in 1881; and there it was stated that these words in their unlimited sense would include every regulation of trade ranging from commercial treaties with foreign governments down to minute rules for regulating particular trades, but a consideration of the context and of other parts shews that these words should not be used in their unlimited sense. The collocation of the regulation of Trade and Commerce with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of those who framed the "British North America Act".

Views to the same effect have been expressed by the Privy Council in *Bank of Toronto* v. *Lambe* (2) and in *City of Montreal* v. *Montreal Street Railway* (3).

The last case where this power of regulating trade and commerce has been considered by the Privy Council, is Attorney General for Canada *v.* Attorney General of Alberta (*Insurance Reference*) (4); and it was held there that

> the regulation of Trade and Commerce does not extend to the regulation of a particular trade.

In "The Combines and Fair Prices Act," there is an attempt to regulate the trade of those who are engaged in the trade of necessaries of life, as there was an

(1) 7 App. Cas. 96.
(2) 12 App. Cas. 575.
(3) [1912] A. C. 333.
(4) [1916], A.C., 588.

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attempt in the Insurance Legislation to regulate the trade of those engaged in the business of insurance.

That power cannot, in view of the above decisions, be exercised by the Federal Parliament.

On the whole, I have come to the conclusion that the Board of Commerce has no jurisdiction to pass the order of the 6th of February, 1920, and that the appeal should be allowed with costs.

MIGNAULT J. (dissenting)—This is an appeal, by leave of a judge of this court, on certain questions as to the jurisdiction of the Board of Commerce of Canada to make the order complained of by the appellant. The Attorney General of Canada appeared to defend the order, and the questions of jurisdiction submitted were exhaustively argued.

The main provisions of this order are preceded by a kind of preamble stating that the appellant is under obligation to supply newsprint to Canadian publishers at the rate of 11,250 tons per annum at prices heretofore lawfully fixed, but is now supplying it at the rate approximately of 2,500 tons per annum, and has not delivered further supplies in Canada; that newsprint is a necessary of life under "The Combines and Fair Prices Act;" that the appellant is accumulating and witholding the said necessary of life beyond an amount thereof reasonably required for the ordinary purposes of its business; and it is declared that the Board of Commerce deems it expedient, in the exercise of its powers and authority under "The Board of Commerce Act" and "The Combines and Fair Prices Act," and under and by virtue of the order-in-council of the Governor General-in-Council concerning paper control, dated 29th January, 1920, and numbered P.C. 230, to order and declare as follows:

1. That any price on the sale of roll newsprint exceeding eighty dollars per ton car lots shall be deemed to include an unfair profit and the said Company is hereby, and until the further order of this Board, restrained and prohibited from the making or taking of unfair profits for or upon the holding or disposition of said necessary of life, to wit, newsprint, that is to say at any price which is to be deemed as aforesaid to include an unfair profit.

2. That the said Company be and it is hereby restrained and prohibited from accumulating and witholding from sale as aforesaid any quantity beyond amounts aforesaid of the said necessary of life, namely, newsprint.

3. The clauses above numbered 1 and 2, are to be deemed interim provisions and are to remain in force until the fifteenth day of March, 1920, with leave to the Company to move to rescind them and to any other person concerned to renew and extend the said provisions.

4. Under the special authority vested in the undersigned by virtue of said Order in Council and otherwise existing under the said Acts the undersigned direct that the said Price Brothers and Company, Limited, do—

(a) Forthwith and not later than the tenth day of February, 1920, ship Free on Board cars on the railway at or nearby a mill of the said Company one car standard newsprint 32 lb. basis, 72 inch rolls, 33 inches diameter, pulpwood cores with metal ends consigned to the publishers of The Montreal Star newspaper at Montreal, Quebec, freight charges collect, at the price of eighty dollars per ton, bill of lading to be attached to bill of exchange, and that the said Company do thereafter in each and every period of seven days computed from time to time from and including the said tenth day of February make such shipments of the like commodity to the said consignee in the same manner and on the same terms in all respects so that the said publishers shall receive in all 93 tons of said newsprint in each and every consecutive period of seven days so computed until further order; the carload first herein mentioned is to be included in computing the first week's shipment of 93 tons.

(b) Forthwith and not later than the tenth day of February, 1920, ship Free on Board Cars on the railway at or nearby a mill of the said Company one car standard newsprint 32 lbs. basis, consisting of 30 rolls, 16¾ inches, and the balance of the said cars in rolls 33¼ inches, all of said rolls to be from 30 to 32 inches in diameter, 3 inch iron cores consigned to The Herald Publishing Company, Limited, Montreal, Quebec, freight charges collect at the price of eighty dollars per ton, bill of lading to be attached to bill of exchange, and that the said Company do thereafter in each and every period of ten days from and including said tenth day of February make such shipments of the like commodity to the said consignee in the same manner and on the same terms, so that the said The Herald Publishing Company, Limited, shall receive one car load composed as aforesaid of said newsprint

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in each and every consecutive period of ten days computed from said tenth day of February until further order.

(c) That the said Company do forthwith ship from a mill as aforesaid consigned to Poirier, Bessette and Cie, 129-133 Rue Cadieux, Montreal, one car load standard newsprint 32 lb. basis, consisting of 29 inch rolls, diameter from 30 to 33 inches, with paper cores from 3 to 4 inches, the price and terms and means of shipment and payment to be as aforesaid, and each month hereafter on or before tenth day thereof the said Price Brothers and Company, Limited, shall make a like shipment to said consignees in the same manner and on the same terms."

The petition for leave to appeal submits seven questions which, in so far as they involve the jurisdiction of the Board, can be reduced to two:

1. Was the order in question authorized by the Dominion Parliament? and

2. Had the Dominion Parliament power to authorize it?

If the answer to either question be in the negative, the Board must be held to have acted without jurisdiction, and if a negative answer be given to the first question, it will be unnecessary to reply to the second.

Paragraphs 1 and 2 of the order involve the question whether newsprint is a necessary of life under "The Combines and Fair Prices Act," 1919, (9 & 10 Geo. V., ch. 45). It is so declared in the order appealed from.

The definition of "necessary of life" is given by section 16 of the statute in the following terms:

> For the purposes of this part of this Act, the expression 'necessary of life' means a staple and ordinary article of food (whether fresh, preserved, canned, or otherwise treated), clothing and fuel, including the products, materials and ingredients from or of which any thereof are in whole or in part manufactured, composed, derived or made, and such other articles of any description as the Board may from time to time by special regulation prescribe.

It is obvious from this definition that in the contemplation of Parliament necessaries of life are primarily articles necessary to sustain life, as distinguished from

luxuries. Being necessaries of life, and the requirements of human life being of infinite variety, they cannot be confined to staple and ordinary articles of food, clothing and fuel, and as it was impossible to enumerate them, the Board was given the power from time to time to declare "such other articles of any description" as it might from time to time by special regulation prescribe, to be necessaries of life. It is argued that the *ejusdem generis* rule should be applied here and that the defining power of the Board should be restricted to articles of the same kind as staple and ordinary articles of food, clothing and fuel. But to so hold would defeat the will of Parliament, for, as I have said, the requirements of human life vary *ad infinitum*, and it would not be difficult to enumerate articles useful or necessary for the purposes of human life which are neither food, nor clothing, nor fuel, such as medicine for the sick, crutches for the lame and eye glasses for persons with defective eyesight. I think the intention of Parliament to exclude the *ejusdem generis*, or *noscitur a sociis* rules is sufficiently shewn here by the words "such other articles of any description" (see *Larsen* v. *Sylvester* (1), where the House of Lords held that the *ejusdem generis* rule was excluded by the words, "frosts, floods, strikes and any other unavoidable accidents or hindrances of what kind soever"), and the general scheme of the Act is to entrust to the Board of Commerce the power of defining what articles, other than food, clothing and fuel, are necessaries of life, any complete or exclusive enumeration being impossible. I would not therefore cut down the generality of the terms of section 16 by resorting to the

(1) [1908] A.C. 295.

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rule, undoubtedly very useful in many cases, that general terms following special ones are to be restricted to the kind of things specially enumerated. Moreover, if the *ejusdem generis* or *noscitur a sociis* rules apply, the powers of definition conferred upon the Board are entirely meaningless, for the enumerated articles alone could be considered necessaries of life.

This does not mean however that this power of definition must not be exercised reasonably, in other words that the articles which the Board declares to be necessaries of life should not have some relation to the requirements of human life, varied and difficult to define *a priori* though they may be. And I must say that I fail to discover any possible connection between the requirements of human life and newsprint paper. It even appears almost an abuse of language to call it a necessity of life. Whatever place newspapers may occupy in modern society, and it is no doubt a very important one, and however indispensable newsprint may be for educational and other like purposes, it certainly does not proximately or even remotely come within the class of things that can be used for the requirements of human life. I therefore am of opinion that the Board acted without jurisdiction in declaring it a necessary of life.

This conclusion shews that paragraphs 1 and 2 of the order complained of cannot be supported under the authority of "The Board of Commerce Act" or "The Combines and Fair Prices Act, 1919", and these paragraphs therefore were not authorized by Parliament. This being so, it is unnecessary to determine in this case whether Parliament could validly pass these two Acts.

Paragraph 4 of the order is based on different considerations and the authority of the Board of Commerce

to order the supply of newsprint to the consumers therein mentioned can only be supported under the authority vested in the Board as Commissioner and Controller of Paper by virtue of the order in council of the 29th January, 1920, and the orders in council that preceded it.

It may be remarked that the office of Paper Controller was created at the height of the war by various orders in council adopted by the Governor General in Council, whereby the powers of the Controller were defined and gradually, as occasion required, increased. The powers, jurisdiction and authority of the Paper Controller were recognized and confirmed by the Dominion statute, 9 & 10 Geo. V., ch. 63, assented to on July 7th, 1919, and were continued until the publication in the Canada Gazette of a proclamation by the Governor in Council declaring that the war which commenced on the 4th August, 1914, no longer exists.

The orders in council concerning the Paper Controller and paper control were made by the Governor General in Council under the authority of the "War Measures Act, 1914," and were recognized as having been so made by the statute of 1919 above mentioned. This is a direct confirmation by Parliament of the authority exercised by the Governor General in Council under the "War Measures Act, 1914," and in so far as the orders in council mentioned in the statute are concerned, certainly precludes any question whether in making them the Governor General in Council acted within the authority conferred by the "War Measures Act, 1914." It is to be noted that the statute of 1919 was passed several months after the Armistice of the 11th November, 1918, had put an end to active military operations, and after the treaty of peace with Germany was signed, although before its ratification.

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Inasmuch however as the Governor General in Council made important orders after the passing of the statute of 1919 concerning paper control, among them that of the 29th January, 1920, on which paragraph 4 of the order in question is based, I will briefly examine whether the authority of the Governor General in Council can be sustained under the "War Measures Act, 1914."

Much stress is laid on the words of section 6 of the Act empowering the Governor in Council to make from time to time such orders and regulations as he may, by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada. And it is argued that these powers can be exercised only during the existence of real or apprehended war and that no such condition now exists.

It appears sufficient to answer that by section 3 of the Act, the provisions of section 6 are only in force during war, invasion, or insurrection, real or apprehended; that by section 4, the issue of a proclamation by His Majesty, or under the authority of the Governor in Council, is conclusive evidence that war, invasion or insurrection, real or apprehended, exists and has existed for any period therein stated, and of its continuance until, by the issue of a further proclamation it is declared that it no longer exists; that by section 5 it is declared that war has continuously existed since the 4th day of August, 1914, *and shall be deemed to exist* until the Governor in Council by proclamation published in the Canada Gazette declares that it no longer exists; and that no such proclamation has yet been published. This, I take it, precludes us from holding

that war having ceased, the jurisdiction of the Governor in Council under the War Measures Act can no longer be exercised.

The appellant also relies on the order-in-council of the 20th December, 1919. This order in council recites that a report from the Minister of Justice has been laid before the Governor General in Council,

directing attention to the present situation with regard to the Government Orders and Regulations which were sanctioned under the authority of the War Measures Act, 1914, and which still remain in operation.

The report refers to the terms by which authority is conferred upon the Governor in Council by section 6 of the "War Measures Act, 1914," and to the report made by the legal committee appointed in England to consider and report upon the interpretation of the term "period of war", which report states that

in our opinion the true construction of the section is that the regulations so issued can operate only during the continuance of the war. The purpose expressed is for securing the public safety and the defence of the realm, which we think mean the public safety so far as threatened by our enemies in the present war and the defence of the realm against these enemies. The powers are given by reason of the national emergency and vest the Executive with an authority so wide that we think it must have been intended only to exist during the existence of the emergency.

The Minister of Justice observes that the provisions of the Defence of the Realm (Con.) Act, 1914, of the United Kingdom, and of the "War Measures Act, 1914", of Canada, vary considerably, but so far as affects the question under consideration they were enacted for the same purpose, and the considerations upon which the opinion of the Committee proceeds are very pertinent to the question as to the operation of the Canadian Orders and Regulations. He adds:

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It must be realized that although no proclamation has yet been issued declaring that war no longer exists, actual war conditions have in fact long ago ceased to exist, and consequently the existence of war cannot longer be urged as a reason in fact for maintaining these extraordinary regulations as necessary or advisable for the security, defence, peace, order and welfare of Canada.

The Armistice which concluded hostilities became effective on the 11th November, 1918, the expeditioninary force has since been withdrawn and demobilized and the country generally is devoting its energies to re-establishment in the ordinary avocations of peace.

In these circumstances the Minister considers that the time has arrived when the emergency Government legislation should cease to operate.

The report of the Minister of Justice apparently recommended the repeal of the emergency Government legislation generally, but it evidently was not acted upon in this wide sense, as is shewn by the enacting clause of the order-in-council which reads as follows:

> Therefore His Excellency the Governor General-in-Council, on the recommendation of the Minister of Justice, is pleased to repeal all Orders and Regulations of the Governor-in-Council which depend for their sanction upon section 6 of the War Measures Act, 1914, and the same are hereby repealed as from the first day of January, 1920, *with the exception of the Orders and Regulations enumerated and included in the annexed schedule, which latter Orders and Regulations* shall continue in force until the last day of the next session of Parliament.

The schedule enumerates nine subjects as to which the orders-in-council and regulations of the Governor in-Council are to remain in force, among them, and the first in the list, "pulp and paper control".

I think therefore that the appellant can found no argument on this order-in-council of the 20th December, 1919. It obviously must be taken as a whole, and the report of the Minister of Justice must be read either as being subject to the exceptions made by the order-in-council, or as not having been adopted as to these exceptions. In other words, as to the excepted orders and regulations, the considerations expressed by the Minister do not apply. Even if the order-in-council

could be given the absolute and sweeping effect contended for, it cannot, in so far as paper control is concerned, prevail against the express provisions of the statute of 1919.

Nor can this order-in-council be held to be, as was somewhat timidly suggested, the peace proclamation referred to in section 5 of the "War Measures Act, 1914," and in the statute of 1919.

It would be a singular process of reasoning, if I may say so with deference, to apply an order-in-council with specific exceptions as if it had contained no such exceptions. This is not construing the order-in-council, it is striking out and disregarding some of its most material provisions.

The situation consequently is this; no peace proclamation as provided in the "War Measures Act, 1914," and the statute of 1919 has been published and therefore, in so far as concerns paper control and the powers of the Paper Controller, the legal presumption of the existence of war, which I take to be *juris et de jure*, cannot be rebutted. That this legal presumption may be contrary to existing facts is a matter for the consideration of Parliament that enacted it, but not for a court of law which is bound by it. The anomaly of such a situation calls for action by Parliament or by the Governor in Council to bring it to an end, but no such action appears to me to be open to this court.

I may add that a considerable number of orders-in-council are printed in the appeal book, notably one of the 3rd November, 1917 mentioned in the statute of 1919, and by which the Paper Controller was authorized to fix the price and distribution of newsprint paper. It cannot be said that any real departure from these orders-in-council is made by the order-in-

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council of the 29th January, 1920, but the same policy, as a measure adopted under the War Measures Act, 1914, has been continued, and the resistance of the appellant to this policy has led to the making of the order here in question.

The appellant cited two proclamations of His Majesty, the King, published in the London Gazette of the 1st of July, 1919.

The first proclamation refers to the signing of the peace treaty with Germany, and orders that upon the exchange of the ratifications thereof, the said treaty of peace be inviolably observed.

The second proclamation states that whereas it has pleased Almighty God to bring to a close the late widespread and sanguinary war in which His Majesty was engaged with Germany and her allies, therefore His Majesty commands that a general thanksgiving to Almighty God for His manifold and great mercies be observed throughout His Majesty's Dominions on Sunday the sixth day of July then instant.

Surely these proclamations cannot do away with the necessity of the proclamation of peace, required by the "War Measures Act, 1914," and the statute of 1919. And it may further be added that by an Order of His Majesty the King in Council, dated the 9th day of February, 1920, and published in an extra of the Canada Gazette of March 29th, 1920, the war is declared terminated on the 10th day of January, 1920, only as to Germany and not as to the other belligerents. This shows that the proclamations published in the London Gazette of July 1st, 1919, cannot be given the effect contented for by the appellant.

It cannot be successfully contended that the "War Measures Act, 1914", transcends the powers of Parlia-

ment. It must therefore be given full effect and until it is repealed or until the peace proclamation is published, the authority of the Governor in Council to make these orders-in-council cannot be disputed. No question of encroachment on provincial powers of legislation under these circumstances can arise.

It has been argued that paper control has no connection with the purposes mentioned in the "War Measures Act, 1914," as justifying the Governor-in-Council in making the orders and regulations therein authorized. It seems to me that unless I am ready to impute bad faith to the Crown, I should not take upon myself to determine whether its orders are necessary or advisable for the security, defence, peace, order and welfare of Canada. It is indeed conceivable that paper control may be very important in the national interest in the case of an emergency like war. I would however consider it sufficient to say in this case that no reason has been shown why this court should undertake to revise and set aside the discretion exercised by the Governor-in-Council under the "War Measures Act, 1914," in relation to the control of paper which discretion received the approval of Parliament, as shown by the statute of 1919.

My opinion consequently in that paragraph 4 of the order-in-council complained of is of binding force. I would however, for the reasons above stated, strike out paragraphs 1 and 2, allowing the appeal to that extent, with costs.

Appeal allowed with costs.

Solicitors for the appellant:

Geoffrion, Geoffrion & Prud'homme.

Solicitor for the Attorney-General of Canada:

O. M. Biggar.

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*Mar. 5
*Apr. 6.

ANDREW H. D. BREAKEY AND OTHERS (PLAINTIFFS).....APPELANTS;

AND

THE CORPORATION OF MET-GERMETTE-NORD (DEFENDANT).....RESPONDENT.

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

Appeal—Jurisdiction—Title to land—Future rights—Timber limits—Valuation roll.

In an action to set aside a valuation roll, the appellants alleged that as to some of the properties assessed they owned neither the soil nor the right to cut timber, and as to the others, owning merely the right to cut timber, they complained that the corporation had undertaken to value the right to cut timber separately from the soil and to assess them as owners of such right.

Held, Idington J. dissenting, that there is jurisdiction in the Supreme Court of Canada to entertain the appeal. The right to cut timber is an immovable right and rights in future in respect thereto are involved.

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court and dismissing the appellant's action to set aside a valuation roll of the corporation respondent.

The material facts of the case are fully stated in the reasons for judgment of the Registrar of this court on a motion to affirm jurisdiction, which motion was granted.

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*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

THE REGISTRAR.—This a motion to affirm jurisdiction; The facts shortly are as follows:—

An action was brought by Andrew H. D. Breakey *et al.* against the corporation of Metgermette-Nord in which the plaintiffs alleged:

1. Les demandeurs sont contribuables de la corporation défenderesse, portés au rôle d'évaluation comme propriétaires de bièn-fonds imposables, pour une valeur considérable, et sont les plus grands propriétaires fonciers de la corporation défenderesse, sans tenir compte des biens-fonds ci-dessus mentionnés, et sont spécialement intéressés dans les affaires municipales de la défenderesse et spécialement dans le rôle d'évaluation en vigueur.

2. La corporation défenderesse a actuellement un rôle d'évaluation sur lequel elle se base pour faire ses répartitions pour taxes municipales et qui sert aussi à la répartition des taxes imposées par la corporation scolaire du même endroit;

3. Au mois de juillet dernier, les estimateurs de la corporation défenderesse préparèrent un rôle, qui fut homologué au mois de septembre suivant et qui sera produit, en vertu duquel rôle la corporation défenderesse a taxé et imposé et a mis susceptible d'être taxés et imposés et a mentionné sur ledit rôle, comme appartenant aux demandeurs en propriété, les lots suivants, savoir:

Rang 2, lots 17 et 18; rang 2, lot 25; rang 2, lot 33; rang 2, lot 34; rang 2, lot 35; rang 3, lot 16; rang 3, lot 58; rang 5, lot 1; rang 5, lot 2; rang 5, lots 8 et 9; rang 6, lot 5; rang 6, lot 6; rang 6, lot 7, rang 6, lot 8; rang 6, lot 9; rang 6, lot 10; rang 7, lot 9; rang 7, lot 29; rang 7, lot 33;

4. Les demandeurs n'ont rien à faire sur ces lots 17 et 18 du rang 2, n'étant pas propriétaires, ni du fonds, ni de la coupe du bois.

5. Les demandeurs ne sont pas propriétaires des lots 33 et 34 du rang 2, ni du fonds, ni de la coupe.

6. Les demandeurs ne sont pas propriétaires du lot 25, rang 2, n'ayant qu'un droit de flotter le bois.

7. Les demandeurs ne possèdent qu'un demi-acre, comme propriétaires sur la partie nord-est du lot 35, rang 2, dont la coupe sur la balance.

8. Les demandeurs n'ont rien à faire avec le lot 33 du rang 7, n'ayant ni la coupe ni le fonds.

9. Quant aux autres lots ci-dessus désignés, les demandeurs ne sont propriétaires que de la coupe de bois.

10. Les demandeurs n'ont aucun droit de possession, ni d'occupation, et n'ont rien à faire sur ces lots qui leur sont complètement étrangers, à part ce que ci-dessus mentionné.

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11. La défenderesse prétend que les demandeurs sont propriétaires de la coupe de bois qui existe sur ces lots et elle a porté ces différents lots au rôle d'évaluation, prétendant avoir le droit d'évaluer les coupes de bois, séparément du fonds, de considérer immeubles, au point de vue municipal, les susdits lots, en vue de taxer les demandeurs comme propriétaires de ces coupes de bois.

12. En portant les demandeurs comme propriétaires de ces lots au rôle d'évaluation, sachant que les demandeurs ne l'étaient pas, mais pensant avoir le droit de taxer et d'évaluer, au rôle d'évaluation, des coupes de bois séparément des fonds, la défenderesse a agi illégalement sans droit et excédant ses pouvoirs.

To this the defendant pleaded:

1. Ignore le paragraphe 1, la défenderesse déclarant s'en tenir au rôle d'évaluation.

2. Admet le paragraphe 2.

3. Le paragraphe 3 est nié, sauf quant à l'existence et la légalité du rôle.

4. Ignore les déclarations mentionnées au dernier paragraphe du paragraphe 3, et les paragraphes 4-5-6-7-8-9-10.

5. Nie les paragraphes 11 et 12 de l'action.

6. Aucune plainte n'a été portée par les demandeurs lors de l'homologation du rôle; les demandeurs sont des absents qui n'ont nommé personne dans la municipalité défenderesse et ni les évaluateurs ni la défenderesse ne peuvent se renseigner auprès d'eux dans la préparation de leur rôle.

The motion was argued before me on the basis that the question to be decided was whether or not a right to cut wood upon lands in the Province of Quebec had the effect of making the person having the privilege the owner of an immovable and therefore liable to be placed on the valuation roll as such owner; it would seem to me, however, that as to certain lots the plaintiffs distinctly allege that they have been placed upon the roll where they have not even a right to cut timber, (see paragraphs 4, 5, 6) and as the plea neither admits nor denies these allegations, it would appear to me that we have here a distinct issue raised as to the title to these lots and the court has jurisdiction by virtue of sec .46 (b) of the Supreme Court Act.

But dealing with the matter on the basis of the arguments of counsel, the question for determination then is: Does the issue involve any title to lands or tenements, annual rents or other matters or things where rights in future might be bound?

A determination of this requires that certain articles of the codes should be construed. Art. 16, subarticle 27 of the Municipal Code reads as follows:

> The words "land" or "immovable" or "immovable property" mean all lands or parcels of land in a municipality, owned or occupied by one person or by several persons jointly, and include the buildings and improvements thereon.

Art. 649, Title XXII and following, of the Municipal Code, provide for the duties of the assessors in preparing their valuation rolls and amongst other things they are told that all immovable property is taxable property with some exceptions not of moment here. They are also told they must draw up the valuation roll setting out the particulars required by title XXII of the Municipal Code.

By Art. 654 of title XXII the assessors are directed to enter on the valuation roll in separate columns, amongst other things, the real value of every taxable immovable or part of an immovable and 6th, the name and surname of the owner of every immovable or part of immovable, if known. It is further provided in the same title that after the roll is prepared, it is to be deposited in the office of the corporation, certain notices must be given, and after complaints have been adjusted, the roll becomes homologated.

Title XXIII of the Municipal Code provides for the imposition of taxes based upon the taxable property as set out in the valuation roll. The Municipal Code

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also contains provisions for appeal, but the law is well established that where the complaint is that the municipal authority has exceeded its powers and its act is therefore *ultra vires*, a person complaining on this ground is not precluded from taking proceedings in the Superior Court to obtain redress.

The defendants rely upon the interpretation of immovables as defined in Art. 381 of the Civil Code as amended by 2 Geo. V. ch. 45 which reads as follows:—

> 381. Rights of emphiteusis, of usufruct of immovable things, of use and habitation, the right to cut timber perpetually or for a limited time, servitudes and rights or actions which tend to obtain possession of an immovable, are immovable by reason of the objects to which they are attached.

It may well be that the interpretation they place upon immoveable is correct and includes the right to cut timber in the present instance, but that is a question of the merits of the appeal. What I have to determine is: Is there jurisdiction in the Supreme Court to hear the appeal? Or in other words: Does the matter in controversy in the appeal involve matters or things *ejusdem generis* with titles to lands where rights in future may be bound?

I am of the opinion that it does. *Gilbert* v. *Gilman*, (1); *Foster* v. *St. Joseph* (2). Counsel for the defendants claims that the action is premature and that the valuation roll has no such finality as would warrant an action to have it annulled, but it appears to me clear from the terms of the Municipal Code that the preparation of the valuation roll is a necessary part of the machinery by which the rates are imposed upon the owners of immovable property and I do not see why

(1) 16 Can. S.C.R. 189. (2) Cam. Pract. Vol. 2, 183.

it cannot be attacked after homologation, which the declaration alleges to have taken place, as readily as later on when all proceedings have been completed and the municipal council proceeds to fix the rate to be imposed upon the property included in the valuation roll.

The plaintiff relies upon the jurisprudence of the court particularly *Stevenson* v. *City of Montreal* (1). The facts of that case are not on all fours with the present but the difference I do not think is material. The fact that in the *Stevenson Case* (1) a by-law was passed for the widening of a street and the valuation roll was based upon the by-law, does not, I think, give the valuation roll any higher standing than the roll which has to be prepared under the provisions of the municipal code.

I am of the opinion therefore, as I have said, that the Supreme Court of Canada has jurisdiction to hear the appeal. If I am wrong in my conclusions, the defendant is not precluded by my order from moving later on to quash the appeal for want of jurisdiction as nothing I do can have the effect of conferring jurisdiction upon the court if otherwise it has none. The application is granted, costs in the cause.

See—Canadian Pacific Railway Co. v. *Rat Portage Lumber Co.* (2). *Glenwood Lumber Co.* v. *Phillips* (3). *McPhersom* v. *Temiskaming Lumber Co.* (4).

E. R. CAMERON,
Registrar.

January 16th, 1920.

Romeo Langlais K.C. for the motion to quash.

Louis St. Laurent K.C., contra.

(1) 27 Can. S.C.R. 187.
(2) 10 Ont. L.R. 273.
(3) [1904] A.C. 405.
(4) [1913] A.C. 145; 18 O.W.R. 319.

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BREAKEY v. CORPORATION OF METGERMETTE NORD.

Idington J.

IDINGTON J.(dissenting)—The basis of assessment in Quebec distinguish between real and personal property. The Court of King's Bench has decided that appellants' title, which is admitted and, as such, is no way in dispute, gives him a property of which the quality is such that it must be classified as real property and hence liable to be assessed as such.

The resultant tax, it is admitted, cannot by any possibility reach the sum of two thousand dollars. Hence that basis for an appeal here fails.

Nor can the provision of subsec. (b) of section 46 of the Supreme Court Act, which reads as follows:

> (b) relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty, or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound;"

So long as the title, as such, is beyond dispute, the question of the quality of property which is held thereby does not, in my opinion, fall within the meaning of this subsection.

I, therefore, think the motion to quash should be allowed with costs.

DUFF J. concurs in dismissing the motion with costs.

ANGLIN J.—I concur with Mr. Justice Mignault.

BRODEUR J.—I concur with Mr. Justice Mignault.

MIGNAULT J. The appellants seek to have a valuation roll of the respondent set aside as to a large number of properties which are entered in the roll as belonging to the appellants and subject to being assessed against them for municipal and school taxes, and allege that as to some of these properties they own

neither the soil, nor the right to cut timber, and as to others they own merely the right to cut timber. They further complain that the respondents have undertaken to value the right to cut timber separately from the soil and to assess the appellants as owners of such right.

The appellant's action was maintained by the Superior Court but dismissed by the Court of King's Bench, and the appellants appeal to this court. They succeeded in having the jurisdiction of this court affirmed by the Registrar and the respondent now moves to have the appeal quashed for want of jurisdiction.

I am of opinion that we have jurisdiction. As to some of the properties mentioned in the declaration, the issue is whether the appellants own either the soil or the right to cut timber thereon, and this raises a question as to the title of these properties. As to the others, the issue is whether the appellants can be assessed in respect of the right to cut timber independently of the right of ownership in the soil. The right to cut timber perpetually or for a limited time is an immovable right (art. 381 C.C.). Future rights ofthe appellants in respect of this immovable right and its being subject to assessment are therefore involved.

The motion to quash should be dismissed with costs

Motion dismissed with costs.

1920
*Feb. 26
Apr. 6.

REGINALD V. DUNN ADMINISTRATOR OF THE ESTATE OF STANLEY L. DUNN (PLAINTIFF).....APPELLANT;

AND

THE DOMINION ATLANTIC RAILWAY COMPANY (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Railway—Drunken passenger—Ejectment from train—Suitable place—Findings of Jury.

The right of a conductor on a railway train to eject a passenger for disorderly conduct is not absolute but must be exercised with proper precaution to avoid putting the passenger in danger.

A drunken traveller was put off a train at a closed and unlighted station at one o'clock in the morning and some hours later his body was found on the track near the station in a condition indicating that he had been killed by a passing train. In an action by the administrator of his estate against the railway company.

Held, Davies C. J. dissenting, that the evidence justified the jury in finding that deceased when ejected was not in a state to take care of himself and that putting him off in that condition at such a place and at such an hour was negligence on the part of the company which led to his death.

Judgment appealed from (53 N.S. Rep. 88) reversed.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming, by an equal division, the

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PRESENT:—Sir Louis Davies CJ. and Idington, Duff, Anglin and Mignault JJ.

(1) 53 N.S. Rep. 88.

judgment at the trial in favour of the defendant company.

The facts are sufficiently stated in the above headnote.

J. J. Power K.C. for the appellant.

Henry K.C. for the respondents.

THE CHIEF JUSTICE (dissenting).—At the close of the argument at bar in this appeal I was of the opinion that the judgment appealed from was right and that this appeal should be dismissed.

Finding, however, in conference with my colleagues that this view was not shared in by them, I deemed it my duty to read all the evidence most carefully and to read and weigh the reasons of the different judges of the Supreme Court of Nova Scotia and the trial judge, who differed in their conclusions.

The result is that I find myself more strongly confirmed in the impression I had formed on the oral argument that the appellant had not proved any case of negligence against the company causing the death of the deceased.

The facts are not complicated and it seems to me that the evidence on all the material and vital facts is one way and that the findings of the jury on these facts as regards the conduct of the deceased on the train before he was put off by the conductor, and as to the place he was put off being an "unfit place" to put him off, were directly contrary to the evidence.

The learned trial judge's decision is short and to the point and I transcribe it in full:—

To recover in an action of this kind it is settled law that the negligence alleged and proved must be the proximate cause of the accident or injury. Here, according to the proof and findings, Dunn

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was ejected or put off an up-train or train going west, and was run down hours later by a down train, or train going east, with no evidence as to the cause of the accident, except marks on the track, indicating that a train going east had run over the man. The jury has found the defendant company's negligence to be in putting Dunn off the up-train at Hantsport.

This is not connected with the accident, and may have had no connection with it. I am obliged to hold that the negligence found does not establish a case upon which plaintiff can recover. For all that appears such negligence may not have in any manner contributed to the accident, and I direct judgment for the Defendant company. The *Wakelin Case* (1) is, I think, a conclusive authority against plaintiff.

The broad simple facts are that the deceased was a passenger on an excursion train leaving Halifax for Kentville between 10 and 11 o'clock at night, the train consisting of an engine and fifteen passenger cars, all cars being filled with passengers. The deceased had been visiting his brother who lived in Woodside on the Dartmouth side of Halifax Harbour, and left about 7 p.m. to take a car to Dartmouth ferry across to Halifax and then some conveyance to the railway station in Halifax. He came aboard the train the worse for liquor but by no means helpless, became very disorderly, made himself generally a nuisance to the other passengers and, in fact, assaulted an old couple quietly sitting in their seats. The conductor remonstrated with him and seems to have treated him with great patience and forbearance, the result being that he was violently attacked by deceased who broke one of the car windows and tried to choke him. Only after much effort was the conductor successful in getting the man comparatively quieted down. After this disorderly conduct had culminated in the violent attack upon the conductor, the latter decided to land the passenger when the train arrived at Hantsport, the next stopping place.

(1) 12 App. Cas. 41.

I agree so fully and completely with the conclusions of the trial judge and of chief Justice Harris of the Supreme Court on appeal from the judgment of the trial judge, that I do not feel it necessary to re-state the facts and the conclusions to be drawn from them at any length.

The first question to be determined is whether the conduct of the deceased while on the express train was so disorderly and unruly as justified the conductor in putting him off the train and, if so, whether the place where he put him off, Hantsport station, was a fit and proper place to do so. As regards the latter point, I may say that the evidence showed Hantsport station is situated in an incorporated town and is not distant from the main thoroughfare of the town more than about one hundred yards.

The excursion train was a very lenghty one and the steps of the car from which the decaesed was ejected when the train stopped at Hantsport opened on an extension of the train platform built up of ashes packed and hardened and protected by side planks. There was no more danger or difficulty in the deceased alighting on this ash extension of the station platform than upon the platform of which it was an extension.

I am of the opinion that this station was a fit and proper place to put off the disorderly passenger, and the only remaining question is whether the deceased's conduct had been so disorderly as to have made him a nuisance and offensive to other passengers in the train. It was proved beyond doubt that he was under the influence of liquor, was using profane language, actually assaulted several persons in the train without the slightest provocation and eventually assaulted the conductor violently, breaking at the time one of

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the windows of the car. The conductor appears to me to have treated the deceased, unruly and provocative as his conduct was, with a good deal of forbearance and restraint and in a manner deserving commendation and not censure.

The result of my reading of the whole evidence, the vital and material parts being uncontradicted, is that I think the conductor was not only warranted and justified, after the deceased's disorderly conduct and the violent personal assault made upon him by the deceased passenger and his inability to keep him quiet, in deciding to put him off the train on reaching Hantsport, but that if he had failed so to put him off he would have assumed a greater responsibility that he was justified in doing. It was not only the conductor's right to land him where he did but, in my opinion, under the circumstances, his duty. The manner of his being put off was, of course, criticised, but I cannot find there was more force used than was reasonably necessary to carry out his ejection. It is true it was after midnight, and the station offices were closed, but the hotel of the town was not many yards away and when last seen by the witnesses who spoke of the man's ejection as the train moved away from the station he was walking away from the track towards the town.

If I am right in my conclusion with uncontradicted evidence that the conductor was justified in putting the deceased off at the Hantsport station, the appeal must fail.

If, however, I am wrong in so holding, I am of the opinion that the fact of the deceased's body having been found with life extinct on the following morning on the car track, where he had eventually been killed by a passing train, would not of itself have been suffi-

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cient to uphold the verdict. There is not a scintilla of evidence as to what became of the man after having been put off at the station. Whether he had liquor on his person and took more of it or got it otherwise, there is no hint. He evidently, we may surmise, wandered on the track while in a state of inebriety, sat down or lay down on the track, probably fell into a drunken sleep and was struck by one of the company's trains coming from the opposite direction to that of the train from which he had been ejected. No negligence is charged against the train which must have struck him. The expulsion, if wrongful, was not the cause of the man's death, nor is there any necessary connection between that expulsion and his death. If, in his half drunken condition, he wandered on to the track and sat or lay down there, and went asleep and was killed, the company is not surely liable, evidence to connect the alleged wrongful landing of the passenger at the station with the accident being entirely wanting.

I think the principle decided in the well-known case of *Wakelin* v. *The London and South Western Ry. Co.* by the House of Lords in 1886 and reported in (1), applicable in this case. To hold the company liable it must be established by proof that the accident to which the death of the deceased is attributable was caused by its negligence. If, in the absence of direct proof, the circumstances which are established are equally consistent with the allegations of the plaintiff as with the denial of the defendants, the plaintiff must fail. The plaintiff was very far from being helplessly drunk when he was put off at the station. He was drunk enough to make himself offensive and a nuisance,

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but not by any means helplessly drunk. Whether he obtained more liquor after being put off the train or not, there is not a particle of evidence. His condition was his own fault and the company is not liable after his expulsion for his imprudence or his fool-hardiness in running into danger on the track and being killed.

I would dismiss the appeal with costs.

IDINGTON J.—The only question raised herein deserving consideration is whether or not the conductor of a passenger train exercised due care in putting off the said train (about 1 a.m. on a dark night, at a station, and leaving unattended) a passenger who was so drunk that he staggered in the car, and when put off staggered and fell in sight of both the said conductor and a brakeman of the train who had been deputed by the former to see that such passenger did not get on again.

The passenger so put off was found on the respondent's railway track, five or six hours later, eleven or twelve hundred feet distant from the said station, evidently mangled to death as the result of being run over by another engine or train.

There was no light or accommodation in the station and none shewn to exist in a nearby hotel, or elsewhere in the vicinity.

Assuming the respondent's by-law enabling its conductor to put off a passenger, possessed of a ticket entitling him to proceed further, when misconducting himself, is the doing so justifiable under such circumstances, so obviously likely to lead to such results, as in question herein, without taking the slightest precaution to guard against same?

The jury answered that in the negative by finding respondent, by reason of such want of care, to have caused the death of said passenger, as well as in answering many other questions submitted to them affirming the conditions I have outlined.

The subsequent finding of the dead body where it was, not only justifies that finding as the cause of death, but illuminates the whole story and demonstrates, if circumstances over can demonstrate anything, the hopelessly drunken condition of the man and the need there was for due care in regard to him in such a condition and in such a dangerous situation.

In broad daylight when there would perhaps be in such a situation many there, engaged in their daily avocations, likely to supply the needed care, such an incident might be justifiable.

The question of law raised herein upon the findings of the jury is of an entirely different character.

I am of the opinion that in this peculiar case herein presented there was ample evidence to submit to the jury relative to the question of the duty of due care, under the circumstances, and that their finding of fact, which was wholly within their province to decide, should not be set aside.

And I am the more inclined to such holding by this evident loss of temper on the part of the conductor leading to and resulting from the scuffle between him and the drunken passenger.

I can see no other excuse for the entire abandonment of a human being in such a condition, to such obvious possible consequences as ensued.

And that excuse for the entire want of care on the part of the respondent's conductor, under such circum-

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stances does not, in my opinion, justify the course pursued.

I agree with Mr. Justice Russell and Mr. Justice Mellish in the result they reached in the court below, and so much am I in accord with the elaborate review of the facts presented by the latter, that I do not feel it necessary to repeat same here.

Nor do I deem it necessary to demonstrate that the *Wakelin Case* (1) is quite irrelevant unless we are prepared to hold that a drunken man has in law so lost his rights that he may lawfully be pitched overboard regardless of the consequences.

I think the appeal should be allowed and judgment be entered for the amount of damages found by the jury with costs throughout.

DUFF J.—This appeal should be allowed.

ANGLIN J.—After some hesitation due chiefly to the difficulty and delicacy of the position of a railway conductor called upon to deal with a disorderly drunken passenger and the danger of unduly curtailing or circumscribing his powers and restricting his discretion, I have reached the conclusion that there was evidence on which a jury might, without laying itself open to a charge of perversity, find that, having regard to the state of inebriety of the late Stanley Dunn and to the conditions at Hantsport station at the time, it was not a proper place at which to remove him from the defendant's train. The right of removal of a disorderly passenger which is conferred on the conductor is not absolute. It must be exercised reasonably. He cannot under it justify putting a passenger off the

(1) 12 App. Cas. 41.

train under such circumstances that, as a direct consequence, he is exposed to danger of losing his life or of serious personal injury.

If, upon evidence warranting that belief, the jury was of the opinion that leaving Dunn alone on the platform of the closed and unlighted Hantsport station at 1.30 a.m. seriously imperilled his life, they were quite right in concluding that the conductor was negligent in doing so. It was eminently for them to determine whether Dunn was or was not in such an advanced state of intoxication that leaving him where he was placed involved endangering his life because he was unable to take care of himself. If so the conductor should have found some other means of discharging his duty to prevent Dunn being a source of danger or annoyance to his fellow passengers as well as a menace to himself until he could be removed from the train without jeopardizing his life. For instance, as Russell J. suggests, he might have been taken to the baggage car and detained there until a suitable place for removing him from the train should be reached.

The absence of direct proof of causal connection between the leaving of a man on the station platform and his death, in my opinion, does not present any serious difficulty. It was quite open for the jury to infer that he wandered from the platform to and along the tracks and eventually lay down on the latter in a state of drunken stupor and was killed there about 3 o'clock in the morning by the second engine of the train when returning from Kentville to Halifax. Indeed that seems to be the most probable inference from all the facts in evidence. That he should have wandered on to the tracks was, I think, a natural

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and probable result of his being left unattended on the dark station platform in the condition in which he was—such a result as the conductor should have anticipated might ensue.

This case is readily distinguishable from *Delahanty* v. *Michigan Central Rly. Co.* (1), where a passenger was put off at an open, lighted station and was not incapable of taking care of himself though slightly intoxicated and also from the *Wakelin Case* (2), where it was a matter of pure conjecture how the man who was killed got on the line, and there was nothing to justify an inference that he got there by any fault of the company. On this aspect of the case the decision of this court in *Grand Trunk Ry. Co.* v. *Griffith* (3), seems to afford authority for rejecting the attack on the verdict.

There was evidence in my opinion which makes it impossible to say that the jury's answers to the sixth, eight and ninth questions were not such as could reasonably be found. They therefore cannot be set aside. Upon them the plaintiff was entitled to judgment.

I would therefore allow the appeal and direct that judgment be entered for the plaintiff for the sum of $2,000, found by the jury to have been the damages sustained, with costs of the action and of the appeals to the court en banc and to this court.

MIGNAULT J.—By the by-laws of the company respondent, admitted to be validly passed by-laws of the respondent, it was provided as follows:—

(1) 10 Ont. L. R. 388. (2) 12 App. Cas. 41.
(3) 45 Can. S.C.R. 380.

12. Persons intoxicated, or otherwise unable to take care of themselves, will not be furnished with tickets or allowed to enter the cars or premises of the company, and if found in the cars or upon the premises of the company, they may be removed.

15. Any person in or upon a carriage, station, platform of the Company, or elsewhere upon the Company's premises, in a state of intoxication, or fighting or guilty of other disorderly conduct, or using foul, obscene or abusive language, or otherwise wilfully interfering with the comfort of other passengers, is guilty of an offence under this By-law. In addition to liability to fine under this section, any such person may be summarily ejected from such station or premises of the Company, or in the case of a moving train, such person may be removed or ejected from the train with his baggage at any usual stopping place, or near a dwelling house, and the conductor and train servants may use force, doing no unnecessary violence, to restrain passengers and others upon the train from fighting, using foul, obscene, or abusive language, or other disorderly conduct.

The jury found that the deceased was killed by an engine or train of the respondent moving towards the east (questions 1 and 2); that his conduct on the excursion train between Halifax and Hantsport had not been such as to interfere with the comfort or endanger the safety of other passengers on the said train sufficiently to eject him from the train (question 3); that he had not used vulgar, offensive, obscene or blasphemous language in the hearing of his fellow passengers (question 4); that he had conducted himself in a disorderly manner during his journey from Halifax to Hantsport (question 5); that there was negligence on the part of the respondent company in connection with the death of the deceased and that caused such death, and that such negligence consisted in putting a drunken man off the train at a late hour at night in an unfit place (question 6); that the deceased was not ejected from the train in question at a usual stopping place for trains of the respondent company (question 7); that the deceased at the time he was ejected was not in a fit state as regards sobriety to take care of himself (question 8); that under the circumstances the place

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where the deceased was ejected from the train, was not a proper place for that purpose (question 9); and the jury assessed the damages at $2,000 equally divided between the deceased's father and mother.

The learned trial judge, notwithstanding the findings of the jury, dismissed the action because in his opinion the negligence found against the respondent in putting the deceased off the train at Hantsport was not the cause of the accident and may have had no connection with it.

In my opinion, with all deference, the jury could infer from the circumstances of the case, that putting off the deceased at 1.30 a.m., on the ash extension of the station platform, near a closed and unlighted station, in a town without any lights, was the cause of Dunn's death. He was found killed on the tracks some distance to the west and it was a matter for the jury to determine, and there was evidence from which they could draw the inference, whether putting off this drunken and helpless man at such a place and at such an hour was the cause of his having been killed by one of the engines of the excursion train which returned through Hantsport a couple of hours later.

If, therefore, there be negligence in ejecting Dunn from the train at such an hour and in such a place, the connection between this negligence and Dunn's death is established by the jury's finding which I cannot consider perverse.

But was there negligence, or in other words did the respondent fail in any duty which it owed the deceased? Dunn had a ticket for this train and had a right to travel on it, but he had no right to conduct himself

in a disorderly manner, or to interfere with the comfort of the other passengers. The jury found that he had conducted himself in a disorderly manner and this, under the by-laws of the company, authorized the conductor to eject him

at any usual stopping place, or near a dwelling house.

Hantsport was a usual stopping place of the railway, and the finding of the jury that it was not, seems hard to reconcile with the evidence, unless the jury considered the ash extension of the platform not a usual stopping place, but, reading together the answers to questions 7 and 9, it is clear that they did not consider this place, even if it were a usual stopping place, as a proper place to leave a drunken man at such an hour, on a dark night, with the electric lights of the town not burning and the station closed and without any lights.

The right to eject a drunken man and disorderly passenger from a train, according to the by-law, is not an absolute one. He must be removed at a usual stopping place or near a dwelling house. This clearly shews that he must be ejected at some place where he can be looked after. To leave him in the middle of the night on the extension of a station platform with a closed station and no light anywhere, would not place him in a better position than if he were ejected in the fields. This does not mean that the company must keep him on the train, but if they choose to eject him in his drunken state, they must eject him at a proper place so as not to leave him in his helpless condition where no one can look after him, and where he is in obvious danger of getting on the railway track and being injured or killed by a

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passing train. The dictates of humanity as well as the by-law itself seem to me to require this of the railway company.

The respondents, in paragraph 16 of their plea, somewhat in contradiction of a previous statement of the plea, say that the deceased on the day in question

> was intoxicated, or otherwise unable to take care of himself and while in the said condition was found in a car of the defendant company and was removed therefrom by servants or employees of the defendant company.

If he was unable to take care of himself, and the jury so found, I cannot think the verdict of the jury perverse in finding negligence against the respondent.

I would therefore allow the appeal and give judgment to the appellant according to the jury's verdict, with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *James Terrell.*

Solicitor for the respondent: *W. A. Henry.*

FRANK BAINTON AND ANOTHER (DEFENDANTS) ..... } APPELLANTS;

AND

JOHN HALLAM, LIMITED (PLAINTIFF) ..... } RESPONDENT

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*Mar. 22
*Apr. 6.

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

Damages—Sale of goods—Sale by sample—Breach of warranty—Measure of damag s.

Where on a sale according to sample the goods delivered are of a quality inferior to that warranted the purchaser is entitled to recover as damages the difference between the market value of the goods received and of those which should have been supplied.

The re-sale by the purchaser at a price less than this difference does not debar him from recovering the full amount; it merely affords some evidence of market value.

Per Idington J.—In this case the price at which the wool was re-sold represented its market value.

Judgment of the Appellate Division (45 Ont. L.R. 483) affirmed.

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

The Hallam Co. bought wool from the defendants which by the order was to correspond with a sample supplied. It proved to be of an inferior quality and acceptance was refused. The vendors would not take

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 45 Ont. L.R. 483.

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it back and it was re-sold at an advance of five cents a pound over the contract price. The purchasers then brought an action for damages and recovered fifteen cents on the trial which the Appellate Division affirmed. The defendants appealed to the Supreme Court of Canada.

McCarthy K.C., and Dancey for the appellants.

Tilley K.C., for the respondent.

THE CHIEF JUSTICE.—This was an action brought to recover damages for the delivery of a quantity of wool by the appellants (defendants) to the respondents (plaintiffs) of an inferior quality to that sold to them by sample.

The appellants contended that the respondents plaintiffs having accepted the goods were not entitled to recover damages, but the trial judge and the Appellate Division both held that while the acceptance of delivery of the wool which was packed in sewn up bags passed the property in the goods delivered to the plaintiffs it did not relieve the defendants from liability for damages for delivery of goods of an inferior quality to that of the sample by which they were sold, and assessed the plaintiff's damages at the sum of $7,500, being the difference between the quality of the goods warranted and sold by the sample and that actually delivered.

These questions of fact of the quality of the wool sold and that actually delivered were found in plaintiffs' favour by the trial judge and these findings were confirmed by the Appellate Division from whose jusgment this appeal has been taken. That court also maintained the assessment of damages of the

trial judge as having been made under the proper rule applicable in such cases as this.

As to the findings of fact made by both courts, this court will not interfere except of course in cases of clear error, and certainly this case is not one of that class.

As to the main question, that of the rule or measure of damages which should be applied in cases such as the one before us, I think the courts below have acted correctly. The rule, as I understand it, is that the measure of such damages in cases of the delivery of goods of an inferior quality to that warranted is the difference between the market value of the goods of the quality warranted and contracted to be delivered, and that of the quality actually delivered. Mayne on Damages, (8th ed.) p. 228; *Rodocanachi* v. *Milburn Bros.* (1); *Williams Bros.* v. *Agius, Limited* (2).

The appeal should be dismissed with costs.

IDINGTON J.—This appeal from the Appellate Division of the Supreme Court of Ontario arises out of a sale by the appellants, carrying on business at Blyth, in the Province of Ontario, to respondent, carrying on business at Toronto, of a quantity of grey shoddy wool, claimed by the latter to have been bought by sample.

A sample undoubtedly had been submitted by appellants shipping it to the respondent, and communications passed over the telephone, and by letter, in relation to latter buying about 50,000 pounds thereof at forty cents a pound. The respondent

(1) 18 Q. B. D. 67. (2) [1914] A.C. 510.

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agreed to take about that quantity, at said price, and asked appellant by letter to arrange for three cars on which to load it.

Respondent by letter said, amongst other things, that, upon that being done, "the writer will go up and have the wool weighed."

There was nothing said therein or otherwise relative to inspection.

A letter written by appellants same or next day to the respondent used the expression "you to come as usual to take over stock."

This letter never was received by the respondent and hence is of no consequence other than shewing a different point of view had been taken by each party, as to the question of inspection.

The appellant alleges in argument that by reason of a former misunderstanding and adjustment thereof there had grown up a well understood course of dealing between them by which the respondent was to make such inspection at the point of shipment, as it saw fit, of any goods sold to it by them, and default that, could not be heard to complain.

Certainly the adoption of such a rule and its observance would have been a most satisfactory and businesslike method. But it was not pleaded as a matter of fact in such express terms as now urged.

The pleading alleged that the goods were

> sold to the plaintiff by the defendants subject to the examinations inspect on and approval of the plaintiff' messenger

etc., at Blyth.

In the particular bargain made herein there was no allusion made to such terms.

And when counsel for appellant at the trial approached the subject he failed to press upon the

attention of the learned trial judge, who ruled out a question as to reasons, all that is now urged upon us as set forth above, and, I understand, was urged below.

I cannot say that under such a pleading and such circumstances the learned trial judge erred in his ruling.

Hence we must rely upon the actual facts proven which disclose that the business as transacted at Blyth consisted only of a weighing and loading of the goods then on the cars.

There really was no actual inspection such as any one would have expected to find if the bargain had been made as pleaded or in accord with an alleged established course of dealing.

Then also it became known to appellants that the shipment was to be made to Carleton Place instead of to Toronto.

Why did they not then suggest inspection by way of an adherence to the alleged course of dealing?

On the other hand it may well be asked, why the manager of respondent was sent up to Blyth for the mere minor, menial or clerical purpose, of weighing, or checking weight of goods.

I cannot help suspecting that it was the confidence reposed in appellants which induced the manager to have thus appeared to waive inspection.

It became the duty of appellants, or at least the part of prudence, on the alleged basis of dealing, to have seen that it was observed and that no cause of complaint could be possible. Instead of that course being pursued they passed in silence an obvious non-observance of the alleged course of dealing.

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I am unable to say that as matter of law, under all the foregoing circumstances, that the respondent was not entitled to rely upon the implied warranty the courts below have proceeded upon.

I am unable, however, to agree, after reading all the evidence adduced in support of respondent's claim, with the assessment of damages adopted by the learned trial judge and upheld by the majority of the Appellate Division.

Whether we adopt the rule for assessing damages as laid down in "Benjamin on Sales" as to the difference in value between the article as delivered and the article as warranted, or that in the English "Sale of Goods Act, 1895", which I incline to think is but another way of expressing the common law rule when it provides that

> the loss directly and naturally resulting in the ordinary course of events from the breach

shall be the measure of damages, the evidence does not justify the said assessment of damages.

We find the utmost profit expected (by respondent conversant with the market price) from a re-sale, based upon the identical samples delivered by appellants, was an advance of five cents a pound; for immediately respondent got possession of the samples, they were submitted to a firm in Carleton Place and a bargain made for a re-sale at forty-five cents a pound. It seems to me idle, in face of such a contract made by respondent at the very time when that in question was expected to be, and was being, carried out, to contend that it can properly be held to have suffered any greater damages in the way of loss of profit than this five cents per pound of profit which it failed to reap, or indeed any other damages, unless

so far as the quality of the goods fell below the sample as to be unsaleable at the price agreed upon.

The respondent is not to be treated as a child ignorant of the conditions of the market, but as being possessed of all the information relative to the market, and the possibilities of re-selling such goods as the sample indicated might be reasonably expected to produce.

I think, bearing that in mind, that forty-five cents must be conclusively taken herein as the basis for the estimated damages.

A perusal of the evidence adduced on behalf of the respondent produces in my mind a clear conviction that there was not a settled market price such as can often be appealed to as a sure and safe basis upon which to estimate damages.

The market for the class of goods in question seems to have been in an unsettled state and subject to a purely chance sort of speculative condition, furnishing no better basis upon which to proceed than the re-sale at an advance of five cents a pound.

A letter of the firm of Cram & Co. to whom the respondent had re-sold, tells that if the goods had been up to the sample, they could have re-sold at a profit of $7,500. Yet we do not find any claim made by that firm for damages of any kind for the breach of contract it has made with respondent. That firm instead seems to have been glad to receive back its cheque without a murmur.

In ordinary cases we might have heard, within the principles laid down in *Wallis* v. *Pratt* (1), of a claim for this $7,500 allowed by the learned trial judge, but no such pretension is set up.

(1) [1911] A.C. 394.

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If fifteen thousand dollars damages had been awarded in such a case, arising out of a twenty thousand dollar contract, from the result of which respondent had received before trial, and indeed within six months, the sum of about fourteen thousand dollars as proceeds of re-sales, I respectfully submit such a result should have so arrested the attention of the courts below as to the need of a closer examination of the evidential basis for measuring of damages than, in my view, has been given herein.

That possibility which I present is only one of the many possibilities presented by several witnesses in a rather loose sort of way.

Cram is asked the following leading question, and answers as follows:—

Q.—You say, comparing the bulk with the sample, that it had a great deal more shoddy, and not only that but some parts were absolutely worthless and useless, that should not be there, that was not in the sample, and you say there was a difference of 25 or 30 cents a lb. in value?

A.—Yes.

When I find in the letter of his firm to the respondent, rejecting the goods, the following sentence:—

We opened up five (5) sacks of this stock promiscuously, and find it not in any sack, up to the five-pound (5-lb.) sample, on which basis we bought this wool.

I am not such impressed with the basis for this estimate.

Only five sacks examined out of a probable seventy in that car, does not seem, when we find all the witnesses testifying to a great variation in the quality of the sacks, a fair basis to found said estimate upon.

Nor is that much improved as a fair test by finding him speak as follows:—

Q.—How many of those bales would you examine? A.—Possibly I examined a couple of dozen before I notified Mr. Hallam, that is, of the first car.

I submit the formal statement made at the time in the above quotation from the letter to the respondent is more likely to be correct than this chance guess made some months later in the witness box.

The witness apparently had examined a second car and possibly his memory got confused, for he says in another place:—

Q.—You say you examined a certain number of the sacks in the first car? A.—Yes.

Q. How many sacks did you examine? A.—Off hand I would say probably a dozen or two.

Q.—How many would there be in a car? A.—If you divide the car by three, there would be about 70. They sometimes vary, according to the size of the car.

Q.—But of the 7 or 80, you examined probably a dozen bags? A.—A dozen or two.

The third car he did not examine at all.

I submit all this as a specimen of the guide we have if we depart from the lines I lay down above to be got from the actual transactions involved in the sale to and re-sale by respondent as the only reliable guiding basis to start from to estimate damages.

Mr. Logan, produced by respondent as an expert, says:—

Q.—Did you see the sample of the bulk that is in question here? A.—All I saw was the two sacks that Mr. Cram sent up to us to be tested.

This witness applied to these sacks a mechanical test, result of which he gives and then respondent's counsel properly drops him as an expert.

The result of that test, however, might have been followed up by others from which we might have got something reliable, but it was not.

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There were two other witnesses called who could speak as experts besides Mr. Hallam, respondent's president.

Of these two, one had bought at forty-two cents a considerable quantity of this shoddy wool and both speak of respective examinations made recently before the trial of a sample submitted by respondent taken from the remaining stock on hand after the re-sales made by respondent, of which I am about to speak.

Neither give what I would consider a more satisfactory basis upon which to assess damages than what I am about to submit, as result of the consideration of all the circumstances so far as available in evidence.

The respondent called the appellants' attention to the results reported by Cram, and proposed, very fairly as it appears to me, to the appellants, or one of them, to go down with a representative of respondent and see the parties concerned at Carleton Place and also the goods and try and arrange a settlement. Respondent even offered to pay expenses of doing so, but appellants refused, apparently determined to stand on what they conceived to be their legal rights.

Some weeks were lost in this sort of haggling, and finally this action was brought on the 13th March, 1918, apparently from the claim made by the indorsment on the writ, for a cancellation of the whole contract, as the claim made indicates it was for the entire price paid. When, better advised, that contention was changed in the statement of claim to a claim of $12,621.25 for damages on the much exaggerated basis of 25 cents a pound, though re-sales

had then been made of eighteen sacks at 43½ to 45c. a pound.

No effort was made by respondent, as should have been done, to re-sell the goods till some time later, and then there were sales made at prices which lead me to the conclusion that if proper energy had been used the whole would have been re-sold at a price of more than the original cost price of forty cents a pound, and have left the assessable damages at five cents a pound.

The increased price got by this mode of proceeding evidently would have re-paid all the attendant expenses upon such a fair and common sense method, which, after all, is but the law upon the subject binding the party claiming damages for breach of a contract to do all that he reasonably can to minimize the loss.

There is no satisfactory reason or explanation given for failure to pursue this course. If chance brought a purchaser he seems to have been dealt with.

Every one knew that unless an effort was made to re-sell before Australian wool came into the market, there was no chance of doing so at prices to minimize the loss. And the only excuse I can find for such an unreasonable course of conduct is that the parties were at war by means of a law-suit.

If that attitude had ceased and a more reasonable course been pursued, I think possibly and indeed probably the respondent would still have been entitled to a judgment for $2,500 or thereabouts—whatever the five cents a pound would have produced. Roughly speaking the expenses might have eaten up the excess of price got over forty cents a pound.

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And that is the sum to which I would now reduce the judgment, instead of the $7,500 awarded.

Perhaps the plan of the learned Chief Justice of the Common Pleas Division, who suggests a reference to determine the damages, might work out a more accurate result, but I am of opinion that there had better be an end of some things even of a lawsuit.

Here we have presented the curious result of a judgment for $7,500, when a statement of respondent presents, after making every allowance to itself for claims not recognizable in law, only a balance of $6,468.62, yet a judgment stands for $7,500.

Is it by way of penalty as the learned Chief Justice of the Common Pleas suggests?

Of course this statement is headed with an incidental suggestion that the sample standard was worth 55c. per pound, but I prefer the cool judgment of the merchant selling at 45c. as a proper test of value of the sample, to that of the litigant and probably exaggerated estimates given by those who probably knew less than he.

Among the indefensible items in this statement, appears a shrinkage of weight due to delay of respondent in re-selling; a charge of 7% for interest, and insurance for a period too prolonged, and $1,398 for commission.

Mr. Hallam's evidence which seems given fairly estimates the goods on hand at 30c. after all the loss of market and possibly deteriorated condition of the goods, suggests to me that a middle line might be drawn between what I have arrived at and that of the learned trial judge.

Hence if the respondent prefers the risk and annoyance of a reference in order to demonstrate that

by proper efforts there could not have been by due energy a re-sale effected in the early part of 1918 which would have minimized the loss, I would agree thereto, the costs thereof to abide the result. And lest it be necessary for some to have a decision to prove the law as stated relative to the duty to minimize the loss, see latest decision of Court of Appeal in England in *Payzu* v. *Saunders* (1), at pages 587 *et seq.*

Meantime I think this appeal should be allowed either fixing the damages at $2,500, or a reference to reduce that already awarded on the lines I have indicated; the costs of this appeal and in the courts below to abide the result of such reference.

ANGLIN J.—On the evidence in the record it is not possible to disturb the findings that the sale in question was by sample, that there was no acceptance of the wool furnished as equal in quality to the sample and that it was in fact substantially inferior. The weight of the testimony also supports the conclusion that the difference in market value between goods of the quality of the sample and the goods actually supplied was at the date of delivery at least 15c. per pound.

The ordinary rule that the measure of the purchaser's damages in such a case is

> the difference between he value of goods of the quality contracted for at the time of delivery and the value of the goods actually delivered. *Loder* v. *Kekulé* (2), at pp. 139-40,

adopted by Mr. Mayne in his excellent Treatise on Damages, (4th ed.) at p. 228, was applied by the learned trial judge and in the Appellate Division. I find no circumstances in evidence to justify a departure

(1) [1919] 2 K.B. 581. (2) 3 C.B.N.S. 128.

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from it. Except as affording some evidence of market value (*Clare* v. *Maynard* (1), the prices agreed to on the re-sale by the defendant and on the subsequent re-sale by his purchaser cannot be taken into account. Neither of them conclusively determines the market value of goods of the same quality as the sample. *Rodocanachi* v. *Milburn Bros.* (2); *Williams Bros.* v. *Agius, Limited* (3).

The appeal should be dismissed with costs.

BRODEUR J.—One of the issues in this case is whether the sale of the goods in question is a sale by sample. The two courts below have come to the conclusion that it was a sale by sample. The facts disclosed by the evidence shew to me conclusively that the sale was properly described as such.

A sample of the goods for which a price was quoted was sent to the respondent company by the appellants and the letter sent by the respondent to the appellants confirming a telephone conversation as to the purchase of these goods declared "same to be up to five pound sample expressed us." Nothing could be clearer; and if the vendors were of opinion that the sale was not to be carried out according to the sample they should have called the attention of the purchaser to what they call today an erroneous statement.

They claim to have sent a letter which in some respects shews that the sale was not absolutely as alleged by the respondent. But this letter was never received by the respondent. Besides this letter does not shew that the sample which had been sent previously to the purchaser would not determine the quality of the goods.

(1) 6 A. & E. 519, 523. (2) 18 Q. B. D. 67.
(3) [1914] A.C. 510.

It is contended by the appellants that the goods were duly received by the respondent company and that their obligation as to the quality of the goods was duly fulfilled. It is true that an important officer was sent by the respondent company to attend the loading of the cars but the goods were not inspected by him and the finding of the courts below was that he went there with the purpose of having the goods properly weighed; and the evidence of this officer, though conflicting with the evidence of one of the appellants, was accepted by the trial judge. I do not feel disposed to disturb this finding.

There has been raised a question as to the amount of damages which should have been awarded. There is evidence which shews that the fifteen cents per pound which was allowed was fair and represented the damages to which the plaintiff was entitled.

For these reasons the appeal should be dismissed with costs.

MIGNAULT J.—In this case I am of opinion that the sale of the wool was a sale by sample and that the wool delivered having been inferior to the sample, there was a breach of warranty entitling the respondent to recover damages from the appellants.

The only question remaining is as to the measure of damages. The learned trial judge allowed fifteen cents per pound, which is certainly a moderate amount, for the sample was worth from 57 to 60 cents a pound and the contract price was 40 cents.

But the appellants say that inasmuch as the respondent had re-sold the wool to one Cram for 45 cents a pound, the most he would have realized out of the transaction was 5c. per pound, and that at all events his damages could not exceed the latter amount.

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This reasoning appears to me to be fallacious. The usual rule, as stated by the learned trial judge, is that the measure of damages is the difference in value between the thing contracted for and the thing delivered. Here the respondent contracted for wool which was to equal the sample and for which he was to pay 40c. per pound. That he had himself contracted to sell the wool for 45c. is not a matter which the appellants can set up to escape liability to pay, as damages, the difference between the value of the wool contracted for and its actual value as delivered. As stated by Lord Haldane in *Williams Brothers* v. *Agius, Limited* (1), at page 520:—

> The law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant as for instance a contract entered into by the plaintiff with a third party.

See also *Rodocanachi* v. *Milburn* (2), approved by the House of Lords in the case just cited.

In this case Cram who bought the wool on the same sample had re-sold it at a higher price, and the respondent may be called on to pay him damages for not having delivered goods equal to the sample, Cram having refused to accept the wool on that ground. If the respondent received only the profit he was to make on his sale to Cram and was liable to the latter for damages, he would not be compensated by receiving from the appellants only the profit he would have made on the sale to Cram.

It may be added that although the respondent had agreed to pay 40c. per pound for this wool, it does not follow that the wool delivered was worth 40c. As a matter of fact, as found by the learned trial judge, it was worth a good deal less.

(1) [1914] A.C. 510. (2) 18 Q.B.D. 67.

My opinion therefore is that the learned trial judge adopted the true measure of damages, and that the appeal from the judgment of the Appellate Division, which affirmed the trial judge, should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *Loftus E. Dancey.*

Solicitor for the respondents: *J. P. White.*

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*FEB. 25.
*MAY 4.

NICHOLAS PETROPOLIS.....APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Appeal—Jurisdiction—Criminal law—Bail—Estreat of recognizance—Criminal matter.

The judgment of a provincial court of final resort on an application to set aside on order estreating a recognizance given by a person charged with a criminal offence for his appearance to stand trial is a judgment in a "criminal case" from which no appeal is given by the Criminal Code. Idington J. dissents.

APPEAL from a judgment of the Supreme Court of Nova Scotia (1) refusing to set aside an order estreating a recognizance.

Petropolis was committed for trial on a charge of indecent assault and gave bail for his appearance. The Grand Jury preferred an indictment for rape and he failed to be present when the case was called for trial. By order of the trial judge his recognizance was estreated, and an application to another judge to set aside the order was referred to the full court which refused to do so. An appeal was then taken to the Supreme Court of Canada. Respondent moves to quash.

Subject to the motion, argument was heard on the merits.

Power K.C. for the appellant.

Mathers K.C. for the respondent.

THE CHIEF JUSTICE.—I concur with my brother Anglin.

IDINGTON J.—The appellant entered into a recognizance, taken before a stipendiary magistrate in and for the county of Halifax, who had committed one

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) 53 N.S. Rep. 309.

Basil Mandakos for trial upon a charge of indecent assault, for the sum of one thousand dollars which was made upon the following condition:—

The condition of the within recognizance is such, that whereas the said Basil Mandakos was this day committed for trial to stand his trial at the next term of the Supreme Court of Criminal Jurisdiction to be holden in and for the county of Halifax on the 6th day of October, A.D. 1918 for that he did at Dartmouth in the county of Halifax on the 1st day of May, A.D. 1918 unlawfully and indecently assault one Jennie Young.

If, therefore, the said Basil Mandakos will appear at the next court of Criminal Jurisdiction to be holden in and for the county of Halifax and there surrender himself into the custody of the Keeper of the common jail there and plead to such indictment as may be found against him by the Grand Jury for and in respect to the charge aforesaid, and take his trial upon the same, and does not depart the said court without leave, then the said recognizance to be void, otherwise to stand in full force and virtue.

The judge who was first applied to for an order enforcing the same, directed it to be estreated because the accused did not appear and plead to an indictment for rape found by the Grand Jury.

Thereupon another judge was applied to by the appellant to set aside the order and the writ of *fieri facias* issued thereon.

Due notice was given of said motion by service on the Attorney General of Nova Scotia.

The learned judge, so applied to, referred the motion to the Supreme Court of Nova Scotia at the November sittings of 1919.

The court entertained the motion without making any question of such a course of procedure being correctly adopted as the mode of relief, so far as hearing of argument and deciding it.

The majority of the court held (Mr. Justice Longley dissenting) that the motion should be dismissed because upon their construction of the recognizance and conditions, the accused having been presented by the

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Grand Jury in a true bill accusing him of rape, and failed to plead thereto, the surety was liable.

It is objected by counsel for the Attorney General that the appeal here, though allowed by the court below, admittedly the court of last resort in the province, is not within our jurisdiction.

The question must be determined by the interpretation and construction of section 36 of the Supreme Court Act which reads as follows:—

36. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest court of final resort now or hereafter established in any province of Canada, whether such court is a court of appeal or of original jurisdiction, in cases in which the court of original jurisdiction is a superior court: Provided that,—

(*a*) there shall be no appeal from a judgment in any case of proceedings for or upon a writ of *habeas corpus*, *certiorari* or prohibition arising out of a criminal charge or in any case of proceedings for or upon a writ of *habeas corpus*, arising out of any claim for extradition made under any treaty; and,

(*b*) there shall be no appeal in a criminal case except as provided in the Criminal Code. R.S., c. 135, ss. 24 and 31; 54-55 V, c. 25, s. 2; 55-56 V, c. 29, ss. 742 and 750.

I am unable to understand how proceedings for the recovery of the alleged debt due the respondent can be as urged either a criminal case or within any of the other exceptions in foregoing.

The Crown rules made 2nd February, 1901, by the judges of the Supreme Court of Nova Scotia, seem to substitute for all earlier procedure a clear and explicit method of dealing with all such debts by rule 83, rendering it the duty of any one taking a recognizance to transmit it to the office of the Clerk of the Crown in the county in which the proceedings are instituted and file same there.

The procedure for enforcing same does not in any way savour of a criminal charge nor in any respect does the judgment enforcing the recognizance consti-

tute the surety a criminal,or the motion to set aside the judgment against him a criminal case, within the meaning of the section 36 quoted above.

I, therefore, have no doubt of our jurisdiction. The provisions in the Criminal Code relative to the enforcement of such an obligation are obviously made to adopt the local court and officers who may be applied to therefor, and the legal machinery provided thereby as it were, as that through which such enforcement is made as that which is most appropriate.

The case of those claims arising in Nova Scotia would seem to fall under section 1099 of the Code which is supplemented by the rules I have already referred to.

The power and procedure are what the province may have furnished by virtue of its legislative authority under the British North America Act.

The motion on its merits ought, I think, to have been allowed.

The language of the instrument seems to me, with great respect, incapable of any other meaning than what it says.

Hagarty C. J. is good enough authority for me and his several judgments on behalf of the Queen's Bench hearing a motion of same nature as that in question herein in the cases of *The Queen* v. *Wheeler* (1) and *The Queen* v. *Ritchie* (2) I should abide by.

The high regard I hold for the late Mr. Justice Killam should induce me also to give heed to his in *The Queen* v. *Hamilton* (3) but that case he decided is not so clearly in point.

All these cases, however, clearly indicate that the

(1) 3 Can. Cr. C. 7. (2) 3 Can. Cr. C. 8.
(3) 3 Can. Cr. C. 1

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law for relief for an improper forfeiture of recognizance is recognized elsewhere in Canada as well as in Nova Scotia to be the same.

If the converse case had been made to appear and a recognizance taken to ensure the accused answering the higher charge of rape and an indictment found for only indecent assault, the respondent's contention herein might be more arguable, but we need not follow that, I submit, further or pass any opinion thereon.

I may point out, however, that the Criminal Code by section 856, seems to authorize any number of counts in an indictment save in the case of murder, and hence the Crown officer retained in such a case as this might be well advised to meet the difficulty which has arisen here by following a count for rape with one for indecent assault.

I would therefore allow the appeal with costs.

DUFF J.—This appeal should be quashed for want of jurisdiction.

ANGLIN J.—In my opinion this is an "appeal in a criminal case" within clause (b) of the proviso to s. 36 of the Supreme Court Act, which enacts that

there shall be no appeal in a criminal case except as provided in the Criminal Code.

This court quite recently determined in *Mitchell* v. *Tracey* (1) in accordance with the view expressed by three of its members in *Re McNutt* (2) that the word "criminal" in clause (a) of the same proviso is used in a very wide sense—in contradistinction to the word "civil." I think the words "criminal case" in clause (b) should receive a similar construction. These words in my opinion were used to signify what is more artfully expressed in section 47 of the

(1) 58 Can. S.C.R. 640. (2) 47 Can. S.C.R. 259.

English Judicature Act of 1877 in the words "any criminal cause or matter." These latter words have, time and again, been held to extend to all the various proceedings incidental to a criminal prosecution. *Ex parte Alice Woodall* (1); *The Queen* v. *Steel* (2); and *Rex* v. *Governor of Brixton Prison* (3) cited by Mr. Mathers in his excellent argument, are instances. As put by Fletcher-Moulton L. J. in the case last cited discussing the scope of the words quoted from the English section:

> If any portion of an application or order involves the consideration of a criminal cause or matter, it arises out of it and in such a case this court (the English Court of Appeal) is not competent to entertain an appeal.

Lord Esher in the *Woodhall Case* (1) had said:—

> I think that the clause of section 47 in question applies to a decision by way of judicial determination of any question raised or with regard to proceedings the subject matter of which is criminal, at whatever stage of the proceedings the question arises.

He repeated this language in *Reg.* v. *Young* (4). See also *Ex parte Schofield* (5). The Criminal Code makes no provision for the appeal before us, (s. 1024). It therefore does not lie.

In substance what is sought—what the appellant must obtain in order to succeed—is the setting aside of the order for the estreat or forfeiture of the recognizance given by him for the appearance of one Mandakos to answer

> such indictment as may be found against him by the Grand Jury in respect to the charge aforesaid—viz., a charge "that he * * * unlawfully and indecently assaulted one Jennie Young.

The information laid was for rape. The magistrate holding the preliminary investigation thought the evidence would not support that charge and committed the accused for trial "for the lesser charge

(1) 20 Q.B.D. 832.
(2) 2 Q.B.D. 37.
(3) [1910] 2 K.B. 1056.
(4) 66 L.T. 16.
(5) [1891] 2 Q.B. 428.

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of indecent assault" and thereupon took the recognizance of himself and the present appellant for his appearance to stand his trial. The Grand Jury in due course presented an indictment for rape. Mandakos failed to appear for trial. By an order, dated the 14th April, 1919, intituled

> In the Supreme Court; March Criminal Sittings, 1918 (a manifest mistake for 1919) Between 'The King,' plaintiff, and Basil Mandakos, defendant,

the recognizance was ordered "forfeited and estreated" and directed to be placed upon the estreat roll." The roll prepared by the Clerk of the Court is produced and after setting out the recognizance proceeds:—

> And afterwards the said Basil Mandakos did not fulfil the conditions of the said recognizance but failed to surrender himself and take his trial as therein provided and after having been duly called in open court the said recognizance was on the 14th day of April A.D. 1919, at Halifax aforesaid, declared and adjudged by the court to be forfeited and estreated. Therefore it is considered that 'Our Sovereign Lord. the King, do recover, etc.

These proceedings were all taken under the Criminal Code, and (except possibly the final adjudication on the roll) in the discharge by the Supreme Court of its duties as a court of criminal jurisdiction.

The contention of the appellant on the merits is that the condition of the recognizance did not require the principal to appear to answer an indictment for rape, but only for indecent assault; and that there was therefore no breach justifying estreat.

The forfeiture and estreat of bail always was a function of the criminal courts. No other court has judicial cognizance of the fact of the default on which the estreat is based, which occurs *in facie curiae*. Sec. 1100 of the Criminal Code enacts that the forfeiture and estreat of recognizance is to be made

by the court before which the principal party thereto was bound to appear.

That court was in this instance the Supreme Court of Nova Scotia at its criminal sittings. In adjudicating the recovery by the Crown of the debt resultant upon the forfeiture or estreat and directing the levy of execution therefor it may be that the Supreme Court of Nova Scotia was exercising a civil jurisdiction (*Re Talbot's Bail*, (1), but see *The King* v. *Harvie*, (2), that formerly belonged to the Court of Exchequer in England, into which it was the duty of the Clerk of the Crown, sitting in the Criminal Court, to "estreat" the recognizance duly certified. (Archbold's Criminal Pleading and Evidence, 21st ed., 101). The practice followed in the present case under the Criminal Code and the Nova Scotia Crown rules appears to be similar to that prescribed by 22 & 23 Vic. (Imp.) c. 21, s. 32, whereby the return of recognizance into the Court of Exchequer is done away with and the Clerk of Assize is directed instead to enroll forfeited recognizance, fines, etc., and to send a copy of the roll, accompanied by a writ of execution in a prescribed form, to the sheriff, whose duty it is to levy thereupon.

The appellant's motion in the Nova Scotia courts was to set aside the order for estreat and forfeiture. Unless he can obtain that relief his appeal cannot succeed. He has no good ground of complaint against the subsequent proceedings assuming the validity and regularity of the estreat itself. That the estreat and forfeiture of the recognizance was a proceeding in a criminal case, taken in a criminal court, and governed

(1) 23 O.R. 65, 72. (2) 20 Can. Cr. C. 369, 370).

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by criminal procedure, and, as such, not appealable to this court I have no doubt.

I would therefore quash the appeal.

MIGNAULT J.—I concur with my brother Anglin.

Appeal quashed with costs.

FRASER COMPANIES, LIMITED..APPELLANT;

AND

TRUSTEES OF SCHOOL DISTRICT NUMBER ONE IN THE PARISH OF MADAWASKA AND THE TOWN OF EDMUNDSTON.....RESPONDENTS.

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*MAR. 2, 3.
*MAY 4.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK.

Assessment—Fixed Valuation—School rates.

In the Town of Edmundston, N.B., the school rates are levied and collected by the school trustees and the general municipal taxes by the town officials. By a contract, validated by Act of the legislature, between the town and the Fraser Companies, the school Trustees not being parties, the valuation of the companies' property for assessment purposes was fixed at $100,000.

Held, affirming the judgment of the Appeal Division (46 N.B. Rep. 506) that this limitation does not apply to the valuation of the property for levying school rates.

APPEAL from a judgment of the Appeal Division of the Supreme Court of New Brunswick (1) confirming the levy of school rates on appellant's property.

The only question raised on the appeal was whether or not the valuation on the appellant's property fixed by the contract mentioned in the head-note at $100,000 should be the valuation for school rates. The judgment appealed against held that it should not and that the assessment was properly made on the real value.

Teed K.C. and *Stevens K.C.* for the appellant.

Lafleur K.C. and *Baxter K.C.* (*Cormier* with them) for the respondents.

*PRESENT :—Sir Louis Davies C.J. and Idington, Duff, Anglin and Brodeur JJ.

(1) 46 N.B. Rep. 506.

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Idington J.

THE CHIEF JUSTICE.—I concur with my brother Anglin.

IDINGTON J.—This is an appeal from a judgment of the Appellate Division of the Supreme Court of New Brunswick whereby it was decided that the appellant was not entitled to claim, under and by virtue of legislation fixing a reduced basis of valuation of its property for the purposes of assessment "for rates and taxes within said town" of Edmundston, that such legislation extended to and necessarily determined the valuation basis for rates and taxes imposed by and through the legal machinery whereby respondent was entitled to have rates and taxes imposed for the support of the respondents' schools.

It is to be observed that there are three distinct corporate entities in each county entitled to levy rates and taxes within said town.

The town corporation is one; the county is another; and the Board of School Trustees of the District is a third.

The respondent in this case had jurisdiction over the town and part of the adjacent parish forming a school district known as School District Number 1.

The county corporation embraced both and much more.

And a very curious feature of the legislation now in question is that by section four of the first Act passed to carry out the purposes of the promoters thereof, it was expressly provided as follows:—

4. In any valuation of the property and income of the said town of Edmundston for county purposes hereinafter to be made, during the period of twenty-five years in which this Act is made to apply, the total valuation of the real and personal property, lands, tenements and hereditaments and capital stock and income of the said Fraser, Limited, shall not exceed the sum fixed by paragraph one of this Act until fixed

by said town council under paragraph two of this Act, from and after which time said valuation shall be the amount so fixed by said town council.

Why, if the same rule was supposed to apply to every rate or tax levied in the town no matter for what purpose, was this express provision made as against the county and not a word said as against the school rates or respondents' right to levy therefor.

I can only infer that it was because the promoters of the legislation well knew that the settled policy of the legislature was, as the learned Chief Justice below states, against such obviously unjust exemptions.

The trifling amount the county would lose, or fail to reap, by the fixing of this assessment basis would hardly be worth contesting.

The increased expenses of the administration of county affairs likely to flow from the establishment of such an industry as the appellant's would be but a drop in the bucket.

On the other hand the probable increase of school expenses, if appellant's enterprise turned out successful, would be sensibly felt.

And the maxim so often applied, *expressio unius est exclusio alterius*, seems to me applicable to this piece of legislation, which doubtless was a legislative expression of a contract between appellant and the town in process of formation.

It was followed by another Act validating the actual contract which resulted and that validating Act provided as follows:—

3. So much of the said Act, 2 George V, chapter 104 as is inconsistent with the provisions of this Act is hereby repealed.

The suggestion made by counsel for appellant that in many similar Acts, through abundant caution, the words "saving and excepting school rates or taxes,"

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or the like expression, was used, does not carry with me much weight when I bear in mind that, though pressed to do so, he could not point to a single instance, of the many he cited, wherein provision was made in such cases for providing the machinery for carrying out such exception but, on the contrary, the ordinary provision of the school Acts for effecting such purpose was apparently thought to be all that was necessary.

If in such cases that legal machinery given school boards for effectually levying their rates, can be carried out notwithstanding the basis of the levy being alleged to be the town assessors' valuation then surely it can be done equally well when as here we have the legal presumption held to be on the construction of the Act that school rates are in law excepted from the operation of the Act.

I think the other questions raised in argument are so effectually dealt with by the judgment of the learned Chief Justice, with which I agree, that I need not repeat his reasons here.

I would therefore dismiss this appeal with costs.

DUFF J.—It is a settled principle that legislation intended to carry into effect contractual arrangements between local authorities and individuals shall not, unless the language is too clear to admit of a doubt, be construed as having collateral effects touching interests outside of those which, as being the interests of the parties immediately concerned, the legislature may be supposed to have had exclusively in view. That principle applies in this case.

The appeal should be dismissed with costs.

ANGLIN J.—I am of the opinion that the appellant company is not entitled to have its assessment for

purposes of school taxation limited as provided for by the New Brunswick statute, 2 Geo. V, c. 104, and the agreement of 1917, confirmed by the Act, 8 Geo. V, c. 65.

The town of Edmundston has not exercised the power, conferred by section 108 of the Schools Act (C.S.N.B., 1903, c. 50), to bring itself under the provisions of section 105 of that statute. Section 111 therefore does not apply to School District No. 1, of which the town of Edmundston forms a part. That is made reasonably clear by the collocation of section 111 and the presence in it of the words

> rates ordered to be levied by the city or town council in accordance with the requisition of the Board of School Trustees or otherwise under the provisions of this Act.

As stated by counsel for the respondents in their factum, the words of section 111 just quoted

> distinctly refer to the provisions of s. 105 (12) and (13), which have no counterpart in ss. 76 to 79, which alone are applicable to School District No. 1 of the Parish of Madawaska.

The valuation dealt with by the two statutes cited is of property liable

> for assessment for rates and taxes within such town.

No provision is made for the assessment of property of the appellant situate outside the town but within the school district. *Primâ facie* these two statutes deal with assessment for taxes and rates for town purposes only. The Board of School Trustees was not privy to the passing of this legislation and it is not a party to the agreement between the appellant and the town of Edmundston confirmed by the latter Act. It is most improbable that the legislature would pass legislation intended to affect the interests of the schools of the district adversely in a matter so important and to such an extent without at least notifying the school

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board and giving it an opportunity to protest against the interests committed to its charge being thus injured. At all events an intention so to act should not be imputed to the legislature unless the legislation in explicit and unmistakable terms puts its existence beyond question. I find no such terms in either statute. On the contrary both Acts, as I read them, purport to deal only with the interests of the parties who were before the legislature seeking them—Frasers, Limited and the town of Edmundston.

I agree with the learned Chief Justice of New Brunswick that the assessors pursued a proper and a reasonable course in first placing on the property of the appellant its actual or true valuation (in this case $1,000,000) and appending thereto the statement.

net assessment as per contract with the town of Edmundston to be reduced to ($100,000) one hundred thousand dollars.

The appeal on this—the main subject of it—fails and should be dismissed as against the school trustees.

Two minor questions affecting the town of Edmundston, though referred to in the appellant's factum, were not pressed at bar. It is therefore thought better to reserve the rights of the appellant as to them in the hope that the parties may reach an agreement which will render disposition of them unnecessary.

BRODEUR J.—The question in this case is whether or not the limit of valuation for municipal assessment would include school taxes.

By a statute passed in 1912 the legislature of New Brunswick declared that, in view of the contemplated establishment by the appellants of a large industrial concern within the town of Edmundston, the valuation

of their real and personal property for twenty-five years should not exceed $200,000.

This legislation was to come into force when the Lieutenant Governor in Council was satisfied that the sum of $250,000 on capital account had been expended.

Nothing was done under the provisions of this Act.

In December, 1916, a contract was made between the appellants and the town of Edmundston dealing with different objects, viz., the sale by the town to the company of electrical energy, the supply of water, the taking of some earth material required by the company for construction purposes and containing the following:

9. The valuation for assessment purposes as provided for under chapter 104 of 2 George V, of the Acts of the legislature of the province of New Brunswick shall be fixed at the sum of $100,000.

It was provided by this contract that the necessary legislation to confirm the agreement should be obtained by the town.

At the session of the legislature of 1917 an Act was passed to confirm this contract between the appellants and the town of Edmundston and to amend the Act of 1912; and section 2 declared:

Section 9 of the said contract shall come into force and effect and be binding upon the said town of Edmundston and the said Fraser when a sum of $250,000 would have been expended and when a proclamation would be issued by the Lieutenant Governor in Council.

The appellants made the necessary expenditure and the proclamation was issued in March, 1918.

Is this legislation binding for school purposes?

If we had to deal with the legislation of 1912 which was somewhat general in its character the decision of this court in *Canadian Pacific Railway Co.* v. *Winnipeg*, (1) could not perhaps be easily distinguished from it.

(1) 30 Can. S. C. R. 558.

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It was held in that case that the exemption from all municipal taxes, rates and levies and assessments of every nature and kind would include school taxes. It should be remembered, however, that in the province of Manitoba where this case of *Canadian Pacific Railway Co.* v. *Winnipeg*, (1) arose, the city had to levy and collect not only the municipal but likewise the school taxes. The school trustees of the city had no power to levy taxes for school purposes.

In the province of New Brunswick the taxes are levied and collected by the school trustees; and the legislature, in confirming a contract between the town of Edmundston and the appellants by which the assessment for town purposes was to be limited to $100,000, would not be supposed to intend to restrict the powers of the school corporation. We might consult on this point the case of *Osment* v. *Town of Indian Head.* (2), where it was held that an exemption from general municipal taxation does not include school taxes under the municipal ordinance.

I am of opinion that the confirmation of this contract is binding, as declared by section 2 thereof, on the corporation of Edmundston and the appellants only, and not on the school trustees.

The judgment *a quo* which dismissed the appellants' contention should be confirmed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Stevens & Lawson.*
Solicitor for the respondents: *Max D. Cormier.*

(1) 30 Can. S.C.R. 558. (2) 7 Terr. L. R. 462.

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AND

HALIFAX SHIPYARDS, LIMITED (INTERVENOR)..... RESPONDENT..

*MAY 3.
*MAY 4.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Admiralty law—Repairs on ship—Arrest pending repairs—Work after arrest—Lien—Priority.

While shipwrights, under contract with the owner, were working on a ship she was arrested in an action by creditors and eventually sold. The shipwrights were left in possession and, without any order from the court, completed the work and claimed payment in full from the proceeds of sale on the value of work done and materials supplied after as well as before the arrest.

Held, Idington and Brodeur JJ. dissenting, that the shipwrights having acted in good faith their claim in respect to the work done after the arrest so far as the selling value of the ship was thereby increased should be allowed in priority to that of the creditors.

Per Idington J. If it can be established that the creditors knew or should have known that the shipwrights had continued the work in good faith believing that they could share in the proceeds of sale for payment, the shipwrights and creditors should share in the fund *pro ratâ*. Failing to establish such knowledge the claim of the creditors should be restricted to the selling value of the ship at the date of the arrest and the shipwrights be paid out of the balance of the proceeds of sale.

Per Brodeur J. The shipwrights have no priority in respect to the later work but should rank *pari passu* with the creditors on the whole fund.

Judgment of the Exchequer Court (19 Ex. C.R. 259) varied.

APPEAL from a judgment of the Exchequer Court of Canada (1) in favour of the respondent.

The only question raised on this appeal was that stated in the head-note, namely, whether or not the Halifax Shipyards Co. had a right to be paid in full out of the proceeds of the sale of the Ship *Westerian*

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Brodeur J.

(1) 19 Ex. C. R. 259.

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for work and labour performed and materials supplied in alterations on the ship after her arrest by the plaintiffs. The judgment of the Exchequer Court allowed this claim in so far as the work done was reasonable and necessary.

Geoffrion K.C. and *J. B. Kerney* for the appellants.
Burchell K.C. for the respondent.

THE CHIEF JUSTICE.—I concur with my brother Anglin.

IDINGTON J. (dissenting).—The ship "Westerian" was sold under proceedings taken by appellants for the purpose of enforcing claims which for the most part would have constituted liens upon her, but, by virtue of the circumstances which had transpired, ceased to have that quality, unless and until in an analogous sense there arose a respective precedence in favour of each appellant, by virtue of the said respective appellants' proceedings over those having failed to take the like steps to enforce their respective claims.

At the time when the first seizure of the "Westerian" for the purpose of enforcing one of those claims, took place, the intervening respondent was engaged in making repairs upon her under a contract with the owners which it had entered into for doing so, according to some specifications named and others to be delivered as the work progressed.

At the time of the said seizure, said work to the value of $15,000 had been executed, for which it is admitted the intervening respondent had a lien prior to these other claims.

The said respondent seems to have paid no attention to the seizure made, but continued its work under said contract without making any application to the

court for protection in doing so, or permission thus to deal with property in the custody of the law, until another $15,000 worth of work, if to be estimated on basis of said contract, had been done.

The ship was sold for about $80,000, about four months after the seizure, and about two months after all the said work had been completed, and that fund is now in court.

It does not seem to have occurred to respondent until after the work had been nearly all completed to move herein. Then, upon doing so, an order was made by the District Registrar giving it liberty to appear and intervene in said action.

There should, I submit, have been something more decisive done by respondent than appears, before the sale of the ship, so that all concerned should have understood how they respectively were situated in relation to such a claim.

On the other hand I cannot help thinking that appellants, at the date of the application for said order allowing intervention, which took place about two weeks before the work was finished, must have had their attention thereby called to the fact that respondent must have assumed it would have a lien.

Nothing appears, in the case presented to us, helping us fully to understand many things bearing upon that very peculiar situation which was being developed.

I cannot help having a strong suspicion that the appellants stood by, knowing that the respondent was finishing its job, and hoping that it would be well done, or at all events acted with some knowledge thereof, in such a way as to debar them from taking advantage, as they seek to do by this appeal, of the curious legal situation which has developed.

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Counsel for appellant, on my suggesting during the argument something like unto such possibilities, very properly pointed out that his clients' places of business were in Montreal, and this work was being done in Halifax, and there was no evidence of any of them having agents in Halifax, and that therefore, we must assume, upon such facts, they were ignorant of what was being done, and hence we could not deal with such a situation, or hold them bound by any estoppel, equitable or otherwise, from claiming as they do now.

The solicitor of appellants, however, carried on business in Halifax. Should he not be held as such agent for all the purposes in question of each appellant?

I refer to all this because, after an examination of all the authorities cited by Mr. Justice Cassels and others referred to in argument, and occurring to me since, I remain, as the argument left me, under the impression that without more evidence than he had, or we have, to go upon, the terms of the order made are too wide.

To settle the law upon such a basis would enable parties situated as respondent was at the time of the seizure, to act as the respondent has acted herein, and to obtain as of right what the order now gives herein.

It may well be that no injustice may be likely to arise under this order now in question, but we have not such facts before us as to enable me to say so.

On the other hand, if my surmise is possible of demonstration, I think an opportunity should be given respondent to do so in the reference which has been directed below and must be had in any event.

And in the event of respondent succeeding in establishing actual knowledge of the later work being

done, or facts which would establish ground for the fair inference that they were put upon inquiry, and should have made further inquiry, and be bound by the highly probable results thereof, I should then be prepared to hold that the better way of applying the equitable doctrine invoked, would be to let the respondent rank in common with appellants upon the fund now in question.

I see no ground for supposing that any of the parties concerned acted fraudulently or from any improper motive but incline to think each and all of them acted in entire ignorance of the law because they never considered the curious possibilities.

But that having so developed each feels justified in putting forth such arguments as, in law, may or may not uphold their respective contentions.

To maintain in its present form the order appealed from would give priority to respondent in a way which might work out grave injustice to some of those concerned, and also hold out a premium to those hereafter tempted to offend against the law in like manner as respondent has done by proceeding improvidently without the leave of the court.

Whilst it is very desirable that appellants should not be permitted to profit at the expense of the respondent, yet there may, for aught we can learn from the record before us, have been created situations by reason of the course of the several proceedings taken which might render it impossible to push respondent's claim very far.

For example, we find the ship sold for $80,000, apparently about enough to cover all the claims and costs, except this item now in question.

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Assuming that the respondent's neglect to get leave of the court led all others innocently to believe that in fact the claims would be all covered by such a bid, and thus those others were induced thereby to refrain from protecting their interests by way of further bidding, would respondent be entitled in equity to encroach upon the fund further than in respect of items such as the removal of the coal and the like which saved the loss of the ship by the fire started in it?

I have been throughout under the impression that these assumptions are probably not maintainable and of little consequence. Yet I think it right to thus illustrate how much we are groping in the dark for want of a more detailed and accurate history of all that has transpired which can bear upon the equitable rights of the respective parties concerned.

The solicitor for the appellants, as already observed, carried on business in Halifax and probably acted throughout in all these proceedings which began with the issue of the first writ on the 17th of January, 1919.

Hence I imagine it improbable that the lastly mentioned of the alternatives to be considered will present any serious difficulties. Yet a very little information in way of dates might have saved the trouble of suggesting its possibilities.

The inquiry as to the respondent's claim began April, 1919—exact date not given— and as to what was done from 8th March, 1919, to that date, or a reasonable time before sale on 10th May, 1919, from which it might be inferred appellants had a reasonable opportunity to consider the possibilities of this claim and govern themselves accordingly in relation to the sale, we are left only to guess at the facts.

Passing these several suggestions, and again, for want of evidence, assuming nothing in any of them and considering the order made to rest upon the rather bare equity that inadvertently the respondent had so acted as to add to the proceeds realized, how far should the court below have gone?

I agree with the learned judge of the Exchequer Court that the value of the vessel when sold, if she had been in the same condition in which she was at the date of the seizure, is all appellants are entitled to out of the fund. How to determine that is no easy task.

Yet I think a reference to find such saleable value, on the 10th of May, 1919, on the assumption of the vessel being in the same plight and condition as when seized on 17th January, should produce the result sought for.

Regard being had to the actual facts bearing upon selling value on the date of the sale, is no doubt what should be proceeded upon. And the deduction of any additional saleable value, realized by virtue of the labour and expense of the respondent after the first seizure, should produce the same result.

Is that what the reference by the order now in question to determine "the value of the work and labour done and materials supplied on and after the 17th of January, 1919, as may be reasonable and beneficial upon and to defendant ship" is at all likely to produce? I am afraid not. Looked at from the point of view of the owners, no doubt all that was done would be reasonable and beneficial to the defendant ship. But, it is argued, and I think possibly with a great deal of reason, that what was done did not add to the realizable selling value so much as implied in the direction given.

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It is what actually was added, by virtue of said labour and expense, to the price realized, in other words, forms that part of the fund now in question, which respondent is entitled to.

In conclusion, any words should be adopted in the formal judgment which will embrace and adequately define and direct, first, a reference to determine whether or not the appellants having the conduct of the sale knew, or should have known, within a reasonable time preceding same, the facts that respondent had proceeded with the work now in question after the seizure, in good faith believing itself entitled to share, in respect of payment therefor, in the proceeds of the sale.

And if that answered affirmatively then no need for further inquiry. In that event the respondent should share *pro ratâ* with appellants in the distribution of the fund in question, and the costs of respondent throughout should be added to the amount proven to have been expended by it in labour and material after the seizure.

Then, secondly, default that finding and the ending of anything such as suggested above that would render it inequitable to do so, the saleable value of the ship, without such work and labour since seizure, as above indicated, should be determined by the referee, and the claims of the appellants upon the fund should be restricted thereto.

In such event the respondent should be paid its claims, for said work in question, out of the balance of the fund in court after deducting the saleable value so found.

The costs of the appeal in such latter event should be reserved to be disposed of by the local judge.

ANGLIN J.—The question for determination in this appeal is the right of the respondent intervenor, a shipwright, who, under a contract for repairs then in course of execution, had possession of the defendant ship at the time of her arrest at the suit of the plaintiffs, to claim priority in the distribution of the proceeds of the sale of the vessel under an order of the court in respect of some $15,000 expended in completing such repairs after the arrest, without the sanction of the court but in good faith. The circumstances out of which this question arises are sufficiently set forth in the judgment of the learned judge of the Exchequer Court.(1)

The learned trial judge (Drysdale J.) allowed the intervenor's claim for priority in respect of expenditure incurred before the arrest—properly no doubt, recognizing and protecting its common law possessory lien therefor; *Williams* v. *Allsup*, (2); 26 Hals. Laws of England Nos. 984 and 997; and in respect of that part of the judgment there has been no appeal. He wholly disallowed the claim for expenditure after the arrest because incurred without the sanction of the court.

On appeal from the latter part of this judgment the learned judge of the Exchequer Court allowed the intervenor's claim so far as its expenditure may be found to

be reasonable and beneficial upon and to the defendant ship

by the District Registrar assisted by merchants, to whom a reference was directed, and granted priority therefor over the claim of the plaintiffs. From this judgment the plaintiffs now appeal.

The claim of the plaintiff, the Montreal Dry Docks & Ship Repairing Company, is for the cost of earlier

(1) 19 Ex. C.R. 259. (2) 10 C.B.N.S. 417

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repairs in respect of which it had relinquished any possessory lien. Its co-plaintiffs have claims for necessaries supplied to the ship during the course of such earlier repairs and before she came into possession of the intervenor. The rights of all the plaintiffs *in rem* arise, therefore, only upon, and date from, the arrest of the ship at their suit.

No doubt the intervenor would have been better advised to have sought the sanction of the court before proceeding with further repairs after the arrest of the ship, which, however, was left in its actual possession until the repairs had been completed. That sanction not having been obtained, however, the question arises what are the respective rights of the plaintiffs and the intervenor in regard to the cost of such subsequent repairs.

Consideration of the numerous authorities cited and some others—none of them directly in point—has satisfied me that the basic principle on which this issue should be determined was correctly stated by Mr. Justice Cassels when he said:—

> These authorities indicate that the right of the plaintiffs who seized the vessel is on the value of the vessel at the date of the seizure (when they first acquired a right *in rem*) and not in the value subsequently enhanced by the necessary work of the shipwright.

That principle is found in the decision of Sir Robert Phillimore in *The St. Olaf* (1) in the following passage quoted by Mr. Justice Cassels:

> The right of the plaintiff who proceeds against the St. Olaf was to have the value of the vessel at the time she was brought into court, as far as the proceedings *in rem* are concerned. His right was to have this *res* made responsible for the damage inflicted on his ship, so far as the value of it extended, and the repair of the vessel subsequent to the damage for the purpose of preventing a deterioration of the property could not in any way increase his right or the obligation of the other party. It left them, as I conceive, in *statu quo* in that respect.

(1) 2 Ad. & Ec. 360.

As put by Dr. Lushington in *The Aline* (1) at p. 120):

With respect to any subsequent accretion in the value of the vessel arising from repairs done after the period when the damage was occasioned (in the case at bar after the arrest out of which the plaintiffs' statutory lien arises) his claim to participate in the benefits of such increase of value must depend upon the consideration how that increase arises, and to whom in equity it belongs.

As put by Lord Esher in *The Cella* (2) at p. 87:—

Whatever may be the judgment of the court it must take effect from the time of the writ * * * * But if the money be in court or the court has possession of the *res*, it can give effect to its judgment as if it had been delivered the moment after it took possession of the *res*. It is contrary to the principle of these cases and to justice that the rights of the parties should depend not upon any act of theirs but upon the amount of business which the court has to do. Therefore the judgment in regard to a thing, or to money which is in the hands of the court, may be taken to have been delivered the moment the thing or the money came into the possession of the court.

Under the doctrine thus stated the plaintiffs would not have the benefit of any repairs subsequent to the arrest.

It may be that

as against the owner who repairs his vessel at his own expense, the claim of the successful suitor would extend to the full amount of his loss against the ship and the subsequent repairs;

The Aline, (1), at page 120; yet a stranger making such repairs on the faith of a possessory lien, which he erroneously conceived he would have, although not entitled to an equitable lien, *The Aneroid* (4), at page 191, may be in a better position to receive equitable consideration to which the owner cannot lay claim. On the one hand the ship-wright cannot be allowed to improve the plaintiffs out of whatever interest they acquired in the *res* by the arrest. Their right was to have it taken and sold for their benefit as it then stood and that right may not be prejudiced, as it well might be if full effect were given to the contention of Mr.

(1) 1 W. Rob. 111. (2) 13 P.D., 82.
(3) 2 P.D. 189.

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Burchell that because the respondent had a contractual right, as against the owner, to retain the vessel and to complete the repairs to her which it had undertaken to make, the plaintiffs' security acquired by the arrest is subject to that right and the respondent is therefore entitled to priority over the plaintiffs for the full amount of its expenditure regardless of whether the selling value of the vessel was or was not thereby increased. While such a claim might be maintained if the assent of the plaintiffs to the completion of the repairs had been expressly given or might fairly be implied, (*Jowitt & Sons* v *Union Cold Storage Co.* (1) at page 10), the evidence here scarcely warrants such an inference. The respondent, in effect, asserts that its possessory lien extends to the post-arrest repairs because the Marshall did not deprive it of actual possession. But, as stated by Townsend J. in *The Acacia* (2),

> the property proceeded against ** when arrested is deemed to be in the custody of the Marshall, although it may really remain in the hands of the party

with whom he found it. The intervenor's possessory lien ceased with the arrest, but his interest then accrued will be protected by the court which deprived him of his legal possession. (*The Tergeste* (3), at pages 32-34). As to it the plaintiffs acquired their security on the *res cum onere*. For any subsequent expenditure, however, not sanctioned by the court, the intervenor's claim must rest on equitable considerations, such as prevailed in the two receivership cases cited by Mr. Justice Cassels. On the other hand, on what principle can the plaintiffs claim the benefit of whatever additional saleable value was

(1) [1913] 3 K.B. 1. (2) 4 Asp. (N.S.) 254.
(3) [1903] P. 26.

given to the vessel by the subsequent expenditure made by the intervenor? Equity would seem to require that, having acted in good faith, it should have the advantage of whatever increase in the saleable value of the *res* is brought about, so long as no prejudice is done to any statutory right acquired by the plaintiffs through the arrest (*The Aline* (1), at p. 121). As put in the factum of the respondent,

> much is to be said in favour of a principle which does justice to one party without doing injustice to the other.

While the Exchequer Court does not possess the full equitable jurisdiction now vested in the Probate Divorce and Admiralty Division by the Judicature Acts (*Bow McLachlan* v. *The Camosun* (2), in the decision of cases properly within the jurisdiction of the former Court of Admiralty, with which the Exchequer Court is vested, "equitable considerations ought to have their weight" (*The Saracen*, (3), at page 74. As put by Dr. Lushington in *The Don Francisco* (4), at p. 472:

> The Court of Admiralty may, in deciding a case, be influenced by equitable consideration.

From the very first it was held that the jurisdiction which the plaintiffs had invoked, originally conferred in 1840, (3 & 4 Vict., c. 65), should be exercised "in equity and upon equitable principles." *The Alexander Larsen* (5), in 1841, at pages 290, 295. It is certainly within the jurisdiction of the Exchequer Court to determine the extent to which the *res* formerly in its possession and the fund now in court representing it became a security to the plaintiffs by the arrest—how far it is subject to the so-called statutory lien in their favour; and it is also within its jurisdiction

(1) 1 W. Rob., 111.
(2) [1909] A.C. 597.
(3) 6 Moo. P.C., 56.
(4) 1 Lush. 468.
(5) 1 Wm. Rob., 288.

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to determine in respect of what amount the intervenor has a possessory lien and the priorities of these two liens *inter se*. By the fourth section of the Admiralty Court Act of 1861 the Admiralty Court was given express jurisdiction over claims for building, equipping or repairing any ship. In determining the question as to the extent of the plaintiffs' rights the court may properly so deal with the *res* under its control that an injustice shall not be done to a person who by the expenditure of money in good faith has improved the subject matter of the common security and increased its saleable value.

A careful study of the authorities has not only failed to disclose anything directly opposed to the disposition of the question before us which, as I have indicated, seems to me to be proper, but has led me to the conclusion that that disposition accords with their spirit, although nothing directly in point can be found.

I would therefore dismiss this appeal with costs and affirm the judgment of the learned judge of the Exchequer Court, as I conceive he intended it should have been framed. In order that his idea may be more clearly embodied and more precisely expressed, the formal judgment of the court as issued, should be modified by striking out of the third paragraph the words

as may be reasonable and beneficial upon and to the defendant ship

and substituting therefor

so far as the selling value of the defendant ship was thereby increased

BRODEUR J. (dissenting).—The question in this case is whether the respondents should have priority for the repairs made to the ship "Westerian" after she was arrested by the appellants.

The local judge in admiralty decided that no such priority could be claimed, but his judgment was reversed by the Exchequer Court.

The appellants admit that the respondents should rank *pari passu* with them.

The claims made by the two parties arise out of repairs which were made for the purpose of converting the ship from an inland water vessel into a sea-going ship.

At one time the appellants could have claimed a possessory lien for the repairs they did on the ship but for reasons which are not disclosed in the record they abandoned their possession and lost their lien.

The vessel was then delivered by her owner to the respondents to have the remodelling completed. When these repairs were going on the vessel on the 17th of January, was arrested.

In spite of this arrest the respondents went on to complete the repairs without obtaining from the court any authorization to that effect. There is no objection on the part of the appellants that the respondents should have priority for the repairs made before the seizure, but the contest is as to the rank of the claims for the repairs made after the arrest.

From the time the arrest took place the ship was in charge of the court and if some repair work had to be done to her, it became necessary for those interested to apply to the court to obtain necessary authorization to do the work. The respondents should not have assumed a power which was entirely in the discretion of the court. It would not be easy for us to determine whether such authorization would have been given or not.

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Brodeur J.

As far as equity is concerned, both parties are in the same position. The respondents will have the benefit, when the sale takes place, of the $50,000 worth of repairs made by the appellants to the vessel and, on the other hand, the appellants will have the benefit of the $25,000 worth of repairs made by the respondents.

The rule that they should all rank *pari passu* appears to me as being the most equitable one.

The appeal should be maintained with costs of this court and of the court below and the judgment of the trial judge should be restored with a proviso that the claims of the parties should rank *pari passu*.

Appeal dismissed with costs.

Solicitor for the appellants: *L. A. Loyett.*

Solicitor for the respondents: *C. J. Burchell.*

WABASH RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

1920
Mar. 25
May 4.

AND

WILLIAM FOLLICK (PLAINTIFF) .. RESPONDENT.

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

Negligence—Railway company—Evidence—Findings of Jury—Statutory precaution.

F. was in charge of a wrecking train working at a crossing where two railway lines intersect and on receiving a signal that a train was approaching from the east removed his cars from the crossing. He then went to a signal station a few feet away and on returning was struck by the oncoming train. He had a clear view of the track to the east before he started to cross and was nearly over when struck. He could not account for his failure to see the train coming. Seven hundred feet east of the crossing was a semaphore and the train stopped several hundred feet east of that and came on without stopping again. On the trial of an action against the railway company the jury negatived contributory negligence and found the company negligent in not stopping at a reasonable distance east of the distant signal (semaphore) and proceeding with sufficient caution approaching wreck zone which was observed.

Held, affirming the judgment of the Appellate Division (45 Ont. L.R. 528) that the jury were justified in finding that the failure to moderate the speed of the train when approaching the crossing was negligence and to infer from the evidence that had the train been brought to a stop as the Railway Act requires the plaintiff would have had a better opportunity to escape injury.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment at the trial by which the action was dismissed.

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 45 Ont. L.R. 528.

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WABASH RAILWAY CO. v. FOLLICK.

The Chief Justice.

The material facts are stated in the above head-note.

H. S. Robertson for the appellant.

Tilley K.C. for the respondent.

THE CHIEF JUSTICE.—This action is one to recover damages for injuries received by respondent Follick when struck by an engine of the appellant railway company as he was crossing the track in front of the appellant's approaching train at a railway crossing called Niagara Junction.

The facts are fairly stated in the appellant's factum as follows:—

At the place in question the line of the Grank Trunk Railway running west from Niagara Falls intersects a branch line of the Michigan Central Railway running south to Fort Erie. The appellant's trains run on the Grand Trunk tracks and the train in question was a regular west bound passenger train.

The respondent was a section foreman of the Michigan Central Railway and at the time of the accident about 5.15 a.m. on the 21st of December, 1916, was engaged in helping to clear up a wreck that had occurred upon its branch line at a point a little south of the Grand Trunk line.

There are two signals or semaphores to protect the railway crossing against trains coming from the East. One is about seven hundred feet east of the crossing and is called the distant signal; the other is close to the crossing and is called the home signal. Both signals are under the control of a signal man stationed at the crossing in a small building called the "H" office.

A little while before the arrival of the train on the morning in question the signal man notified the conductor of the wrecking train that the appellant's

train would soon pass and the wrecking operations were suspended and the wrecking train taken off the crossing, its engine going to the north side and the cars standing on the south side of the track on which the appellant's train was travelling. The signal man on the approach of the appellant's train gave it both signals clear so that the train could come through.

The respondent had shortly before this sent his men home to breakfast and he himself was preparing to go and went into the "H" office for his lantern. Coming out of the door of that office he was facing directly towards the approaching train, but it is said that it was hidden from him at the moment by a car of the wrecking train which stood about seven feet south of the Grand Trunk tracks. The respondent walked from the door of the "H" office in a northerly direction towards the Grand Trunk tracks, having the above mentioned car on his right hand. He says that when he reached the north end of the car he looked easterly, and although the country is level and free of obstructions for at least one third of a mile to the east he says he did not notice the appellant's approaching train, although its headlight was burning and bell ringing and the engine was almost upon him.

The respondent continued on his course to and across the Grand Trunk tracks and had just passed the north rail of the track when the appellant's engine struck him and severely injured him.

The respondent is quite unable to explain why he did not notice the approaching train. Various explanations were suggested to him. He had been at work constantly for a period of twenty-two hours at the time of the accident and the appellants suggested

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that that fact may have been the effective cause of the accident. His counsel and some of his witnesses suggested that he may have been blinded by the headlight of the Michigan Central wrecking engine which stood at the north side of the Grand Trunk track. The respondent frankly confessed that he could not explain it.

On behalf of the respondent it was contended that the appellants were responsible for the accident because in the first place it is alleged their train did not come to a stop before proceeding over the railway crossing as it was required to do. The evidence as to the stopping of the train was conflicting. Some witnesses said the train did not stop at all after it had come in sight of the crossing. Other witnesses said that it did stop at a point about five hundred feet east of the distant signal, and then came on, the signals shewing a clear track. The jury contented themselves with finding on this point merely that the train did not stop at a reasonable distance east of the distant signal.

The respondent also complained that the train was run at an excessive speed. The evidence as to the speed of the train was also conflicting. The estimates of speed given by different witnesses varied from ten to twenty-five miles an hour. The jury did not make a finding as to the speed of the train. They found the appellants chargeable with negligence in not

proceeding with sufficient caution approaching wreck zone which was observed.

I frankly confess that at the close of the argument at bar, Mr. Robertson had by his able argument and clear presentation of the case for the railway company almost, if not quite, convinced me that the appeal

should be allowed and the action dismissed. After however, reading the evidence and judgments, and most carefully considering them in connection with the findings of the jury, I entertained great doubts that my first impressions of the case after the argument were correct.

In the result, I find myself in the position of being unable to decide that the judgment appealed from is so clearly wrong that I would be justified in reversing it.

Under these circumstances I will not, though still doubting, dissent from the judgment proposed dismissing the appeal.

IDINGTON J.—The question raised by this appeal must turn upon the question of whether or not there was sufficient evidence to warrant the jury in finding that the injuries which respondent suffered on the occasion in question were caused by the failure of appellant

in not stopping its train at a reasonable distance east of the distant signal and proceeding with sufficient caution approaching wreck zone which was observed.

The appellant, in my opinion, absolutely discarded the statutory provisions contained in sections 277 and 278 of the Railway Act, which are as follows:—

277. No train or engine or electric car shall pass over any crossing where two lines of railway, or the main tracks of any branch lines, cross each other at rail level whether they are owned by different companies or the same company, until a proper signal has been received by the conductor or engineer in charge of such train or engine from a competent person or watchman in charge of such crossing that the way is clear.

278. Every engine, train or electric car shall, before it passes over any such crossing as in the last preceding section mentioned, be brought to a full stop; provided that whenever there is in use, at any such crossing, an interlocking switch and signal system, or other device which, in the opinion of the board, renders it safe to permit engines and

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Idington J.

trains or electric cars to pass over such crossing without being brought to a stop, the board may, by order, permit such engines and trains and cars to pass over such crossing without stopping under such regulations as to speed and other matters as the board deems proper.

The statute does not in express terms define the exact distance from the crossing at which the "full stop" is to be made, but uses very imperative terms when it says

the engine, train or electric car shall, before it passes over any such crossing, * * be brought to a full stop.

I should say that the stopping seventeen hundred feet away, alleged in this case, by the appellant was a mere mocking of the Act.

Some electric cars do stop several times in that distance. If one happened to have stopped that far back from a crossing, would it be justified in rushing ahead when it came to the railway crossing, even if, as urged herein, the signal to pass was up?

I submit decidedly not and hold that such a car must, before crossing, come "to a full stop" immediately next the crossing place.

I say this to illustrate how variable the conditions may be for the respective moving things specified in the statute.

Obviously what would be the exact stopping place for an electric car might, for many reasons, be impossible for a train, or even an engine alone, upon a steam railway.

Hence Parliament, finding it impossible by the ordinary use of language accurately to define a common distance serviceable for each and all of these different kinds of traffic appliances, left that to the reasonable allowance necessary to be made in each respective case by those concerned, impliedly requiring, however, the exercise of a reasonable judgment.

The verdict in terms finds this was not exercised and the evidence supports that finding.

In the case presented herein reasonable judgment seems to have been entirely absent. I can find no excuse for such a disregard of its use. I am quite sure that the signal being up permitting the crossing was no excuse for disregarding this statutory obligation, otherwise there would have been no occasion or need for enacting section 278.

The latter was an added, independent and imperative safeguard which experience, no doubt, had dictated was necessary; and it is to the observance, or non-observance, of that alone, and the possible relation of that non-observance to the accident in question, that we should direct our attention in this case.

The primary object of this statutory safeguard probably was to avert the possible collision of crossing trains, whilst at the same time protecting those employed in the complicated situation often found co-existent with such crossings.

But its existence and observance was something which all those working at the point of crossing, or immediately thereabout, had a right to rely upon for their protection.

And all the more so when working under the peculiar conditions in question of removing a wrecked train, as respondent had been doing for twenty-two hours on a stretch up to the very moment of the crossing, and (after putting away his tools) he had picked up his lantern and was necessarily crossing the track on his way home.

Had the statute been duly observed on that occasion, it seems quite clear he would not have been touched by the appellant's train.

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Idington J.

Had he been a mere casual trespasser he might have had no ground in law to complain.

But as a man lawfully engaged in his employment at the place in question, he was entitled to that measure of protection which a due observance of the statute would have produced.

The circumstances in which he was placed, by reason of the appellant's non-observance of the statute, rendered the conditions for his discharge of duty far more hazardous than need have been.

There is thus to my mind evidence of the natural sequence connecting the illegal act of appellant with the injuries suffered by respondent, which, of necessity, had to be submitted to the jury.

I find no difficulty in understanding the verdict of the jury in light of the evidence and the learned judge's charge.

I fail to understand the relevancy of the case of the *Grand Trunk Ry. Co.* v. *McKay* (1) relied upon by counsel for appellant.

According to the construction put therein, by the majority of this court, upon the statute there in question, the railway company had duly observed the terms thereof.

I think the appeal should be dismissed with costs.

ANGLIN J.—I was much impressed during the argument by Mr. Robertson's ingenious and forceful contention that the failure of the employees of the defendant company to stop its train at a reasonable distance east of the distant signal could not have been the proximate cause—*causa causans*—of the injury to the plaintiff, but was as most a remote cause or

(1) 34 Can. S. C. R. 81.

cause *sine quâ non*. If all that the jury were entitled to infer from this omission of duty was that if it had been fulfilled the train would not have reached the crossing until the plaintiff had passed over it, I incline to think Mr. Robertson would be right. But it seems to me that the jury was entitled to infer more, and to find that, had the stop been made as required by the statute, the plaintiff would have had a much better opportunity by reason of a reduced speed of the train to escape being run down. Of course nobody can positively affirm that he would have escaped; but as, in the familiar cases of failure to sound the whistle or ring the bell as prescribed by the statute, the jury is allowed to infer that the omission to do so is the cause of injuries sustained at a highway crossing, although nobody can assert that had the bell been rung or the whistle blown the injured person's attention would have been thereby attracted to the approaching train and the accident averted, and the company cannot successfully appeal in such cases from a finding that its negligence was the cause of the plaintiff's injury, so here it seems to be impossible to hold that the jury was not warranted in inferring that the failure to discharge the statutory duty of stopping within a reasonable distance of the diamond crossing was truly a *causa causans* of the plaintiff being run down.

While the additional finding—that the defendants were negligent

> in not * * proceeding with sufficient caution approaching a wreck zone, which was observed—

seems a little vague and indefinite, on turning to the statement of claim I find that, in addition to failing to stop as prescribed by the statute, the only other

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Anglin J.

negligence charged against the defendants is "running at an excessive speed" and "not giving the proper statutory warning on approaching the level crossing." There is no evidence of the latter omission and it is not mentioned in the charge of the learned trial judge. But he does direct the jury's attention specifically to the allegation of excessive speed—"that the train was going at too great a speed" and he tells them that they should

> eliminate from (their) consideration anything except such negligence as caused injuries to the plaintiff.

Although it is not so clear as in the recent case of *British Columbia Electric Ry. Co.* v. *Dunphy*, (1), that the jury's finding of lack of precautions was directed to the specific neglect charged, I incline to think we should not ascribe to them an intention to travel outside the record or to find negligence of which there was no evidence and that we should assume that failure to moderate the speed of the train in approaching the wreck zone was the lack of due caution for which they meant to find the company to blame.

No objection to the findings seems to have been made when they were brought in. If counsel were not satisfied that they were sufficient and responsive to the questions submitted they might have called the attention of the trial judge to the matter and he might have directed the jury to bring in a more specific finding.

On the whole, while the case is undoubtedly close to the line, interference with the judgment appealed from seems to me not to be warranted.

(1) 59 Can . S.C.R.263.

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WABASH RAILWAY CO. v. FOLLICK.

Brodeur J.

BRODEUR J.—This is a railway accident. The action instituted by the respondent claims that as a result of the appellants' negligence he suffered damages. The negligence that is complained of is want of conformity to the statutory provisions of the Railway Act in reference to level railway crossings.

Section 278 of the Railway Act enacts that a train, before it passes over a level railway crossing, must be brought to a full stop.

The question of fact is whether the appellants' railway train did or did not come to a full stop at the place where the law requires them so to do. The evidence is conflicting on that point. The jury was fully charged as to that and they found that the company was at fault. It was also for the jury to determine in those circumstances if there was contributory negligence and their findings are not such that we could consider them as perverse.

The appeal should be dismissed with costs.

MIGNAULT J.—I concur with my brother Anglin.

Appeal dismissed with costs.

Solicitor for the appellant: *Fasken, Robertson, Chadwick & Sedgewick.*

Solicitor for the respondent: *G. H. Pettit.*

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*Mar. 25
*May 4.

GEORGE FAULKNER, (PLAINTIFF) APPELLANT;

AND

ARCHIBALD FAULKNER, (DEFENDANT)..... } RESPONDENT.

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

Will—Testamentary capacity.

A solicitor prepared a will as instructed by the testator who was fully competent when giving the instructions but when the will so drawn was presented for execution he was not in a condition to sign his name and refused to execute it as a marksman. Three days later, on before he died, it was again presented and read over to him, clause by clause, the solicitor, as each was read, asking if he understood it and he indicating that he did. The will was then executed by the testator making his mark the solicitor guiding his hand as he could not see. In an action to set it aside—

Held, affirming the judgment of the Appellate Division (46 Ont. L.R. 69) that the evidence of the solicitor and of the physician in attendance established the mental capacity of the testator to follow the reading of the will and to realize that his instructions had been carried out.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment of the trial judge (2) who set aside the will of Hugh Faulkner.

The head-note states the material facts in this case.

Tilley K.C. for the appellant.

Dewart K.C. and *N. S. Macdonnell* for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 46 Ont. L.R. 69. (2) 44 Ont. L.R. 634.

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FAULKNER v. FAULKNER.

The Chief Justice.

THE CHIEF JUSTICE.—At the close of the argument in this case which was quite elaborate and dealt with every phase of the evidence bearing upon the capacity of the testator to make the will in question alike when the instructions were given for its making on the Tuesday, and again on the Friday when it was executed, I was of the opinion that the appellant had utterly failed to establish the testator's incapacity.

In deference, however, to the opinion of the trial judge to the contrary effect, I have read and carefully considered all of the evidence called to our attention, with the result that I am more strongly confirmed in my opinion.

The Appellate Division which set aside the judgment of the trial judge and affirmed the validity of the will speaks of Mr. Anderson, the solicitor who took his instructions from the testator and drew the will, as a "careful and competent solicitor." He, it appears to me, took great pains to make sure that the testator fully understood the disposition he was making of his property, reading each paragraph over slowly and carefully to him and satisfying himself that the testator clearly understood them. Then we have the evidence of Dr. Forrest, who attended the deceased while he was in hospital and speaks of his mental and physical condition when the instructions for the making of the will were given and when it was read over to the testator, clause by clause, and executed by him.

I agree fully with the judgment of the Appellate Division, delivered by Maclaren J.A., allowing the appeal from the judgment of the trial judge and affirming the validity of the will.

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The decision of the Privy Council in the case of *Perera* v. *Perera* (1), is relied upon in the judgment appealed from and is, I think, peculiarly applicable to the case before us. The head-note to that case reads that

> where a testator is of sound mind when he gives instructions for a will but at the time of signature accepts the instrument drawn in pursuance thereof without being able to follow its provisions, held, he must be deemed to be of sound mind when it is executed.

Lord Macnaghten in delivering the judgment of the Judicial Committee is reported at page 361, as follows:—

> The learned counsel for the appellant did not contend that the witnesses in support of the will were acting in conspiracy or saying what they knew to be false. He said that the will may have been, and probably was, read over to the testator, but that there was nothing to shew that he followed the reading of the will or understood its meaning He adopted the argument of Laurie J., to the effect that it was not enough to prove that a testator was of sound mind when he gave instructions for his will, and that the instrument drawn in pursuance of those instructions was signed by him as his will, if it is not shewn that he was capable of understanding its provisions at the time of signature. That, however, is not the law. In *Parker* v. *Felgate*, (2), Sir James Hannen lays down the law thus: "If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far: I gave my solicitor instructions to prepare a will making a certain disposition of my property; I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.
>
> Their Lordships think that the ruling of Sir James Hannen is good law and good sense. They could not, therefore, hold the will invalid even if they were persuaded that Perera was unable to follow all the provisions of his will when it was read over to him by Gooneratne's clerk. But they desire to add that they see no reason to doubt or qualify the testimony of the witnesses who agreed in saying that the testator was of sound mind when the will was executed.

I would dismiss the appeal with costs.

(1) [1901] A.C. 354. (2) 8 P.D. 171.

IDINGTON J.—The evidence of the solicitor who drew the will in question is, to my mind, conclusive that the testator was, at the time of giving instructions therefor, possessed of testamentary capacity and sufficiently so to give said instructions and to understand the will drawn in accord therewith as read to him, when he assented thereto.

The solicitor, although he had become acquainted with him in the course of serving him professionally, knew nothing of his family relations, save and except what he got from himself on that occasion.

The will which resulted from the instructions so given by the testator, is what, under all the circumstances in question, including the destruction of a previous will, one might not unreasonably expect.

It seems to fit the testator's peculiar circumstances and purposes in a way that would have been impossible had he been in the sort of comatose state some would seem to be inclined to lead us to believe.

The refusal to make his mark on Tuesday, when too feeble to write, shews the man and the mind, in a way to indicate he knew what he was about—and declined to go down as a mere marksman, though too feeble to be quite sure of holding his pen to the end of writing out his signature.

The repeated categorical assent (given on the following Friday when the will was executed) to each clause therein indicates that degree of intelligence and understanding on the part of the testator which has been upheld in many cases as sufficient for the mere execution of a will prepared according to instructions given when testamentary capacity had existed as I find herein.

I therefore think the appeal should be dismissed with costs.

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Anglin J.

ANGLIN J.—Without discrediting and in large part rejecting the testimony of Mr. Anderson, the solicitor who prepared the impeached will, it is, in my opinion, not possible to set it aside. That I am certainly not prepared to do.

The testamentary capacity of the testator on the Tuesday, when instructions for the will were given and it was drafted, is in my opinion well established by the evidence considered as a whole. Although Dr. Forrest undoubtedly left himself open to some criticism as a witness, I cannot regard his testimony as entirely undeserving of credit.

While the condition of the testator on the Friday, when the will was executed, is perhaps more questionable, the weight of the evidence, in my opinion, is that he then had the degree of capacity required under such authorities as *Parker* v. *Felgate*, (1); *Perera* v. *Perera* (2), and *Kaulbach* v. *Archbold* (3).

I would dismiss the appeal with costs.

BRODEUR J.—I concur with my brother Mignault.

MIGNAULT J.—After carefully reading the evidence in this case I am satisfied that the testator, Hugh Faulkner, had sufficient testamentary capacity on the afternoon of Tuesday, January 29th, 1918, after his admission to the hospital, to give instructions for his will. Outside of his brother, the respondent, several independent witnesses saw him on that Tuesday, and state that he was perfectly rational, although severely ill, and with assistance he walked down the stairs and steps of his lodging house, and went to the hospital in a taxi. Shortly afterwards, Mr. Anderson, the solicitor who prepared the will, arrived at the hospital and received the testator's instructions, and unless Mr.

(1) 8 P.D. 171, 174. (2) [1901] A.C. 354, 361.
(3) 31 Can. S.C.R. 387, 391.

Anderson's testimony is rejected as unreliable, the testator fully understood the nature of the disposition which he was making of his property. The will was written out by Mr. Anderson then and there and read over to the testator, but when the time came to sign it, Hugh Faulkner was in a sleepy or drowsy condition, and after a couple of attempts, Mr. Anderson and the nurse thought they had better wait and have him sign another time. Had he then signed the will, I do not think that on the evidence it could be successfully contended that he did not have sufficient testamentary capacity.

Mr. Anderson was called early on Friday, he says, by the superintendent of the hospital, Miss Walkdem, to have the will signed, and it was then that the testator, his hand being aided by Mr. Anderson, for the disease had blinded him, put his mark to the will before three witnesses, including Dr. Forrest, his medical attendant, for whose arrival Mr. Anderson had very prudently waited before proceeding with the execution of the will. The question then was: Could the testator think thus far

> I gave my solicitor instructions to prepare a will making a certain disposition of my property; I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.

(Per Sir James Hannen in *Parker* v. *Felgate* (1), approved by the Judicial Committee of the Privy Council in *Perera* v. *Perera* (2). In fact this test is more than satisfied because Mr. Anderson states:—

> I said to him "Mr. Faulkner, do you know who is speaking? Anderson is speaking." He said: "Yes, oh yes." "Are you willing to have your will signed this morning?" He said "Yes." Then I said "You remember the other day you did not sign your will, you would not make your mark?" He said "Yes." I said "Are you willing to make your mark this morning, I am afraid you cannot

(1) 8 P.D. 171. (2) [1901] A.C. 354.

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Mignault J.

see." He said "Yes." "Well," I said, "the will is the same will that I drew the other day, only we will have to change the date of it to this morning." I think I changed the date right there. Then I read it over to him. I read it clause by clause, and after each clause—Q.—Just a moment. In reading it over to him, what was your judgment as to whether he heard and understood what you were reading? A. He certainly heard and understood, to my mind, what was said.

Mr. Anderson adds that he went back to the clause concerning the appellant, to whom $1.00 only was bequeathed, and asked the testator if he wished to change this legacy, and he answered "No."

As I have said, it would be necessary to reject Mr. Anderson's testimony to decide that the will was not properly executed by a competent testator.

I have considered, of course, the nurses' evidence that Hugh Faulkner, while at the hospital, was unconscious all the time, apparently because they could not get him to speak to them. The expert medical testimony is not sufficiently strong to my mind, characterized as it really is by many qualifications, to discredit the direct evidence of testamentary capacity. The testator, it is clear, was not delirious at any time, he was generally in a state of stupor, from which, however, he could be and evidently was roused, sufficiently, without doubt, to give his instructions for his will on the Tuesday, and on the Friday sufficiently to know that he was executing the will prepared according to these instructions.

The Appellate Division under these circumstances reversed the judgment of the learned trial judge, and after reading the evidence, I would not feel justified in disturbing its judgment.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Irwin, Hales & Irwin.*

Solicitors for the respondent: *Anderson & McMaster.*

THE CITY OF MONTREAL (PLAINTIFF)..... APPELLANT;

1920
Mar. 5, 8.
May 4.

AND

JAMES MORGAN (MIS-EN-CAUSE). RESPONDENT.

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

Municipal Corporation—By-law—Validity—Residential Street—Garage—Constitutional law—Construction—Appeal—Jurisdiction—(Que.) 1 Geo. V., 2nd secs., c. 60—(Que.) 3 Geo. V., c. 54—(Que.) 62 Vict., c. 58—"Charter of the City of Montreal," ss. 299, 300, s.s. 44, 44a, 55, and 300c—"Ontario Municipal Act," R.S.O., 1914, c. 192, s. 406, s.s. 10—Arts. 406, 407, 1065, 1066. C.C.

Subsection 44a of section 300 of the "Charter of the City of Montreal" empowers the municipal corporation "to regulate the kind of buildings that may be erected on certain streets * * * ." By-law No. 570, passed by the appellant, enacts that "the following streets are reserved exclusively for residential purposes" and that "every person offending against the above provision shall be liable to a fine * * * and in default of immediate payment, * * * to imprisonment. * * * ."

Held, Idington and Duff JJ. dissenting, that such by-law is valid and effectual, as a regulation passed under s.s. 44a, to prevent the construction, on the streets named in the by-law, of any buildings other than residential ones and to prohibit the erection there of a public garage.

Per Anglin, Brodeur and Mignault JJ.—The recovery of the penalties prescribed in the by-law was not meant to be the sole remedy available for its enforcement; and the demand for the demolition or undoing of anything done in breach of the obligation which it imposes falls within the purview of art. 1066 C C. Idington J. *contra.*

Per Anglin J.—Power to regulate does not imply, generally, power to prohibit (*City of Toronto* v. *Virgo*, [1896] A.C. 88); but it necessarily implies power to restrain the doing of that which is contrary to the regulation authorized, and, in that sense and to that extent, involves the power to prohibit.

Per Anglin, Brodeur and Mignault JJ.—There is jurisdiction in the Supreme Court of Canada to entertain this appeal, as the matter in controversy affects the future rights of the respondent as to the use and employment of his property. Idington J. *dubitante.* Judgment of the Court of King's Bench, (Q.R. 29 K.B. 124) reversed, Idington and Duff JJ. dissenting.

* PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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THE CITY OF MONTREAL v. MORGAN.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1) reversing the judgment of the Superior Court (2) and dismissing the appellant's, plaintiff's, action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Charles Laurendeau K.C. and *Paul Lacoste K.C.*, for the appellant.

T. P. Butler K.C. and Geo. H. Montgomery K.C., for the respondent.

IDINGTON J. (dissenting).—In this case the appellant by its declaration seeks to have a building valued at $50,000 or over, demolished because someone had in mind the intention to use it when erected as a public garage which it is claimed would be an offence against a by-law of appellant.

No other relief is sought by the conclusion of the declaration.

Counsel for appellant is unable to cite any statutory authority for such a drastic method of enforcing obedience to the requirements of the prohibition of a by-law.

The by-law itself contains none but the ordinary money penalty for the breach thereof and imprisonment as an alternative and in case of persistent breaches imprisonment. An argument is attempted to be founded upon articles 1065 and 1066 of the Civil Code and other articles relevant to obligations.

(1) Q.R. 29 K.B. 124. (2) Q.R. 54 S.C. 481.

I am of the opinion that there is nothing in any one or all of the articles referred to which can be made relevant to what is involved herein, and hence for that sole reason that there is no statutory authority for such a drastic remedy for infringing an alleged by-law, this appeal should be dismissed.

The case has been argued in all its aspects at great length and hence in deference thereto I should perhaps express my opinion as to some of the leading contentions set sp.

The by-law in question it is alleged is founded upon the powers given the appellant by the general comprehensive sections of its charter to enact by-laws for its good government, and of which section 299 gives the specific powers to be exercised by the way of by-law. None of the grounds set forth cover that question.

Then section 300 is relied upon but none of the specific provisions therein seem to touch upon what is involved herein unless it fall within paragraph 44a of section 300 of the Charter, or 55 which read as follows:—

44a. *To regulate the kind of buildings that may be erected on certain streets, parts or sections of streets or on any land fronting on any public place or park* to determine at what distance from the line of the streets, public places or parks the houses shall be built, provided that such distance shall not be fixed at more than twenty-five feet from the said line, or *to prohibit the construction, occupation and maintenance of factories, workshops, taverns, billiard-rooms, pigeon-hole rooms, livery-stables, butcher's stalls or other shops or similar places of business in the said streets, parts or sections of certain streets or on any land fronting on any public place or park,* saving the indemnity, if any, payable to the proprietors, tenants or occupants of the buildings now built or being built or who have building permits, which indemnity shall be determined by three arbitrators; one to be appointed by the city, one by the proprietor, tenant or occupant interested and the third by the two former, and, in default of agreement by a judge of the Superior Court.

55. *To prohibit offensive or unwholesome business* or establishments within the city or within one mile of the limits thereof; to prohibit *the erection or occupation of any offensive buildings in any place or site where they will damage the neighbouring property, and determine the localities where certain manufactories or occupations* may be carried on.

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The by-law 570 relied upon herein to found the claim for demolition, is as follows, as set forth in the appellant's factum:—

> Besides the Penal Clause, By-law No. 570 contains only the following clause:—
>
> "The following streets are reserved Exclusively for residential purposes:—
>
> Durocher, Hutchison, Mance, St. Famille and St. Urbain Streets, between Sherbrooke Street and Pine Avenue."

I can find nothing in this to prohibit such an erection as in question. And I can find no reason founded thereon for the demolition of a building which, admittedly, as to part of it fronting on Mance Street, might be converted into and used as an apartment house.

And as to the major part of it, fronting on another than any of those streets named, by no stretch of imagination can those parts be defined as within the area defined in the by-law.

It is to be observed that this action is not to prohibit the use of the said building or any part of it as a public garage, but solely because it may be adaptable therefor, or any other like purpose, that the desire to demolish it is sought to be gratified.

The attempt founded upon such powers as given to remove factories or workshops from residential districts or prohibit their operation therein must, if ever, be dealt with in a much more specific manner than is done by this by-law.

I need not follow the curious question of a licence having been given expressly to build a public garage and work done on faith thereof, and a lease therefor made of the premises a month before the appellant's authorities changed their minds and attempted to object thereto, and prevent the building being completed.

I see no ground upon which such an action can be founded and enforced resting upon no other right than said by-law; and that itself founded only on such legislative provisions as presented above.

I incline to the opinion that the appeal taken by appellant is not within our jurisdiction but the case having been, subject thereto, fully argued out, I need not form a definite opinion thereon which might be found more difficult to dispose of than the want of legal merits in the appeal itself.

This appeal should be dismissed with costs.

DUFF J. (dissenting).—This appeal should be dismissed with costs.

ANGLIN J.—The facts of this case are fully stated in the judgments rendered in the Superior Court (1) and in the Court of King's Bench (2) and in the opinion to be delivered by my brother Mignault, which I have had the advantage of reading.

I concur in the disposition made by my learned brother of the motion to quash this appeal.

Much was made in argument of alleged permits to construct the public garage in question granted to the respondent by civic officials. I agree with Mr. Justice Carroll when he says:—

> Aucune autorité ne pouvait lui conférer le droit de construire en violation des prescriptions de la loi, et aucune autorité municipale ne pouvait acquiescer à pareille illégalité. Les actes des officiers municipaux ne sont valides que s'ils sont conformes à la loi.

See *Yabbicom* v. *The King* (3).

(1) Q.R. 54 S.C. 481. (2) Q.R. 29 K.B. 124.
(3) [1899] 1 Q.B. 444, at p. 448.

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It may be said that if the respondent is obliged to demolish his building or sustain loss in converting it into a structure to be made use of for some less profitable purpose he will have a legal right to recover damages from the municipal corporation owing to the conduct of its officials and representatives. On that point I express no opinion. But any equitable considerations which he can invoke arising out of what occurred in regard to the granting of the building permits, approval of plans, etc., are more than offset by his acquiescence in the demand of the city that he should change the character of the building in Jeanne Mance St. so as to make it conform to by-law No. 570, his taking out of a permit to complete it as an apartment house and his undertaking that, if not fined in the Recorder's Court (where a prosecution was instituted and carried to conviction) for a breach of by-law No. 570, he would complete the building in accordance with the permit so obtained. I am quite unable to assent to the view of Mr. Justice Martin that the equities of this case are all against the appellant. If not equally balanced, they seem to me rather to preponderate in its favour.

But the question we have to decide cannot be disposed of on equitable grounds. We have to determine whether by-law No. 570 of the City of Montreal is valid and effective to prevent the erection and maintenance of a public garage on Jeanne Mance Street just above Sherbrooke Street. I respectfully adopt the following passage from the judgment of the learned Chief Justice of Quebec.

Je désire écarter immédiatement du débat la considération du montant des dommages que l'appelant pourra souffrir par cette démolition, ainsi que le montant des dommages que les propriétaires voisins pourraient souffrir par suite du maintien du garage—si ce n'est pour souligner l'importance de la cause. Ce point de vue fait appel à

des sentiments auxquels les juges doivent fermer leur coeur. La cour est en face d'une question de loi—et non d'une question d'équité. Si le règlement civique N°. 570 a force de loi, si ce règlement a été violé, il nous faut le dire sans regarder aux consequences.

I also agree with that learned judge that the objections founded on Jeanne Mance Street being called "Mance Street" in the by-law, and on the fact that the frontage of lot 43, of which lot 43-1 (on which the building in question is erected) is a subdivision, is on Sherbrooke street, lack substance. There is no room for any doubt that Jeanne Mance Street is the street intended to be designated in the by-law and the respondent's garage as constructed in fact fronts on that street.

The only questions of real importance to be determined are: (a) whether by-law No. 570 is authorized by the charter of the city of Montreal; (b) whether that by-law is sufficiently clear, precise and definite; and (c) to what consequences a breach of it will subject the respondent.

Paragraph 44 of article 300 of the city charter, set out in the judgment of my brother Mignault, empowers the municipal corporation to regulate the height, construction and materials of all buildings and their architecture, dimensions, symmetry, etc. Paragraph 44 (a)—an amendment of 1 Geo. V. (2 Sess. c. 60)—confers power to pass by-laws

to regulate the kind of buildings that may be erected on certain streets, parts or sections of streets or on any land fronting on any public place or park; to determine at what distance from the line of the streets, public places or parks the houses shall be built, provided that such distance shall not be fixed at more than twenty-five feet from the said line, or to prohibit the construction, occupation and maintenance of factories, workshops, taverns, billiard-rooms, pigeon-hole rooms, livery-stables, butcher's stalls or other shops or similar places of business in the said streets, parts or sections of certain streets or on any land fronting on any public place or park, saving the indem-

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nity, if any, payable to the proprietors, tenants or occupants of the buildings now built or being built or who have building permits, which indemnity shall be determined by three arbitrators: one to be appointed by the City, one by the proprietor, tenant or occupant interested and the third by the two former, and, in default of agreement, by a judge of the Superior Court.

In view of the specific provisions of the charter, I incline to think that any general power to pass by-laws for the good government, etc., of the city conferred by Arts. 299, 300, and 300 (c), cannot be invoked to sustain by-law No. 570, although the article last cited—an amendment of 3 Geo. V. (c. 54)—may, as my brother Mignault suggests, furnish a strong argument against giving a restrictive effect to any of the provisions of the specific clauses—*inter alia*, of paragraph 44 (a) of art. 300.

No other authority than *City of Toronto* v. *Virgo* (1) need be cited for the general proposition that power to regulate does not imply power to prohibit. Thus, under the first clause of Art. 44 (a) the city could not entirely prohibit the erection of any buildings whatsoever on any named street nor could it entirely prohibit the erection within the city limits of any particular kind of building, in the sense in which that phrase is used in paragraph 44 (a). But every power to regulate necessarily implies power to restrain the doing of that which is contrary to the regulation authorized, and in that sense and to that extent involves the power to prohibit. As Rousset says in his work "Science Nouvelle Des Lois," Tôme I, at p. 224:

> Restreindre le champ de la *liberté naturelle*, lui interdire *certains actes déterminés*, c'est en cela et en cela seulement que consiste le pouvoir régulateur de l'autorité législative sur l'exercice des droits individuels des citoyens.—A ce point de vue la loi ne peut être qu'une *prohibition d'action*. La formule de sa rédaction sera donc nécessairement *prohibitive*.—C'est ce qu'il s'agissait de constater.

(1) [1896] A.C. 88, at p. 93.

Compare *Kruse* v. *Johnston* (1). The word "exclusively" in by-law 570, expresses the prohibition of the erection of buildings not suitable for a residential street. Effective regulation of the kind of buildings that may be erected on certain streets necessarily involves the right to authorize the erection of buildings of some descriptions and to prohibit the erection of those of other descriptions on such streets.

The legislature in passing art. 44 (a) certainly did not intend senselessly to repeat the enactment of paragraph 44. It had in that paragraph dealt exhaustively with such matters as materials, height, dimensions, architecture, symmetry and stability. By the phrase "kind of buildings" in art. 44 (a) must therefore be meant something quite different. As the context shews it is with the destination of the building—the use for which it is designed—that that paragraph deals—the kind of building, i.e., industrial, commercial, residential, educational, religious. Of that I cannot conceive any reasonable doubt.

The first clause of paragraph 44 (a) in my opinion, taken by itself, is quite broad enough to empower the municipal corporation to prescribe that in certain streets no buildings other than residences (i.e. private dwelling houses) shall be built, or to enact that from certain streets commercial and industrial buildings shall be excluded. Does anything in the rest of the paragraph require that the *ex facie* generality of the power so conferred should be restricted? The clause immediately following, which deals with the distance of houses from street lines, certainly does not. But it is said that the next succeeding clause

(1) [1898] 2 K.B. 91, at p. 99.

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or to prohibit the construction, occupation and maintenance of factories, workshops, taverns, billiard-rooms, pigeon-hole rooms, livery-stables, butcher's stalls or other shops or similar places of business in the said streets, parts or sections of certain streets or on any land fronting on any public place or park—

clearly indicates that any power of prohibition involved in the right to regulate conferred by the first clause of the ordinance must be restricted to the particular classes of buildings enumerated in such later clause—factories, workshops, etc.—or, if not, that the presence of this express provision for prohibition precludes the implication of any power to prohibit being involved in the right of regulation first conferred, because if such a power to prohibit exists under the first clause, the later clause, "or to prohibit, etc.," is unnecessary and useless. This argument of course assumes that the subject matter of the two clauses is the same.

On an analysis of the paragraph the force of these contentions disappears. In the first place the separation of the clause "to regulate, etc.," from the clause "to prohibit, etc.," by the intervening clause dealing with the distances of houses from street lines, in itself goes far to negative the idea that the latter could have been intended as a particularization of the subjects to which any prohibitive power conferred by the former should be restricted. But the two clauses really deal with different subject matters. The earlier clause has to do only with the erection of buildings; the latter with the construction, maintenance, and operation of a number of things, some of which (e.g. billiard-rooms and butcher stalls) may occupy a comparatively small part of a building. Original erection of buildings is dealt with by the first clause. Reconstruction and occupation of existing buildings come under the second.

In regard to new buildings the legislature has seen fit to confer an unlimited power of regulation. The municipal corporation is given complete discretion as to the kind of new buildings which it will allow to be erected on streets designated by it. But in the case of existing buildings only certain uses of them may be prohibited; and here the power is properly extended to prohibition of occupation and maintenance as well as construction.

The use of the word "construction" in the later clause at first presented some difficulty; but it is properly used in connection with such things as butcher stalls and pigeon-hole rooms in the fitting up of which work of construction is necessary; and in other cases it may well be taken to mean reconstruction or alteration. I find nothing in the subsequent clauses of paragraph 44 (a) which can properly be invoked to restrict the generality of the power conferred by its opening clause.

The concluding provision for indemnity in paragraph 44 (a) obviously refers to cases in which the operation of the by-law would interfere with the use made of structures already built, or to be made of structures in course of erection, or for which permits had issued at the date of its passing. There is nothing to shew that any such cases exist in regard to the streets named in the by-law. Moreover, the statute itself preserves or confers the right to indemnity in such cases and an express provision for it in the by-law would scarcely seem to be required.

Section 1 of by-law No. 570 reads as follows:—

Section 1.—The following streets are reserved exclusively for residential purposes:—

Durocher, Hutchison, Mance, St. Famille and St. Urbain Streets, between Sherbrooke and Pine Avenue.

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It seems to have been practically common ground in the courts below, as it was at bar in this court, that the erection of any building other than a dwelling house fronting on any of the streets named in the by-law would contravene it. I am far from being satisfied, however, that this construction of the words "for residential purposes" is not too narrow. I rather incline to the view that "residential" is used in contra-distinction to "business and industrial" and that such buildings as churches and schools would not necessarily be excluded—that buildings not of a business or industrial character, such as are ordinarily found in exclusively residential districts, are not prohibited. *Wright* v. *Berry* (1).

Nor does this imply such vagueness or indefiniteness in the by-law as would render it invalid.

I fully recognize the force of the general rules that the language of by-laws should be explicit and free from ambiguity, and that by-laws in restraint of rights of property as well as penal by-laws should be strictly construed. But the very statement of the latter rule implies that a by-law is not necessarily invalid because its terms call for construction—as does also another well recognized rule, viz., that a by-law of a public representative body clothed with ample authority should be "benevolently" interpreted and supported if possible. *Kruse* v. *Johnston* (2) It may be a counsel of perfection that in drafting by-laws the use of words susceptible of more than one interpretation should be avoided; but it is too much to exact of municipal councils that such a degree of certainty should always be attained. It would be

(1) 19 Times L.R. 259. (2) [1898] 2 Q.B. 91, at p. 99.

going quite too far to say that merely because a term used in a by-law may be susceptible of more than one interpretation the by-law is necessarily bad for uncertainty.

As Lord Alverstone said in *Leyton Urban Council* v. *Chew* (1)

> I quite agree that a man ought to know what he is required to do, but the answer is that the by-law gives him sufficient information.

Exception had been there taken to the presence in a construction by-law of the words

> or otherwise in a suitable manner and with suitable materials.

See too *Dunning* v. *Maher* (2).

During the course of the argument I directed attention to s. s. 10 of s. 406 of the Ontario Municipal Act, which empowers councils of cities and towns to pass by-laws

> for declaring any highway or part of a highway to be a residential street,

and I put to counsel the question: "Could a by-law passed by the council of an Ontario town in these terms—'B Street is hereby declared to be a residential street'—be successfully attacked as too vague and indefinite to be enforced?" In the application of such a by-law it would of course be necessary to determine just what class of buildings should be permitted in a residential street. But I cannot think that the by-law should therefore be held invalid. That business and industrial establishments are excluded by by-law No. 570 there would seem to be no room for reasonable doubt. Nor can there be any question that a public garage is a business establishment, if indeed it is not industrial as well.

(1) [1907] 2 K.B. 283, at p. 289. (2) 106 L.T. 846.

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I am, for these reasons, of the opinion that by-law No. 570 is valid and effectual, as a regulation passed under the first clause of paragraph 44 (a) of Art. 300 of the charter of the City of Montreal, to prohibit the erection on the part of Jeanne Mance Street here in question of a public garage.

To what consequences has the defendant's contravention of by-law No. 570 subjected him? He argues that he is merely liable to the penalty which the by-law provides and that the plaintiffs have no other means of enforcing it. But a person prepared to do so cannot thus purchase the right to disobey the law. The public interest forbids that the enforcement of the penalty should be the sole remedy for the breach of such a by-law and requires that the regulation itself should be made effective. The general rule of construction that where a law creates a new obligation and enforces its performance in a specific manner, that performance cannot be enforced in any other manner (*Doe d. Murray* v. *Bridges* (1) is of course well established. But that rule is more uniformly applicable to statutes creating private rights than to those imposing public obligations. *Atkinson* v. *Newcastle Waterworks Co.* (2). Moreover whether the general rule is to prevail or an exception to it should be admitted must depend on the scope and language of the act which creates the obligation. *Pasmore* v. *Oswaldtwistle Urban District Council* (3) per Lord Macnaghten. The provisions and object of the Act must be looked at. *Vallance* v. *Falle* (4); *Brain* v. *Thomas* (5).

(1) 1 B. & Ad. 847, at p. 849.
(2) 2 Ex. D. 441, at p. 448.
(3) [1898] A.C. 387, at pp. 397-8.
(4) 13 Q.B.D. 109, at p. 110.
(5) 50 L.J.Q.B. 662, at p. 663.

Here the object and scope of by-law No. 570 make it clear, in my opinion, that the recovery of the penalties prescribed was not meant to be the sole remedy available for its enforcement. A breach of the obligation which it imposes falls within the purview of Art. 1066 C.C., as my brother Mignault points out.

I entirely agree however that the demolition of a costly building should be ordered only as a last resort, and if the owner persists in defying the law, and I concur in the allowance of a further period of six months to permit of compliance by the defendant with the by-law.

The appeal should be allowed with costs here and in the Court of King's Bench and the judgment of the Superior Court should be restored subject to the modification that if within six months the defendant converts the building on lot 43-1 into something permissible under by-law No. 570, the order for its demolition shall not be enforced.

BRODEUR J.—Je suis d'opinion que la motion pour casser l'appel devrait être renvoyée et que l'appel devrait être maintenu avec dépens de cette cour et de la cour d'appel et que le jugement de la cour supérieure devrait être rétabli. Je partage l'opinion de mon collégue, le juge Mignault.

MIGNAULT J.—At the hearing the respondent moved to quash this appeal for want of jurisdiction. In my opinion this motion cannot be granted for the simple reason that the matter in controversy affects the future rights of the respondent as to the use and enjoyment of his property. Mr. Montgomery urged that the interest of the appellant alone was to be considered,

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but here the appellant seeks to have the respondent's building demolished and therefore the matter in controversy relates to a title to lands, to wit the right of the respondent to build on his property, as he has done, and the right of the appellant to demand the demolition of the building so erected. If the appellant is right, the respondent's title and right of use of his land is materially restricted. The motion should be dismissed with costs.

On the merits, the main question is whether the appellant had the right to pass by-law No. 570, and, if this right exists, whether the by-law prohibits the erection of a public garage on Mance Street, so that the appellant would be justified in asking for the demolition of the public garage erected by the respondent.

By-law No. 570, passed in 1915, enacts as follows:—

Section 1.—The following streets are reserved exclusively for residential purposes:

Durocher, Hutchison, Mance, St. Famille and St. Urbain Streets, between Sherbrooke and Pine Avenue.

Section 2.—Every person offending against the above provision shall be liable to a fine, with or without costs, and in default of immediate payment of said fine, with or without costs, as the case may be, to an imprisonment, the amount of said fine and the term of imprisonment to be fixed by the Recorder's Court of the City of Montreal, at its discretion, but such fine shall not exceed forty dollars, and the imprisonment shall not be for a longer period than two calendar months, the said imprisonment, however, to cease at any time before the expiration of the term fixed by the said Recorder's Court upon payment of the said fine, or fine and costs, as the case may be, and if the infringement of this by-law continues, the offender shall be liable to the fine and penalty provided by this by-law for each day during which the infringement is continued.

The first question is whether this by-law was authorized by the appellant's charter, 62 Vict. (Que.) ch. 58, and amendments.

The appellant cites several of the provisions of this charter to which I will briefly refer.

Section 299 of the charter gives the city council the right to pass by-laws for the peace, order, good government and general welfare of the city, and for all matters and things whatsoever that concern and affect the city as a city and body politic and corporate, provided always that such by-laws be not repugnant to the laws of the Province of Quebec or of Canada. And the section adds

for greater certainty, but not so as to restrict the scope of the foregoing provision, or of any power otherwise conferred by the charter,

a list of eighteen subjects, none of which cover the matter now under consideration.

Subsection 44 of section 300 of the charter gives the city council the power

to regulate the height, construction and materials of all buildings * * * to regulate the architecture, dimensions and symmetry of buildings in certain streets * * * to prohibit the construction of buildings and structures not conforming to such regulations, and to direct the suspension, at any time, of the erection of any such building as does not conform to such regulations, and to cause the demolition of any building not conforming to such regulations, if necessary.

Subsection 44a of the same section, as amended, gives the council the power

to regulate the kind of buildings that may be erected on certain streets, parts or sections of streets or on any land fronting on any public place or park; to determine at what distance from the line of the streets, public places or parks the houses shall be built, * * * or to prohibit the construction, occupation and maintenance of factories, workshops, taverns, billiard-rooms, pigeon-hole rooms, livery stables, butcher's stalls or other shops or similar places of business in the said streets, parks, or sections of certain streets or on any land fronting on any public place or park * * *

Subsection 55 of section 300 also enacts that the council shall have the power

to prohibit offensive or unwholesome businesses or establishments within the city or within one mile of the limits thereof; to prohibit the erection or occupation of any offensive buildings in any place or site where they will damage the neighbouring property, and determine the localities where certain manufactories or occupations may be carried on.

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Section 300 c. added by 3 Geo. V., ch. 54, section 9, provides as follows:—

300 c. In order to give full effect to articles 299 and 300 and to extend and complete the same, so as to secure full autonomy for the city and to avoid any interpretation of such articles and their paragraphs which might be considered as a restriction of its powers, the city is authorized to adopt, repeal or amend and carry out all necessary by-laws concerning the proper administration of its affairs, peace, order and safety as well as all matters which may concern or affect public interest and the welfare of the citizens; provided always that such by-laws be not inconsistent with the laws of Canada or of this Province, nor contrary to any special provision of this charter.

I think the statutory provisions which I have cited—and they are the only ones on which the appellant relies—must be read together. Section 300 gives to the city specific powers enumerated in considerably more than a hundred subsections. Paragraph one of section 299 and section 300c are of the same class of enactments, and, standing by themselves, would probably not allow the city to prevent the construction by the respondent of a building for commercial purposes on his own property, (*City of Toronto* v. *Virgo*) (1), although section 300c. shews that it was not intended that sections 299 and 300 should be restrictively construed. Of course the general powers given to the city are not to be repugnant to or inconsistent with the laws of Canada or of the province, and therefore the respondent may, not unreasonably, contend that his right to make full use of his title of ownership under articles 406 and 407 of the Civil Code ought not to be regarded as taken away or restricted by these mere general enactments. But while this is no doubt true, the question still remains whether the respondent's right to make any use he desires of his property is not restricted—and the legislature could undoubtedly restrict it—

(1) [1896] A.C. 88, at pp. 93, 94.

by the specific enactments of section 300 of the charter. I will therefore endeavour to answer this question by considering subsections 44, 44a and 55 of section 300.

Subsection 44 speaks about regulating the height, construction and materials of all buildings as well as the architecture, dimensions and symmetry of buildings in certain streets, and the city is authorized to prohibit the construction of buildings not conforming to such regulations and to cause their demolition if necessary. In my opinion this subsection does not help the appellant.

Subsection 55 concerns the prohibition of "offensive or unwholesome" businesses, establishments or buildings which the city is empowered to prohibit "within the city or within one mile of the limits thereof." It surely cannot be contended that this subsection would apply to a commercial building or a public garage on a street like Mance Street, for if it does the appellant could prevent the erection of public garages or commercial buildings anywhere within the city or within a further radius of one mile. And as to the power to determine the localities where certain manufactories or occupations may be carried on, it seems sufficient to say that By-law No. 570 does not profess to do anything of the kind. The appellant in his factum cites by-law No. 551, which prohibits the erection on either side of Sherbrooke Street between St. Denis and City Councillors Streets, of any public garage, but the by-law here under consideration goes much further and purports to reserve a part of Mance and other streets for residential purposes exclusively.

There remains only subsection 44*a* which allows the city to regulate the "kind of buildings" (in the French text "le genre des constructions") that may be erected on certain streets, parts or sections of streets or on

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any land fronting on a public place or park. It was suggested that by "kind of buildings" is meant the regulation of the mode of construction, architecture, materials, dimensions, height, etc. But that matter is already dealt with in subsection 44, which exhausts the subject in so far as the mode of construction, materials, and the architectural properties of buildings are concerned, so the "kind of buildings" referred to in subsection 44*a*, which was added to the charter by a subsequent amendment, must be the kind, either residential, commercial or industrial, of buildings which may be erected in certain locations. The description of these localities as being certain streets or parts or sections of streets or land fronting on any public place or park would indicate that it was intended to preserve to certain locations a more select or refined character, which, it is urged, is eminently desirable in a large modern city. The evidence shews that Mance Street, above Sherbrooke Street, was an exclusively residential street before the construction of the respondent's garage, and that after the opening of this garage, the neighbours were awakened at all hours of the night by the tooting of motor cars for admission to the garage, which of course was a decided nuisance to the immediate vicinity. The evidence is also that there is a repair shop in connection with this garage, and this would well come within the description of a "workshop" which is among the buildings or establishments which subsection 44*a* permits the city to prohibit in certain streets, parts or sections of streets or land fronting on any public place or park.

I have not lost sight of the possible suggestion that the words "the kind of buildings" should be restricted to the kind enumerated below, to wit, factories, workshops, etc. It may also be said that the word "con-

struction" in connection with the enumeration would be useless if the regulation of the "kind of buildings" that may be erected applies to all buildings that could be constructed in the localities indicated. I think however that the two clauses are severable and bear on different subjects. In the first the question is of the kind of new buildings that may be erected, in the second of the fitting up of existing buildings for the enumerated purposes, and in the latter case I understand the word "construction" in the sense of "alteration" or "fitting up" for a certain purpose. There obviously can be no "construction" of billiard-rooms, pigeon-hole rooms or butcher stalls, in the same sense as the "construction" of a new building. I consequently think that the introductory clause of subsection 44*a* is not cut down by the enumeration, from which moreover it is separated by an independent provision.

I would therefore conclude that under subsection 44*a* the appellant could prevent the construction of any buildings other than residential ones on the part of Mance Street mentioned in the by-law, and this would exclude the public garage which the respondent claims to have the right to build there.

We now have to consider the terms of By-law 570.

The vital enactment of this by-law is contained in the words:—

> The following streets are reserved exclusively for residential purposes:
>
> Durocher, Hutchison, Mance, St. Famille and St. Urbain streets, between Sherbrooke Street and Pine Avenue.

It is contended that this enactment is too vague to have any meaning. I cannot agree with this contention. The reservation of these streets exclusively for residential purposes means that no buildings other than what can properly be considered as residential

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Mignault J.

ones may be erected on them. It is said that this would exclude buildings such as churches or schools. It is unnecessary to express any opinion on this point, for it is obvious that the respondent's public garage is not a residential building. And I may add, merely as an apt illustration, that the Municipal Act of Ontario (R.S.O. 1914, ch. 192, section 406, subsection 10), empowers cities and towns to pass by-laws for declaring any highway or part of a highway "to be a residential street," and this language would certainly prevent the erection, on a street declared residential, of a public garage such as that of the respondent.

I am therefore of opinion that By-law 570 is sufficiently supported by subsection 44*a* and that it suffices to render the respondent's public garage an unlawful one.

It is said that the by-law provides a penalty and that this penalty only, and not the demolition of the building, can be claimed. There are no doubt cases where this argument has successfully been made, but I do not think that here the imposition of a penalty deprives the appellant of any other remedy to prevent the erection of a building in violation of the by-law; on the contrary, Art. 1066 of the Civil Code clearly allows the demand for the demolition or undoing of anything done in breach of an obligation. The facts here are that as soon as it was discovered that the respondent intended to build a public garage fronting on Mance Street, the appellant notified him to desist and he then promised to convert his building into an apartment house, and actually asked for, and obtained, a building permit for this purpose, and wrote to the appellant that he had not proceeded with the work on the Mance Street end of the building except in accordance with the new plans and permit. The

respondent subsequently decided to complete the building as a public garage, but he did so at his own risk, and his pretext that his tenant refused to consent to its being converted into an apartment house, is certainly no excuse for the violation of the by-law.

It is said that the appellant authorized by the building permits which it gave to the respondent the construction of a public garage on Mance Street. The building permits do not bear this construction, for they are limited to the construction of a public garage on lot 67, which is not on Mance Street, and do not allow the construction of a public garage fronting on Mance Street and situate on the rear part (looking from Sherbrooke Street) of lot 43-1 which abuts both on Sherbrooke and Mance Streets.

Objection is also made to the name of "Mance Street" in the by-law, the real name being "Jeanne Mance Street." But there is no doubt as to the identity of the street meant to be dealt with, and the objection cannot be entertained.

I think therefore that the appellant is entitled to succeed, but I would allow the respondent six months to change the destination of his building so as to conform with the by-law, and on his failure to do so I would grant the prayer of the appellant for the demolition.

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

Appeal allowed with costs.

Solicitors for the appellant: *Laurendeau, Archambault, Damphousse, Jarry, Butler & St.-Pierre.*

Solicitor for the respondent: *T. P. Butler.*

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*Feb. 10, 11.
*May 4.

INTERNATIONAL TYPESETTING MACHINE CO. (DEFENDANT)..... APPELLANT;

AND

J. C. FOSTER AND E. H. McARTHUR (PLAINTIFFS)..... RESPONDENTS.

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

Company—Debenture—Lien—Registration—Priority—"Bills of Sale Ordinance," N.W.T. Ord. Cons. (1915) *c.* 43—*"Ordinance respecting Hire Receipts and Conditional Sales of Goods," N.W.T. Ord. Cons. c.* 44—*Alta. S.* (1916) *c.* 3, *s.* 8.

A manufacturing company, under a conditional sale agreement, sold in 1913 certain machinery, and in 1915 the purchaser gave to F. as security for an advance of money a "first mortgage debenture" thereon which was declared to be "a specific charge" as regards the "fixed assets" of the purchaser but was never registered. In 1916, the legislature amended the law respecting conditional sales and it was then provided that, unless a renewal statement of the amount due was registered every two years, the condition of the agreement "should cease to have effect." The vendor did not comply with the provision.

Per Davies CJ., Idington and Brodeur JJ.—By the failure of the vendor to renew the registration of its lien agreement, the priority of the lien over F.'s debenture was lost.

Per Duff and Mignault JJ. (dissenting)—F.'s debenture is a mortgage within the meaning of "The Bills of Sale Ordinance" and, not having been registered, is void against the vendor who is a creditor of the purchaser. *Grand Trunk Pacific Railway Co.* v. *Dearborn* (58 Can. S.C.R. 315), followed.

Judgment of the Appellate Division (1919) 2 W.W.R. 652) affirmed, Duff and Mignault JJ. dissenting.

* PRESENT:—Sir Louis Davies CJ. and Idington, Duff, Brodeur and Mignault JJ.

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APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming the judgment of Ives J. at the trial (1) and maintaining the respondent's, plaintiff's, action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

R. B. Bennett K.C. for the appellant.

H. P. O. Savary K.C., for the respondent.

THE CHIEF JUSTICE.—The issue in this appeal was an interpleader one to determine the priority of the parties' rights to certain property of the Press Publishing Company, Limited, under the respective securities of the litigants.

I am of the opinion that the decision of the trial judge, Mr. Justice Ives, was correct, namely, that the failure of the defendant appellant to renew the registration of its lien agreement on the 3rd day of October, 1917, when the previous registration expired, had the effect of losing the priority of the defendant's lien agreement over the plaintiff's debenture.

This judgment was unanimously concurred in by the Appellate Division.

The appeal, therefore, should be dismissed with costs.

IDINGTON J.—If, as I submit we must, we strictly observe the terms of the interpleader issue herein and read it in light of the facts leading up to its framing and apply the relevant law, the question raised by this appeal is in a very narrow compass.

(1) [1919] 2 W. W. R. 652.

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INTERNATIONAL TYPESETTING MACHINE CO. v. FOSTER.

Idington J.

The appellant, under a conditional sale agreement, agreed to sell for $2,150 in 1913 to the Press Publishing Company, Limited, some printing machines and delivered same to the latter.

The said Press Publishing Company in 1915, gave to the respondents as security for an advance of $6,763.47, a first mortgage debenture, the validity of which as such is not impeached.

The Press Publishing Company, Limited, became insolvent and its property was seized by the sheriff under executions of other creditors than parties hereto and the landlord had later placed in his hands a warrant to distrain for rent. Thereupon an order was made for its winding up.

In the course of proceedings thereunder it was decided by the creditors and others concerned, and affirmed by an order of the Master at Calgary, to transfer to the respondents as holders of said debentures, all the assets, undertaking and business of said company, free from all liabilities of the company subject only to such liens or charges as might exist therein for taxes

or under chattel mortgages or lien notes or agreements or claims for rent entitled to priority over the said debenture but reserving to the said Edward H. McArthur and the said James C. Foster, Jr., all rights which they might have, notwithstanding this order, to resist or contest any claim of mortgage or lien upon the said assets, be and the same is hereby approved.

The Order of the Master proceeded further thus:—

And it is further ordered that the Liquidator be and it is hereby authorized and empowered to carry out and complete such settlement and to sell and transfer unto the said Edward H. McArthur and James C. Foster, Jr. all of the assets, undertaking and business of the said Company, subject to such mortgages and liens as may appear to be a charge thereon in priority to the charge created by the Debenture held by them, and that the acceptance of such transfer shall not prejudice or affect any rights which the said Edward H. McArthur and the

said James C. Foster, Jr. have, or, but for the making of this Order and the transfer hereunder, might have had to resist or contest any such mortgage, lien, charge or encumbrance, and they shall take and hold said assets, undertaking and business subject only to such mortgages, liens, charges and encumbrances as are or were prior to the making of this order, entitled to priority over the charge created by their said debenture, but reserving unto the Intertype Corporation only the right to contest the validity of the debenture held by the said Edward H. McArthur and James C. Foster, Jr., and to take such action or proceedings at its own expense and for its own benefit only as it may see fit, to set aside the same for the purpose only of recovering the amount owing by the Company to the said Intertype Corporation.

F. Clarry,
M.C.

The issue arising out of the foregoing is as follows:—

Whereas the above named James C. Foster, Junior, and Edward H. McArthur affirm, and the above named International Typesetting Machine Company and J. V. Drumheller deny, that certain goods and chattels formerly in the possession of The Press Publishing Company, Limited, seized by the Sheriff of the Judicial District of Calgary under Warrant of Distress from W. R. Hull, are the property of the plaintiffs, or that the plaintiffs have the right to possession thereof, as against the defendants, or either of them; and it has been ordered by order of the Master dated the 14th day of January, A.D. 1919, that the said question shall be tried by a Judge without a Jury at Calgary at a date to be fixed by the Clerk of the Court.

The appellant by its solicitors then gave a written admission of facts for the purposes of this "action," admitting respondents' advance; that it was made on the express condition that a debenture would be issued to respondents to secure its repayment; and further in detail admitted all the legal requirements to constitute, in my opinion, the validity of the debenture, and admit non-payment of the money; and that respondents are the holders of the debenture and had made demand for payment, and that yet it remains unpaid.

There was no reservation of any kind in the appellant's favour in the admission.

The appellant was not at the time of its making the agreement of sale with the Press Publishing Company in law bound to renew its registration of such lien

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Idington J.

agreement as it had, but long before the seizure by the sheriff the law was changed by an amendment of the statute of Alberta, 1916, chapter 3, section 8, which provided that unless registration is renewed

> any such agreement, proviso or condition as is mentioned in Section 1 of this Act, shall cease to have effect and the property or right of possession therein mentioned shall be deemed to have passed to the purchaser.

The appellant made default in complying with the law by failing to renew on 3rd Oct. 1918.

As a result thereof I am of the opinion that its title and right of possession passed to and became vested in The Press Publishing Company, Limited, which was the purchaser.

The moment that occurred, the respondent's claim as against the Press Company became *ipso facto* operative upon that which had so passed and remained so throughout.

Whether other creditors might, in turn, have sought successfully to have impeached that result, by reason of any failure on the part of the respondents to register, in any of the ways which the "Companies Act" or "The Bills of Sale Ordinance" require, is not open on this issue. It might conceivably be open to argument on behalf of such creditors in a proper case. That does not concern us, for all such matters are precluded by the proceedings I have so fully recited leading up to the order transferring the property then in liquidation to the respondents.

And the form of the issue founded thereon, together with the all comprehensive admission of appellant, leaves no room for other creditors or even the appellant itself to start a new issue.

As this way of looking at the case seems to me quite impregnable, I need not pursue the matter further.

I may, however, say that if I could find any flaw in the process of reasoning I adopt, and had to consider the matter from the point of view taken by the court below, I could not see my way to reverse, though I do see in that way of looking at the case a rather wider field for argument not touched upon before us, which rests upon the peculiar provision in "The Bills of Sale Ordinance" contemplating evidently a renewal of debenture mortgages, and again the registration of them being provided in another place.

I confess I have not followed up these respective provisions to see whether in force or not and concurrently so.

But if they are, I may be permitted to say, the sooner the confusion they may create is removed by legislation the better.

I think the appeal should be dismissed with costs.

DUFF J. (dissenting).—The debenture of the 5th April, 1915, charges the "fixed assets" of the company and the charge upon these assets is declared to be a "specific charge." As regards the "fixed assets," therefore, I have no hesitation in holding that the debenture is a mortgage within "The Bills of Sale Ordinance," and, not having been registered, it is, under the authority of the *Dearborn Case* (1), void as against creditors.

By the order of the 27th of December, 1918, the right was reserved to the appellant company alone to contest the validity of the debenture as against the appellant company and the issue directed to be tried is in the following terms:

(1) 58 Can. S.C.R. 315.

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Duff J.

Whereas the above named James C. Foster, Junior, and Edward H. McArthur affirm, and the above named International Typesetting Machine Company and J. V. Drumheller deny, that certain goods and chattels formerly in the possession of the Press Publishing Company, Limited, seized by the sheriff of the Judicial District of Calgary under Warrant of Distress from W. R. Hull, are the property of the plaintiffs, or that the plaintiffs have the right to possession thereof, as against the defendants, or either of them.

The right of the appellant company to contest the validity of the debenture as against the respondents is not open to dispute and the claim of the respondents as affirmants in the issue must, therefore, fail.

BRODEUR J.—I am of opinion that this appeal should be dismissed. I concur with my borther Idington.

MIGNAULT J. (dissenting).—The appellant, in October, 1913, had sold to The Press Publishing Co., Limited, a machine described as "one model A Intertype," for $2,150, the price being payable by instalments, and the title to the property remaining in the appellant until full payment of the purchase price, which however was never fully paid. The agreement was registered as required by the "Ordinance respecting Hire Receipts and Conditional Sales of Goods" (ch. 44 of the Ordinances of the Northwest Territories). In 1916 an amendment was adopted requiring the filing of an annual renewal statement, and the appellant failed to file this renewal statement as it should have done on the 3rd October, 1918, the effect of this failure being, in the words of the statute, that the agreement

shall cease to have effect, and the property or right of possession therein mentioned shall be deemed to have passed to the purchaser or bailee.

On that date however, 3rd October, 1918, the appellant's solicitors sent a distress warrant to the sheriff with instructions to seize the machine, and on

the following day the sheriff answered that the goods were under seizure under a landlord's warrant, so that it would not be necessary to seize under the appellant's warrant, but that he (the sheriff) had placed the warrant on file and would protect the legal amount of the appellant's claim in the event of sale.

While the appellant's title to the machine in question was fully protected by registration, the respondents obtained from the Press Publishing Company, Limited, a first mortgage debenture for an advance of $6,763.47, carrying interest at seven per cent and dated the 5th April, 1915. This debenture contained the following clauses:—

3. The company hereby charges with such payments its undertaking and all its property whatsoever and wheresoever, both present and future and such charge under this debenture as regards the company's fixed assets and good-will is to be a specific charge, and as regards the company's other assets is to be a floating security, but so that the company is not to be at liberty to create any mortgage or charge on its property ranking in priority to or *pari passu* with this debenture.

4. The company may at any time, without notice, pay off this debenture.

5. The principal moneys hereby secured shall immediately become payable if an order is made or an effective resolution is passed for the winding up of the company.

The respondent's debenture was never registered in the Registration Office under "The Bills of Sales Ordinance," nor was it registered with the registrar of joint stock companies.

By "The Bills of Sales Ordinance" chapter 43 of the Ordinances of the Northwest Territories, section 6):

Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which is not accompanied by an immediate delivery and actual and continued possession of the things mortgaged, shall within thirty days from the execution thereof be registered * * *

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and section 11 provides that a mortgage not registered shall be absolutely null and void as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith for valuable consideration.

In *Grand Trunk Pacific Railway Company* v. *Dearborn* (1) this court held that the word "creditors" as used in section 17 of this ordinance—and the opinions of the judges shew that the meaning of this word in sections 11 and 17 was considered for purposes of construction—means all creditors of the mortgagor, and not merely execution creditors. It would therefore appear that even if the appellant is not an execution creditor, its status as a contract creditor of the Press Publishing Co., Limited, would entitle it to treat the mortgage debenture of the respondents, if subject to registration, as being absolutely null and void.

The respondents, however, contend that their debenture was not subject to registration. The learned trial judge, whose judgment was affirmed by the Appellate Division of Alberta, accepted this contention. He said:—

> Clearly the security is not a mortgage but a charge and does not come within the provisions of "The Bills of Sales Ordinance" according to the cases, *Johnston* v. *Wade* (2), and the cases there cited.

I cannot, with respect, agree with this construction of the debenture or of the ordinance. The debenture expressly states that it is to be a specific charge as regards the company's fixed assets and good-will. If such a charge is not of the nature of a mortgage I cannot see how it could affect the company's fixed assets, and if it is a mortgage, it is null and void for want of registration as regards the company's creditors, and the appellant is undoubtedly a creditor of the company.

(1) 58 Can. S.C.R. 315. (2) 17 Ont. L.R. 372.

In *Johnston* v. *Wade* (1), the bond contained the following conditions:—

> The company hereby charges with such payments its undertaking and all its property real and personal, rights, powers and assets of every kind and description, present and future, including its uncalled capital.

In the present case, as I have said, the bond expressly provides that the charge under the debenture

> as regards the company's fixed assets and good-will is to be a specific charge, and as regards the company's other assets it is to be a floating security.

This sufficiently distinguishes this case from *Johnston* v. *Wade* (1), and also from several English decisions relied on by the respondents, where the effect of a floating charge was considered, for here, as to the fixed assets of the company, the debenture was made a specific and not a floating charge.

On this view of the case it does not appear necessary to consider whether the appellant has or has not a lien on the machine it sold to the Press Publishing Company, Limited. It is, however, contended that by the amendment of 1916 it is provided that if the required renewal statement is not filed the conditional sale agreement

> shall cease to have effect, and the property or right of possession therein mentioned shall be deemed to have passed to the purchaser or bailee.

I would think that this enactment would not render the agreement void *inter partes* (see also *Stuart Manufacturing Co.* v. *Whitaker* (2)), but it appears sufficient, as regards any mortgage created by the respondent's debenture, to say that the appellant was and is a creditor of the Press Publishing Company, Limited.

(1) 17 Ont. L.R. 372. (2) 11 Alta. L.R. 495.

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Mignault J.

I have hitherto discussed the questions submitted as they were presented by the learned counsel of both parties, each of whom denied the validity of the lien or charge claimed by the other. I may also add that both courts below dealt with the matter as involving a question of priority between two rival claimants.

The question arose under an order of the Master in Chambers, of the 14th January, 1919, subsequent to the liquidation proceedings taken against the Press Publishing Company, Limited. This order authorized a settlement of the claim of the respondents by transferring to them all the assets of the company free and clear of all debts and liabilities of the company, but subject to such mortgages, liens, charges and encumbrances as are or were, prior to the making of the order, entitled to priority over the charge created by the respondent's debenture, reserving unto the appellant only the right to contest the validity of the debenture, and to take proceedings to set aside the same for the purpose only of recovering the amount owing by the company to the appellant.

Then an interpleader order was made on the 22nd February, 1919, stating as follows the question to be decided:

> Whereas the above named James C. Foster, Junior, and Edward H. McArthur affirm, and the above named International Typesetting Machine Company and J. V. Drumheller deny, that certain goods and chattels formerly in the possession of the Press Publishing Company, Limited, seized by the sheriff of the Judicial District of Calgary, under warrant of distress from W. R. Hull, are the property of the plaintiffs (Foster and McArthur), or that the plaintiffs have the right to possession thereof, as against the defendants (International Typesetting Company and Drumheller) or either of them; and it has been ordered by order of the Master dated the 14th day of January, A.D. 1919, that the said question be judged by a judge without a jury at Calgary, at a date to be fixed by the Clerk of the Court:

Therefore let the same be tried accordingly.

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On the question thus submitted, I am of opinion, for the reasons above stated, that this question should be answered in the negative. I do not however wish to be understood as passing in any way on the rights of any creditor who had seized the machine in question, if any such rights can now be asserted.

The appeal should, therefore, be allowed with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellant: *Lougheed, Bennett & Company.*

Solicitors for the respondents: *Savary, Fenerty & Chadwick.*

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*May 19.
*June 21.

PETER HEICHMAN (DEFENDANT)..APPELLANT;

AND

NATIONAL TRUST COMPANY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Marriage—Contract—Ante-nuptial representations—Administrators.

H., desiring to marry S.'s daughter, went with S. to H.'s father, who verbally told them he was giving to H. some land and certain chattels. S. then consented to the marriage, which took place afterwards. H. and his wife resided on the land and brought there some of the chattels but after H.'s death, his father removed them.

Held that H.'s administrators could enforce the transfer of the land and the recovery of the chattels against H.'s father.

Held also that H.'s father was bound to make good his representations on the faith of which the marriage took place. Mignault J. *dubitante.*

Per Mignault J.—The ante-nuptial promise by the father was a contract of gift and the subsequent marriage was a valuable consideration to support it.

Judgment of the Court of Appeal (13 Sask. L.R. 22; [1920] 1 W.W.R. 220) affirmed.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) affirming the judgment of the trial judge and maintaining the respondent's action.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 13 Sask. L. R. 22; [1920] 1 W.W.R. 220.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Geo. A. Cruise for the appellant.

J. M. Stevenson for the respondent.

THE CHIEF JUSTICE.—I must say that, alike during the argument at bar and since then during my reading and examination of the case and factums, I entertained some misgivings as to the soundness of the judgment appealed from.

The question seems to me reduced to this: Had Stephen Heichman, the defendant's son, at the time of his death such a cause of action as entitled him to maintain an action against his father either for specific performance of his alleged agreement to give and convey to him the two-quarter sections of land in question or, in the alternative, for damages, as claimed in the statement of claim. If he had not, it goes without saying that the plaintiff company, as administrator of his estate, could not maintain the action.

I have reached the conclusion that the findings of fact by the learned trial judge are clearly such as the evidence justified. His rejection of the evidence of Paul Serak and his complete discrediting of him and his acceptance of the evidence of Solinak and Antonenko as to what took place between the father and the son when the written document signed by the defendant, the father, purporting to evidence that he had conveyed the half-section of land in question to his son was read and that this was done and intended to be done in consideration of his son marrying Mary, the daughter of the witness Solinak, coupled with the

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fact that such document satisfied the father of the intended bride who gave his consent to the marriage which shortly afterwards took place, satisfy me that the judgment of the Court of Appeal was right and the ground on which it was based of estoppel was sound.

The deceased son was induced to change his condition in life and enter into a marriage with Mary Solinak on the explicit statement made and the written document signed by defendant and read by the son in the father's presence to his future father-in-law that he, the son, was the owner of the half-section of land in controversy, as he, the father, had transferred the half-section to his son or was about doing so.

It does seem to me that the son having been thus induced to change his condition in life and assume the duties and responsibilities of married life could enforce that contract as against the father, the defendant herein, and that the latter would, in equity, be estopped from repudiating his representations of fact respecting the ownership of the half-section in question or "from setting up his own iniquity as a defence."

The representations of fact made by the defendant and which resulted in the marriage of his son related to, and covered as well, the personal property involved in the action. His representations were that he was giving the half-section of land to his son and the horses and machinery necessary to work the same.

I concur in the judgment of the Court of Appeal as stated in the reasons for judgment of Mr. Justice Newlands on the main and substantial question before us, which I think is sufficiently supported by the authorities to which he refers.

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I cannot, however, agree with respect to the point of a partnership reference on which he thinks an amendment of the trial judge's judgment should be made. No such question was pleaded by the defendant, or in issue, or thrashed out at the trial and I would restore the trial judge's judgment unamended, excepting that the extension of the time given for the return to the plaintiff of his personal property should date from the day of this judgment.

I think this appeal should be dismissed with costs.

IDINGTON J.—I am of the opinion that the finding of facts by the learned trial judge was amply justified by the evidence assuming he was right, as a perusal of the relevant evidence assures me he was, in utterly discrediting the witness Serak as he did in a minor degree the appellant.

It might have been more satisfactory had the learned trial judge expressly said his finding was arrived at and intended to be applied in light of and in conformity with the statement of the law correctly stated by the learned judges in the Court of Appeal.

There is no doubt that they viewed the facts disclosed in the evidence as relevant to the principles of law upon which they proceeded.

It is very easy to confuse a representation of an existent fact with a promise to produce a condition of things in harmony therewith.

I see no reason to think that the Court of Appeal has done so and thereby erred in the application of the relevant law upon which they rely.

The mode of thought, and expression given thereto through interpreters, as in this case, is much more likely to have been correctly appreciated by the

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learned judges in appeal, by reason of their experience in dealing with the like incidents of a trial in the province of Saskatchewan, than we who have not had the same, though possibly something analogous, in our respective experience.

We should, therefore, be slow to reverse in such a case where we find the Court of Appeal has correctly apprehended the principle of law upon which they profess to act and apply thereto the evidence presented under such like difficulties.

Moreover, it is quite clear that what Solinak saw appellant about, was to be assured of the existent financial condition of his proposed son-in-law, in order to secure the future happiness of his daughter whose marriage he was being asked to consent to.

He left convinced by the appellant's actual representations and conduct that what had been done to satisfy him in that regard had in fact, by and in conformity with the representations or silence giving consent thereto as actual representations of fact, been accomplished.

I am, therefore, not disposed to act upon mere criticism of forms of expression of an interpreter suggesting another possible meaning than that which the court below has placed thereon, when clearly seized, as that court seems to have been, of the principle of law to which the evidence must be applied.

I therefore think the appeal fails.

But in regard to the cross-appeal I doubt if the facts in any way one can look upon them, give any title to the measure of relief which the court below has given.

If the parties are well advised they can reach a much more equitable result than anything based either upon the assumption of any partnership to be

implied from the facts or adjustment based thereon, or anything analogous thereto, and would suggest they attempt same before the cross-appeal is finally disposed of.

In the event of their failure we must dispose of same as best we can.

Meantime I would dismiss the appeal with costs and suspend the disposition of the cross-appeal for such brief period as the parties may intimate a desire for their attempting to consider same.

ANGLIN J.—Although I was at first somewhat in doubt, on further consideration of the evidence of Efram Solinak and George Antonenko, in the light of all the circumstances, I think it sufficiently supports the finding that a representation was made by the defendant that his son, Stephen, was the actual beneficial owner of, if not the legal holder of the title to, the half-section in question. I see no good reason why the plaintiff, as personal representative of Stephen Heichman and as trustee for Mary Heichman, whose intermarriage took place, as the defendant knew was intended, on the faith of that representation, cannot maintain this suit. It is not necessary to discuss the other grounds of action preferred by the plaintiff, viz., actual conveyance and contract to convey. For the reasons more fully stated by Mr. Justice Newlands I would dismiss the appeal with costs.

BRODEUR J.—This is an action instituted by the administrator of the deceased Peter Heichman for a transfer of a half-section of land in Saskatchewan and the return of certain chattels.

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The deceased was married to Mary Solinak under the following circumstances:

He went to see her at Battleford where she was living and she expressed then her willingness to marry him provided her father would be agreeable. The father of the bride, before giving his consent, wanted to know about the financial situation of the young man, met his father and there it was represented to him that the prospective son-in-law was the owner of the half-section in question in this case and of certain chattels. He was shewn a typewritten paper describing the son as the owner. The father of the young girl was satisfied with the representations made and the marriage took place a short time afterwards.

The young man and his wife resided with his father for a while and then went to settle on this half-section where he died a few months after.

After his death (the young wife being herself very sick) his father brought her to his house and removed all the chattels from the half section, and even the money which the young couple possessed.

Soon after the young wife was removed to some other place and the present action in recovery of the land and of the chattels is now instituted.

The defendant claims that his son was to give him a certain sum of money, viz., $3,000, and that credit was to be given on the purchase price of the half-section and that the contracts to that effect, though drafted, were never executed.

The evidence is somewhat conflicting as to what was said and done; but the trial judge and the Court of Appeal accepted the evidence of the plaintiff.

This evidence shows that the defendant represented to the father of the bride that his son was the owner of the property in question and that the payment of a sum of $3,000 was never mentioned.

What has become of the slip of paper which was read at the interview between the two fathers? The respondent denies its existence but the court has found that such a document was read. Has this document been taken by the appellant from the house of his son when he took away everything, even the money? Of course the appellant denies that but such a thing might have occurred.

There is no doubt that the evidence as accepted by the courts below is to the effect that the appellant represented that his son was the owner of the land and chattels in question. The law is that where upon proposals of marriage third persons represent anything material in a light different from the truth they shall be bound to make good the statement they make. *Montefiori* v. *Montefiori* (1), *Mills* v. *Fox* (2).

The appeal should be dismissed with costs.

There is a cross appeal.

The trial judge has charged the defendant with the value of the whole crop. The evidence shows, however, that this crop had been put in by the defendant himself and that he should not be charged with the whole value thereof and a reference was ordered to determine what amount should be properly charged to the defendant. The cross-appeal should be held over in order to give the parties an opportunity to settle.

(1) I Wm. Bl. 363. (2) 37 Ch. D. 153, at p. 162.

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MIGNAULT J.—In this case the evidence is very conflicting and the learned trial judge, on the vital fact as to the ownership by the appellant's son, Stephen Heichman, of the south half of section 30 of township 38, believed the testimony adduced by the respondent in preference to that of the appellant's witnesses. He did not, however, state specifically the facts found by him, being content with saying that he found that the facts were as alleged by the witnesses on behalf of the respondent. Reference must therefore be had to this testimony, which was taken through an interpreter, the witnesses being Russians.

The story is that Stephen Heichman desired to marry Mary Solinak and asked the latter's father, Efram Solinak, to allow the marriage, pretending that he owned two farms. Thereupon Solinak, to make sure of Stephen's prospects in life, went with Stephen and one George Antenenko to see the appellant. I quote from his testimony.

Q. What was said to Peter Heichman?

A. I told Peter Heichman, "Your son wants to marry my daughter."

Q. Yes?

A. Stephen told me that he had two farms, that you were giving him four horses and all the machinery.

Q. Yes?

A. Peter Heichman then said, "Yes, I am giving those."

Q. Did he say he was giving the land too, as well as the machinery?

A. Then I asked, "In whose name stands the land? Is the land standing?"

Q. Yes?

A. "The land is in my name but I am giving it to him. He is my son."

Antenenko swore:

Q. What took place?

A. We came over there to Peter Heichman's after 12.

Q. Yes?

A. Only John was home, and the children. Stephen then told John to go and get the father.

Q. Yes?
A. Then the father came and we got acquainted.
Q. Yes?
A. Solinak then started to ask questions.
Q. What about?
A. "Your son wants to marry my daughter."
Q. Yes?
A. 'He says he has two farms, four horses, and all the machinery."
Q. Solinak said that to Peter?
A. Yes.
Q. And what did Peter Heichman say?
A. Peter Heichman then said, "Yes, that is right." Peter Heichman (should be Solinak) then asked in whose name was the land.
Q. Peter Heichman asked?
A. Solinak asked Peter Heichman in whose name was the land.
Q. Yes?
A. And Heichman then said, "It is in my name."
Q. Yes?
A. "Are you going to make this transfer over to Stephen?" "Yes, all right."

That conversation took place late on Sunday night, the 10th February, 1918. On the Monday morning, the 11th, the appellant went with Stephen to see a Justice of the Peace, one Paul Serak, and the two afterwards returned with a typewritten paper, which Stephen read to Solinak and Antenenko in presence of the appellant. The former gives the contents of the paper as read as follows:

I, Peter Heichman, give the south half of section 30, township 38, range 11, to my son Stephen, to my son I am giving this land.

Antenenko's version is:—

I, Peter Heichman, turn over to Stephen Heichman the south of 30, half section 11-38; 38-11.

This satisfied Solinak and he consented to the marriage and returned home. The marriage took place on March 1st, Stephen brought his wife home, and afterwards the appellant built him a house on the south half of section 30, where he resided until his death in October of the same year.

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The difficulty of the respondent's case is no doubt increased by the fact that if such a paper ever existed it has disappeared, and this renders it imperative to carefully scrutinize the secondary evidence by which it is sought to prove its contents. The same critical scrutiny must be directed to the evidence by which the appellant attempted to contradict this secondary proof, for he afterwards called Paul Serak, the Justice of the Peace whom the father and son went to see on February 11th, and Serak stated that he had drawn up a paper purporting to be a receipt from the appellant to Stephen for the sum of $3,000, as a first payment on some land, and he is not sure whether the land was described in the receipt. Serak also said that he had subsequently prepared a formal agreement of sale of the land in question which was never signed, and one of the copies of which he files. The trial judge however did not credit Serak's testimony, and the alleged receipt is not produced, so I will not further consider Serak's story.

Apparently the learned trial judge considered the evidence sufficient to show that a gift had been made by the father to the son in consideration of the latter's marriage to Solinak's daughter. In the Court of Appeal, the learned Chief Justice of Saskatchewan, very reluctantly he said, acquiesced in the strong findings of the trial judge. Mr. Justice Newlands, with whom Mr. Justice Lamont concurred, based his judgment in favor of the respondent on a representation made by the appellant to Solinak, Antenenko and Stephen Heichman, that he had given this farm and the implements to Stephen, estopping the appellant from now denying the truth of this representation.

Mr. Cruise, who very ably argued the case on behalf of the appellant, contended that if the respondent relied on a contract of gift by the appellant to Spephen, no action could be taken on such a contract under the statute of frauds in the absence of a memorandum signed by the appellant. He further urges that no sufficient consideration has been shown for a gift of, or a promise to give, the land to Stephen. And as to the claim of estoppel founded on representation, Mr. Cruise argued that there was no representation of an existing fact, but at the most a representation, in the first interview, that the appellant would make over the land to Stephen. In regard to the document read in the second interview, Mr. Cruise urged that no existing fact was then represented but merely a statement made as to its contents. He further contended that if there was any representation, it was made to Solinak who is not a party to the action.

As to the contention based on the statute of frauds, I may say that the appellant did not plead the statute. Moreover this contention is fully answered by the evidence given by Solinak and Antenenko and believed by the learned trial judge of the contents of the writing read by Stephen in the appellant's presence, which writing was stated to have been signed by both the appellant and Stephen. This writing, it is true, has disappeared, but evidence was made without objection of its contents and I have no doubt that where a sufficient memorandum in writing under the statute of frauds is proved to have existed but to have been lost, secondary evidence of its contents can be made. As sworn to by both Solinak and Antonenko, the document read by Stephen satisfies all the requirements of the statute.

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Then as to consideration, marriage is a valuable consideration to support an ante-nuptial promise by a third person (Halsbury, Contract, No. 803). *Shadwell* v. *Shadwell* (1), is in point. There the plaintiff's uncle had promised an annuity to the plaintiff on hearing of the latter's intention to marry. It was held that the marriage was sufficient consideration to support the promise. Mr. Cruise attempted to distinguish the case of *Shadwell* v. *Shadwell* (1) by saying that here the promise was made to obtain the consent of the prospective father-in-law to the marriage and not to Stephen to induce him to marry. It must not be forgotten however that Stephen was the person chiefly interested in obtaining both the consent of Solinak, which would permit of his marriage, and the settlement on him of the land which would aid him in discharging the added pecuniary obligations resulting from his marriage. In the words of Erle C. J. Stephen

> may have made a most material change in his position, and induced the object of his affections to do the same, and may have incurred pecuniary liabilities resulting in embarrassments which would be in every sense a loss if the income which had been promised should be withheld. (*Shadwell* v. *Shadwell* (1) At page 174.

I must therefore think that the objection as to want of consideration is not well taken.

Thus far I have considered the respondent's claim in so far as it can rest on a contract. I think the trial judge and the Chief Justice of Saskatchewan so viewed it. As I have said, however, the two other judges of the Court of Appeal preferred to base their conclusions on a representation made by the appellant that he had given the land to Stephen, estopping him from now denying the gift. I cannot free myself from

(1) 9 C.B. N.S. 159.

doubt that this ground should be adopted. So far as there was representation, it would appear that it was solely made to Solinak, and Stephen, by reading the document signed by him and his father, was, in a way, a party to this representation. But so far as there was a contract, it was made with Stephen and my opinion is that it was sufficiently supported by the consideration of Stephen's marriage. On this ground I think the learned trial judge was right in giving judgment to the plaintiff.

I would dismiss the appellant's appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Cruise, Tufts & Lindal.*

Solicitors for the respondent: *Bence, Stevenson & McLorg.*

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*May 20.
*June 21.

THE MONTREAL COTTON AND WOOL WASTE COMPANY (PLAINTIFF) ..... APPELLANT;

AND

THE CANADA STEAMSHIP LINES (DEFENDANT) ..... RESPONDENT.

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

Carriers—Liability—Damages—Bill of lading—Cost price—Market value—Arts. 1073, 1074, 1675 *C.C.*

Where a bill of lading contains the following clause: "The amount of loss or damage for which any carrier is liable shall be computed on the basis of the value of the goods at the time and place of shipment," the damages occasioned by the loss of a shipment of goods must be calculated at the market value of these goods at the time and place of shipment, and not at the cost price of the goods to the owner at the place where he bought them plus the charges for freight.

Judgment of the Court of King's Bench (Q.R. 29 K.B. 186) reversed.

APPEAL from the judgment of the Court of King's Bench, Appeal side, Province of Quebec (1), modifying the judgment of the Superior Court and maintaining the appellant's action in part.

PRESENT.—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

J. L. Perron K.C., for the appellant.

A. Wainwright K.C., for the respondent.

THE CHIEF JUSTICE.—At the close of the argument the court was unanimously of the opinion that the appeal should be allowed and the judgment of the trial judge restored on the ground that the contract or bill of lading for the carriage of the goods fixed and determined the damages for which the defendant might become liable, namely, on the basis of the value of the goods at the time and place of shipment.

The defendant company did not dispute their liability for damages, the goods having been destroyed by their negligence during their transit. The sole question was as to the proper test by which their liability for damages should be determined. The defendant's contention was that their liability should be determined from the cost to the plaintiffs of these goods under their contract with the Dominion Textile Co., Ltd., by which they agreed to purchase the entire output of the mills for four cents per pound for one year. That price so agreed to be paid was the value, they contended, of the goods in Quebec on which their liability should be based and determined.

The trial judge held that the true value of the goods to the plaintiff under the contract of carriage was not the cost or price at which they purchased them from the mills but what they would fetch in the open market at the time and place of shipment and assessed the damages on that basis at eight cents per pound, or $2,010.24.

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The Court of King's Bench (1) reversed this finding, holding that the purchase price at which the plaintiffs bought from the mills was the test of value of the goods under the contract of carriage to them for the loss of which only they could recover, and accordingly reduced the damages by half or to $1,005.12.

I am of opinion that the Court of King's Bench erred in the test they accepted as to the value of the goods at the time and place of shipment. That value, I think, was not the price which under a yearly contract for the entire output of the textile company's mills they had bought the goods for, but the market value of those goods to them at the time and place of shipment of the goods. Their contract for the purchase of the entire output of the mills may or may not have been a good one; it may or may not have been improvident. It is not evidence of the market value of the goods at the time and place of shipment which was proved independently as very nearly double the cost to them from the mills. The carrier had nothing to do with that price. If they had paid double the market value, they certainly could not recover such value from the carrier, nor can the fact of their having purchased at less than the market price at the time of shipment avail against the market value. An ordinary purchase in open market would be very different.

The evidence uncontradicted at the trial shewed that the goods had been purchased by plaintiffs for resale in Montreal where their market value at the time of shipment was between 8 and 8 5-8 cents per pound and that the only difference between the market value in Quebec and Montreal was the cost of

(1) Q.R. 29 K.B. 186.

carriage from Quebec to Montreal. This cost, $71.25, was no doubt inadvertently not deducted from the damages awarded in the Superior Court and must be, of course, deducted now.

In some way or another which has not been explained this vital and necessary evidence of the market value of the goods in Quebec at the time and place of shipment was overlooked by the Court of King's Bench. There, however, we find it in the record clear and distinct and uncontradicted, and so finding it must render our judgment accordingly.

A question was raised during the argument as to whether the bill of lading or contract of carriage was not illegal as contravening the 4th section of the statute 9 & 10 Ed. VII, ch. 61, but as the defendants, respondents, so far from relying on that section distinctly rest their case upon the validity of the contract I do not deem it necessary to discuss the question.

In my judgment the appeal must be allowed with costs and the judgment of the Superior Court restored with a reduction of the amount by the sum of $71.25, the cost of the carriage between Quebec and Montreal.

The case of *Wertheim* v. *Chicoutimi Pulp Co.* (1), is, I think, much in point in some of the material points involved in this appeal. The head-note of that case in the Law Journal report states the decision of their Lordships to have been, *inter alia*, as follows:

> Where a contract provided for the delivery of goods at a place where there was no market for them, damages for non-delivery should be calculated with reference to the market at which the purchaser, as the vendor knew, intended to sell them, with allowance for the cost of carriage.

(1) 80 L.J. P.C. 91; [1911] A.C. 301.

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Idington J.

IDINGTON J.—The only evidence we have for our guide as to the value of the goods in question when destroyed, explicitly puts them at market prices in Montreal supplemented by clear and express evidence of their value in Montreal at the time in question and further, in accordance with common sense that their value in Quebec, the point of shipment in question, was the same less the expense of transportation from Quebec to Montreal.

Thus, even under the contract insisted upon by the respondent—of the legality of which there may be a doubt upon which I do not pass because the point was not taken below—the value is amply demonstrated.

What right has the respondent to reduce the value to the cost price, at another point than Quebec, of the goods which may have been got at a bargain, due to business foresight on the part of appellant, long before the time in question?

The appeal should be allowed with costs and the damages assessed on the basis of the market value sworn to.

ANGLIN J.—The defendants come into court admitting liability. The sole question at issue is the measure of damages to which the plaintiffs are entitled. The defendants assert that that measure is fixed by the terms of the special clause in the bill of lading under which the goods were shipped for the loss of which the plaintiffs sue. The plaintiffs contest the validity of this special clause on the ground that it contravenes s. 4 of c. 61 of 9 & 10 Ed. VII. (D.). But it is probably unnecessary to determine that question and I express no opinion upon it.

Assuming the validity of the special clause of the bill of lading relied upon, I find myself, with great respect, unable to agree with the view, which seems to have prevailed in the Court of King's Bench (1), that by "the value of the goods at the place and time of shipment" (in this case Quebec) the parties meant the cost price of the goods to the owner at the place where he bought them (in this case Montmorency) plus the charges for freight. I find no justification for such a departure from the ordinary meaning of plain language. "Cost price plus freight" and "value" are by no means the same thing. The utmost that can be said is that the former may afford some evidence of the latter.

The only evidence in the record is that the value of the goods in question was the same in Quebec as in Montreal, due allowance being made for the cost of transportation; and the uncontradicted testimony is that the goods could not have been replaced at the time they were destroyed.

The only evidence of value was given by the plaintiff's manager who tells of actual sales in Montreal on September 4th at 9½ cents, on September 6th, at 8 7-8 cents and on September 26th at 8 cents. The learned trial judge found the value at the date of the breach (Sept. 12th) to have been between 8 and 8 5-8 cents a pound. He fixed the value "within the terms of the bill of lading" at 8 cents a pound and allowed the plaintiffs as damages on that basis, $2,010.24.

Counsel for the appellant conceded at bar that there should be a deduction from this amount of $71.25 to cover cost of transportation. I rather think it should be $^{44}/_{50}$ ths of that amount ($62.70)

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since six bags out of the fifty were duly delivered, only 44 having been destroyed. The learned trial judge appears to have fully intended to make this deduction as two *considerants* in his judgment shew. He apparently omitted to do so when finally computing the amount of the damages.

I would allow the appeal with costs here and in the Court of King's Bench and would restore the judgment of the Superior Court modified however to the extent indicated.

BRODEUR J.—L'intimée est une compagnie de navigation qui, en septembre 1918, a reçu à Québec de la Dominion Textile Co. quarante-quatre balles de déchets de coton et s'est chargée de les transporter à Montréal sur l'un de ses bateaux.

Elle avait stipulé dans le connaissement que le montant des dommages qu'elle pourrait encourir devrait être basé sur la valeur de ces marchandises au port d'expédition, c'est-à-dire à Québec.

Je serais porté à croire que cette clause du connaissement fût illégale si elle eut pour effet de restreindre ou de diminuer la responsabilité du propriétaire du navire, car je crois qu'elle violerait la "Loi du transport des marchandises par eau" (9 & 10 Ed. VII, ch. 61). Mais il n'est pas nécessaire de décider cette question dans la présente cause, car le litige ne porte que sur la signification des mots suivants du connaissement, "value of the goods at the place and time of shipment."

L'appellant prétend que la compagnie de navigation, ayant perdu ces quarante-quatre balles de déchets, doit lui rembourser la valeur marchande de ces balles, soit environ huit cents la livre. L'intimée

prétend qu'elle n'est tenue de rembourser que le prix d'achat, soit quatre cents la livre. La cour supérieure a décidé en faveur de la demanderesse-appelante; mais en cour d'appel l'intimée a eu gain de cause (1).

Les articles 1073, 1074 et 1075 du code civil nous indiquent comment les dommages-intérêts doivent être calculés. Si un contrat est inexécuté, les dommages-intérêts dus par celui qui y contrevient doivent remplacer tout l'avantage sur lequel le créancier pouvait raisonnablement compter, et le débiteur n'est tenu responsable que des dommages qui ont été prévus et qui sont la suite immédiate et directe de cette inexécution, à moins qu'il y ait dol de sa part; et personne ne suggère que l'intimée s'est rendue coupable de dol.

Dans le contrat de transport, si le voiturier perd la chose, il doit en rembourser la valeur intégrale. (Baudry-Lacantinerie, 3ème édition, vol.22, n.° 2574).

Il est admis par les deux parties que la responsabilité de la compagnie de navigation doit être déterminée dans le cas actuel par la valeur des effets au port d'expédition. Or, quelle est cette valeur?

L'intimée dit que c'est le prix payé par la demanderesse à la Dominion Textile Co. La demanderesse prétend que le prix qu'elle a payé était très bas et ne représentait pas la valeur actuelle du marché. Et elle prouve par un témoin dont la déposition n'est pas contredite que la valeur actuelle de ces effets était d'environ huit cents la livre. Il nous dit qu'à Québec il était impossible de se procurer sur le marché des marchandises de cette nature et que l'endroit le plus rapproché où l'on pouvait les avoir était à Montréal où elles valaient environ huit cents, plus les frais de transport.

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Il n'y a pas de doute, ainsi qu'il a été décidé dans la cause de *Wertheim* v. *Chicoutimi Pulp Co.* (1), que l'on pouvait, dans un cas comme celui-là, avoir recours au prix du marché de Montréal pour établir la valeur des marchandises à Québec.

La preuve constate que les marchandises avaient été vendues en vertu d'un contrat à long terme à l'appelante par la Dominion Textile Co. C'était un contrat qui pouvait avoir ses avantages mais qui avait aussi ses mauvais cotés.

Dans ce cas-là quelle est la somme que doit rembourser le transporteur ? Est-ce la valeur des marchandises, ou bien si c'est le prix ? Baudry-Lacantinerie (loc. cit. no 3585) pose cette question et la résout comme suit:

> Lorsque les marchandises avaient été vendues par l'expéditeur au destinataire, est-ce leur valeur ou le prix de vente qui doit être remboursé par le voiturier?
>
> Il nous semble que la première solution ne fait aucun doute dans le cas où le prix était *inférieur* à la valeur, et cela que les marchandises aient voyagé aux risques de l'expéditeur ou aux risques du destinataire . . . En tout cas, quelle que soit la partie aux risques de qui la marchandise voyage, c'est, suivant le droit commun, la *valeur* de la chose qui doit être remboursée.

Dans notre cas, le prix d'achat était inférieur à la valeur de la marchandise. Alors, adoptant l'opinion de cet auteur, je suis obligé de dire que la cour d'appel a fait erreur en basant son jugement sur le prix payé par la compagnie appelante.

L'appel doit être maintenu avec dépens de cette cour et de la cour d'appel. Le jugement de la cour supérieure devrait être rétabli. On devra déduire de ce dernier jugement une somme de $62.70 qui y a été portée par erreur.

(1) [1911] A.C. 301.

MIGNAULT J.—This action arose out of a shipment, in September, 1918, of fifty bales of cotton waste consigned to the appellant at Montreal by the Dominion Textile Company, Limited, from which company they had been bought by the appellant at the Dominion Textile Company's Mills at Montmorency, Quebec, the shipment being made from Quebec to Montreal. The bill of lading contained the following condition:

> The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the goods at the place and time of shipment under this bill of lading (including the freight and other charges if paid and the duty if paid or payable and not refunded), unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariff upon which the rate is based, in any of which events such lower value shall be the amount to govern such computation, whether or not such loss or damage occurs from negligence.

The appellant alleged that when the said bales reached Montreal, employees of the respondent, through carelessness and neglect, instead of placing them in the respondent's sheds, left them on the dock exposed to the rain, where 44 of the said bales were spoiled, and the appellant claimed as damages $2,387.16.

By its plea the respondent, setting up the above condition, admitted its liability for the said loss

> computed on the basis of the value of the said goods at the place and time of shipment as provided in the bill of lading,

so that the only question is as to the amount to which the appellant is entitled.

The learned trial judge (Maclennan J.) found that the goods had been purchased by the appellant from the Dominion Textile Company at four cents per pound, that there were no users of said goods in Quebec, but there were users and a market for them in Montreal where they were being brought for resale

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by the appellant, and where their market value, at the time of shipment, was between eight and eight and five-eighths cents per pound; that the true value of said goods to the appellant at the time and place of shipment was not the invoice price or cost at which the appellant had bought them under a yearly contract, but what they would fetch in the open market at such time and place; that the only difference between the market value of said goods in Quebec and Montreal was the cost of their carriage from Quebec to Montreal, and that their value at Quebec might be taken to be the market value thereof in the ordinary course of business in the open market at Montreal, less the cost of carriage from Quebec to Montreal; and fixing their value at eight cents per pound for forty-four bales, weighing 25,128 pounds, the learned trial judge gave judgment to the appellant for $2,010.24.

On appeal to the Court of King's Bench (1), the latter court reduced the judgment to $1,076.12 for the following reasons:

Considérant que les 44 balles de déchets de coton dont il s'agit ont été endommagées et gâtées, comme l'intimée le prétend et comme la cour supérieure l'a décidé;

Considérant cependant que la base du quantum adopté par la cour supérieure est erronée et que ledit jugement de la cour supérieure—vu que le prix d'achat était de 4 cts la livre—se trouvait à accorder à l'appelante un profit de 100% sur les marchandises en question, sans les avoir revendues, sans y avoir touché et sans avoir fait aucune dépense ni encouru aucun risque à ce sujet;

Considérant que le montant de l'indemnité, dans un cas comme celui qui nous occupe, est, toutes choses égales d'ailleurs, celui de la perte subie ou du prix auquel l'acheteur pourrait se procurer d'autres marchandises semblables, mais que, dans la présente action, il y a, entre les parties, un contrat contenu dans la lettre de voiture et qui règle cette question dans l'espèce;

Considérant que cette lettre de voiture déclare que le montant de la perte ou du dommage pour lequel l'appelant est responsable sera calculé sur la base de la valeur des marchandises au temps et au lieu de l'expédition:

(1) Q.R. 29 K.B. 186.

Considérant que les marchandises en question ont été achetées à Montmorency, près de Québec, de la Montreal Textile Co. au prix de 4 centins la livre:

Considérant que ce chiffre établit la valeur des marchandises en question au point d'expédition, tel que le veut la lettre de voiture;

Considérant qu'en accordant 8 centins pour le prix d'une livre, la cour supérieure a accordé la valeur, non pas au point d'expédition, tel que le veut le contrat, qui est la loi des parties, mais à Montréal, au point de débarquement, et que la lettre de voiture a spécialement pourvu à ce que la responsabilité de l'appelante soit celle de la valeur au point de l'expédition.

The appellant now appeals to this court from the latter judgment.

With all possible respect, I think the judgment appealed from is clearly wrong. The measure of damages was fixed by the bill of lading, and it was "the value of the goods at the place and time of shipment." The determination of this value involves a pure question of fact and we have only to look at the evidence, which was properly directed to show the value of the goods to the appellant, to decide what amount should be awarded.

Mr. Lichtenheim, managing director of the appellant, was called by the latter. He said, in answer to questions put by the appellant's counsel:

Q. I want to know what they were selling for at the market price?

A. Your Lordship, the goods were purchased on a contract many months before they were ready for sale and you cannot sell those goods in that way until you obtain possession of them, never knowing whether you are going to get them or not.

Q. Those goods were shipped from Quebec?

A. Montmorency Falls.

Q. The boat company took them from Quebec?

A. Yes.

Q. You have stated in your examination "on discovery" what the value of those goods was in Montreal? A. Yes.

Q. Was there any difference between the value of those goods in Quebec and in Montreal? A. Freight and cartage only. And they could not have been replaced by the company at the price for which we wanted to sell.

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MONTREAL COTTON AND WOOL WASTE CO. v. CANADA STEAMSHIP LINES.

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Q. All I am concerned with is whether there was any difference in the value between Quebec and Montreal, and if so what it was? A. The freight and cartage. That was the market price of the material at that time.

This evidence, which was not contradicted or tested by cross-examination, establishes that the only difference between the market value of the goods as between Quebec and Montreal, was the freight and cartage. In his examination on discovery, Lichtenheim swore that he could have sold the goods at $9\frac{1}{2}$ cents per pound if he had them. As the witness testified to sales at 8, $8\frac{7}{8}$ and 9 cents, the learned trial judge accepted the value as being 8 cents per pound, finding that the only difference between the price at Montreal and Quebec was the cost of carriage.

I take it that we are bound by this evidence which, as I have said, was not contradicted, and it establishes the value of the goods at Quebec, the place of shipment, by merely deducting from their value in Montreal the cost of shipment to the latter city. It also seems to me that in the case of two cities relatively near to each other, even though there be no buyers in the one, if there be buyers in the other, the value of the goods in the former can be fairly considered as being that at which they could be sold in the latter, less the cost of carriage. I am also of opinion that the value to be considered is the value to the purchaser; *Wertheim* v. *Chicoutimi Pulp Co.* (1). This is in agreement with art. 1073 of the Civil Code, which allows to the creditor the profit of which he has been deprived, and the appellant would not be compensated according to this rule if he were given only the price he paid for the goods, excluding any profit on the same.

(1) [1911] A.C. 301, at pp. 307-8.

I have duly considered the reasons of the learned judges of the Court of King's Bench, but, with deference, it seems to me that under this contract, and there is involved here merely a matter of contract, it cannot be said that the value of the goods is the purchase price of the same, or the price at which similar goods could be bought by the appellant. It is noteworthy that Lichtenheim swears he could not have purchased identical goods in the open market, but it suffices to say that the measure of damages was fixed by the contract, and was not the price at which the goods were purchased but their value at the place and time of shipment. This raises merely a question of fact and unfortunately for the respondent the evidence of this value, uncontradicted as it was, is conclusive against it.

Mr. Perron for the appellant conceded at the argument that the cost of the carriage of the goods from Quebec to Montreal, which the bill of lading stated to have been $71.39, for 50 bales, making $62.82 for the 44 bales in question, should be deducted from the value found by the learned trial judge. This deduction however should be without effect on the costs.

I would therefore allow the appeal with costs here and in the Court of King's Bench and restore the judgment of the learned trial judge, reducing however the amount allowed to $1,947.42.

Appeal allowed with costs.

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

Solicitors for the respondent: *Davidson, Wainwright, Alexander & Elder.*

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*May 7.
*June 1.

IN THE MATTER OF

THE BOARD OF COMMERCE ACT AND THE COMBINES AND FAIR PRICES ACT OF 1919.

CASE STATED UNDER SECTION THIRTY-TWO OF THE BOARD OF COMMERCE ACT.

Constitutional Law—Legislative powers of Parliament—Combines and Fair Prices Act, 9 & 10 Geo. V, c. 45, ss. 18 and 22—Regulation of Trade and Commerce—Criminal law—Peace, order and good government.

A case stated for the opinion of the Supreme Court of Canada under sec. 32 of the Board of Commerce Act should not submit abstract questions but should state the facts of some matter pending before the Board and submit questions of law or jurisdiction arising when considering the same. *In re Cardigan County Council*, (54 J.P. 792), appl.

By sec. 18 of The Combines and Fair Prices Act, 1919, the Board of Commerce is empowered to inquire into and prohibit the making of unfair profits on the holding or disposition of necessaries of life, and practices with respect to such holding or disposition calculated to unfairly enhance the cost of such necessaries. The Board made an order restraining and prohibiting certain manufacturers of clothing from omitting or refusing to offer for sale in the city of Ottawa their commodities at prices not higher than are reasonable and just; offering the same for sale at prices higher than are reasonable and just; and marking for sale by retail said commodities at prices ascertained by the addition to cost of fifty per cent or more or made up of cost plus a gross profit of a percentage greater than by the order recognized as fair or a percentage indicated as unfair.

Held, per Davies C.J., Anglin and Mignault JJ., Idington, Duff and Brodeur JJ. contra, that the Board had authority to make the order; that Parliament had power to confer the authority on the Board by its jurisdiction to make laws for "the regulation of Trade and Commerce" and for "the peace, order and good government of Canada" and possibly, except as to the power of the Board to inquire into trade matters, by its jurisdiction to legislate on "Criminal Law."

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*PRESENT.—Sir Louis Davies C.J., and Idington, Duff, Anglin, Brodeur and Mignault JJ.

By sec. 38 of the Board of Commerce Act the Board is authorized to require that any order it issues shall be made a rule of the Exchequer Court or of any superior court of a province.

Held, per Davies C.J., Anglin and Mignault JJ., Idington, Duff and Brodeur JJ. expressing no opinion, that Parliament may, in passing legislation within its jurisdiction, impose duties upon any subjects of the Dominion including officials of provincial courts and that the Board could validly exercise the power so conferred.

CASE stated by the Board of Commerce for the opinion of the Supreme Court of Canada.

The provisions of the Acts in question on this appeal and the order of the Board are set out in the reasons for judgment. The questions submitted is whether or not the Board had jurisdiction to make the order and to require that it be made a rule of the Supreme Court of Ontario.

W. F. O'Connor K.C., and *Duncan*, appeared for the Attorney General of Canada.

Lafleur K.C., for the Attorney General of Alberta.

Tilley K.C., for Manufacturing Associations interested.

The opinions of the Chief Justice and of Anglin and Mignault JJ. were written by:—

ANGLIN J.—In this case I am to deliver the judgment of my Lord, the Chief Justice, Mr. Justice Mignault and myself.

The Board of Commerce, constituted under the authority of c. 37 of the Dominion Statutes of 1919, is by s. 32 of that Act empowered to

state a case in writing for the opinion of the Supreme Court of Canada upon any question which, in the opinion of the Board, is a question of law or of jurisdiction.

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Purporting to proceed under this provision the Board presented for determination by this court a series of six questions—three of them directed to the constitutional validity of certain provisions of the Combines and Fair Prices Act (c. 45 of the statutes of 1919) and the other three to the construction of certain sections of the same statute. With a view to meeting a suggestion that Parliament had not intended to authorize the submission of abstract questions for the opinion of the court, the Board amended the case by adding to it a statement that the questions submitted had arisen in the consideration of certain matters actually pending before it. *Glasgow Navigation Co.* v. *Iron Ore Co.* (1). After hearing argument during the winter term, however, the court was of the opinion that the case as presented was not a "stated case" within the contemplation of s. 32 of the Board of Commerce Act inasmuch as it did not contain any statement of concrete facts out of which the questions formulated arose; *Re County Council of Cardigan* (2); compare the English O. 34, r. 1 and *Bulkeley* v. *Hope* (3); but was rather, under the guise of a stated case, an unintentional assumption of the power conferred on the Governor-General-in-Council by s. 60 of the Supreme Court Act, to refer to this court for hearing and consideration important questions of law or fact touching (a) the interpretation of the British North America Acts, 1867 to 1886, or (b) the constitutionality or interpretation of any Dominion or provincial legislation.

The attention of counsel having been drawn to this aspect of the matter it was arranged that the case as originally submitted should be superseded by a new

(1) [1910] A.C. 293. (2) 54 J.P. 792.
(3) 8 DeG.M. & G. 36, 37.

case which should contain a statement of facts in some matter or matters pending before the Board and formulate questions of law or jurisdiction which had actually arisen in their consideration, indicating how such questions arose. Such a case was accordingly filed and supplemental argument upon it was recently heard. I am of opinion that inasmuch as by s. 33 (3) of the Board of Commerce Act the finding or determination of the Board on any question of fact within its jurisdiction is made binding and conclusive, the case as now submitted falls within the intendment of s. 32 of that statute. It states that the Board proposes to make an order in which, after reciting that it has upon an oral investigation found that in some thirty-six shops in the city of Ottawa men's ready made and partly made suits and overcoats, purchased at a cost of $30 or under, have as a practice been sold at the same percentage of gross profit or margin to the retailers as commodities purchased by them at a greater cost and that unfair profits have been made on such sales and that the merchants concerned have not offered their stocks-in-trade of such commodities for sale at prices not higher than are reasonable and just, but that extenuating circumstances render a prosecution unnecessary, and that in the opinion of the Board fair profits on such commodities may be ascertained on a basis set forth, it will proceed to order that the individuals, firms, and corporations conducting such establishments, naming them, be, and each of them is, restrained and prohibited from

(*a*) omitting or refusing to offer for sale within the city of Ottawa said commodities in accordance with the ordinary course of business at prices not higher than are reasonable and just;

(*b*) offering for sale within the City of Ottawa said commodities at prices higher than are reasonable and just;

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(*c*) making or taking upon dispositions within the city of Ottawa by way of sale of said commodities unfair profits being profits greater than those hereinbefore indicated as fair profits;

(*d*) instituting, continuing or repeating the practice of marking for sale by retail within the City of Ottawa either the said commodities or stocks-in-trade of clothing of which said commodities form part at prices calculated or ascertained by the addition to cost of fifty per cent or more of cost or at prices made up of cost plus a margin or gross profit of (*a*) a percentage greater than by this order recognized as fair, or (*b*) a percentage by this order indicated as unfair, whether or not sales are intended to be actually made at lower prices and in conformity with this order, such practices being in the opinion of the Board designed or calculated to unfairly enhance the price realized upon dispositions by sale of said commodities.

At bar Mr. O'Connor, representing the Attorney General, very properly conceded that clauses (a) and (b) of the proposed order would be merely repetitions of the general statutory prohibition implied in s. 17 of the Combines and Fair Prices Act and are not in a defensible form, and he accordingly abandoned them. As to the remaining clauses (c) and (d), the stated case submits two questions:

"(1) Has the Board lawful authority to make the order?

"(2) Has the Board lawful authority to require the Registrar or other proper officer of the Supreme Court of Ontario to cause the order when issued to be made a rule of said Court?"

Sec. 18 of the Combines and Fair Prices Act purports in explicit terms to confer the authority to make such a restraining or prohibitive order, and s. 38 of the Board of Commerce Act likewise purports in explicit terms to enable the Board to require that any order made by it shall be made a rule, order or decree of the Exchequer Court or of any superior court of any province of Canada. The questions presented are, therefore, in reality whether these particular provi-

sions are within the legislative jurisdiction of Parliament. They may be more conveniently considered separately.

Upon the policy, efficacy or desirability of such legislation it should be unnecessary to state that an opinion is neither sought nor expressed.

Could Parliament empower the Board to make the order?

Counsel representing the Attorney General maintains that it could by virtue of its legislative jurisdiction (a) over "The Criminal Law," (b) in regard to "The Regulation of Trade and Commerce," and (c) "To make Laws for the Peace, Order and Good Government of Canada" (B.N.A. Act, s. 91).

Sec. 17 of the Combines and Fair Prices Act prohibiting the unreasonable accumulation or withholding of "necessaries of life" defined by s. 18 (recently construed by this court in the case of Price Bros. Limited), and requiring that any excess of necessaries of life and all stocks in trade of such necessaries shall be offered for sale at reasonable and fair prices, and s. 22, which imposes penalties, *inter alia*, for contraventions of s. 17, may, I think, be held valid (the latter *pro tanto*) as criminal legislation. The provision of s. 18 authorizing the Board to make the inquiries therein provided for and to determine what shall constitute unfair profits may possibly be supported as ancillary criminal legislation, as well as for the purposes of s. 24.

But I think it is not possible to support, as necessarily incidental to the efficient exercise of plenary legislative jurisdiction over "the criminal law," the further provision of s. 18 purporting to empower the court to restrain prospective breaches of the statute, the making or taking of unfair profits, and practices calculated unfairly to enhance costs or prices, or the

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provisions of s. 38 of the Board of Commerce Act for making decisions or orders of the Board rules or decrees of the Exchequer Court or of any provincial superior court. The exception at the end of s. 91 of the B.N.A. Act, although applicable to all the enumerated heads of s. 92,

> was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen subsections, save to the extent of enabling the Parliament of Canada to deal with matters local and private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of s. 91.

Attorney General for Ontario v. *Attorney General for Canada* (1), at page 360; *Montreal* v. *Montreal Street Rly. Co.* (2).

In so far as the provisions of s. 18 immediately under consideration may involve an invasion of the field of property and civil rights assigned to provincial legislative jurisdiction by s. 92 (12), in my opinion they cannot be supported under s. 91 (27).

The jurisdiction of Parliament over "The Regulation of Trade and Commerce" (s. 91 (2)) has frequently been invoked—usually without success—either in supporting federal legislation alleged to invade the provincial field or in attacking the validity of provincial legislation claimed to fall under one of the enumerated heads of s. 92. In *Citizens Ins. Co.* v. *Parsons* (3), at page 112, the Judicial Committee first points out that these words are not used in an unlimited sense as is apparent from their collocation and from the specific enumeration of several subjects which in their broadest sense the words "the regulation of trade and commerce" would include. Their Lordships suggest

(1) [1896] A.C. 348. (2) [1912] A.C. 333, 343.
(3) 7 App. Cas. 96.

that regulations relating to general trade and commerce were in the mind of the legislature,

and that these words (p. 113)

would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern and it may be that they would include general regulation of trade affecting the whole Dominion; (but) their Lordships abstain * * from any attempt to define the limits of the authority of the Dominion Parliament in this direction.

In *Bank of Toronto* v. *Lambe* (1), it was held that an attempt to make the expression, "the regulation of trade and commerce" cover direct taxation of banks so as to exclude provincial power to impose such taxation would unduly strain it. What was said in the *Parsons Case* (2), was impliedly approved in *The Local Prohibition Case* (3). In *Montreal* v. *Montreal Street Rly. Co.* (4), Lord Atkinson, after setting out some propositions which *The Local Prohibition Case* (1) should be taken to have established with regard to the purview of the exception to the provincial legislative authority contained in s. 91 of the B.N.A. Act at its end and the restrictions which must be imposed on the legislative powers of the Dominion over unenumerated subjects exercisable under its jurisdiction

to make laws for the peace, order, and good government of Canada,

says, at p. 344, that

these enactments, secs. 91 and 92, indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in s. 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance and ought not to trench upon provincial legislation with respect to any classes of subjects enumerated in s. 92, * * * and that if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of

(1) 12 App. Cas. 575.
(2) 7 App. Cas. 96.
(3) [1896] A.C. 348.
(4) [1912] A.C. 333, 343.

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local or private interest upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation. The same considerations appear to their Lordships to apply to two of the matters enumerated in s. 91, viz., the regulation of trade and commerce.

Ex *facie* the last sentence would almost seem to import that legislation properly held to fall within sec. 91 (2) of the B.N.A. Act must not trench upon the provincial field—that Parliament cannot in an otherwise legitimate attempt "to regulate trade and commerce" legislate so as to affect matters with which a provincial legislature might deal in some other aspect as falling within "property and civil rights." In *The Insurance Act Reference* (1), at page 309, I was disposed so to interpret his Lordship's language. But if that be its real meaning "the regulation of trade and commerce" would cease to be effective as an enumerated head of federal legislative jurisdiction. In the more recent decision of *John Deere Plow Co.* v. *Wharton* (2), the partial interpretation put on head No. 2 of sec. 91 in *Citizens Ins. Co.* v. *Parsons* (3), was again approved and, while it was pointed out that the exclusive power to regulate trade and commerce thereby conferred must, like the expression

property and civil rights in the province

in sec. 92, receive a limited construction, it was held to

enable the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the whole Dominion should be exercisable and what limitation should be placed on such powers. For if it be established that the Dominion Parliament can create such companies then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade.

(1) 48 Can. S.C.R. 260. (2) [1915] A.C. 330.
(3) 7 App. Cas. 96.

The clear effect of this last decision, I take it, is that s. 91 (2) retains its place and office as an enumerative head of federal legislative jurisdiction and that legislation authorized by its terms, properly construed, is not subject to the restrictions imposed on Dominion legislation that depends solely on the general "peace, order and good government" clause, but, on the contrary, is effective although it invades some field of jurisdiction conferred on the provinces by an enumerated head of s. 92.

Probably the test by which it must be determined whether a given subject matter of legislation, *primâ facie* ascribable to either, properly falls under s. 91 (2) or s. 92 (13) is this:—Is it as primarily dealt with, in its true nature and character, in its pith and substance, (in the language of Viscount Haldane's judgment just quoted)

a question of general interest throughout the Dominion

or is it (in Lord Watson's words in the Local Prohibition Case)

from a provincial point of view of a local or private nature?

In order to be proper subjects of Dominion legislation under "the regulation of trade and commerce" it may well be that the matters dealt with must not only be such as would ordinarily fall within that description, but, if the legislation would otherwise invade the provincial field, must also be

of general interest throughout the Dominion,

or, in the language used by Lord Watson in The Local Prohibition Case (p. 361) in regard to legislation under the peace, order and good government clause upon matters not enumerated in s. 91, must be

unquestionably of Canadian interest and importance.

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Mr. Justice Clement suggests this view in his valuable work on the Canadian Constitution (3 ed.), at pp. 448 and 688, and it may be that that was all Lord Atkinson intended when he said that the considerations applicable to the general powers of the Dominion Parliament supplementary to its enumerated powers apply also to the powers conferred on it under the head, "The Regulation of Trade and Commerce." Otherwise I find it difficult to reconcile his views with those expressed in the *Parsons Case* (1), and in *John Deere Plow Co.* v. *Wharton* (2).

The regulation of the quantities of "necessaries of life" that may be accumulated and withheld from sale and the compelling of the sale and disposition of them at reasonable prices throughout Canada is regulation of trade and commerce using those words in an ordinary sense. While the making of contracts for the sale and purchase of commodities is primarily purely a matter of "property and civil rights," and legislation restricting or controlling it must necessarily affect matters ordinarily subject to provincial legislative jurisdiction, the regulation of prices of necessaries of life—and to that the legislation under consideration is restricted—may under certain circumstances well be a matter of national concern and importance—may well affect the body politic of the entire Dominion. Moreover, "necessaries of life" may be produced in one province and sold in another. In the case of manufactured goods the raw material may be grown in or obtained from one province, may be manufactured in a second province and may be sold in several other provinces.

(1) 7 App. Cas. 96. (2) [1915] A.C. 330.

Effective control and regulation of prices so as to meet and overcome in any one province what is generally recognized to be an evil—"profiteering"—an evil so prevalent and so insidious that in the opinion of many persons it threatens to-day the moral and social well-being of the Dominion—may thus necessitate investigation, inquiry and control in other provinces. It may be necessary to deal with the prices and the profits of the growers or other producers of raw material, the manufacturers, the middlemen and the retailers. No one provincial legislature could legislate so as to cope effectively with such a matter and concurrent legislation of all the provinces interested is fraught with so many difficulties in its enactment and in its administration and enforcement that to deal with the situation at all adequately by that means is, in my opinion, quite impracticable.

Viewed in this light it would seem that the impugned statutory provisions may be supported, without bringing them under any of the enumerative heads of s. 91, as laws made for the peace, order and good government of Canada in relation to matters not coming within any of the classes of subjects assigned exclusively to the legislatures of the provinces, since, in so far as they deal with property and civil rights, they do so in an aspect which is not "from a provincial point of view local or private" and therefore not exclusively under provincial control.

"It must be borne in mind," says Lord Haldane in the recent case of *John Deere Plow Co.* v. *Wharton* (1), at page 339,

> in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other.

(1) [1915] A.C. 330.

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In such cases the nature and scope of the legislative attempt of the Dominion or of the Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and reality.

The legislation now under consideration must fall under the one set of powers or under the other, since

the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada. *Attorney General for Ontario* v. *Attorney General for Canada* (1), at page 581, per Loreburn L.C.

As put by Sir Montague Smith in *Russell* v. *The Queen* (2), at pages 839, 840:

What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. Upon the same considerations, the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful.

After giving illustrations of laws designed for the promotion of public order, safety or morals which, nevertheless, prohibit certain uses of, and certain acts in relation to, property, his Lordship proceeds:

Few, if any, laws could be made by Parliament for the peace, order and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have been intended when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it. The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs.

(1) [1912] A.C. 571. (2) 7 App. Cas. 829.

Lord Fitzgerald in delivering the judgment of the Privy Council in *Hodge* v. *The Queen* (1), quoted extensively and with approval from the Russell judgment and referring to it and also to *Citizens Ins. Co.* v. *Parsons* (2), said

> that the principle which these cases illustrate is, that subjects which in one aspect and for one purpose fall within sect. 92 may, in another aspect and for another purpose fall within sect. 91,

and this is said, as the passages cited shew, in relation to the general Dominion power to make laws for the peace, order and good government of Canada as well as in relation to matters falling clearly within some one of the enumerated heads of s. 91. Reference may also be made to *Union Colliery Co.* v. *Bryden* (3), at page 587, and to the oft quoted language of Lord Watson in the *Local Prohibition Case* (4), at page 361.

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion.

I ventured in the *Insurance Act Reference* (5), at page 310, to state what I conceive to be the result of the authorities on this particular point in these words:

> When a matter primarily of civil rights has attained such dimensions that it affects the body politic of the Dominion and has become of national concern it has in that aspect of it, not only ceased to be "local and provincial" but has also lost its character as a matter of "civil rights in the province" and has thus so far ceased to be subject to provincial jurisdiction that Dominion legislation upon it under the "peace, order and good government" provision does not trench upon the exclusive provincial field and is, therefore, valid and paramount.

In the judgment of the Privy Council on the same Reference (6), Lord Haldane said, at page 595:

(1) 9 App. Cas. 117.
(2) 7 App. Cas. 96.
(3) [1899] A.C. 580.
(4) [1896] A.C. 348.
(5) 48 Can. S.C.R. 260.
(6) [1916] 1 A.C. 588.

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There is only one case, outside the heads enumerated in s. 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is when the subject matter lies outside all the subject matters enumeratively entrusted to the province under sect. 92. *Russell* v. *The Queen* (1) is an instance of such a case.

It may be said that if the subject matter of the Dominion legislation here in question, when its true aspect and real purpose are considered, relates to public order, safety or morals, affects the body politic of the Dominion and is a matter of national concern, so that it can be supported under the general peace, order and good government provision of s. 91 without recourse to any of the enumerated heads, it is unnecessary and inadvisable to attempt to bring it under head No. 2. But while, as Lord Haldane said in *The Insurance Case* (2) at page 596, great caution must always be exercised in applying the well established principle that

> subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial legislatures may in another aspect and for another purpose fall within Dominion legislative jurisdiction,

having regard to the warning of Lord Watson in the *Local Prohibition Case* (3), at pages 360-1, that

> the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91 would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate to the exclusion of the provincial legislatures,

(1) 7 App. Cas. 829. (2) [1916] L.A.C. 588.
(3) [1896] A.C. 348.

I think it is better that legislation such as that with which we are now dealing, which undoubtedly affects what would ordinarily be subject matters of provincial jurisdiction, should, if possible, be ascribed to one of the enumerated heads of s. 91. I prefer, therefore, to rest my opinion upholding its constitutional validity on the power of the Dominion Parliament to legislate for "the Regulation of Trade and Commerce" as well as on its power

to make laws for the peace, order and good government of Canada

in regard to matters which, though not referable to any of the enumerated heads of s. 91, should, having regard to the aspect in which and the purpose for which they are dealt with, properly be held not to fall within any of the enumerated heads of s. 92—to "lie outside all the subject matters" thereby "entrusted to the province."

The carrying out of the Act now in question, as I have endeavoured to point out, will, in some of its phases, affect the inter-provincial trade and the foreign trade of Canada. It has to do with the general regulation of trade in necessaries of life throughout the Dominion. It would therefore seem to fall within the jurisdiction conferred by Head No. 2 as indicated in *Citizens Ins. Co.* v. *Parsons* (1), at pages 112-113.

No objection can successfully be founded upon the fact that the Board must exercise its powers from time to time in a particular province. *Colonial Building Association* v. *Attorney General of Quebec* (2). The necessity of such local action and regulation is perhaps the chief justification for the delegation to a

(1) 7 App. Cas. 96. (2) 9 App. Cas. 157.

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Board or Commission of the power to define what shall be unfair profits and unreasonable and unjust prices. The unfairness of profits and the unreasonableness and injustice of prices, depends so largely on local conditions which vary from day to day and from place to place that Parliament could not itself deal with them by general legislation. Effective regulation of such matters can be accomplished only by some body such as the Board of Commerce endowed with the powers bestowed upon it and ready from time to time to deal promptly with the problems involved as they arise. Yet the power of Parliament to delegate its functions to the limited extent for which the Combines and Fair Prices Act provides has been challenged. We had occasion comparatively recently to consider and overrule a similar objection in *Re Gray* (1), at pp. 170, 175. Dealing with the power of a provincial legislature to confer on bodies of its own creation authority to make by-laws and regulations upon specific subjects and with the object of carrying an enactment of the legislature into effect, their Lordships of the Privy Council said in *Hodge* v. *The Queen* (2), at page 132:

> It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for courts of law, to decide.

(1) 57 Can. S.C.R. 150. (2) 9 App. Cas. 117.

The Acts now under consideration involve no such abdication of legislative jurisdiction—no such abrogation of the power of one of the integral constituents of the legislature as was attempted in recent Manitoba legislation held *ultra vires* by the Judicial Committee in *Re the Initiative and Referendum Act* (1), where such a limited delegation of legislative functions as was sanctioned in the *Hodge Case* (2) again received their Lordships' approval.

However formidable may be the obstacles to the creation of a Dominion court of criminal jurisdiction presented by clause 27 of section 91 and clause 14 of section 92, of the B.N.A. Act, I see no valid objection to the constitution by our Parliament under s. 101 of a court to carry out the provisions of the Acts now before us designed for the regulation of trade and commerce; and the power to make an order such as that now under consideration, eliminating from it clauses (a) and (b) of the paragraph numbered 1, which are not supported, seems a reasonable and necessary jurisdiction to vest in such a body, in order that its administration may be effective. At all events, if Parliament is endowed with legislative jurisdiction to deal with the subject of profiteering under the head of "the regulation of trade and commerce" as a matter not substantially of local or provincial interest but affecting the well being, social, moral and economic, of the Dominion at large, there appears to be no tenable objection to its jurisdiction to confer on a court of its own creation power to restrain and prohibit contraventions of such regulations and restrictions, general or particular, within the purview of the statute, as it may be found necessary or proper to impose.

(1) [1919] A.C. 935, at page 945. (2) 9 App. Cas. 117.

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Again it is objected that the proposed order is rather a local regulation than a restraining order. I think not. It will impose a behest *nominatim* on a number of individuals, firms and corporations who were first cited to appear before the Board and whose dealings with the subject matter of such behest were investigated by the Board. It is just as much an order within the contemplation of s. 18 of the Combines and Fair Prices Act as it would be if it were one of several similar documents dealing separately with each of the parties to be enjoined.

No valid objection to the provision for making such an order a rule, order or decree of a provincial superior court has, in my opinion, been presented. The machinery of the provincial court is to be utilized for a Dominion purpose. The power of Parliament to require this to be done is distinctly affirmed in *Valin* v. *Langlois* (1), and the express approval by this court of the following passage from the work of the late Mr. Lefroy on Legislative Powers in Canada, at page 510, in *Re Vancini* (2), at page 626, puts it beyond questionhere.

> The Dominion Parliament can, in matters within its sphere, impose duties upon any subjects of the Dominion whether they be officials of provincial courts, other officials, or private citizens; and there is nothing in the British North America Act to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing provincial courts, or to give them new powers as to matters which do not come within the subjects assigned exclusively to the legislatures of the provinces, or to deprive them of jurisdiction over such matters.

The authorities on this feature of the case are collected and discussed in Mr. Justice Clement's work, at p. 531.

We are for these reasons of the opinion that the power of Parliament to confer the authority, to the existence of which the questions in the stated case are directed,

(1) 5 App. Cas. 90. (2) 34 Can. S.C.R. 621.

has not been successfully impugned and that the right of the Board of Commerce to make the proposed order, eliminating from it clauses (a) and (b) of the operative paragraph numbered 1, may be upheld as an exercise of authority validly bestowed under the jurisdiction of Parliament to make laws for "the regulation of trade and commerce" and for "the peace, order and good government of Canada," and, in so far as the findings in its recitals are concerned, possibly also under Dominion legislative jurisdiction over "The Criminal Law," although the investigation and the findings made thereon for the purpose of determining what are reasonable and just prices and of affording a foundation for an order prohibiting the making or taking of unfair profits and practices calculated to unfairly enhance costs or prices may not form part of a criminal cause or matter. *Rex* v. *Manchester Profiteering Committee* (1).

We would therefore answer both the questions of the stated case in the affirmative.

IDINGTON J.—This is claimed to be a stated case pursuant to section 32 of the Board of Commerce Act, which reads as follows:—

32. (1) The Board may, of its own notion, or upon the application of any party, and upon such security being given as it directs, or at the request of the Governor-in-Council, state a case, in writing, for the opinion of the Supreme Court of Canada upon any question which in the opinion of the Board, is a question of law or of jurisdiction.

(2) The Supreme Court of Canada shall hear and determine such question or questions of law arising thereon, and remit the matter to the Board with the opinion of the Court thereon.

(1) 36 Times L.R. 254.

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This section is in substance the same as that appearing in the Railway Act as section 55 thereof and is evidently taken therefrom.

The Board of Railway Commissioners in practice formulate a statement of facts which of course is binding upon us, and then submit the questions of law which they desire answered.

The party then appealing has charge of the conduct of the appeal, and same is argued out in a due and orderly manner, first by counsel for appellant and then by the counsel for respondent, as all appeals on a stated or special case submitted to this or any other appellate court have been heretofore treated.

The origin of such a mode of appeal need not be traced for many illustrations are to be found in various branches of both civil and criminal, and quasi-criminal, law.

The necessity for the statement of a concrete case seems to me to be almost self-evident, and at all events all relevant precedents I can find establish that.

It so happened that the Board of Commerce got seized of the idea that all it had to do was to submit questions to this court for its opinion relative to mere abstract points raised upon the construction of some sections of the Combines and Fair Prices Act, without stating any concrete case. And half a dozen such were presented.

I was applied to as Judge in Chambers and refused to recognize such right by making any formal order but suggested to the Registrar that he had better set the matter down to be brought under the notice of the full court at its then approaching sittings, and he did so.

Upon its coming up there, it developed that there had been a number of questions raised by parties who had been before the Board.

I insisted, for my part, that unless and until a stated concrete case was made in accord with the settled practice of the Railway Board, there should not be a hearing granted.

There appeared counsel for the Board of Commerce, which surprised me somewhat, and for the Attorney General for Canada and for a number of the parties concerned.

A long discussion ensued resulting in the matter being left to all those so concerned to try and agree upon the selection of a case upon which argument could properly take place.

The case of the Ottawa Clothiers had been mentioned in the course of said discussion, as one in which all the questions desired to be raised had been therein raised before the Board, and another was suggested as equally important.

Previously to said sitting of this court, I had given leave to appeal in a concrete case from Winnipeg which I suggested might bring up much that it was desired to have this court pass upon.

The net result of the foregoing attempt to frame a suitable case, consisted of the so-called stated case submitted by the Board in the first place, with a brief typewritten memo, which was inserted therein, and after elaborate argument of counsel for all parties appearing before us, and due consideration of the non-observance of our demand, for a concrete case, it was determined by us to insist thereon. The decision in *Re the County Council of Cardigan* (1), was pointed to as a guide.

(1) 54 J.P. 792.

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The result is now before us in an alleged stated case in which instead of half a dozen questions as previously of a purely abstract character, we have presented to us to be answered, two questions relative to the jurisdiction to make a proposed order based upon what is alleged to be the finding of facts.

The latter are referred to as follows:—

All evidence elicited was given subject to the jurisdiction of the Board to make any order consequent upon the inquiry and to the power of the Parliament of Canada to enact the legislation under which the inquiry was proceeding, counsel for the clothiers having formally protested such jurisdiction. At the conclusion of the sittings argument was heard on behalf of the clothiers and as well on behalf of the public, whereafter the Board took into consideration all matters, including the protest as to jurisdiction. The Board, upon the evidence before it, found as matters of fact the matters set forth in the recitals to the draft order which is Schedule "B."

The recital thus referred to is as follows:—

It appearing that heretofore and since the 7th day of July, 1919, sales by retail of the commodities Men's Ready-Made and Partly Ready-Made Suits and Overcoats (hereinafter referred to as "commodities") purchased by the retailer thereof at a cost of thirty dollars or under have, as a practice, been made within the city of Ottawa by the respective persons, firms and corporations hereinafter named (all being retailers of clothing within said city) at the same percentage of gross profit or margin to the retailer as the commodities purchased by him or them at a greater cost than thirty dollars, and that said persons, firms and corporations respectively have, since said 7th day of July, 1919, made and taken unfair profits upon sales of such commodities so purchased at a cost of thirty dollars or under and have not offered their respective stocks-in-trade of such immediately hereinbefore mentioned commodities (the same being necessaries of life as defined by section 16 of the Combines and Fair Prices Act, 1919), at prices not higher than were reasonable and just, the said unfair profits being profits greater than those hereinafter indicated as fair profits; and it further appearing that the conditions mentioned are not such as to call for prosecution, because the making or taking of such unfair profits was not in deliberate breach of or non-compliance with section 17 of the Combines and Fair Prices Act, 1919, but was the result of the existence of a long standing practice of marking selling prices upon the basis of addition of arbitrary percentages for gross profit or margin to cost, which practice has been almost universal throughout Canada, was fair at the time of instituting it, but has become unfair and ought

to have been varied by reduction of such percentages in consequence of continued substantial increases in basic costs causing an increased yield of profit, in terms of money, net as well as gross or margin; wherefrom the hereinbefore indicated offences against said section 17 of the Combines and Fair Prices Act, 1919, resulted.

Then follows the opinion of the Board thereon.

I do not consider this, which deals with or is made to represent the result of an inquiry by the Board into the respective courses of business pursued by thirty-six different persons or firms or corporate companies carrying on business in Ottawa and are grouped together in one order, is either such a concrete case as was demanded or presented by way of an appeal as such a case should be.

The Board frames and presents the order.

By section 3 of the Combines and Fair Prices Act, 1919, it is declared that the Board

> shall have the general administration of this Act which shall be read and constructed as one with The Board of Commerce Act.

Section 18 of the same Act, which is the immediate authority upon which the proposed order must rest, if at all valid, by subsection (1) thereof provides as follows:—

> *18.* (1) The Board is empowered and directed to inquire into and to restrain and prohibit,—
>
> (*a*) any breach or non-observance of any provision of this Act;
>
> (*b*) the making or taking of unfair profits for or upon the holding or disposition of necessaries of life;
>
> (*c*) all such practices with respect to the holding or disposition of necessaries of life, as, in the opinion of the Board are designed or calculated to unfairly enhance the cost or price of such necessaries of life.

The only concrete facts presented to us are those above recited, presumably the result of the exercise of the powers and discharge of duties above set forth.

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There is no appellant named or indicated unless from the fact that a member of the Board appeared as counsel for the Attorney General for the Dominion, and opened the argument before us supporting the action of the Board.

On the application I have referred to, first coming before us, the Board was specifically represented by counsel for it; but none appeared on the last argument herein though the Board of Commerce Act, by subsection 7 specially provides for the Board being heard by counsel or otherwise on appeals such as this. Presumably this provision was made to overcome the possible effect of the case of *Smith* v. *Butler* (1), where the court held that the justices could not be heard in support of an appeal stated by them.

Such a case so presented without an appellant, I respectfully submit, should be dismissed.

The majority of the court hold that notwithstanding all the foregoing peculiar features of this case, as an appeal on a stated case, we must answer the questions submitted.

Therefore, bowing to their opinion, I will proceed to deal therewith.

On the first argument the leading counsel who presented the case in its then condition seemed to rest the exercise of power in question as based upon the power of the Dominion Parliament over criminal law, and his junior as if based upon its power over trade and commerce.

Counsel respectively for the firms or parties then concerned in the exercise of the power and for the Province of Alberta, each denying its existence, argued

(1) 16 Q.B.D. 349.

ably that we must look at the general purview of the whole Act to determine its character and by doing so urged that it could not be called legislation within the powers assigned Parliament relative to criminal law and hence must be held as an Act dealing with property and civil rights.

The elimination from the case, as first stated, of four of the questions thereby submitted has rendered much of the argument then considered necessary inapplicable to the case as it now stands before us.

The proposed order rests upon subsections 1 and 2 of section 18, of which subsection 1 is above quoted, and the said subsection 2 is as follows:—

(2) For the purposes of this Part of this Act, an unfair profit shall be deemed to have been made when, pursuant to and after the exercise of its powers by this Act conferred, the Board shall declare an unfair profit to have been made, and an unfair enhancement of cost or price shall be such enhancement as has resulted from the making of an unfair profit.

Indeed this sub-section (2) in the last analysis is that upon which it must rest.

Assuming the ancient laws against forestalling, regrating and engrossing, which had long been treated as obsolete, and, being considered unsuited to a free people, were finally repealed in England by 7 & 8 Vict., ch. 24, yet may be existent in older parts of Canada or re-enacted as part of our criminal law, how can that help to maintain said section as being within the power of the Dominion Parliament which for its legislative authority must act within the power conferred by the British North America Act?

It seems to me that the enactment of section 22 of the Combines and Fair Prices Act, coupled with much else therein, must have been passed by reason of an

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oversight of the limitations in the British North America Act, otherwise we would not be confronted with so much therein as seems, to say the least, of very questionable authority.

I cannot imagine that Parliament really intended to invade the rights secured to the provinces to the extent that some of these enactments (of which section 18 is one) clearly do.

Section 91 of the British North America Act provided as follows:—

91. It shall be lawful for the Queen, by and with the advice and consent of the House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; 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 the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

Item 27 of the enumeration reads as follows:—

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters.

By section 92 it is enacted as follows:—

92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,—

Item 14 of this enumeration reads as follows:—

14. The administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.

The Board is constituted a court of record. Its acts must be taken to be those of a court.

How can such a court, declared by the above quoted section 3 of the Combines and Fair Prices Act to have

the general administration of that Act which is now in question, be held not to offend against these items, 27 of section 91, and 14 of section 92?

The constitution of courts of criminal jurisdiction

is expressly excluded by said item 27, and

the administration of justice in the province

is, by the enacting part of section 92 and said item 14 thereof handed over exclusively to the legislature thereof.

How can the Board claim in face thereof any right to administer what it urges is criminal law?

The administration of procedure in criminal law is not by a single line or letter assigned to the Dominion.

All the power that is conferred on Parliament relative to procedure is to define the mode of procedure to be followed by the provincial courts in the administration of criminal law.

Included in procedure, as heretofore interpreted, is the law of evidence which Parliament may declare.

It has never occurred to any one hitherto, that the conception of what would constitute relevant evidence should be something evolved by a court, constituted by Parliament first to inquire and declare what was a reasonable course of conduct on the part of any one of the classes of business men falling within the provisions of the Combines and Fair Prices Act, and then to warn, by virtue of section 18 thereof, those concerned where and how the line to regulate such course of conduct should be drawn in future; and then to inquire, after such warning had been given, whether any of those so warned had transgressed; and then, if any one found by the inquisition of the Board or its appointed examiners under section 19, by means of examining the accused, his employees and books, to

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have transgressed, the offender so found guilty may be handed over to the consideration of the Attorney General for the Province who, as well as the offenders, would be bound in duty duly to observe, under section 33 of the Board of Commerce Act, such findings of fact.

That section by sub-section 3 thereof provides as follows:—

> The finding or determination of the Board upon any question of fact within its jurisdiction shall be binding and conclusive.

Such is a fair outline of this new method of defining what may become evidence, and hence legislation within the meaning of item 27 of section 91 of the British North America Act relative to what is covered by the phrase therein

> but including the procedure in criminal matters.

There is no other ground upon which, in a strictly legal sense, such provision can be upheld, than as falling within this reservation relative to matters of procedure.

I submit respectfully that the closest examination, or most liberal interpretation, of these two items, 27 in section 91, and its counterpart in item 14 in section 92, of the British North America Act, preclude the possibility of making out of them anything which can maintain such a mixture of substantive "criminal law," and law including the procedure in criminal matters, consistent with a due observance of the exclusion of power over

> the constitution of courts of criminal jurisdiction

given by item 14 of section 92 to the provincial legislatures, or in any way to support or justify such legislation as in said section 18 of the Combines and Fair Prices Act, on which ultimately the proposed order must rest.

To do it justice the Board, or counsel for the Attorney General, failed to attempt to put forward such a direct method of dealing with the matter, though the section on which its proposed order must rest, for a basis, necessarily involves all I have set forth in light of the whole of the legislation in question.

The method of meeting so obvious a difficulty was to suggest that as relative to criminal law it was maintainable as ancillary thereto.

The British North America Act leave no room for any such distinction. And the same sort of argument was put forward in the case of *Montreal Street Railway Co.* v. *Montreal* (1), but rejected by a majority of this court, and we were upheld by the court above in the appeal taken therefrom by the decision in *City of Montreal* v. *Montreal Street Rly. Co.* (2).

That decision, of course, stands as a declaration of principle for much more than is merely relative to what was directly involved therein. I, therefore, rely upon its adoption of a principle applicable in other regards, as well as upon its apt disposition of the ancillary argument for which there was much more reason for its application therein than there is herein.

In default of that argument maintaining the jurisdiction of the Board, counsel falls back upon the provision in section 101 of the British North America Act, which reads as follows:—

101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada.

(1) 43 Can. S.C.R. 197. (2) [1912] A.C. 333.

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By virtue of that section this court was constituted; and, by virtue of the last part thereof, the Court of Exchequer and the Board of Railway Commissioners were created.

Each of these lastly mentioned courts was constituted as an additional court for the better administration of the laws of Canada, and in no way, in actual practice, did they interfere with provincial rights save when straining the power given, as in the Montreal case just cited.

It is conceivable that within the powers thus assigned the Dominion Parliament, it might

for the better administration of the laws of Canada

i.e., laws enacted by that Parliament, create many such courts.

It is inconceivable to me how, when the relative powers of Parliament and provincial legislatures are so tersely dealt with and definitely expressed, as they are by the items of sections 91 and 92 which I have already quoted, Parliament can properly constitute any additional courts for the purpose in question herein.

In relation to many of the subjects enumerated in section 91 over which the Dominion Parliament is given plenary powers, the constitution by it of additional courts is quite conceivable, as within the scope of section 101, and is also clearly necessarily so, in relation to the government of territories not given a provincial legislature or the status of a province, and all implied therein.

But whilst the administration of justice thereunder may rest with the Dominion Parliament, how can the constitution of courts of criminal jurisdiction or any part of the administration of justice relative thereto

be assigned by Parliament in anything relative to the criminal law when so expressly excluded on the one hand regarding the constitution of courts, and all that which is relative to the administration of justice, so far as regards the constitution of courts of criminal jurisdiction is, on the other hand, so expressly assigned to the respective provincial legislatures.

Yet these enactments now in question, presume to hand over the greater part of the administration of what is claimed to be criminal law to the Board of Commerce. Not only that but do it in such a manner as is quite repugnant to the ideals of British law and justice, as well exemplified in the recent case of *Law* v. *Chartered Institute* (1).

This enactment which we have under consideration constitutes the Board of Commerce the sole investigator, the sole prosecutor, and the judge to determine the facts it has discovered, or imagines it has discovered, and only when the Board deems proper accused is to be handed over to have the formal part of rendering judgment duly executed. And, as if to let nothing escape its grasp, the Board has delegated to it the power to make further regulations as set forth below.

I suspect that the clear separation of the legislative power from the administration of its products in relation to criminal law was not born of accident but design, on the part of the astute men who framed the British North America Act. Many obvious reasons existed for doing so. The substantial racial differences between Upper and Lower Canada (now respectively Ontario and Quebec) must never be forgotten if justice is to be done in operating the British North America Act.

(1) [1919] 2 Ch. 276.

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Then failing to find that source of jurisdiction available, the argument in support of the proposed order fell back upon the old forlorn hope, so many times tried, unsuccessfully, upon this court and the court above, of item 2 of section 91 of the British North America Act, which empowers Parliament to deal with "the regulation of trade and commerce."

The scope and purpose of this power has so often been referred to in numerous cases, that I hardly think it necessary to repeat what has so often been said in that regard.

I doubt if it has ever been heretofore relied upon in support of such an extravagant claim as this put forward herein.

To regulate the prices charged in the tailor shop, or the corner grocery, needs a power which has not only the limited powers of Parliament but also all that is comprehended in the item 13 of section 92 of the British North America Act, which gives exclusively to provincial legislatures the power to make laws in relation to "property and civil rights in the province."

What is this power so assigned to each of the provincial legislatures worth, if it can be effectually wiped out by the Dominion Parliament enacting a so-called criminal law and supplementing it by such legislation as before us, including the large delegation of legislative power given by section 39 of the Board of Commerce Act which reads as follows:—

> 39. Any rule, regulation, order or decision of the Board shall, when published by the Board, or by the leave of the Board, for three weeks in the *Canada Gazette*, and while the same remains in force, have the like effect as if enacted in this Act, and all courts shall take judicial notice thereof.

Is there any sumptuary law or socialistic conception of organized society which could not be made to fall within the power of Parliament, by the same process of reasoning as must be resorted to, in order to maintain the right of the Board to make the proposed order?

Our Confederation Act was not intended to be a mere sham, but an instrument of government intended to assign to the provincial legislatures some absolute rights, and of these none were supposed to be more precious than those over property and civil rights.

The case of *Citizen's Ins. Co.* v. *Parsons* (1), at an early date in our system of Federal Government decided in effect, by the principle expressly and impliedly adopted therein, much more than appears on the superficial aspects thereof relative to the contractual powers falling within civil rights. Its implications have been maintained in many well known ways by numerous decisions needless to cite.

The case of *Vancini* v. *The King* (2), so much relied on, not only binds us but in the result reached I fully agree; yet I fail to see how that or any of the decisions in the cases cited on behalf of the Board's power, at all help to support its pretension in question herein; unless that in the case of *Geller* v. *Loughrin* (3), which does not bind us. If there was much resemblance between the legislation in question in that case and this, I might find it necessary to say something, but I fail to find any close resemblance.

Indeed there is, I venture to say, no judicial authority maintaining such legislation.

(1) 7 App. Cas. 96. (2) 34 Can. S.C.R. 621.
(3) 24 Ont. L.R. 18.

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The counsel for the Attorney General of the Dominion in his opening on the first argument, referred to certain remarks made by me in the case of *Weidman* v. *Schragg* (1), at page 22, and repeats the reference in his supplemental factum as if supporting his contention. I was therein attempting to properly appreciate the scope of section 498 of the Criminal Code as then in force. I still adhere to all I therein expressed, not only in its immediate bearing upon the issue presented for consideration therein, but, if I may be permitted to say so, in a much wider sense lying within the power of Parliament to deal effectively with, not only by way of the criminal law but also that bearing upon its power over patents and of incorporating companies and the limitations it can impose relative to their operative results.

I fail to see, however, that what I had there in mind (and beyond, relative to which I did not give expression of judicial opinion) can in any way help to maintain such legislation as before use.

Parliament has, in its residual power for the "peace, order and good government of Canada," both legislatively and administratively, a plenary power over territory not yet given the status of a province.

Yet default satisfactory authority for the maintenance of the remarkable legislation, now in question in relation to those dwelling in one of the provinces, the residual power of Parliament was invoked.

Whatever may be said and must be admitted, relative to the proper exercise of any of the enumerated powers conferred on Parliament being likely to touch incidentally and necessarily upon property and civil rights within a province, there the power to do so ends.

(1) 46 Can. S.C.R. 1.

I deny its existence in the residual power of Parliament, save in the extreme necessity begotten of war conditions, or in manifold ways that do not touch provincial rights.

The war had ended when the legislation now in question was enacted.

It is one of the many curious things relative to these Acts that there seems so much difficulty on the part of those who ought to know in assigning them, or parts of them, to the exact power that is sought to be exercised thereby.

It generally happens that amendments to the criminal law are presented as such and the clear purposes and powers had in view are, therefore, thereby well understood.

In this instance, if so designed, those sections which form Part 2 of the Combines and Fair Prices Act, save section 20 expressly excluded, I respectfully submit should have found a place in the chapter of important amendments to the Criminal Code passed in the same session, assented to same day, and forming the very next chapter of the statutes. And, not having done so, coupled with the curious blending of that which is *intra vires* with what is *ultra vires* of Parliament, gives rise to many questions we have not to answer, yet renders any consideration of these we are asked to answer rather confusing.

Counsel for Alberta submits a recent decision in *Rex* v. *Manchester Profiteering Committee* (1), upon an analogous statute in England, where it was held that the legislation there in question, though dealing with the fixing of prices and affixing penalties for breaches

(1) 36 Times L.R. 254.

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of the order determining same, was not criminal law, is a very important one when we apply it to what may be possible for provincial legislatures to enact within their powers over property and civil rights.

In that connection it tends to demonstrate that all that is proposed by the form of order presented herein is quite within the powers of the provincial legislatures to enact and hence not within any of the powers assigned to the Dominion.

However that may be we are confronted with section 22 of the Combines and Fair Prices Act which enacts as follows:—

22. (1) Any person who contravenes or fails to observe any of the provisions of this Part of this Act other than section twenty shall be guilty of an indictable offence and liable upon indictment or upon summary conviction under Part XV of the Criminal Code to a penalty not exceeding five thousand dollars, or to imprisonment for any term not exceeding two years or to both fine and imprisonment as specified, and any director or officer of any company or corporation who assents to or acquiesces in the contravention or non-observance by such company or corporation of any of the said provisions shall be guilty of such offence personally and cumulatively with his company or corporation and with his co-directors or associate officers.

(2) For the purposes of the trial of any indictment for any offence against this part of this Act, section five hundred and eighty-one of the Criminal Code, authorizing speedy trials without juries, shall apply.

There cannot be a doubt surely of the intention that this enactment should be held part of the criminal law however absurd some of the consequences may be.

For example, under section 18, if the Board failed to observe any of its provisions, it must be held liable to be indicted and punished according to the terms of the enactment.

Such like complications may arise in applying section 22 to other sections, save section 20, in same part 2 of the Act.

This sort of legislation is characteristic of much more in these two Acts to be administered by the Board of Commerce.

Fortunately we have only to pass upon section 18 and answer one question, if concluding, as I do, for the reasons assigned above, that it is *ultra vires* the Dominion Parliament and infringes upon the exclusive jurisdiction of provincial legislatures, over property and civil rights, and over the administration of justice in the province including

> the constitution, maintenance and organization of provincial courts both of civil and of criminal jurisdiction

as above set forth.

Hence I say "No" in answer to the first question Has the Board lawful authority to make the order?

And, as an obvious consequence of that answer, the second needs no answer.

As I am unable to find an appellant who has prosecuted this so-called appeal, I cannot suggest imperatively who should pay the costs.

The Attorney General for the Dominion had the same right, as of course, to intervene and be heard in argument on so grave a constitutional question, as has always been accorded by this court, in the like cases, to him and provincial attorneys general.

But I cannot in the case before us hold him to have been the appellant.

This is another illustration of how futile this whole proceeding has been, and how far it has fallen short of what is required in a stated case.

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To illustrate further what I have advanced I imagine the order proposed might be held quite valid if dealing with traders in Dawson City in the Yukon, over which Parliament has plenary power, but not when dealing with traders in Ottawa, which is part of the Province of Ontario.

DUFF J.—The scope of the authority arising under sec. 91-(2) of the B.N.A. Act has been much discussed. No precise definition of that authority has of course been given or even attempted; nevertheless, it has for 40 years been a settled doctrine that the words "regulation of trade and commerce" as they appear in that item cannot be read in the sense which would be ordinarily ascribed to them if they appeared alone and unaffected by a qualifying context. To adopt the language of Lord Hobhouse in the case of *The Bank of Toronto* v. *Lambe* (1) at page 586.

> it has been found absolutely necessary that the literal meaning of the words should be restricted in order to afford scope for powers which are given exclusively to the provincial legislatures,

and some definite limiting rules are deducible from the decided cases.

In the *Parsons Case* (2), it was held that

> this authority does not comprehend the power to regulate by legislation the contracts of a particular business or trade in a single province

the particular business or trade there under consideration being the business of fire insurance.

In *Hodge* v. *The Queen* (3), the authority given to the Provinces by item 9 of sec. 92 to make laws with respect to licenses for raising a revenue for provincial purposes was considered sufficient to enable a province

(1) 12 App. Cas. 575. (2) 7 App. Cas. 96.
(3) 9 App. Cas. 117.

to regulate within its own boundaries the manner in which a particular trade is to be carried on and in the judgment delivered upon the reference touching the validity of the Liquor License Act of 1883, commonly known as the McCarthy Act, it was held that the authority of the Dominion in relation to trade and commerce did not include authority to regulate a particular trade by a licensing system applicable to the whole Dominion. And again on the reference upon the subject of the Dominion Insurance Act in 1916, *Attorney General for Canada* v. *Attorney General of Alberta* (1), this decision was affirmed and it was decided that the Dominion Insurance Act professing to regulate the business of insurance by a single system of licensing governing the whole of Canada could not be supported as an exercise of the Dominion legislative power in relation to trade and commerce.

The decisions of the Judicial Committee in the two last-mentioned cases appear to have been the logical result of the decision in *Hodge's Case* (2), for although it is quite true that after all proper modifications of the natural meaning of the words used in the respective enumerations in secs. 91 and 92 have been made (by a comparison of the enumerations with each other in accordance with the well known doctrine in *Parson's Case* (3) at pages 108-9, there must still be considerable overlapping of the domains ascribed to the Dominion and the Provinces respectively by these enumerations; this is not because the provinces are authorized by sec. 92 to trench upon the subject matters strictly comprised within the enumerated items of sec. 91 (to pass laws for example which could be described as "railway

(1) [1916] 1 A.C. 588. (2) 9 App. Cas. 117.
(3) 7 App. Cas. 96.

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legislation strictly so called," *Canadian Pacific Rly. Co.* v. *Bonsecours* (1), or legislation dealing with the subject matter of fisheries or a bankruptcy law or a copyright law, *Attorney General for Canada* v. *Attorney General for Ontario* (2)), but because the Dominion for the purpose of giving effect to a legislative scheme properly falling within the authority of one or more of the enumerated heads of sec. 91 may in order to prevent the defeat of the scheme enact proper ancillary provisions upon matters falling under some of the heads of sec. 92, *Attorney General for Canada* v. *Attorney General of Ontario* (2).

It is, of course, an important principle that legislation which for one aspect and for one purpose falls within the authority conferred by sec. 92, may in another aspect and for another purpose fall within the authority conferred by sec. 91, but where the question concerns the scope of the enumerated heads of sec. 91 it is in the sense just indicated that this principle must be understood. It cannot be applied in such a way, as Lord Herschell said in the decision in the Fisheries case just referred to, as to enable a provincial legislature to legislate in respect of the matters which fall strictly within one of the specified classes enumerated in sec. 91. Therefore the decision in *Hodge's Case* (3), appears to have involved the conclusion that the kind of regulation which the Judicial Committee there held to be competent to a provincial legislature, was not the kind of regulation which is exclusively committed to the Dominion Parliament by the second enumerated head of sec. 91; and it would only be a corrollary of this to hold that the Dominion could not

(1) [1899] A.C. at page 372. (2) [1898] A.C. 700, at page 715.
(3) 9 App. Cas. 117.

by enacting a law professing to put into effect the same kind of regulation in each province, legitimately appropriate a field belonging to one of the enumerated specific classes of sec. 92; and this is what was decided upon the Reference touching the validity of the McCarthy Act. In *Attorney General for Canada* v. *Attorney General of Alberta* (1), Lord Haldane speaking for the Judicial Committee said:—

> But in *Hodge* v. *The Queen* (2), the Judicial Committee had no difficulty in coming to the conclusion that the local licensing system which the Ontario statute sought to set up was within provincial powers. It was only the converse of this proposition to hold, as was done subsequently by this Board though without giving reasons, that the Dominion licensing statute known as the McCarthy Act, which sought to establish a local licensing system for the liquor traffic throughout Canada, was beyond the powers conferred on the Dominion Parliament by s. 91.

By parity of reasoning it seems to follow as a result of *Parson's Case* (3) that legislation regulating the contracts of a particular business or trade is not the kind of regulation which is exclusively committed to Parliament by that provision of sec. 91 now under discussion and consequently that it is not competent to the Dominion to regulate such contracts in each Province by legislation applicable to all of the provinces.

Again in the *Montreal Street Railway Case* (4), a Dominion enactment purporting to regulate local railways in respect of through traffic, that is to say traffic passing from a Dominion to a local line and *vice versâ*, was held to be *ultra vires* and it was decided that the authority conferred by item No. 2 of sec. 91 could not be legitimately exercised in regulating the management of "local works or undertakings" of the kind committed to the exclusive jurisdiction of the province by item No. 10 of sec. 92.

(1) [1916] A.C. 588, at p. 596.
(2) 9 App. Cas. 117.
(3) 7 App. Cas. 96.
(4) [1912] A.C. 333.

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In *Parson's Case* (1), at pages 112 and 113 appears the well known elucidation of the language of No. 2 of sec. 91 by Sir Montague Smith. In the *Montreal Street Railway Case* (2) at page 344, the substance of this passage is adopted by the Judicial Committee; and again in *John Deere Plow Co.* v. *Wharton* (3), at page 340, Lord Haldane speaking for the Judicial Committee said:—

> Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens Insurance Co.* v. *Parsons* (1), at pages 112 and 113, on head 2 of s. 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade.

Turning then to the exposition in *Parson's Case* (1), thus adopted in 1912 and 1915, we find (in addition to the negative proposition that the authority in question does not comprehend the power to enact minute regulations in respect of a particular trade), 1st that the context affords an indication that "regulations relating to general trade and commerce" were in the mind of the legislature, and 2nd that matters embraced by these words would include

> political arrangements in regard to trade requiring the sanction of Parliament; regulation of trade in matters of interprovincial concern

and possibly

> general regulation of trade affecting the whole Dominion.

It is not easy to ascribe a precise meaning to the words "general trade and commerce" but the passage seems to imply that the words "trade and commerce" are to be read conjunctively or at all events that the word "trade" takes on a special colour and significance from its association with the word "commerce"; and whatever be the precise significance of the word

(1) 7 App. Cas. 96. (2) [1912] A.C. 333.
(3) [1915] A.C. 330.

"general" we are at least able to affirm in consequence of the decisions already mentioned that it excludes regulations such as those which were in question in *Hodge's Case* (1), in the McCarthy Act reference, in *Parson's Case* (2), and in the *Montreal Street Railway Case* (3). To borrow a phrase used arguendo on the Liquor License appeal, *Attorney General of Ontario* v. *Attorney General for Canada* "general" in this passage means

> general not as including all particulars but general as distinguished from some particulars.

In the *Montreal Street Railway Case* (3), at page 344, it was laid down in effect that the authority to deal with trade and commerce ought not to be so construed and applied as to enable the Parliament of Canada to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest and in particular in relation to matters which in each province are comprehended within the subject matters assigned to the province by No. 10 of sec. 92, viz., "local works and undertakings."

In addition to these negative and limiting rules a recent decision, *Wharton's Case* (4), affords an illuminating example of the application of the considerations mentioned in *Parson's Case* (2). It was there held that companies incorporated under the residuary power arising under sec. 91, having the status of corporations throughout the Dominion generally might properly be subjects of regulation under No. 2 of sec. 91 in the sense that Parliament in the exercise of the

(1) 9 App. Cas. 11.
(2) 7 App. Cas. 96.
(3) [1912] A.C. 333.
(4) [1915] A.C. 330.

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authority thereby conferred might prescribe the extent to which such companies should be entitled to trade in any of the provinces. That is entirely consistent with the proposition laid down in *Parson's Case* (1), that the authority of Parliament under the heading mentioned is an authority to pass regulations in relation to "general" trade and commerce. For the regulation in question in *Wharton's Case* (2), was not a regulation relating to any particular kind of trade or business, but a regulation touching the trading powers of all Dominion Companies engaged in any kind of business and applying to all such companies alike and thus at least potentially affecting Dominion trade and commerce in general through one of its most important instrumentalities.

Coming to the consideration of the Combines and Fair Prices Act, and particularly section 18 of that Act under which the order in dispute has been made. The jurisdiction of the Board under this section falls broadly into two sub-divisions, first the jurisdiction to make orders prohibiting the accumulation of articles to which the statute applies or the withholding from sale at reasonable prices of any such articles in excess of the amount reasonably required for domestic purposes, or for the ordinary purposes of business, and secondly the jurisdiction to regulate profits; that is to say to declare what constitutes an unfair profit upon the holding or disposition of such articles, to prohibit the making or taking of such profits and to prohibit any practice which in the opinion of the Board has a tendency to enhance the cost of such articles, or the profits rising from the holding or the disposition of them, or the price of them.

(1) 7 App. Cas. 96. (2) [1915] A.C. 330.

As regards the first head of jurisdiction, the authority of the Board extends to traders and non-traders alike, to persons accumulating by means of purchase or by means of production, to articles accumulated whether by means of production or otherwise, for domestic use or for use for the ordinary purposes of business. For example it applies to accumulations by the house-holder of articles of food produced by the house-holder himself, the small farmer's pork and butter, as well as to his cordwood. It applies to the stock of coal accumulated by a railway or shipping company, or of coal or coke by a gas company or a smelting company, as well as to the coal accumulated by a coal mining company or the gas produced by a gas company; to the dairyman's as well as to the rancher's herd.

In so far as the Act authorizes the Board of Commerce to compel persons who are not engaged in trade to dispose of their property subject to conditions fixed by the Board and persons who are traders to dispose of property in respect of which they are not engaged in trade, (the coal of the railway company or of the gas company, the dairyman's herd for example), I have not a little difficulty in classifying it as an enactment relating to the matters comprised within section 91-(2), upon any fair construction of the words "regulation of Trade and Commerce." It is legislation effecting trade and commerce no doubt, but I am unable to distinguish such an enactment from an enactment authorizing a Board established by Parliament to take over such property on terms to be fixed by the Board and to dispose of it itself. Such compulsory enactments seem to be enactments on the subject

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of the rights of property, 92-(13) and "local undertakings," 92-(10) rather than enactments in regulation of trade and commerce.

Turning now to the authority vested in the Board by section 18, in relation to profits and prices. The provisions of section 18 on this subject appear to be obnoxious to the principles laid down in the passages referred to in *Parson's Case* (1), *the Montreal Street Railway Case* (2), and the *Wharton Case* (3). The authority given to the Board is an authority to prohibit the making or taking of unfair profits upon the holding or disposition of any articles to which the statute applies, and the section provides,

> that an unfair profit shall be deemed to have been made, when the Board shall declare an unfair profit to be made.

It is thus left to the Board to make orders affecting individual holders or traders, to fix the terms upon which they are required to dispose of articles withheld from disposition or held for disposition, and such terms the Board is not required to fix by any general regulation, but may, and in the normal course would, fix them with reference to the circumstances of a particular case. The fixing of the terms of disposition by reference to the prohibition against unfair profits might well result in great disparity between the prices charged for the same article by different traders. The creation of an authority endowed with such powers of fixing the terms of contracts in relation to specific articles appears to involve an interpretation of the words, "regulation of trade and commerce," much more comprehensive than anything contemplated by the decisions and judgments referred to

(1) 7 App. Cas. 96. (2) [1912] A.C. 333.
(3) [1915] A.C. 330.

above. I have indicated the principle which in my opinion is deducible from *Parson's Case* (1), namely that section 91-(2) does not authorize an enactment by the Dominion Parliament regulating in each of the provinces the terms of the contracts of a particular business or trade, for the reason (put very broadly) that such legislation involves an interposition in the transactions of individuals in the provinces, within the sphere of

property and civil rights and local undertakings

not contemplated by section 91-(2). Legislation, for example, imposing upon the trade in ready-made clothing throughout Canada, the prohibitions put into force by the order out of which this reference arises would, if my view of the effect of *Parson's Case* (1) be the right view, pass beyond the scope of the authority given in 91-(2); an enactment, that is to say, by the Dominion Parliament in the precise words of the order now in question could not be supported under that head. I cannot discover any principle consistent with these conclusions, upon which an enactment delegating to a commission the authority to regulate the terms of particular contracts of individual traders in a specified commodity according to the views of the Board as to what may be fair between the individual trader and the public in each transaction, can be sustained as an exercise of that power; and if such legislation could not be supported when the subject dealt with is a single commodity, or the trade in a single commodity, or a single group of commodities, how can jurisdiction be acquired so to

(1) 7 App. Cas. 96.

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legislate by extending the scope of the legislation and bringing a large number of specified trades or commodities within its sweep? Every consideration which can be invoked in support of the view that the authority to regulate by general regulations of uniform application the contracts of a trade in one commodity, does not fall within section 91-(2), can properly be brought to bear with I think increased force in impeaching legislation of the character now in question.

The point may be illustrated by reference to the provincial jurisdiction concerning Local Works and Undertakings. The power given to the Board by section 18, is a power to interfere with the management of local undertakings in respect of all the matters mentioned, accumulation, withholding from sale, making and taking profits, from holding or selling, prices, cost, and practices affecting prices and cost. The authority extends to such undertakings for example, as coal mines and gas works. Electricity does not fall within the definition of section 16, but could I think be brought within the jurisdiction of the Board by a regulation passed under that section. Section 19 shows that such undertakings are within the contemplation of section 18, and in *Union Colliery Co.* v. *Brydon* (1), at page 585, it was laid down that coal mines are local undertakings within 92-(10).

It is necessary to observe that we are not dealing with a statute clearly within one of the enumerated heads of section 91, and only incidentally affecting local undertakings, or other matters committed to the province. The normal operation of section 18, being such as I have pointed out, namely through the instrumentality of orders made by the Board directly

(1) [1899] A.C. 580.

against individuals and particular undertakings, and based upon conclusions derived from a consideration of the circumstances of each particular case, it becomes plain that what is contemplated is a direct interference by the Board, in respect of the matters committed to its jurisdiction, in the management of such undertakings, the property held in connection with them and the contracts made by their proprietors. Let us take as instances, coal mines and gas works. The authority given to the Board to fix the rate of profit, to prohibit accumulation beyond the amount which in the opinion of the Board may reasonably be required for the purposes of the business, to prohibit practices which in the opinion of the Board enhances costs or profits, is essentially an authority to interfere with the management of undertaking A, undertaking B, and undertaking C, notwithstanding that the authority is given in general terms, and therefore the legislation creating that authority is not legislation merely affecting such undertakings but legislation in relation to such undertakings; *Canadian Pacific Railway Co.* v. *Bonescours* (1), at page 372; *Montreal* v. *Montreal Street Ry. Co.* (2) at page 346.

It may be conceded that while section 18 could in its very terms be validly enacted by a provincial legislature, the authority reposed in a Commission created by such a legislature, would not of course extend beyond the ambit of authority committed to the legislature itself and consequently such a Commission would not acquire power to deal with matters belonging to the subjects of foreign trade, inter-provincial trade, and the regulating of the management of Dominion undertakings and beyond the legitimate

(1) [1899] A.C. 367. (2) [1912] A.C. 333.

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scope of the legislative activities of the province; but it does not follow because the Dominion could alone deal with these last mentioned matters it is itself authorized to enter upon fields exclusively reserved for the provinces, in order to carry out a legislative design necessarily incomplete without legislation on matters so exclusively reserved; co-operation between the Dominion and the provinces may be necessary to attain the ends desired by the legislators and such co-operation is of course not unknown and has indeed in some cases been expressly provided for in Dominion legislation, see for example 9 & 10 Geo. V., chapter 68, section 373, sub-section 6.

Having regard then to the scope of section 18, the authority conferred upon the Board to interfere with the proprietary rights of producers, holders and consumers of any of the articles to which the Act applies, and the authority to interfere with the management of local works and undertakings, and to prescribe the conditions of contracts relating to such articles and to the manner in which the Act takes effect, I conclude that it is not an enactment in relation to trade and commerce within section 91-(2).

The second question is whether section 18 can be sustained as an exercise of the power of the Dominion under the introductory clause of section 91 to

make laws for the peace, order and good government of Canada.

Two conditions govern the legitimate exercise of this power. First—it is essential that the matter dealt with shall be one of unquestioned Canadian interest and importance as distinguished from matters merely local in one of the provinces; and, secondly, that the legislation shall not trench upon the authority of the province in respect of the matters enumerated in

section 92. *Attorney General of Ontario* v. *Attorney General for Canada* (1), *Montreal* v. *Montreal Street Ry. Co.* (2), at pages 343 and 344; *Wharton's Case* (3), at page 337. I have already pointed out that section 18 does profess to deal with matters which in each province are, from the provincial standpoint, rights of property and civil rights there and matters which, in each province, are comprehended within the subject matter "local undertakings."

It is true that in *Russell* v. *The Queen* (4), the Canada Temperance Act was held to be validly enacted under this general power and that in *Local Option Reference* (1), and in the *Manitoba License Holders' Case* (5), the enactment of similar legislation was held to be competent to a local legislature, the legislation being, of course, limited in its operation, to the province; but it is I think impossible to draw from these authorities on the "drink" legislation any general principle which can serve as a guide in passing upon the validity of the statute before us.

Russell's Case (4) was accepted by the Judicial Committee in 1896, as decisively determining the validity of the Canada Temperance Act and to that extent it was treated as a binding authority.

But it must be remembered that *Russell's Case* (4), was in great part an unargued case. Mr. Benjamin who appeared for the appellant—the provinces were not represented upon the argument—conceded the authority of Parliament to enact legislation containing the provisions of the Canada Temperance Act to come into force at the same time throughout the whole

(1) [1896] A.C. 348.
(2) [1912] A.C. 333.
(3) [1915] A.C. 330.
(4) 7 App. Cas. 829.
(5) [1902] A.C. 73.

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of Canada and this Lord Herschell said in a subsequent case, was a "very large admission." The Judicial Committee proceeded upon the view that legislation containing the provisions of the Canada Temperance Act was not, from a provincial point of view, legislation relating to "property and civil rights" within the province; it was, they said, legislation dealing rather with public wrongs, having a close relation to criminal law and on this ground they held that the subject matter of it did not fall within the exceptions to the introductory clause.

The subsequent judgments of the Judicial Committee in the *Local Option Reference* of 1896 (1) and in the *Manitoba License Holders' Case* (2) show that consistently with the validity of the Canada Temperance Act similar legislation by the provinces limited in its operation to the province, can be supported as being from a provincial point of view legislation dealing with matters merely local. In the last mentioned case Lord Macnaghten said it might be doubtful whether if such legislation were from the provincial point of view properly classified as legislation upon the subjects denoted by "property and civil rights," general legislation by the Dominion such as the Canada Temperance Act could be sustained.

There is no case of which I am aware in which a Dominion statute not referable to one of the classes of legislation included in the enumerated heads of sec. 91 and being of such a character that from a provincial point of view, it should be considered legislation dealing with "property and civil rights," has been held competent to the Dominion under the introductory clause; and the effect of decisions in the Mont-

(1) [1896] A.C. 348. (2) [1902] A.C. 73.

real Street Railway case, or the McCarthy Act Reference and in the Insurance Act Reference, *Attorney General for Canada* v. *Attorney General of Alberta* (1), is that legislation by the Dominion applying to the whole of Canada dealing with matters which from a provincial point of view fall within No. 9 or No. 10 of sec. 92, is not a competent exercise of this general power.

"Property and civil rights," of course, taken in the most comprehensive sense, is a phrase of very wide application and like the words "Trade and Commerce," it must be restricted by reference to the context and the other provisions of sections 91 and 92. But my view is that where a subject matter is from a provincial point of view comprehended within the class of subjects falling under "property and civil rights," properly construed (*ex hypothesi* such matter could not fall strictly within any of the classes of subjects enumerated in sec. 91) it is incompetent to the Dominion in exercise of the authority given by the introductory clause to legislate upon that matter either alone or together with subjects over which the Dominion has undoubted jurisdiction as falling neither within sec. 92 nor within the enumerated heads of sec. 91; and legislation which in effect has this operation cannot be legitimised by framing it in comprehensive terms embracing matters over which the Dominion has jurisdiction as well as matters in which the jurisdiction is committed exclusively to the provinces.

Nor do I think it matters in the least that the legislation is enacted with the view of providing a remedy uniformly applicable to the whole of Canada in relation to a situation of general importance to the Dominion. The ultimate social economic or political

(1) [1916] 1 A.C. 588.

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aims of the legislator cannot I think determine the category into which the matters dealt with fall in order to determine the question whether the jurisdiction to enact it is given by sec. 91 or sec. 92. The immediate operation and effect of the legislation, or the effect the legislation is calculated immediately to produce must alone, I think, be considered. I repeat that if, tested by reference to such operation and effect, the legislation does deal with matters which from a provincial point of view are within any of the first fifteen heads of section 92, it is incompetent to the Dominion unless it can be supported as ancillary to legislation under one of the enumerated heads of section 91.

This view may be supported by contrasting the decision of the Judicial Committee in *Russell's Case* (1), with its decision on the McCarthy Act reference. The Canada Temperance Act was an attempt on the part of the Parliament of Canada to cope with the evils arising from the sale of intoxicating liquor, and that Act as already mentioned was held to be within the power of Parliament as dealing not with civil rights and property but with public wrongs, and being legislation analogous in character to the statute restricting the sale of explosives and poisons and having a close relation to the criminal law. The McCarthy Act which was passed shortly after the decision in *Russell's Case* (1), recited that it was expedient to regulate the traffic in intoxicating liquors by a system uniform throughout Canada for the purpose of preserving public order, and then proceeded to regulate the liquor trade by a system of licensing. This decision, as already mentioned, was a logical conse-

(1) 7 App. Cas. 829.

quence of the preceding decision of the Board in *Hodge's Case* (1), to the effect that from a provincial point of view such a system of licensing fell within number 9 of section 92. The combined effect of these decisions seems clearly to be that while for the purpose of dealing with a matter of interest to the whole Dominion in the sense of being a matter affecting and pertaining to the public order and good government of the whole Dominion (the evils of the liquor trade), Parliament may legislate so long as its enactments are of such a character that they do not deal with matters from a provincial point of view within the specific classes of subjects enumerated in section 92, (that is, the first fifteen heads) it is not within its power under the residuary clause to enact legislation which from the provincial point of view falls within any one of such classes. It is quite true that the McCarthy Act Reference principally involved a consideration of only one of the enumerated heads, No. 9, but it is difficult to find any satisfactory relevant distinction between No. 9 and No. 10 (as regards matters falling under this head, the *Montreal Street Railway Case* (2), seems to be conclusive), or between No. 9 and No. 13, although as regards the last mentioned head, caution must be used in observing the limits necessarily imposed by the context in the two sections upon the scope of their application.

The argument based upon the residuary clause rests upon the principles supposed to be deducible from the decisions upon the liquor legislation. The result of the decisions of the Judicial Committee in *Russell's Case* (3), on the Local Option Reference in

(1) 9 App. Cas. 117. (2) [1912] A.C. 333.
(3) 7 App. Cas. 829.

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1896, and the *Manitoba License Holders Case*, in 1902 (1), is that while the restriction or prohibition of the liquor traffic in the manner effected by the Canada Temperance Act within a single province, may from a provincial point of view fall within No. 16, it may also fall within the ambit of the residuary clause as subject matter of legislation; but there is in my judgment no justification for applying the reasoning of their Lordships in their judgments in the Local Option Reference, in support of the proposition that matters falling within any of the other heads of section 92 as subject matter of legislation can be dealt with by the Dominion under a general law passed under the authority of the residuary clause, and the doubt expressed by Lord Macnaghten in the *Manitoba License Holders Case* (1) affords very weighty argument against such an interpretation of Lord Watson's judgment on the Local Option Reference.

The consequences of this proposed view of the residuary clause, can be illustrated by the present legislation. The scarcity of necessaries of life, the high cost of them, the evils of excessive profit taking, are matters affecting nearly every individual in the community and affecting the inhabitants of every locality and every province collectively as well as the Dominion as a whole. The legislative remedy attempted by section 18 is one of many remedies which might be suggested. One could conceive, for example, a proposal that there should be a general restriction of credits, and that the business of money lending should be regulated by a commission appointed by the Dominion Government with powers conferred by Parliament. Measures to increase production might

(1) [1902] A.C. 73.

conceivably be proposed and to that end nationalization of certain industries and even compulsory allotment of labour. In truth if this legislation can be sustained under the residuary clause, it is not easy to put a limit to the extent to which Parliament through the instrumentality of commissions (having a large discretion in assigning the limits of their own jurisdiction, see sec. 16), may from time to time in the vicissitudes of national trade, times of high prices, times of stagnation and low prices and so on, supersede the authority of the provincial legislatures. I am not convinced that it is a proper application of the reasoning to be found in the judgments on the subject of the drink legislation, to draw from it conclusions which would justify Parliament in any conceivable circumstance forcing upon a province a system of nationalization of industry.

Mr. O'Connor's chief contention was that the enactments of section 17 are enactments upon the subject of criminal law, within the meaning of that phrase as used in section 91 and that the provisions of section 18 can be supported as provisions ancillary to these enactments. I think it is open to doubt whether the enactments in section 17 can be supported as enactments upon the subject of "the criminal law." Section 22 it is true makes infractions of section 17 punishable as therein provided, but the penal sanctions provided by section 22, apply clearly to any contravention of any provisions of Part 2 of the Combines and Fair Prices Act, and it is not easy to believe that every such infraction (for example, subsection 3, sec. 19) was intended by the legislature to be classed as a crime in the strict sense. Moreover having regard to the jurisdiction conferred upon the Board (by sec. 16) to enlarge the application of the statute, it seems

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very doubtful indeed if such could have been the object of the legislature. But assuming this view of section 17 to be the right view, I cannot agree that the enactments of section 18 are in any proper sense ancillary to the enactments of section 17. Sections 17 and 22 are quite complete in themselves, and while I think the legislature might very well have provided as ancillary to these enactments special administrative machinery for the investigation of questions of fact pertaining to the matters dealt with in these two sections, and have reformed the criminal procedure for the purpose of meeting the difficulties of enforcing section 17, the authority conferred upon the Board by section 18 is not in my opinion in any way necessary in order to give complete effect to sections 17 and 22.

BRODEUR J.—The Board of Commerce had, on the 9th of January, 1920, under section 32 of the Board of Commerce Act (9 & 10 George V, ch. 37) stated a case for the opinion of this court upon several questions which, in the opinion of the Board, were questions of law.

The specific facts which had arisen and the decision arrived at on these facts had not been mentioned in the stated case and it could hardly be considered that the questions were properly submitted. *In re Cardigan County Council* (1). It was found advisable, at the suggestion of the Court, that a new case should be submitted. The Board then stated a new case with regard to the retail clothiers of the City of Ottawa, in which it is alleged that the Board had made of its own motion an inquiry under the provisions of

(1) 54 J.P. 792.

section 18 of The Combines and Fair Prices Act, 1919 (ch. 45, 9 & 10 Geo. V.) and that it was found that those merchants had made unfair profits on the sales of men's clothing and that after a certain date an order would issue restraining them from selling these goods, except at a certain margin of profit. We are asked to determine whether or not the Board has the authority to make such an order and to require the Registrar or other proper authority of the Supreme Court of Ontario to cause the order to be made a rule of said court.

This new stated case supersedes the question formerly submitted. It is made with the evident intention of testing the validity of section 18 of the Combines and Fair Prices Act. There was at first some uncertainty as to whether the proposed order was issued under sections 17 and 18; but at the argument it was stated as a common ground that the only section of the Act applicable to the facts of the case is section 18. This section 18 declares that the Board is empowered to inquire into and to prohibit any breach of any provision of the Act, the making of unfair profits upon necessaries of life and all practices calculated to unfairly enhance their cost.

The Attorney General of Alberta, who had appeared by counsel on the first stated case which covered the validity of the whole Act, has also appeared on this amended issue to contest the validity of the order. He does not desire to question the wisdom of any proper legislative attempts to regulate prices in the interest of the consumers, but he claims that such a legislation is within the exclusive jurisdiction of the Provincial Legislature.

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The retail clothiers specifically named in the proposed order are being defended by the association of which they are members, the Retail Merchants Association of Canada, and this association, as well as some other associations and organizations which are interested in the proceedings instituted before the Board of Commerce, have also appeared and have asked us to declare *ultra vires* the legislation on which the order is based.

The Attorney General of Canada upholds the constitutionality of the said order, his main ground being that section 18 is legislation ancillary to criminal legislation. viz., to section 17 of the Combines and Fair Prices Act. The first question then is as to whether or not section 17 is criminal legislation.

Section 17 prohibits undue accumulation of necessaries of life and forces the accumulators to dispose of these necessaries at fair prices.

In other words, it is an enactment relating to the quantity of goods which a person may possess and determines the conditions at which they should be sold. *Primâ facie* it is legislation affecting property and civil rights and would fall within provincial and not federal jurisdiction. Sec. 92, s.s. 13.

It is true that penalties are imposed on those who contravene or fail to observe any provisions of the Act and even these contraventions are indictable offences; (sect. 22). But the imposition of penalties would not by itself give the Federal Parliament power to legislate. As it was declared by the Privy Council in *The Insurance Reference* (1), such penalty is an ancillary enactment. We must ascertain the class

(1) [1916] 1 A.C. 588 at p. 594.

to which the operative enactment really belongs, the primary matter dealt with, the true nature and character of the legislation, its leading features, its pith and substance. *Union Colliery Co.* v. *Bryden* (1).

What is the object of the legislation at issue in this case? It is to investigate and restrain the withholding and enhancement of the price of commodities. A Board is created for that purpose with very extensive powers. If the intention of Parliament was to enact criminal legislation, it would likely have been embodied in an amendment to the Criminal Code, as they have done by the following chapter, chapter 46 of the statutes passed in the same year.

Similar provisions had to be construed in the *Insurance Reference* (ss. 4 and 70 of the Insurance Act) (2). Penalties and imprisonment were enacted for the contravention; but it was mildly contended it could be considered as criminal legislation before this court (2); it was not mentioned before the Privy Council (3).

Legislation similar to the one we have to construe in this case was passed last year in England and was called "The Profiteering Act". Under that Act the Board of Trade has power to investigate prices, profits, etc., and for that purpose to require any person to appear before them, and on any such investigation they may by order fix maximum prices and declare the price which would give a reasonable profit.

(1) [1899] A.C. 580. (2) 48 Can. S.C.R. 269 at p.313.
(3) [1916] 1 A.C. 588.

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By subsection 2 of section 1 of the Act it was declared:

> If as the result of any investigation undertaken on their own initiative or on complaint made to them, it appears to the Board of Trade that the circumstances so require, the Board shall take proceedings against the seller before a court of summary jurisdiction, and if in such proceedings it is found that the price charged or sought about which the complaint was made, or the price discovered at the investigation to have been charged or sought, was such as to yield a profit which is, in view of all the circumstances, unreasonable, the seller shall be liable on summary conviction to a fine not exceeding £200 or to imprisonment for a term not exceeding three months or to both such imprisonment and fine.

By section 2 of the same Act, the Board of Trade has power to establish local committees to whom the Board may delegate any of their powers.

The Lancashire and Yorkshire Railway were charged before the Manchester Profiteering Committee for charging at their restaurant exorbitant prices. The railway company applied for a writ of prohibition and the court, on the 15th March, decided that

> a prosecution under s. 1, sub-s. 2, of the Act is a separate and independent proceeding from the investigation with a view to declaring a price and ordering repayment of any amount in excess of that price under s. 1, sub-s. 1, and that the investigation was not a criminal cause or matter.

Even if section 17 were criminal legislation, it could not be claimed that the order is valid because it is ancillary to criminal legislation.

The power to pass criminal laws belongs to the Federal Parliament (B.N.A. Act, s. 91, s.s. 27). In its ordinary sense, the words *criminal law* would cover not only the definition and punishment of crime, but also the procedure and the courts for the trial of persons accused of crime. But section 92, s.s. 4, gives to the provincial legislatures the legislative control over the constitution of the courts of criminal jurisdiction, and, besides, subsection 27 of section 91,

in giving legislative power to the Federal Parliament on the criminal law, excepts formally the constitution of the courts of criminal jurisdiction.

It is such a formal enactment that I cannot accept the proposition that the creation of a court like the Board of Commerce could be validly constituted as a court of criminal jurisdiction. Section 101, which is invoked also in that respect, could not alter the formal provisions of section 91 which should stand *"notwithstanding anything in this Act,"* as it is declared therein.

I admit that *intra vires* federal legislation will override inconsistent provincial legislation and that the widest discretion must be allowed to the federal Parliament in the moulding of its legislation, but at the same time no usurpation should be made under the guise of so-called ancillary legislation. *Montreal* v. *Montreal Street Railway Co.* (1).

It could not be considered as essential to the exercise of the Dominion legislative authority that section 18 of the Fair Prices Act should have been passed, and I understand this as the test which should be adopted to determine the validity of any ancillary legislation.

The Board in exercising its powers under section 18 exercises independent civil powers and the order we have to examine is made for the purpose of forcing the merchants to sell their goods at a certain price.

It is contended also that this can be dealt with by the Federal Parliament as a regulation of Trade and Commerce.

The words "regulation of trade and commerce" may cover a very large field of possible legislation and there has been much discussion as to their limits.

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

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They were first considered in the *Parsons Case* (1), in 1881, and there it was stated that these words in their unlimited sense would include every regulation of trade ranging from commercial treaties with foreign governments down to minute rules for regulating particular trades, but a consideration of the context and of other parts shows that these words should not be used in this unlimited sense. The collocation of the regulation of trade and commerce with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the minds of the fathers of Confederation when they gave the Federal Parliament the power to deal with it.

Views to the same effect have been expressed by the Privy Council in *Bank of Toronto* v. *Lambe* (2), and in *Montreal* v. *Montreal Street Railway Co.* (3).

The last case where this power of regulating trade and commerce has been considered by the Privy Council is the *Insurance Reference* (4), and it was held there that

> the regulation of trade and commerce does not extend to the regulation of a particular trade.

In the Combines and Fair Prices Act, there is an attempt to regulate the trade of those who are engaged in dealing with necessaries of life, as there was an attempt in the Insurance Legislation to regulate the trade of those engaged in the insurance business.

Then the contention is made that this legislation is valid in the exercise by the Federal Parliament of its power to make laws for the peace, order and good government of Canada.

(1) 7 App. Cas. 96.
(2) 12 App. Cas. 575.
(3) [1912] A.C. 333.
(4) [1916] 1 A.C. 588.

According to the principle of construction adopted in the *Parsons Case* (1), the first question to be determined with regard to the distribution of legislative powers is whether section 18 of the Combines and Fair Prices Act falls within any of the classes of subjects enumerated in section 92 and assigned exclusively to the legislatures of the provinces. If it does, then the further question would arise whether the subject of the Act does not also fall within one of the enumerated classes of section 91 and so does not still belong to the Dominion Parliament.

Primâ facie section 18 of the Combines and Fair Prices Act is legislation affecting property and civil rights and would fall within provincial control and not federal control (s. 92, s.s. 13) and, as I have shown above also, the subject of the Act does not fall within the regulation of trade and commerce or criminal law.

There may be matters not included in the enumeration of section 91 upon which the Parliament of Canada has power to legislate, because they concern the peace, order and good government of the Dominion, but if they are enumerated in sec. 92, then the Dominion Parliament has no authority to encroach upon these subjects. It is not claimed that the order in question is of Canadian interest or importance, because this order has reference to merchants of a certain city and the provincial authorities could certainly pass the necessary legislation to carry out such an order. *Attorney General of Ontario* v. *Attorney General of Canada* (2).

(1) 7 App. Cas. 96. (2) [1896] A.C. 348.

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I do not then hesitate to say that section 18 of the Combines and Fair Prices Act could not be considered as valid under the exercise by the Federal Parliament of its power to legislate concerning peace, order and good government. The legislation in question is then *ultra vires* and should be declared unconstitutional.

For these reasons the answer to the first question submitted should be in the negative. As to the second question, it is not then necessary for me to deal with it.

WATT & SCOTT, LIMITED, (PLAINTIFF) ..... APPELLANT;

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*Mar. 9, 10.
*May 4.

AND

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

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

Negligence—Municipal corporation—Sewers—Heavy rain—Vis Major—Liability—Appeal—Jurisdiction—Consolidation of actions—"Charter of the City of Montreal," 62 Vict., c. 58, s. 42, ss. 94, 96 and 97 of s. 300—Arts 1053, 1054, 1614, 2615 C.C.—Arts. 281 and 292 C.P.C.—Arts. 1382 and 1384 C.N.

The appellant took two actions, one for $1,178.83 and another for $3,013.23, against the respondent for damages caused by two floodings of its cellar through the insufficiency of the civic sewer to carry off the drainings and surface waters. These two actions were consolidated for purposes of trial; they were both maintained by the judgment of the trial judge, and both dismissed by the Court of King's Bench, the first by a majority judgment and the second unanimously. The appellant took one appeal to the Supreme Court, and the respondent moved to quash the appeal for want of jurisdiction as to the first action.

Held, that there was no jurisdiction in the Supreme Court of Canada to entertain an appeal in the first action, which had not lost its identity through the consolidation of the two actions.

On the merits of the second action:

Per Idington, Duff, Anglin and Mignault JJ.—The respondent should have provided the instalment of "suitable automatic safety valves at connection in sewerage" as enacted by its charter.

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*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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Per Idington, Duff, Anglin and Mignault JJ.—Under the circumstances of this case, the rainstorm did not constitute *vis major*, as, though extraordinary but not unprecedented, it was not of such violence that it could not reasonably have been anticipated. Brodeur J. *contra*.

Per Idington and Duff JJ.—The primary duty rested on respondent, which was in control of the works it had undertaken to construct, and the responsibility devolved on it to see that they were so efficient in all details as not to injure any one else either in relation to person or to property.

Per Anglin and Mignault JJ.—The respondent's liability arises from the fact that the appellant's damage was caused by a thing which the respondent had under its care, i.e., the sewer, and that it has failed to prove that it was unable to prevent the act which has caused the damage, such act being the water from the sewer backing into the appellant's cellar. *Quebec Railway, Light, Heat & Power Co.* v. *Vandry*, (36 Times L.R. 296) followed.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), reversing the judgment of the Superior Court, and dismissing the appellant's, plaintiff's, action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Wainwright K.C. and Elder for the appellant.

Laurendeau K.C. and *St. Pierre* for the respondent.

IDINGTON J.—The appellant herein brought two actions to recover from respondent damages suffered by reason of water flowing from a sewer of respondent into the cellar of appellant connected therewith.

The first was in respect of damages, not amounting to $2,000, for an occurrence of that nature in March, 1917.

(1) Q.R. 29 K.B. 338.

The second arose out of an overflow on the night of 29th, and morning of 30th July, 1917.

An order was made for the consolidation, so called, of the two actions after issues had been joined.

The result was the trial of both actions together and a judgment of the learned trial judge which, after the recital of the pleadings in each case respectively awarded separate damages in respect of each cause of action namely the sum of $1,178.83 arising out of the occurrence in March, and the sum of $3,015.23 for that arising out of the occurrence in July.

The appeal from that judgment to the Court of King's Bench was prosecuted by a like preservation of distinction between the two causes of action and the determinate result.

There was never an amendment of the pleadings such as to produce any other result.

Hence on the appeal here we cannot say as to the result founded on the March occurrence there is a matter in controversy which can be said to involve at least $2,000.

And if we turn to the pleadings and the amount claimed thereby which often has to be, and here must be, our guide, we find nothing but the claim for $1,178.83.

It was therefore decided during the course of the argument herein that we had no jurisdiction to hear the appeal relative to the claim for damages in March, 1917. That branch of this appeal being thus eliminated, we must confine our attention to the alleged damages suffered in July, 1917.

The respondent is a municipal corporation created and operated by virtue of a special charter which enabled it to construct sewers and pursuant thereto it

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constructed in 1887 a main sewer, known as the "Commissioners Street Sewer" furnishing an outlet for the drainage through numerous other sewers draining an area of over thirty-eight acres in said city.

In 1896 the owners of the property, of which the appellant later, on the 1st of January, 1913, became tenants, obtained permission to make the necessary connections between said property and the sewer in question.

The respondent's engineer in charge of the sewer pumping station, testifies as follows as to that:—

Q.—First of all, Mr. Dowd, have you got with you the records of the Sewer Department of the city of Montreal shewing the permit issued by the city for the private drain from the premises at the north west corner of St. Gabriel street and Commissioners street, connecting with the Commissioner street sewer?

A.—Yes, it is in the book that I shewed you the other day.

Q.—So that here is a permit for a private drain from these premises to connect with the Commissioners street sewer?

A.—Yes, there is a permit; it is in book No. 10, page 40, permit No. 206, issued on the fourteenth of October eighteen hundred and ninety-six.

Q.—Does your record in reference to this permit show the particulars as to the location and size of the drain?

A.—Yes, they are all shown in the book, which I did not bring with me.

Q.—Then, there is no dispute between us on that point that there is a private drain from these premises to connect with the Commissioners street sewer?

A.—No.

Q.—There is no dispute as to that?

A.—Oh no, there is a private drain.

Q.—If I remember rightly, your records shew the location of the drain, its size and grade?

A.—Yes.

Q.—And you say you have not got that particular book with you?

A.—No, I did not bring it; I forget to bring it.

There seems to be no doubt of the power controlling all incidental thereto being with the respondent as appears by section 42 of its charter as it existed at that time, which is as follows:—

42. To regulate the sewerage of the city, and to assess proprietors of real estate to such amount as may be necessary to defray the expenses of making any common sewer in any street of the city, in which such proprietors own property, and for regulating the mode in which such assessment shall be made, collected and paid

and which was expanded in the charter as renewed in 1899 by 62 Vict. ch. 58, for which expansion see sections 94, 96 and 97 of Art. 300.

Pursuant thereto by-laws were enacted as follows:—

By-law No. 239.

Sec. 1. The city, by resolution of its council, is authorized to place automatic safety valves at the connection of sewers for the drainage of any land situated within limits of its territory. This work, however, shall not be commenced before it has been declared necessary by a report of the Road Committee, accompanied by a detailed statement from the city surveyor, containing the name of the proprietor, the lot or cadastral subdivision, the name of the street, the probable cost of the work to be performed, and by a certificate to the effect that such work is necessary in order to prevent the floods resulting from the public sewer existing in any street where such land is situated.

Sec. 2. The expenditure to be incurred for the manufacture and putting in of said safety valves shall be borne and paid one half by the city, and the other half by the proprietors of such lands.

* * * *

Sec. 6. The cost of repairing and maintaining said safety valves shall be payable by the City, which is hereby authorized to appoint any persons or officials of the Road Department to do the work required for that purpose on said lands.

It became, I submit, the respondent's duty to see that due care was taken in executing the purposes of these provisions.

Section 95 of the later enactment provided as follows:—

95. To permit the city to provide, where it may be necessary, suitable automatic safety valves at connections in sewerage for the drainage of any lands, the expense thereof to be borne one half by the city and one half by the owner of the property, and such cost shall be recovered according to the statement prepared by the officer designated for that purpose by the board of commissioners and approved by the latter and to provide for the inspection of the same by the city; but for all other buildings the expense shall be borne entirely by the city.

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There is most emphatic evidence by an engineer in the employment of the city and, I think, others, that the instalment of such automatic valves is the efficient remedy.

Vanier, an engineer employed by the city, speaks as follows:—

Q.—D'après votre expérience, des valves, des trappes dont vous avez parlé tout-à-l'heure, croyez-vous que s'il y en eut chez les demandeurs de telles valves d'installées convenablement, comme il se fait dans la pratique, ç'aurait eu pour résultat de prévenir ces inondations?

R.—Je le crois, j'en suis convaincu.

Q.—Est-ce que de semblables trappes ou valves, à votre connaissance, ont déjà prévenu des inondations ailleurs?

R.—Certainement.

Q.—Il y en a beaucoup d'installées à Montréal?

R.—Vous en avez d'installées un peu dans tous les quartiers ici.

And he testifies as to the practice relevant to private drains, as follows:—

Q.—Vous savez que la ville de Montréal a approuvé la connection de l'égout privé de la demanderesse avec l'égout de la rue des Commissaires?

R.—Parfaitment. Cela, c'est pour la partie franchement privée, qui se trouve de la bâtisse à l'égout de la rue. Mais je ne sache pas qu'elle ait approuvé, au moins d'après la preuve que j'ai entendue ici, de dispositions intérieures du drainage dans la maison de la demanderesse.

Q.—C'est la ville de Montréal qui installe la connection entre l'égout privé et l'égout de la rue?

R.—Entre la maison et l'égout de la rue.

Q.—C'est la ville qui fait cela?

R.—Il me semble.

Q.—Et la ville a approuvé la connection qu'elle a faite elle-même dans cette cause entre l'égout privé de la demanderesse et l'égout de la rue des Commissaires

R.—Oui. Dans ce cas-ci ça n'a pas d'importance du tout.

Q.—Mais cela se fait

R.—Cela se fait; je sais que c'est la pratique suivie à Montréal depuis quelques années.

We heard a great deal in argument about *force majeure* as if to pronounce these words should charm away any common sense method of looking at the real questions involved therein.

The exaggerated demands made on the one side thus met by the other, do not seem to me to furnish the way to the solution of the real problems presented.

The city had, seven years before the building of this sewer, a storm which I suspect was much more severe than that of July, 1914, now in question. That was followed later and meantime by very severe storms in July, 1906, June, 1907, and June, 1911, which would suggest a much greater downpour of rain than this sewer could take absolute care of if we have regard to the evidence of Mr. Blanchard, one of the city's engineers, who testifies as follows:—

Q.—Est-ce qu'il est pratique, au point de vue du génie civil, de construire des égouts pouvant répondre à des besoins tels qu'il s'en est produit le 29 et le trente juillet mil neuf cent dix-sept (1917)

R.—Non, il est impossible.

Q.—Est-ce que ça se fait

R.—Pas à ma connaissance.

Q.—Quelle est la capacité de l'égout de la rue des Commissaires, Monsieur Blanchard, en pouces, par heure

R.—Un pouce et quarante-deux centièmes.

Q.—Au point de vue des capacités "Standard," est-ce que c'est suffisant, cette capacité, un pouce et quarante-deux centièmes.

R.—Oui, dans un grand nombre de villes, on se contente d'un pouce seulement.

Q.—Quelle est la superficie que l'égout prend?

R.—C'est trente-huit acres et huit centièmes.

Q.—Tel que démontré sur le plan?

R.—Tel que démontré sur le plan.

Q.—Quelle est la capacité du débit de cet égout là par heure. Monsieur Blanchard?

R.—A l'heure,—je peux le donner à la seconde, c'est trente-six pieds et huit centièmes par seconde, c'est-à-dire des pieds cubes.

Q.—Maintenant, Monsieur Blanchard, quoi qu'étant un jeune homme vous connaissez bien Montréal depuis assez longtemps

R.—Je suis né ici à Montréal.

Q.—Est-ce que le quartier où la superficie que cet égout est appelé à égoutter est un endroit où il s'est fait un très grand nombre de changements depuis la construction de cet égout

R.—Seulement la rue St. Laurent qui s'est ouverte.

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To put beyond peradventure as it were there is set forth in the appellant's declaration an instance as follows:—

> 11. The defendant had previously recognized and admitted its liability for loss and damage occurring under circumstances such as those hereinabove mentioned, having previously compensated plaintiff on a previous occasion for loss suffered by it from the same cause and under similar circumstances, namely in the sum of $91.20 on the 24th day of July, 1913, the whole as is well known to defendant.

Though denied in the respondent's plea, this was admitted on argument and no explantation why except for sake of peace. A mere surmise, I suspect, of counsel.

This last incident, to my mind, acts two ways.

It seems to deprive appellant of being entirely free from blame in failing to ask for the installation of the necessary valve. And at the same time robs respondent of any reasonable excuse for failing to point out, as was its duty, the true remedy.

That seems to me to present the common sense view. And it was within the power of the city alone to supply its application.

I entirely disagree with the ground taken in respondent's factum that it cannot refuse a ratepayer to connect with the sewer. It not only can refuse, but it is its duty to refuse unless and until all reasonable conditions have been complied with and the measure of such presumably are those provided in its by-laws.

I must also express my dissent from the misapplication sought to be made in same factum of the decision in the case of *Roy* v. *City of Montreal* (1),

The by-laws in question herein are of an entirely different character from that in question therein, and deal with the subject matters of the relations between the city and those connecting their property with the city sewers, and are obligatory on both.

(1) Q.R. 2 S.C. 305.

Every brief storm such as those in question brings with it the risk of far more damage than the cost of these valves would be. And the brief storm if intense would leave on the streets and vacant places a temporary degree of discomfort which may have to be borne.

Hence I do not dwell on the issue of *force majeure* which from my point of view is besides the question at issue, or should be, if we apply common sense.

The primary duty rested on respondent which was in control of the works it had undertaken to construct, and did construct, and the responsibility devolved on it to see that they were so efficient in all details as not to injure any one else either in relation to person or to property.

The respondent did not exercise that due care which it was bound to have exercised.

Exhibit P2 filed herein as the permit given the owner in 1896 to make the connection is not very illuminating. Resort must be had to the by-laws for any delimitation of the respective rights and obligations of the parties concerned. The citizen who is presented with the due consideration of such a problem is not faultless if he fails to remonstrate when having occasion to complain.

I would, therefore, allow this appeal with costs, but divide the damages, four-fifths to be borne by respondent and one-fifth by appellant, and award it judgment accordingly with costs in the court below on the Superior Court scale throughout against respondent.

The appeal as to the other case having been quashed we ought not to interfere with anything relative to same beyond the costs of motion to quash.

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DUFF J.—I concur with Idington J.

ANGLIN J.—I concur with my brother Mignault.

Brodeur J.

BRODEUR J. (dissenting).—L' appelante par deux poursuites distinctes a poursuivi la cité de Montréal en dommages pour l'inondation de ses caves en mars 1917 et en juillet de la même année. Elle allègue que ces inondations ont été causées par l'insuffisance de l'égout collecteur construit par la ville.

La première poursuite pour l'inondation de mars était pour un montant de $1,178.83 et la seconde était pour un montant de $3,015.23. Comme ces deux poursuites soulevaient des questions qui étaient sous certains rapports substantiellement les mêmes, la cour a ordonné qu'elles soient instruites et jugées sur la même preuve (arts. 291 & 292 C.P.C.).

Par le jugement de la cour supérieure les deux actions ont été maintenues et la ville a été déclarée coupable de négligence pour les deux inondations. En cour d'appel ce jugement a été renversé.

La compagnie Watt & Scott porte les deux poursuites en appel devant cette cour.

La première question qui se pose est de savoir si nous avons juridiction pour juger la première poursuite, c'est-à-dire celle où le montant en litige est de moins de $2,000.

Les jonctions d'instances pour les fins de la preuve se font dans le but d'éviter des frais et n'ont pas pour effet de constituer une seule action. Les poursuites, après qu'elles sont réunies, ne perdent pas leur identité, et il arrive souvent que l'une d'elles soit maintenue et que l'autre soit renvoyée. Ainsi dans le cas actuel nous voyons que la cour d'appel, qui a été unanime sur la responsabilité de la défende-

resse dans la seconde action, s'est divisée quant à la première. Il y avait dans la considération de ces deux causes des circonstances qui pouvaient être invoquées dans un cas et ne pouvaient pas l'être dans l'autre.

Fuzier-Herman dans son Répertoire, *vo. Jonction d'instances*, nous déclare dans les termes suivants les effets de la réunion de deux poursuites:

No. 77. On doit d'ailleurs admettre que le jugement de jonction des deux instances qui ne peuvent pas être considérées comme n'en formant qu'une seule laisse à chaque action son caractère primitif, *ses règles propres de juridiction* et n'altérant ni la nature ni les effets de chaque demande, chaque cause doit être évaluée séparément pour la fixation du dernier ressort.

No. 83. La jonction de deux demandes formées par exploit séparé, n'a pas pour effet de modifier leur nature propre, de leur faire perdre leur individualité et de les fondre dans une instance unique. Chacune des actions conserve après le jugement de jonction son caractère primitif et ses règles propres de juridiction.

Pour déterminer la juridiction de cette cour, il faut donc voir quel est le montant des deux actions.

Dans une cause jugée récemment par cette cour, L'*Autorité* v. *Ibbotson* (1) nous avons décidé que si onze personnes se réunissent dans une seule poursuite pour réclamer des dommages au montant de $22,000 payables $2,000 en faveur de chacune d'elles, il faut traiter cette poursuite comme s'il y eût eu onze poursuites différentes.

Les décisions suivantes de cette cour sont au même effet: *Hearn* v. *Nelson & Fort Sheppard Ry. Co.* (2), *Glen Falls Ins. Co.* v. *Adams* (3), *Ontario Bank* v. *McAllister* (4).

(1) 57 Can. S.C.R. 340.
(2) 8 West. W.R. 99.
(3) 54 Can. S.C.R. 88.
(4) Cameron's Practice, 2nd ed. 265.

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On a dit que ces articles 291 et 292 du code de procédure étaient de droit nouveau et étaient tirés des Règles de la Cour d'Echiquier du Canada dans les causes maritimes. Je dois dire cependant à ce sujet que cette pratique de réunir les instances a toujours été reconnue dans la doctrine et la jurisprudence. (1865) *Foley* v. *Tarratt* (1), (1866) *Hébert* v. *Quesnel* (2), (1882) *Chrétien* v. *Crowley* (3), (1882) *Larivière* v. *Choquet* (4), (1891) *Dépatie* v. *Gibb* (5), Guyot, Répertoire, vbo. Connexité, p. 480; Ferrière, Introduction à la pratique, p. 91, vbo. Jonction; Rolland de Villargues, vbo. Connexité, p. 100.

Pour ces raisons je suis donc d'opinion que nous n'avons pas juridiction dans la première poursuite et que l'appel quant à elle doit être cassé avec dépens.

Quant au mérite de la seconde poursuite, je suis d'opinion que le jugement de la cour d'appel est bien fondé.

Il s'agirait de savoir si l'inondation du mois de juillet 1917 est due à une cause fortuite qui ne pouvait être prévue, ou s'il y a eu force majeure. La faute ne peut se concevoir chez celui qui subit l'empire d'un cas fortuit ou d'une force majeure. Lorsqu'il y a cas fortuit ou force majeure, il n'y a pas de responsabilité pour le dommage causé par une chose dont une personne a la garde.

Il est incontestable que les accidents de la nature proviennent d'une cause étrangère à l'obligé et constituent des cas fortuits, mais ils n'écartent pas la responsabilité dans tous les cas. Il faut qu'ils se produisent dans des conditions que la sagesse commune n'a pas prévues. Ainsi des pluies sont bien

(1) 15 L.C.R. 245.
(2) 10 L.C.Jur. 83.
(3(2 Div. Q. B. 385.
(4) M.L.R. I S.C. 461.
(5) 35 L.C.Jur. 60.

l'acte de la nature, mais comme elles se répètent fréquemment, on doit remplir ses obligations de manière à se protéger contre elles. Cependant si ces pluies se déchainent en tempêtes, si elles dépassent les prévisions de la sagesse commune, alors elles tombent dans la catégorie des cas fortuits qui enlèvent toute responsabilité. (Sourdat, Responsabilité, nos. 644-645. Toullier, vol. 2, p. 223. Mignault, vol. 6, p. 362. *Sawyer* v. *Ives* (1).

Dans le cas actuel, il y a eu dans la nuit du 30 juillet 1917 une pluie torrentielle. Quant à son intensité et à sa durée, il n'y aurait jamais eu, de mémoire d'homme, un orage aussi considérable, excepté 37 ans auparavant. Et encore, quant à ce dernier orage, le système de mesurage alors en usage n'avait pas la précision des instruments dont on se servait au 30 juillet 1917.

On a examiné sur ce point l'officier, M. Weir, qui a charge de l'observatoire de l'université McGill et qui a la garde de ses registres et il nous parle d'abord de la tempête en question en la présente cause. L'orage aurait duré 78 minutes et il serait tombé pendant ce temps 1·51 pouce d'eau. L'intensité n'aurait pas toujours été la même. Ainsi, par exemple, il donne la période de cinq minutes où l'intensité aurait été plus grande et pendant laquelle il aurait trouvé une chute d'eau de 0·26 pouce. Si cette intensité s'était continuée pendant tout le temps de l'orage on aurait eu alors pour les 78 minutes 4·05 pouces et pour une heure 3·12 pouces. Aussi ce météorologiste n'hésite pas à dire:

I should say that as regards the intensities they are extraordinary, that is the shortest period *of intensities are not extraordinary, but the amount of water during the duration of the downfall is extraordinary.*

(1) Q. R. 4 Q. B. 374.

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Il prouve par les registres du McGill que nous avons eu dans les années qui ont précédé la tempête en question trois gros orages:

	Maximum de l'intensité 5 minutes.	Intensité pendant la durée de l'orage	Durée
1° le 30 juillet 1906	0·35	0·78	60 min.
2° le 26 juin 1907.....	0·35	0·59	60 "
3° le 11 juin 1911....	0·35	0·77	60 "
4° le 29 juillet 1917 ..	0·26	1·51	78 "

M. Weir nous dit qu'on ne devrait pas comparer les orages de 30 juillet 1906 et du 29 juillet 1917. Quoique l'intensité pour cinq minutes dans le premier cas fût plus considérable que dans le dernier cas, ce dernier doit être considéré bien plus sévère à cause de sa durée. La durée d'un orage, pour en déterminer la sévérité pour un égout, doit donc être prise en considération, et c'est bien naturel. En effet, si un orage ne dure que quelques minutes, l'égout peut en recevoir toute l'eau et sans crainte d'inondation. Mais si l'orage dure longtemps, alors l'égout se remplit, il devient insuffisant et l' inondation se produit. Il ne faut donc pas regarder au maximum d'intensité pour quelques minutes mais à la quantité d'eau qui tombe pendant tout le temps de l'orage.

M. Weir nous dit alors que le seul orage qui puisse se comparer avec celui qui a causé l'inondation est celui du 11 juin 1911 qui a eu une intensité de 0·35 dans cinq minutes, de 0·77 dans une heure et de 1·98 dans les onze heures que l'orage a duré. Si nous examinons soigneusement ces chiffres, nous voyons que pendant une heure il y a eu une chute d'eau de 0·77 tandis que dans l'orage de juillet 1917 il est tombé dans une heure et dix-huit minutes 1·51. Ce dernier me paraît avoir été plus sévère. Le chiffre de 1·98

couvre 11 heures et par conséquent donne à l'égout, qui est d'ordinaire supposé avoir une chute d'eau d'environ 1·50 de l'heure, amplement le temps de transporter toute l'eau qui s'y jette.

D'après M. Weir, l'orage le plus sérieux qu'on aurait eu est celui de 1880; mais il déclare que le mesurage qui se faisait alors n'avait pas la même précision que celui qui peut se faire avec des instruments modernes.

Toute cette preuve n'est pas contredite et le témoignage de ce météorologiste est accepté par les deux parties. Nous ne nous trouvons donc pas en présence de faits plus ou moins certains, comme dans le cas de la cause de *Sawyer* v. *Ives* (1), mais en présence de faits incontestables.

En résumé, je vois que la tempête qui a donné lieu à l'inondation n'a jamais été surpassée de mémoire d'homme, excepté par celui de 1880; et encore il n'y avait pas à cette époque d'instruments bien précis. A tout événement on aurait passé 37 ans sans avoir de tempête semblable.

M. St. George, l'expert des demandeurs, qui a construit lui-même le canal d'égout en question lorsqu'il était l'ingénieur de la défenderesse, nous dit qu'il a été fait suivant les règles de l'art et qu'il était suffisant pour égoutter les terrains qui s'y déversaient. Il a tenté, il est vrai, de trouver en faute la défenderesse par certains changements qui avaient été faits, mais il n'a pas réussi à convaincre les tribunaux inférieurs du bien fondé de ses prétentions sous ce dernier rapport.

Ce canal d'égout a la capacité d'une chute d'eau de 1·42 pouce par heure. Or cette cour, dans une cause de *Faulkner* v. *City of Ottawa* (2), a déclaré, sur la preuve qui y avait été faite

(1) Q.R. 4 Q.B., 374. (2) 41 Can. S.C.R. 190.

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that a fall of 1½ inch of water per hour is considered as meeting the requirements of good engineering and is the standard adopted by all the cities of Canada and the northern states.

La légère différence de 8-100 d'un pouce ne devrait pas être considérée comme étant suffisante pour engager la responsabilité de la défenderesse, d'autant plus que dans la cause actuelle la même preuve que dans la cause de Faulkner n'a pas été faite et qu'au contraire les experts de la poursuite et de la défense sont d'opinion que le canal était fait suivant les règles de l'art et était suffisant.

Pour que la corporation intimée fût responsable, il aurait fallu qu'elle eût concouru au dommage qui aurait été causé. Il n'y a pas de doute que l'inondation a été causée par la pluie torrentielle qui est tombée, c'est-à-dire par une force étrangère à la volonté de la défenderesse. Cette dernière a jugé à propos, après avoir été autorisée par l'Etat et dans un but de salubrité publique, de construire des égouts. Il était de son devoir de les construire assez spacieux pour la quantité d'eau que, dans les prévisions de la sagesse humaine, elle devait raisonnablement présumer devoir tomber. Or voici un orage qui de mémoire d'homme n'aurait eu lieu qu'une fois. Cet orage déjoue les calculs des hommes de l'art. Peut-il y avoir responsabilité? Je n'hésite pas à dire que cela constitue un cas de force majeure et que la défenderesse n'a pas engagé sa responsabilité.

Nous avons eu d'ailleurs récemment dans une cause de *Bénard* v. *Hingston* (1), à examiner cette question de force majeure et l'honorable juge-en-chef déclarait:

The damages were caused by a combination of a very heavy rainfall and an abnormal overflow of the River St. Lawrence. It is not necessary to bring such an event within the scope and meaning of the

(1) 56 Can. S.C.R. 17.

words *vis major* or the act of God that such an event should never have happened before: it is sufficient that its happening could not have been reasonably expected.

L'honorable juge Anglin, dans la même cause, disait que si l'inondation était si extraordinaire qu'elle n'aurait pas dû être anticipée, alors il y aurait force majeure.

Les inondations dont il était question dans la cause de *Bénard* v. *Hingston* (1) étaient bien plus fréquentes que cet orage qui a eu lieu en juillet 1917, vu que de mémoire d'homme il n'aurait été surpassé en intensité et en durée que 37 ans auparavant.

La jurisprudence paraît bien établie dans Québec qu'une corporation municipale n'est pas responsable pour l'inondation des caves si elle a construit son système d'égout suivant les plans d'ingénieurs d'expérience et si elle en prend bien soin. (1880) *Riopel* v. *Cité de Montréal* (2); (1899) *The A.M.C. Medicine Co.* v. *Cité de Montréal* (3). Ce dernier jugement a été confirmé en appel.

Alors il me semble que nous ne devons pas hésiter à déclarer que dans la cause actuelle il y a eu cas fortuit et force majeure et que la corporation n'a pas engagé sa responsabilité.

En résumé l'appel devrait être cassé et renvoyé avec dépens.

MIGNAULT J.—The appellant company took two actions against the city of Montreal for damages caused by two floodings of its cellar on Commissioners street through the insufficiency of the civic sewer on that street to carry off the drainage and surface waters, so that the water of the sewer backed into the appellant's cellar which was used for purposes of storage in connection with its business.

(1) 56 Can. S.C.R. 17. (2) 3 L.N. 320.
(3) Q.R. 15 S.C., 594.

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The first flooding occurred in March, 1917, and the appellant in the first action claimed $1,178.83. The second flooding was during the night of the 29th and 30th July, 1917, and for this flooding the appellant sued for $3,015.23 by a second action against the city. These two actions were consolidated for purposes of trial, and were both maintained by the Superior Court, Weir J., for the full amount, no contradiction of the appellant's proof of damages having been made. On appeal, both actions were dismissed by the Court of King's Bench, appeal side, the first by a majority judgment, the second unanimously.

The appellant took one appeal to this court as to the two actions, and the respondent having moved to quash the appeal for want of jurisdiction as to the first action, the motion was reserved for hearing at the same time as the merits. At the hearing the court intimated that it had not jurisdiction in so far as the appeal in the first action was concerned, which appeal is quashed, and the appeal was restricted to the second action for $3,015.23 for the July flooding, which is the only one to be considered.

I have carefully read the voluminous evidence. The sewer in question was built in 1887 and runs along Commissioners street, emptying into a main sewer which itself discharges into Elgin Basin in the Montreal harbour, some distance to the west. The Commissioners street sewer drains a drainage area of 38 8-100 acres, and has a capacity of 1·42 inches per hour. Its size is 4 by 2·8 feet. The main sewer carries the sewage and surface waters from the western part of the city, the volume of the sewage and surface waters thus carried being very considerable, and in comparison with it the sewage drained by the Commissioners street sewer is, according to the expression of one of

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the witnesses, a mere bucketful. Some years after the construction of the latter sewer, the city decided to install a pumping station at Youville Square, the object of which was to divert the sewage coming from the west by way of St. Sulpice street into the Craig street sewer, and for the purposes of the pumping station a small dam was built in the main sewer so as to have sufficient water to work the pumps. However the pumps when constructed were found not to have been properly built and the city refused to accept them as satisfying the contract for their construction and they were never put in operation. It is pretended by Mr. St. George, expert witness for the appellant, that this dam obstructed the flow of sewerage from the Commissioners street sewer, but this is denied by the respondent's experts, and the learned trial judge did not find that this dam contributed to the flooding complained of.

The appellant's cellar was connected with the Commissioners street sewer by a private drain constructed under the inspection of the respondent's officers and must be taken to have been a proper connection. For this reason I do not think that the respondent can claim that the appellant's cellar was too low for efficient drainage. It is common ground, however, that no automatic safety valve was placed by the appellant or the respondent in the appellant's connecting drain, and the respondent's evidence shews that had such a valve been installed it would have been closed by the overflow from the street sewer and no flooding would have occurred.

The July flooding was caused by a very heavy rainstorm, and the evidence is that the water backed up from the street sewer into the appellant's premises. The question under these circumstances is whether

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the respondent is liable for the appellant's damages. The Court of King's Bench, referring to the two floodings held that it was not because the appellant had not proved that the respondent's sewers were defectively constructed or were insufficient, and because

les inondations dont se plaigent les demandeurs intimés sont dues à des causes fortuites ne pouvant être prévues et constituant des causes de force majeure.

If this latter *considérant* of the judgment is well founded it disposes of the appellant's action.

In the Superior Court the learned trial judge held the respondent liable for three reasons:

1. The sewer on Commissioners street was not of sufficient capacity to drain the surface area in times of exceptional rainstorms which have been proved to have fallen on the locality at various times from the year 1880 onwards, and the damages were caused by such a storm.

2. The sewer was insufficient for the further reason that the flooding through the private drain could have been prevented by the defendant if it had equipped the sewer at its connection with the private drain with automatically closing and opening valves as described in its plea.

3. The defendant, knowing the possibility of such rainstorms occurring in the summer months, should have equipped and operated the Youville pumping station in such manner as to have aided the functions of the Commissioners street sewer in carrying off the unusual water flow, which it neglected to do.

The learned trial judge treats the rainstorm in question has having been "exceptional" or "unusual," but finds expressly that such storms have fallen on this locality at various times, and, in his reasons for judgment, he instances a rainstorm of greater intensity and quantity on the 9th of August of the same year, when the appellant's cellar was again flooded, another on June 11, 1911, comparable to the one in question, and a heavier one—the heaviest rainfall ever recorded in Montreal—on July 20, 1880, when 1·58 inches of rain fell in 46 minutes, as opposed to 1·51 inches in 78 minutes during the storm in question. He, therefore, holds that the rain in question was not unprecedented.

In 1895, the Quebec Court of Queen's Bench in *Sawyer* v. *Ives* (1) held that a rainstorm extraordinary but not unprecedented, nor of such violence that it could not reasonably have been anticipated, does not constitute *vis major*. I must accept this holding as being in conformity with the definition of *force majeure* or of *cas fortuit*, as

> tout évènement que la prudence humaine ne peut prévoir et auquel on ne peut résister quand on l'a prévu." (Pandectes françaises, vo. Obligations, no. 1774.)

My opinion is, therefore, that the plea of *force majeure* is not made out, and I may add that the position taken by the respondent is that Commissioners street sewer was sufficient for ordinary needs, the inference being that it is not obliged to provide a sewer which can take care of extraordinary rainstorms, though not unprecedented or unforseeable. I will examine whether this pretension is founded in law, for I am of opinion that the respondent cannot rely on its plea of *force majeure*.

There remains therefore the question whether the respondent having constructed a sewer sufficient for the ordinary requirements of the population of the district to be drained, is liable for a flooding caused by an exceptional or unusual rainstorm not coming within the definition of a *cas fortuit* or a *force majeure*.

Besides citing several decisions of the Quebec courts which are not binding on us, and of which some support the respondent's position, while others were influenced by the fact that the flooded premises were built after the construction of the sewer (a number of these decisions favourable or unfavourable to the respondent, may be found in Beauchamp's Repertoire, vo. *Respon-*

(1) Q.R. 4 Q.B. 374.

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sabilité, nos. 407 and following), the respondent relies on the judgment of this court in *Faulkner* v. *City of Ottawa* (1), by which it was decided that where a city has constructed a sewer capable of carrying off 1½ inches of water per hour, which is considered as meeting the requirements of good engineering and which is the standard adopted by all the cities of Canada and the Northern States, the city is not liable for a flooding caused by a rainstorm which during nine minutes fell at an intensity of 3 inches per hour and was one which could not reasonably be expected.

Judging by the evidence in this case, the rainstorm was not as violent as the one in *Faulkner* v. *The City of Ottawa* (1). Moreover the liability of the respondent must be determined according to the rules laid down by the Quebec Civil Code (Arts. 1053, 1054), so I do not think that the matter would necessarily be concluded by the decision of this court in the *Faulkner* case (1), were it on all fours with the case at bar.

The respondent also cited the judgment of this court in *Bénard* v. *Hingston*, a Quebec case (2). I do not think that this decision helps the respondent, for the litigation arose between a tenant and a landlord, and the latter, after having been condemned to pay damages to her tenant for a previous flooding, had adopted the very measure of precaution indicated by the tenant's experts and the best possible professional advice, which she herself had obtained. Moreover the flooding there was caused by an ice shove in the river St. Lawrence, coinciding with a very heavy rainstorm, which might reasonably be considered as a *cas fortuit*, and the question was as to the contractual liability of the landlord under article 1614 of the Quebec Civil Code.

(1) 41 Can. S.C.R. 190.

(2) 56 Can. S.C.R. 17.

As I have said, the question of liability or non-liability of the respondent must be determined according to articles 1053 and 1054 of the Quebec Civil Code, and as to the construction of the latter article we are bound by the recent decision of the Judicial Committee of the Privy Council in *Quebec Railway, Light, Heat and Power Co.* v. *Vandry* (1).

In that case the Judicial Committee held that the first paragraph of article 1054 C.C. stating that

> he (i.e. every person capable of distinguishing right from wrong) is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control and by things which he has under his care,

does not, in the case of damage caused by a thing which a person has under his care

> raise a mere presumption of *faute*, which the defendant may rebut by proving affirmatively that he was guilty of no *faute*. It establishes a liability, unless, in cases where the exculpatory paragraph applies, the defendant brings himself within its terms. There is a difference, slight in fact but clear in law, between a rebuttable presumption of *faute* and a liability defeasable by proof of inability to prevent the damage.

Perhaps I may be permitted to observe that holding that article 1054 C.C. establishes a legal liability does not entirely do away with the idea of fault, for this legal liability is evidently imposed because of a presumed fault, that is to say, a negligence in respect of the care of the thing which caused the damage. (Planiol, vol. 2, nos. 917 and 930, 7th edition).

Their Lordships also hold that by the "exculpatory paragraph," the penultimate paragraph of article 1054 C.C.

> the responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage,

(1) 36 Times L.R. 296.

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applies to the first paragraph of the article as well as to the four next succeeding paragraphs concerning the vicarious liability of fathers and mothers, tutors, curators, school masters and artisans. This is an absolutely new construction, and in adopting it preference was given to the French version of article 1054 C.C. without apparently considering the rule of construction laid down by article 2615 C.C. that when a dfference exists between the English and French texts of any article of the code,

> that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded.

Hitherto it had always been considered that the "exculpatory paragraph" of article 1054 C.C. referred merely to the specific cases mentioned in the four preceding paragraphs, this being more consistent with the provisions of the existing laws (see Pothier, *Obligations*, Bugnet ed. no. 121), while a similar excuse was not open to masters and employers when held liable for the damage caused by their servants and workmen in the performance of the work for which they were employed. The extension of the "exculpatory clause" to the first paragraph of article 1054 may now give rise to new questions of construction.

Deferring to the Privy Council decision in *Quebec Railway, Light, Heat and Power Co.* v. *Vandry* (1), I must hold that the inquiry in this case should be whether the appellant's damage was caused by a thing which the respondent had under its care, and whether the respondent has failed to establish that it was unable to prevent the act (*empêcher le fait*) which has caused the damage.

(1) 36 Times L.R. 296.

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The respondent undoubtedly had the Commissioners street sewer under its care, and this sewer collected the rain water of the area drained by it. The damage was caused by the water from this sewer backing into the appellant's cellar, which was the act (*le fait*) which caused the damage. This establishes against the respondent a liability defeasable only by proof of its inability to prevent the damage.

Has the respondent established this inability? Its own plea states that had an automatic valve been placed in the appellant's private drain connecting with the street sewer, the water would not have backed into the cellar, and the respondent's own evidence establishes this fact. Could not the respondent have installed such a valve and thus prevented the damage?

The City Charter, 62 Vict. ch. 58, sect. 300, subsection 95, gives the city council the power

> to permit the city to provide, where it may be necessary, suitable automatic safety valves at connections in sewerage for the drainage of any lands, the expense thereof to be borne one-half by the city, and the other half by the owner of the property, and said cost shall be recovered as per statement prepared by the city surveyor, and to provide for the inspection of the same by the city; but for all other buildings, the expense shall be borne entirely by the city.

The city passed a by-law in 1899, numbered 239, section 1 of which provides that

> the city, by resolution of its council, is authorized to place automatic safety valves at the connection of sewers for the drainage of any land situated within limits of its territory. This work, however, shall not be commenced before it has been declared necessary by a report of the Road Committee, accompanied by a detailed statement from the City Surveyor, containing the name of the proprietor, the lot or cadastral subdivision, the name of the street, the probable cost of the work to be performed, and by a certificate to the effect that such work is necessary in order to prevent the floods resulting from the public sewer existing in any street where such land is situated.

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The words "any lands" and "all other buildings" in subsection 95 are very vague, but the respondent did not contend that it could not have placed an automatic safety valve in the appellant's private drain, but merely that it was discretionary on its part to do so.

If, therefore, the installation of such a valve would have prevented the act which has caused the damage, the respondent has not brought itself within the "exculpatory paragraph" of article 1054 C.C., and is liable under paragraph one of this article.

The respondent contended that, under the statute and by-law, it could only install an automatic safety valve at the connection of the appellant's private drain with the street sewer, and not in the appellant's cellar, and that had it installed such a valve at the sewer connection, the filling up of the sewer would have closed the valve and the rain water from the appellant's roof (which drains by means of a pipe inside the building into the private drain and thence into the sewer) would have been unable to get into the sewer and would have flooded the appellant's cellar. The answer is that so long as the sewer was not filled the rain water from the roof would freely flow into it, and that if it could not get away and backed into the cellar, it would not be on account of the valve but because the sewer was filled and, valve or no valve, the rain water could not have gone into the sewer and must have backed into the cellar. It follows therefore that the flooding of the cellar by the rain water would be caused not by the valve, but because the sewer was completely full, and could carry no more water. And because the valve was not there, not only the rain water from the roof but the sewer water as well backed into the appellant's cellar.

It may be useful to add that under articles 1382-1384 of the Code Napoleon, similar to our own articles as to damages caused by things, the liability of a *commune* for the flooding of a house connected with a public sewer, through the insufficiency of the public sewer, is fully recognized. Thus the Conseil d'Etat decided in 1895, in a case of *Ville de Paris c. Nissou* (1) that

l'inondation des caves d'une maison par suite du débordement des eaux d'un égout dont la capacité n'était pas suffisante, constitue un dommage provenant de l'exécution d'un travail public, et dont la ville, qui a construit l'égout, doit réparation au propriétaire (L. 28 pluv. an 8, art. 4.

See also the note appended to this decision.

The law referred to (loi du 29 pluviose, an 8, 17 février, 1800) has no bearing on the question of liability for flooding, but merely determines the jurisdiction of the *conseil de préfecture* to pronounce on questions arising as to damages caused by the construction of public works.

And in another case, *Deloison* c. *Ville de Paris* (2) it was also held by the *Conseil d'Etat* that

la commune est responsable des dommage causés par une inondation survenue dans les caves d'un immeuble et provenant du refoulement des eaux de l'égout public qui ont débordé par le manchon des tinettes filtrantes placées dans ces caves, alors cette inondation a eu pour cause, d'une part, l'insuffisance de l'égout, et, d'autre part, les conditions dans lesquelles la commune a autorisé la pose des tinettes et dans lesquelles elle a contracté à leur sujet un abonnement.

See also Fabreguettes, *Traité des eaux publiques et des eaux privées*, vol. 2, p. 394, note 1.

I take it therefore that the liability of the respondent for the July flooding admits of no doubt. The only question is whether the respondent is alone answerable for the whole amount of the damages suffered by the

(1) Sirey, 1897, 3, 77. (2) Dalloz, 1900, 3, 63.

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appellant. If the latter contributed to these damages, if it neglected any precaution which it should have taken to avoid the flooding of its cellar by an overflow from the street sewer, the rule of the civil law is that there being common fault, the injured party should bear a share of the damages proportionate to its own fault.

See *Price v. Roy* (1), also Planiol, Droit Civil, 7th ed. vol. 2, no. 899, and, as having a bearing on cases of flooding, *Epoux Laugier c. Delarbre*, Cassation, 11 novembre, 1896 (2).

The evidence shows that automatic safety valves are in common use in Montreal and are installed by the owners of buildings with deep cellars so as to prevent an overflow from the street sewers. The appellant well knew that its deep cellar rendered a flooding probable in case of heavy rains, for it alleges that its cellar had previously been flooded, and after its experience in the previous March, it acted most imprudently in storing thousands of dollars worth of perishable goods in its cellar and in not resorting to the simple device of placing an automatic safety valve on the sewer connection. I do not think that the appellant was justified in thus neglecting to adopt a well-known precautionary measure and in expecting at the same time to be fully compensated by the city for any damage caused to its goods. To my mind, the rule is well stated by Sourdat, *Responsabilité*, 6th ed., vol. 1, no. 660, as follows:

> Si la partie lésée a elle-même offert occasion au dommage par une faute personnelle, est-elle recevable à s'en plaindre?
>
> La Cour de Cassation décide que cette circonstance ne fait pas disparaître la responsabilité, mais a seulement pour effet de l'atténuer.

(1) 29 Can. S.C.R. 494. (2) Dalloz, 1897, 1, 315.

Nous pensons, pour notre part, qu'il ne peut y avoir à cet égard de règle absolue. Il n'en est plus ici comme dans l'hypothèse d'un délit. Celui qui, dans une intention malveillante, commet un acte de nature à nuire à autrui, en est responsable alors même que la victime du dommage y aurait contribué par sa faute. Mais les conséquences d'une simple imprudence, d'une légère inattention, peuvent être absorbées complètement par celles de l'imprudence plus grave, de la faute lourde, et surtout du délit commis par la partie lésée. C'est aux tribunaux à apprécier si la faute imputable au plaignant est seulement de nature à atténuer la responsabilité du défendeur, ou si elle est assez grave pour rendre la personne lésée complètement irrecevable à se plaindre du préjudice éprouvé.

Even accepting the doctrine of the Judicial Committee that the liability here is one imposed by the law irrespective of any presumption of fault, I cannot think that the conduct of the injured party, in so far as it may have contributed to the damage, should be disregarded. It is no doubt difficult in a case like this to divide the damages so that each party shall bear a share exactly proportioned to its own fault or imprudence, but I am convinced that here the appellant should assume a substantial part of the damages it could easily have prevented. After due consideration, I think that justice will be done to both parties if the liability for the damages caused by the July flooding is equally divided between them.

I would therefore allow the appeal and condemn the respondent to pay to the appellant $1,507.61 with interest and the costs of an action for that amount in the Superior Court, except the cost of evidence. The action for the March flooding was dismissed with costs by the Court of King's Bench and the appeal to this court is quashed for lack of jurisdiction, so that this part of the judgment of the Court of King's Bench stands. The evidence dealt with both floodings, and I think in view of the result that each party

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should bear the expense of its own evidence. As but one appeal was taken in the Court of King's Bench and in this court, and as one action stands dismissed and the other is partially maintained, my opinion is that each party should bear its own costs both in this court and in the Court of King's Bench.

Appeal allowed without costs.

Solicitors for the appellant: *Davidson, Wainwright, Alexander & Elder.*

Solicitors for the respondent: *Laurendeau, Archambault, Damphousse, Jarry, Butler & St. Pierre.*

LES ALLUMETTES DE DRUMMONDVILLE, LIMITEE (DEFENDANT) ..... APPELLANT;

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*Mar. 12.
*May 4.

AND

C. E. BOIVIN (PLAINTIFF) ..... RESPONDENT.

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

Sale—Rescission—Defective goods—Redhibitory action—Part of the goods sold—Tender—Arts. 1152, 1162, 1164, 1496, 1526, 1644 *C.C.*

The respondent brought an action for rescission of the sale of 1214 cases of matches alleged to have been defective, out of a total sale of 5,115 cases; and he declared, in his statement of claim, that he was ready to deliver up the defective cases on being recouped their cost. During the trial, the respondent sold 57 cases and the trial court ordered the rescission of the sale as to the remaining 1,157 cases.

Held, that the action was redhibitory in character, and that such an action is maintainable as to any part of the goods sold which is proved to have been defective.

Held, also, that, notwithstanding the sale of part of the cases pending the action, and the consequent inability to return them, the respondent can still recover the price of the remaining 1,157 cases, which he is ready to return to the appellant upon the reimbursement of the price of sale.

Judgment of the Court of King's Bench (Q.R. 28 K.B. 486) affirmed.

APPEAL from the judgment of the Court of King's Bench, Appeal side, Province of Quebec (1), affirming the judgment of the trial judge (2) and maintaining the respondent's, plaintiff's, action.

PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) Q.R. 28 K.B. 486. (2) Q.R. 54 S.C. 337.

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The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

J. E. Perreault K.C. and *Napoléon Garceau K.C.* for the appellant.

L. A. Taschereau K.C. and *Morin* for the respondent.

IDINGTON J.—I am of the opinion for the reasons assigned by the learned trial judge (1) and the learned Justices Carroll and Martin in the Court of King's Bench (2), to which I can add nothing useful, that this appeal should be dismissed with costs.

DUFF J.—The appeal, I think, fails.

ANGLIN J.—So well does the evidence support the plaintiff's contention that the defects in the 1,157 cases of matches, in respect of which he has judgment for repayment by the appellants of $5,133.52, were such as to justify their rejection that the attempt to secure a reversal of the finding to that effect, confirmed by the Court of King's Bench, is quite hopeless.

On the questions raised as to the nature of the action and as to the right of the plaintiff to sue for rescission in respect of only a part of the goods purchased and as to the effect of inability to return 57 of the 1,214 cases, to recover the price of which he originally sued, I have had the advantage of reading the judgments prepared by my brothers Brodeur and Mignault and I concur in their conclusions. For the reasons stated by them I am of the opinion that the action is redhibitory in character, that the sales were

severable, that an action for rescission is maintainable as to any number of cases proved to have been defective, and that, notwithstanding the sale of the 57 cases pending the action and his consequent inability to return them, the plaintiff may recover the price of the remaining 1,157 cases, which he is prepared to deliver to the defendants on being recouped their cost.

BRODEUR, J.—Il s'agit d'une action rédhibitoire instituée par l'intimé qui demande l'annulation de la vente de 1,214 caisses d'allumettes qui lui avaient été livrées par l'appelante. Plusieurs moyens de défense avaient été invoqués par l'appelante. Le seul qui ait été particulièrement discuté à l'argument devant nous est que le demandeur n'a pas fait d'offres légales. D'autres sont mentionnés au factum de l'appelante, mais comme la plupart d'entre eux reposent sur des questions de fait et que les cours inférieures se sont prononcées contre l'appelante, cette dernière n'a pas jugé à propos, et ce avec raison, d'insister sur ces moyens de défense à la plaidoirie orale.

La quantité d'allumettes vendues et livrées était bien plus considérable que celle mentionnée dans l'action. En effet, la défenderesse avait livré 5,115 caisses au défendeur, tandis que la poursuite n'est que pour 1214.

Dans sa déclaration le demandeur se déclare prêt à remettre à la défenderesse ces 1214 caisses de marchandises sur remboursement du prix qu'il a payé.

La cour supérieure (1) a prononcé la résiliation de la vente de 1157 caisses, vu que pendant l'instance le demandeur avait disposé de 57 caisses. Elle a déclaré en outre que le demandeur n'était pas tenu d'offrir

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autrement qu'il ne l'avait fait la marchandise en question et elle a condamné la défenderesse à en payer au demandeur la valeur quand ce dernier lui livrera ces 1,157 caisses.

Ce jugement a été confirmé par la cour d'appel (1).

En cour supérieure, on s'est demandé si lorsque plusieurs choses ont été comprises dans la même vente le vice rédhibitoire de l'une donnait lieu à la résolution du marché pour le tout ou seulement pour cette chose. Dans le cas actuel le demandeur, qui avait acheté 5,115 caisses d'allumettes pouvait-il porter son action en rescission que pour 1,214 caisses? Ou encore, ayant poursuivi pour 1,214 caisses, pouvait-il vendre 57 caisses pendant l'instance et obtenir par le jugement la résolution de la vente pour la différence, soit 1,157 caisses? En d'autres termes, l'action rédhibitoire est-elle divisible?

La vente et la livraison de ces marchandises se sont faites à différentes époques. Le prix stipulé était de tant par caisse et il variait selon la marque de la marchandise de $5.75 à $7.20 la caisse.

Quelques marques paraissent meilleures les unes que les autres; alors je crois que l'on pouvait légalement réclamer la résolution de la vente que pour les caisses qui contenaient des marchandises défectueuses et que le demandeur pouvait maintenir la vente pour les bonnes caisses et ne demander l'annulation que pour les autres.

Pothier, dans son traité de la Vente, aux n^{os}. 226 et suivants, discute cette question et nous dit d'abord que si la chose qui a le vice rédhibitoire a été seule l'objet principal de la vente et que les autres n'aient

(1) Q.R. 28 K.B. 486.

été vendues que comme les accessoires, la rédhibition de la chose principale entraîne celle de toutes les accessoires: mais, ajoute-t-il

> Quand les choses vendues sont également principales il faut examiner si elles ont été vendues comme faisant ensemble un tout et comme étant telles que l'une n'aurait pas été vendue sans l'autre, comme lorsqu'on a vendu deux chevaux de carosse, une couple de bœufs, etc.: en ce cas, le vice rédhibitoire de l'une de ces choses donne lieu à la rédhibition de tout ce qui a été vendu et l'action rédhibitoire ne peut en ce cas s'exercer que pour partie. Mais si les choses qui ont été vendues étaient indépendantes les unes des autres, l'action rédhibitoire n'aura lieu que pour celle qui a un vice, quand même toutes auraient été vendues pour un même prix: car encore que cette circonstance jointe à d'autres serve à faire présumer que les unes n'auraient pas été vendues sans les autres, elle n'est pas néanmoins seule décisive. C'est pourquoi l'action rédhibitoire pourra avoir lieu pour cette seule chose et le vendeur sera tenu de restituer le prix de cette chose suivant la ventilation qui sera faite sur le total du prix.

Ces principes énoncés par Pothier nous permettent de dire que dans le cas actuel où les allumettes ont été vendues pour des prix différents suivant l'étiquette de chaque caisse, rien n'empêche de réclamer l'annulation que pour un certain nombre de caisses et maintenir la vente pour les autres. Si pendant l'instance le demandeur a trouvé aussi que certaines caisses dont il avait originairement demandé l'annulation de la vente n'étaient pas entachées de vices, ou si pour d'autres raisons il en a disposé, rien n'empêche le tribunal, dans ce cas, de maintenir l'action pour les autres. Il n'y a pas de doute, comme le dit l'honorable juge-en-chef Lamothe, que dans ce cas l'action *quanti minoris* peut être exercée par le créancier: mais vu l'opinion de Pothier que je viens de citer, il me semble que l'acheteur peut également exercer l'action rédhibitoire pour les caisses qui étaient entachées de vices. Il a été jugé par la cour de cassation que la résiliation de la chose vendue peut être prononcée pour partie seule-

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ment lorsque la chose vendue est susceptible de livraisons partielles. Dalloz, 1871-1-11. En d'autres termes, je viens à la conclusion que l'action rédhibitoire dans ces circonstances est divisible.

L'action doit-elle être nécessairement précédée d'offres réelles? Je comprends que s'il s'agissait d'un paiement on ne pourrait se libérer de son obligation qu'en faisant des offres conformément aux dispositions des articles 1162 et suivants du code civil qui nous indiquent comment les offres peuvent équivaloir, quant au débiteur, à un paiement. Mais quand il s'agit d'une action rédhibitoire, l'acheteur est-il obligé de se déposséder de la chose avant qu'on lui en restitue le prix ou peut-il simplement demander aux tribunaux de déclarer que la chose vendue était entachée d'un vice qui en rend la vente annulable ?

Dans le cas actuel il se déclare prêt, dans son action, à remettre les marchandises viciées. Il demande par ses conclusions à ce que la vente soit annulée et à ce que la défenderesse soit tenu de lui rembourser le prix qu'il a payé.

La cour a annulé le contrat: mais elle a ajouté qu'il n'aurait droit de recouvrer le prix qu'il avait payé qu'en livrant les marchandises. C'est à lui maintenant de s'exécuter s'il veut recouvrer son argent. Il lui faut faire des offres.

D'un autre côté, la défenderesse peut revendiquer les marchandises dont la vente est annulée en offrant de rembourser ce qui lui a été payé.

Voilà la situation légale qui est faite aux parties par le jugement.

L'appelante invoque l'article 1526 du code civil qui dit que

> l'acheteur a le choix de rendre la chose et de se faire restituer le prix, ou de garder la chose et de se faire rendre une partie du prix suivant évaluation.

Cet article énonce seulement les droits d'action que l'acheteur trompé peut exercer. Il a le choix de l'action rédhibitoire ou de l'action *quanti minoris* selon qu'il veuille garder la chose ou non. S'il veut remettre la chose et obtenir la restitution du prix, il prend l'action en rédhibition. Alors il sera bien obligé de rendre la chose si l'acheteur lui rembourse le prix. Mais tant que l'argent qu'il a versé ne lui est pas remboursé il se trouve dans la position du vendeur non payé, qui n'est pas tenu, nous dit l'art. 1496 C.C. de délivrer la chose tant qu'il n'a pas été payé.

Comment la défenderesse peut-elle se plaindre qu'il n'y a pas eu d'offres plus formelles que celles mentionnées dans la déclaration? Car elle contestait le droit du demandeur de faire résilier la vente, et alors, tant que ce débat n'était pas vidé, quel intérêt avait-elle de se plaindre que la marchandise ne lui eût pas été formellement offerte?

Fuzier Herman sous l'article 1644 du code civil dit que

> si l'acheteur opte pour l'action rédhibitoire et triomphe dans ses prétentions, il doit rendre au vendeur la chose vendue.

Il ne fait pas de cette obligation de rendre la chose une condition préalable de l'exercice du droit d'action.

L'obligation qui est imposée au demandeur sur l'action rédhibitoire est de remettre la chose. Cette obligation ou ce paiement doit s'exécuter à son domicile, nous dit l'article 1152 du code civil. Et s'il désire recouvrer le prix qu'il a payé, il peut alors faire

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des offres suivant les articles 1164 et 1165 C.C. et obtenir un jugement de condamnation formelle contre la défenderesse.

J'aurais été d'opinion cependant que les offres faites par l'action, quoiqu'elles ne fussent pas très explicites, eussent été suffisantes. Mais comme la cour supérieure n'a condamné la défenderesse à payer que sur livraison et que le demandeur s'est déclaré satisfait de cette condamnation conditionnelle, je dois nécessairement en venir à la conclusion que l'appel est mal fondé et doit être renvoyé avec dépens.

MIGNAULT J.—La seule difficulté réelle en cette cause est au sujet de 57 caisses d'allumettes (sur une quantité totale de 1214 caisses) que le demandeur a vendues au cours de l'instance et que partant il ne peut rendre à la défenderesse. Il avait acheté en tout 5,115 caisses, et il ne demandait l'annulation de la vente que pour 1,214 caisses. Dans les jugements *a quo* on a discuté également la nature de l'action même, soit rédhibitoire, soit *quanti minoris*, mais la déclaration conclut à l'annulation des achats faits par le demandeur de la défenderesse, ce qui démontre que l'action est rédhibitoire et non *quanti minoris*.

Quelle que soit sa nature du reste, l'action est régie par l'article 1526 du code civil qui dit que

> l'acheteur a le choix de rendre la chose et de se faire restituer le prix, ou de garder la chose et se faire rendre une partie du prix suivant évaluation,

et ici, je suis d'avis que nous sommes en présence d'une action rédhibitoire.

Il importe aussi de constater que les ventes ayant été faites à tant la caisse, on peut considérer qu'il y a eu autant de ventes distinctes qu'il y a eu de caisses de vendues, de telle sorte que l'acheteur pouvait, si

une partie seulement des caisses contenaient des marchandises défectueuses, demander l'annulation pour ces caisses, et garder les autres. C'est ce qui a été fait dans l'espèce.

Mais en prenant son action rédhibitoire, le demandeur devait rendre à la défenderesse les caisses dont il demandait l'annulation de la vente. C'est la condition même de son action d'après l'art. 1526 C.C. Le demandeur paraît s'en être rendu compte, car le paragraphe 7 de sa déclaration disait:

7. Le demandeur a tojuours été prêt et est encore prêt à remettre la marchandise contre remboursement du prix qu'il a payé.

Ce ne sont pas des offres bien formelles, mais la cour supérieure les a envisagées comme telles, car elle a condamné la défenderesse à payer au demandeur $5,133.52, avec intérêt de la signification de l'action et les dépens,

sur livraison par le demandeur des 1157 caisses d'allumettes qui restent de 1214 caisses mentionnées dans son action.

La difficulté réelle est celle-ci. Le demandeur a opté pour l'annulation de la vente quant à 1214 caisses et il se déclare prêt à les remettre sur remboursement du prix qu'il avait payé. Il devait donc, dit-on, conserver toutes ces caisses, c'était l'obligation qu'il avait assumée par ses offres, pour les remettre à la défenderesse. En disposant de ces 57 caisses, il a manqué à cette obligation et à la condition à laquelle était subordonnée son action en l'envisageant comme action rédhibitoire, et il a accepté la vente et il ne peut maintenant réussir dans sa demande. Tel est le motif qui a déterminé le dissentiment de l'honorable juge-en-chef de la province de Québec. L'honorable juge Pelletier, également dissident, aurait traité l'action comme si elle avait été réellement l'action *quanti*

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minoris, et envisageant la totalité des ventes, n'aurait accordé au demandeur que sept à huit cents piastres, il ne précise pas autrement le montant.

En présence des deux jugements qui ont trouvé la marchandise défecteuse, je ne serais pas disposé à discuter ce point. Je ne crois pas non plus devoir me rendre à l'opinion de l'honorable juge Pelletier, et je ne discuterai que le motif du dissentiment de l'honorable juge-en-chef Lamothe.

Après y avoir sérieusement réfléchi, je crois qu'on peut voir, dans la vente par le demandeur de 57 caisses d'allumettes, un désistement partiel tacite de l'action qu'il avait intentée. Il n'est pas douteux que le désistement peut n'être que partiel, et comporter renonciation à certains chefs seulement, ou à une partie distincte d'une demande divisible, et la demande ici me paraît clairement divisible. On appelle généralement ce désistement partiel un *retraxit*, mais le nom qu'on lui donne est assez indifférent, car il est certain que le droit de se désister partiellement, quand la demande est divisible, existe dans notre droit.

Or le désistement peut être tacite. Garsonnet, *Procédure*, tome 5, n°. 1179, p. 792, dit:

> On distingue, quant à la forme, trois espèces de désistement: 1° le désistement amiable qui se fait dans la forme convenue entre les parties et sans nulle formalité si elles en sont tombées d'accord; 2° le désistement tacite qui résulte d'une attitude incompatible avec le maintien d'une demande antérieurement formée (désaveu de l'action intentée par un avoué sans mandat spécial, poursuites à fin d'exécution d'un jugement dont on a antérieurement appelé, second appel se substituant à celui qu'on a d'abord interjeté, cession de biens offerte par un failli qui avait d'abord demandé l'homologation de son concordat): il ne se présume pas, mais il n'exige aucune formalité particulière et se fait ou se prouve comme tout autre contrat; 3° le désistement judiciaire qui ne suppose pas l'accord des parties et exige deux ou même trois formalités.

Il est clair que les exemples de désistement tacite que Garsonnet donne ne sont pas limitatifs, car, comme il le dit lui-même, le désistement tacite résulte d'une attitude incompatible avec le maintien d'une demande. Or ici le demandeur ayant pendant l'instance disposé de 57 caisses, et son action étant une action divisible, il renonçait tacitement par là à sa demande pour l'annulation de la vente de ces caisses, car le fait de disposer de ces caisses était incompatible avec le maintien de la demande d'annulation en tant que ces caisses étaient concernées. Mais cela n'enlevait pas au demandeur son droit de persister dans son action pour les autres caisses

La situation aurait été absolument la même si la preuve avait constaté que 57 caisses étaient bonnes et les autres mauvaises. L'action n'aurait pas réussi pour les 57 caisses. De même le demandeur aurait pu, s'il avait constaté la bonne qualité de ces 57 caisses, renoncer à sa demande à leur égard, et cette renonciation n'aurait pas porté préjudice à sa demande d'annulation pour les autres caisses. Pourquoi alors dire que le fait de disposer de quelques caisses pendant l'instance enlève à l'intimé son recours pour l'annulation des autres ventes? Tout ce que cela prouve, c'est que le demandeur n'avait pas raison de se plaindre de ces 57 caisses; cela ne démontre nullement que les autres caisses étaient bonnes ou que le demandeur renonçait à s'en plaindre.

L'objection que soulève la défenderesse me paraît manquer de base. Elle n'éprouve aucun préjudice de la vente de ces quelques caisses, l'action contre elle en est diminuée d'autant, et les deux cours ont décidé que les autres caisses d'allumettes étaient mauvaises. Elle a mauvaise grâce à vouloir échapper entièrement

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à la condamnation parce que le demandeur a disposé d'un nombre insignifiant des caisses mentionnées en son action.

Je renverrais l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Garceau & Ringuet.*

Solicitors for the respondent: *Lachance, Ahern & Morin.*

THE ST. LAWRENCE BRIDGE CO. (DEFENDANT)..... APPELLANT;

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*Mar. 10, 11.
*May 4.

AND

CYRILLE LEWIS (PLAINTIFF).....RESPONDENT.

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

Workmen's Compensation Act—Construction—French Act—"Class"—Method of computing "average remuneration"—Hypothetical earnings—Practice and procedure—Common law action—Factum—Incomplete citation—Fees—R.S.C. Art. 7328.—(Que.) 8 Geo. V., c. 71, s. 4.

The respondent had been in the appellant company's employment from the 5th of January, 1918 to the 1st of April, 1918, as a machinist helper at 32½ cents an hour and from the 1st to the 19th of April, 1918 as an "operator" in munitions work being paid 15c. per shell, a somewhat higher rate of pay. During these periods the respondent's earnings amounted to $295.60. On the 19th of April, 1918, he was injured. He is debarred from recovery under the "Workmen's Compensation Act" if his yearly remuneration, calculated as contemplated by the statute, exceeded $1,200. Article 7328 R.S.Q. provides that "in the case of workmen employed less than twelve months before the accident, such wages shall be the actual remuneration which they have received since they were employed in the business, plus the average remuneration received by workmen of the same class during the time necessary to complete the twelve months." The trial judge found the respondent entitled to a rent based on an annual remuneration of $960; and the Court of King's Bench, though finding the respondent not entitled to relief under the statute, awarded him $1,825 as damages at common law.

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*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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Held that an action brought under the "Workmen's Compensation Act" and conducted to judgment as such cannot be converted on appeal into an action for damages under the common law.

Per Anglin, Brodeur and Mignault JJ.—The legislature, in adopting in 1909 as part of the law of Quebec the French Act upon workmen's compensation as enacted in 1898, may well be taken to have intended that the same construction should be placed upon article 7328 R.S.Q. as had been sanctioned in France by the Cour de Cassation in 1906.

Per Anglin, Brodeur and Mignault JJ.—The "class" intended by the statute is that in which the injured man was first employed.

Per Anglin, Brodeur and Mignault JJ.—When there are other workmen of the same class as the injured man in the establishment to which he belonged, it is the average earnings of those workmen on which his complementary hypothetical remuneration should be computed; and it is only where there are not such workmen that the average earnings of outside workmen should be resorted to.

Per Anglin and Mignault JJ.—In order to ascertain the "average remuneration" of the injured man, evidence must be adduced (and the trial judge's findings on these points are entitled to the greatest weight) 1st, of the period during which the injured man was employed; 2nd, of the workmen doing the same class of work in the establishment during that period irrespective of their salary; 3rd, of the respective periods of employment of each of such workmen (*per* Anglin J. making deduction from the number of days comprised therein for loss of time which is exceptional and involuntary, whether ascribable to a cause personal to the employee or to non-operation of the establishment); 4th, of the total amount of the earnings of each of such workmen during the period. By adding together the earnings of all these workmen and dividing the total by the sum of the number of days included in their respective terms of employment added together, the average daily wage of the workmen during the period in question will be ascertained. If the quotient thus obtained be multiplied by 261 (the number of days comprised between the 19th April, 1917, and the 5th of January, 1918) the product will be the average total earnings during that period of a workman of the category to which the injured man belonged; and, this average added to the sum of $295.60 earned by the injured man during his actual employment will be the basic annual remuneration on which his right to recover will depend and his annual rent must be computed.

Per Duff J. (dissenting).—The manner of computing compensation is as follows: the average of aggregate earnings of employees of the class to which the injured man belonged at the time of the accident for each week during the statutory period preceding the accident should be taken and these averages averaged; and there is sufficient proof that upon this basis, the respondent is not entitled to relief under the statute.

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Per Anglin, Brodeur and Mignault, J.J.—Counsel for the respondent in no event, will be entitled to his costs of factum, because in transcribing a passage from an author he had omitted a material part of the same passage which was against his pretentions.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec, modifying the judgment of the trial court and maintaining the respondent's, plaintiff's, action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Lafleur K.C. and *De Witt* for the appellant.

Audet and *Sauvé* for the respondent.

IDINGTON J. (dissenting).—The enactment R.S.Q. 7328, by which in the last analysis the rights of appellant are to be determined under the "Workmen's Compensation Act," reads as follows:—

> The wages upon which the rent is based shall be, in the case of a workman engaged in the business during the twelve months next before the accident, the actual remuneration allowed him during such time, whether in money or in kind.
>
> In the case of workmen employed less than twelve months before the accident, such wages shall be the actual remuneration which they have received since they were in the business, plus the average remuneration received by workmen of the same class during the time necessary to complete the twelve months.
>
> If the work is not continuous the year's wages shall be calculated both according to the remuneration received while the work went on, and according to the workman's earnings during the rest of the year.

If the computation designed by this reaches a result whereby it becomes clear that the injured workman has been earning over $1,200 for the year, then he does not fall within the class which the Act was designed to protect according to the scale in force when the accident here in question occurred.

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The above quoted section in the first sentence thereof does not directly touch upon what we have to deal with but incidentally both it and the third sentence help to illuminate what the draftsman had in view and gives room for a consideration of the total possible earnings of respondent in both classes of work and a comparison of the totals in both classes of work in trying to reach a conclusion as to the average wage that is to be had in view to apply to the remainder of the twelve months. But that will not help respondent unless we go a step further and unsettle things by discarding the rule the court below in previous ones had settled.

I regret to say that I am unable to put upon the above quoted part of said Act any such interpretation and construction as will when applied to the relevant facts bring the respondent within the provisions of the Act. And such seems to have been also the unanimous opinion of the Court of King's Bench.

A majority of that court saw its way to give relief independently of the said Act, although the prayer of the declaration is exclusively confined to the claim made in virtue of said Act.

I should not feel much difficulty if the case had clearly been fought out upon all the facts relative to either alternative as the legal basis for recovery, and been heard by a tribunal that the parties had clearly adopted as competent and satisfactory to them for such purpose.

But for the purposes of the "Workmen's Compensation Act" there can be no trial by jury.

How can I say that appellant by silence or conduct waived in any way that right, when it was thus bound

by the provisions of the Act to a trial without a jury of the case made by the declaration and confined by the conclusions thereto so made?

We are told by counsel for appellant that there is no possibility of two such claims being joined according to Quebec law, and I can find nothing in respondent's argument to the contrary except the citation of the provision of the Act properly reserving the rights of the workman to fall back on his other legal grounds if need be.

That does not seem to allow the trial of the two alternative claims in one action.

I agree with the reasons assigned by Mr. Justice Carroll.

And though driven to the conclusion that the appeal should be allowed with costs if appellant insists thereon, I hope it will not insist on costs.

DUFF J. (dissenting).—The appeal, I think, should be allowed.

The manner of compensation in my judgment is this. The average of aggregate earnings of employees of the class to which the respondent belonged at the time of the accident for each week during the statutory period preceding the accident should be taken and these averages averaged.

The evidence is not specifically pointed to this; but I think there is sufficient in the record to shew that upon this basis the appeal must succeed.

ANGLIN J.—The questions for determination on this appeal are whether the Court of King's Bench properly held the appellants liable at common law in this action for damages for personal injuries sustained

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by the respondent on the 19th of April, 1918, while in their employment, and, if not, whether the respondent, as he claimed and as was held by the learned trial judge (Mr. Justice Guerin), is entitled to recover under the "Workmen's Compensation Act" of Quebec (R.S.Q., 1909, Arts. 7321 et seq., as amended), and, if so, on what basis.

The action was brought and relief claimed distinctly and solely under the Workmen's Compensation Act. The trial was conducted on that footing. Liability at common law does not appear to have entered the mind of either party. That issue was not tried. No evidence was directed to it. The trial judge found the plaintiff entitled to a rent under the "Workmen's Compensation Act," based on an annual remuneration of $960, but his judgment unfortunately leaves us in the dark as to the means or method by which he computed the hypothetical earnings under paragraph 2 of Art. 7328, R.S.Q. for the portion of the twelve months mentioned therein during which the plaintiff was not in the defendant's employment. *Barret c. Société*, etc. (1) (49e espèce). Not only is the judgment of the Court of King's Bench awarding $1,825 as damages at common law *ultra petita*, but it condemns the appellants upon a claim never presented, which they have had no opportunity to meet, and which, if presented, might have been tried by a different tribunal.

With respect, I entirely concur in the dissenting opinion of Mr. Justice Carroll on this branch of the case. The judgment rendered by the Court of King's Bench cannot stand. Indeed, the principle of the recent dismissal of the plaintiff's action by that court in *Canadian Steel Foundries* v. *Stychlinsky* (2) (the converse case) appears to be opposed to it.

(1) D. 1917, 1, 27. (2) 25 R.L. (N.S.) 135, at p. 138.

But should the plaintiff recover under the "Workmen's Compensation Act?" That depends on whether his yearly remuneration, calculated as contemplated by that statute, exceeded $1,200 (8 Geo. V., c. 71, s. 4). If not, his right to compensation under the statute is reasonably clear. The difficulty in the case arises from the facts that the plaintiff had been in the defendant's employment only a little over three months (5th of January to 19th of April) when injured, and that between the 5th of January and the 1st of April he had been employed as a machinist helper, at 32½ cts. an hour, and from the 1st to the 19th of April as an "operator," being paid in that capacity 15 cts. per shell—a somewhat higher rate of pay.

Art. 7328 of the statute reads as follows:—

> The wages upon which the rent is based shall be, in the case of a workman engaged in the business during the twelve months next before the accident, the actual remuneration allowed him during such time, whether in money or in kind.
>
> In the case of workmen employed less than twelve months before the accident, such wages shall be the actual remuneration which they have received since they were employed in the business, plus the average remuneration received by workmen of the same class during the time necessary to complete the twelve months.
>
> If the work is not continuous the year's wages shall be calculated both according to the remuneration received while the work went on, and according to the workman's earnings during the rest of the year.

The plaintiff's work having been continuous, the case falls within the second paragraph of the articles.

The ascertainment of the plaintiff's actual earnings from the 5th of January to the 19th of April presents no difficulty. They amount to $295.60. Whether

> the average remuneration received by workmen of the same class during the time necessary to complete the twelve months

exceeded $904.40 (the balance of $1,200) is the problem presented. What is the proper construction of the statutory language just quoted?

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A comparison of their provisions shews that the French Act of the 9th of April, 1898, and the statute first passed in Quebec in 1909 (c. 66) are couched in substantially the same terms. The latter was, no doubt, taken from the former. In the particular clause under consideration, just quoted, the language of both Acts is identical. The phrase

qu'ont reçue * * * les ouvriers de la même catégorie

of the second paragraph of Art. 10 of the French Act of 1898 is reproduced verbatim in the French version of Art. 7328 of the Quebec Revised Statutes. That phrase was replaced in France, in 1905, by the words

qu'ils auraient pu recevoir * * * d'après la remunération moyenne des ouvriers de la même catégorie * * *

Although Loubat says

le nouveau texte du second alinéa de l'art. 10 ne diffère de l'ancien que dans la forme ("Risque professionnel" 3e éd. No 665),

it seems to me that the average earnings actually received by a group of workmen during a given period may differ materially from the average earnings that the same group might have received in the same period. In the one case time lost through causes attributable to the workmen themselves and not to their employer is included in the number of hours, days, or weeks on which the average is computed. In the other it may not be. But, however that may be, subject to allowances for exceptional and involuntary loss of time, as hereinafter explained, it is actual earnings—not possible earnings—that the Quebec statute prescribes as the basis of computation.

The text of the statute does not explicitly require that the category of workmen whose average wages or earnings is to serve as the basis of calculation should be confined to employees of the establishment in

which the injured workman was employed. (Loubat, No. 668). In many cases—for instance, where an industry has been recently started, or where there is no other workman of the same class employed in the establishment—that basis is not available and resort must be had to the earnings of workmen of the same class in other establishments. (ibid). Indeed there is not a little to be said for the view that the hypothetical remuneration of the injured man "for the time necessary to complete the twelve months" should be computed upon the average earnings of all workmen of a similar class in the community during that period. But the French commentators—Loubat, in the work cited No. 668, and Sachet (Législation sur les Accidents du Travail, 5^{e} éd. No 854)—seem to make it clear that the contrary view had been well established in France before the Quebec statute was passed—that where there were other workmen of the same class as the injured man in the establishment to which he belonged it was the average earnings of those workmen on which his complementary hypothetical remuneration should be computed and that it is only where there are not such earnings available that the average earnings of outside workmen should be resorted to. In adopting the French Act as part of the law of Quebec the legislature may well be taken to have intended that the construction so placed upon it in France should likewise be adopted. I had occasion recently, in *Arnold* v. *Dominion Trust Co.* (1), to refer to the authorities bearing on this aspect of the case.

Nor is it unreasonable that an employer should be in a position to ascertain from his own records the basis on which the compensation of an injured workman should be calculated. Moreover, it is that

(1) 56 Can. S.C.R. 433, at pp. 448-9.

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workman's probable earnings which have to be established and it is not unlikely that what the legislators had in mind was what he would have earned had he been in the same establishment during the period for which the estimate is to be made.

Another question, which has been somewhat debated, is whether the class or category intended is that to which the workman belonged at the time he sustained his injuries, or that in which he was placed when he first entered the establishment, or some average of any two or more classes in which he may have worked while there. But when it is borne in mind that the matter to be estimated is the average earnings of workmen of the same class during the period necessary to complete "the twelve months next before the accident"—that the statute is merely intended to provide an artificial rule for cases in which during a part of the twelve months' period the facts necessary to bring the plaintiff within the first paragraph of the article do not exist—it seems fairly clear that resort should be had to the average earnings of workmen of the class in which the injured man was first employed. The law would seem to contemplate it to be probable that had he spent the preceding three, six or nine months (or whatever the time may be) necessary to complete the twelve months' period in the establishment in which he was injured, he would have been employed in that class, though it may well be that if engaged sooner his advance to a higher grade of employment would have come earlier. The view that the original class of employment determines the category is taken by Cabouat ("Accidents du Travail, Vol. 2, No 581") and has the sanction of a decision of the Cour de Cassation, *Bourdis c. Villard* (1)

(1) 1906, 1 Gaz. du Palais 437.

The Court of Review in *Pelletier* v. *Montreal Locomotive Works* (1), took the same view. A contrary opinion of the Court of Appeal at Dijon in *Compagnie des Mines de Blanzy c. Rose* (2), is adversely criticised by the reporter (n. 1) although favourably received by Sachet (Nos. 847 and 856). Mr. Justice Pelletier who delivered the opinion of the majority of the Court of King's Bench also adopted it. He says:

> Il faut prendre, comme je l'ai dit tantôt, la moyenne de ce qu'ont gagné les ouvriers de la même catégorie, c'est-à-dire la catégorie dans laquelle se trouvait l'ouvrier lorsque l'accident est arrivé.

With respect, in this particular, I prefer the interpretation of M. Cabouat and the Cour de Cassation and in regard to this matter also it may fairly be said that the legislature in adopting the French statute intended that the same interpretation should be placed upon it as had already been sanctioned by the highest court of France.

There remains the question how the average remuneration of workmen in the defendant's establishment in the same category with the plaintiff during the required period (i.e., from 19th of April, 1917, to the 5th of January, 1918) is to be computed.

The Court of King's Bench followed the method which it had itself formulated in *St. Maurice Paper Co.* v. *Marcotte* (3), stated in the headnote of that case as follows:

> Ce salaire moyen se compute, quand les ouvriers sont payés à l'heure, en divisant le montant total qu'ils ont reçu durant la période complémentaire par le nombre d'heures qu'ils ont travaillé durant la même période.

(1) 25 R.L, (N.S.) 76, at pp. 79, 80. (2) S. 1901, 2, 293.
(3) Q.R. 27 K.B. 394.

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This mode of calculation was again approved by the same court in *Canadian Steel Foundries Co.* v. *Stychlinsky* (1). With great respect, I cannot think it is correct. By making the divisor the number of hours during which the men actually worked, the element of lost time being entirely ignored, the result attained is not the actual average earnings of the workmen during the entire period but what they might have earned, had there been no loss of time. The court would appear to have read "qu'ils ont reçue" as the equivalent of "qu'ils auraient pu recevoir." The divisor should have been not the number of hours during which the men actually worked but the number of working hours during the period in question, assuming that all the men were in the defendants' employment for the entire period.

The method prescribed by Sachet (No. 854) is to add together the earnings of the workmen of the same class during the complementary period and divide the total by the number of men engaged. Where all these men have been in the employment of the establishment during the entire period this method would be absolutely fair and would carry out the intent of the statute. Cabouat (Vol. 2, No. 580) prescribes the same method, adding, however, that the earnings of the workmen should be calculated

> suivant les règles combinées des articles 10, par. 1, et 10, par. 4, c'est-à-dire en tenant compte des périodes de chômage exceptionnel et involontaire." See too Sachet, Nos. 869 and 878.

But it cannot be used where the workmen have been employed, some for shorter, some for longer portions of the period in question. That would seem to be the case here as the following table (prepared by Francis

(1) 25 R.L. (N.S.) 135.

Dockrill, the defendant's accountant) of the earnings of each of fifteen men employed by the defendant company at the rate of 32½ cents an hour as machinist helpers during the period from the 19th of April, 1917, to the 5th of January, 1918, would indicate.

$211.50	$ 85.95	$247.30
247.90	140.25	77.90
238.65	244.65	157.20
108.85	160.55	380.90
102.50	216.95	226.55

It may be that all the machinist helpers in the defendants' employment who could fairly be held to be in the same category as the plaintiff were paid 32½ cents an hour. Sachet defines the category as including

ceux qui dans un établissement industriel ont à peu près le même emploi et touchent le même salaire que la victime.

Loubat's definition ignores the element of equality in wages. It is:—

Ceux qui font le même travail ou un travail analogue. No 667.

M. Louis Sarrut in a copious note in D. 1917.1.5. says:

Les ouvriers de la même catégorie, ce sont ceux qui exercent le même métier, la même profession que l'ouvrier victime de l'accident.

Cabouat, Vol. 2, No. 581, says:

Des explications données par M. Poirier, il résulte que l'on doit entendre par ouvriers de la même catégorie que la victime, ceux qui exercent une fonction correspondante à la sienne ou exécutent un même travail sans tenir compte d'ailleurs des inégalités d'aptitude professionnelle susceptibles d'entraîner des inégalités de salaire * * *

On this point I respectfully agree in the interpretation of the three last mentioned authors adopted by the late Chief Justice of Quebec in *St. Maurice Paper Co.* v. *Marcotte* (1). If it might be assumed that the fifteen men whose gross earnings Dockrill gives were

(1) Q.R. 27 K.B. 394, at p. 396.

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the only employees of the defendant company in the same category with the plaintiff during the period in question it would still be necessary to have information as to how long each of them remained in the company's employment as a machinist helper.

Unfortunately the record does not contain that information. Moreover, Mr. Dockrill states that there were quite a number of other machinist helpers engaged at different rates of pay. His computations of averages are all based on the erroneous view that to ascertain the actual average earnings per hour of a class of workmen during a given period it is only necessary to divide their total earnings during the period by the number of hours of work which they have actually put in, instead of by the number of hours which they might have put in had there been no involuntary and exceptional loss of time.

The burden was on the plaintiff to furnish to the court the information necessary to enable it to determine the average salary of workmen of his class during the period necessary to complete the twelve months. *Pelletier* v. *Montreal Locomotive Works* (1). He has not done so.

There is nothing to shew that the lacking information cannot readily be obtained. On the contrary Mr. Dockrill's testimony rather indicates that it can. There is in my opinion no justification for taking either the wages earned by the plaintiff himself while engaged with the defendants as machinist helper or his earnings in other employment during the rest of the twelve months' period as the basis on which to compute his hypothetical earnings for that time. I agree with Mr. Loubat when he says (No. 666):

(1) 25 R.L. (N.S.) 76, at p. 82.

666. La loi n'admet aucun équivalent à cette seconde partie du salaire annuel. Dès lors, sous aucun prétexte, les tribunaux ne sauraient lui substituer un autre terme de comparaison, par exemple, le salaire que l'ouvrier aurait reçu pendant le temps nécessaire pour compléter les douze mois, évalué d'après la rémunération effective depuis son entrée dans l'entreprise (*contra*, Alais, 5 Janv. 1900. Gaz. Pal. 1900.1. 230). Ce procédé a été, du reste, condamné par le rejet d'un amendement dans ce sens, présenté par M. Félix Martin au Sénat (Sén., 28 oct. 1895; J. off., p. 870). Le salaire que l'ouvrier aurait gagné doit donc être déterminé uniquement d'après le salaire moyen des ouvriers de la même catégorie, c'est-à-dire d'après la moyenne des salaires des ouvriers de la même catégorie pendant la période nécessaire pour compléter les douze mois.

Cabouat, (Vol. 2, No. 575) clearly expresses the same opinion. The case must therefore be remitted to the Superior Court to obtain the information necessary to permit of the requirements of the statute being complied with.

In computing the period of service of each workman deduction must be made for loss of time by him which is exceptional and involuntary—"chômages exceptionels non-volontaires"—whether ascribable to a cause personal to him or to non-operation of the establishment. Thus absence due to serious illness, injury or military service should be allowed for, but not absence attributable to laziness or caprice or to mere casual indisposition such as ordinarily befalls workmen from time to time. So allowance must be made for loss of time occasioned by extensive repairs, (*grosses réparations*) destruction of premises by fire, total or partial, and unusual depression in business, or any other abnormal cause.

These allowances are specifically provided for by paragraph 4 of Art. 10 of the French Act of 1905, stated by Sachet (No. 869) merely to embody the effect of decisions on the French law of 1898, which, like the Quebec Act, did not specifically provide for them. An admirable note of M. Planiol, (D.1904.1.289), deals with this subject.

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The determination of the trial judge as to the deductions to be made for loss of time, and likewise his finding as to what workmen should be classed as belonging to the same category as the plaintiff will be entitled to the greatest weight. Under the French system such matters "appartiennent au juge du fait souverainement." D. 1903.1.572.

In the Superior Court proof must be adduced

(1) to establish what persons engaged as machinist helpers by the defendants during the period from the 19th of April, 1917, to the 5th of January, 1918, were in the same category as the plaintiff, i.e., doing the same class of work, unless the evidence of Mr. Dockrill should be accepted as sufficient proof that it comprised the 27 men of whom he speaks and no others;

(2) the number of days during that period for which each of these workmen was in the defendants' employment as a machinist helper, i.e., from the commencement of the period or the later date at which he entered the establishment or was put in that class until he left it or was discharged or the period expired. (From the period of his employment, however, must be deducted any exceptional and involuntary loss of time of the workman as above indicated); and

(3) the total amount of his earnings while so employed.

By adding together the earnings of all these workmen and dividing the total by the sum of the number of days included in their respective terms of employment (computed as aforesaid) added together, the average daily wages of the workmen during the period in question will be ascertained. If the quotient thus obtained be multiplied by 261 (the number of days comprised in the period between the 19th of April, 1917, and the 5th of January, 1918) the product will be the average earnings during that period of a workman

of the category to which the plaintiff belonged. The result will be practically the same as if working days merely had been made the basis of computation in both cases, and the method adopted has the advantage of simplicity. The sum of the amount thus ascertained and the $295.64 earned by the plaintiff between the 5th of January and the 19th of April, 1918, will be the basic annual remuneration on which, if less than $1200 (as I incline to think it will turn out to be), the rent to which the plaintiff is entitled under the provisions of Arts. 7322 and 7326 of the Workmen's Compensation Act must be computed.

In the result the defendants' appeal must be allowed. While the plaintiff cannot have the restoration of the judgment of the Superior Court sought by his cross-appeal, because it is impossible to tell whether in computing the basic annual remuneration at $960 the learned trial judge proceeded as I understand the statute to require (the respondent suggests in his factum that for the complementary period he took the plaintiff's earnings in other employment—but I find nothing in the record to warrant the statement that a course so contrary to the provisions of the statute was in fact adopted), his action should not be dismissed, as the appellants ask, but will be referred back to the Superior Court to permit of the additional facts being established, knowledge of which is necessary to ascertain, in the manner indicated above, the basic annual remuneration on which the plaintiff's rights must be determined.

Should such annual remuneration be found to exceed $1,200 the action must be dismissed with costs throughout. Should it be found not to exceed $1,200, the plaintiff should have judgment for such amount as the

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Superior Court may thereupon find him entitled to, with costs of an action in that court. If the amount of the judgment ultimately entered should not be less than that of Mr. Justice Guerin's former judgment, inasmuch as the plaintiff has been needlessly put to all the subsequent costs—those of the appeals to the Court of Appeal and to this Court—he should also recover these costs in addition as well as any extra costs in the Superior Court occasioned by the second enquête now directed which that court may allow him. In no event, however, for the reasons indicated by my brother Brodeur, can the respondent have any costs of his factum on the cross-appeal to this court. Should the ultimate recovery, however, be of an amount less than that originally awarded there should be no costs to either party of any of the proceedings subsequent to the judgment of Mr. Justice Guerin.

BRODEUR J.—La présente poursuite a été instituée en vertu de la "Loi des accidents du travail" (arts 7321 et suivants, S.R.P.Q.). Nous avons à décider si le demandeur intimé avait un salaire de plus de $1,200, car s'il avait une rémunération plus élevée il tomberait sous le coup de la loi commune et ne pourrait pas invoquer la loi des accidents du travail. Il nous faut à cette fin interpréter les dispositions de l'article 7328 qui se lit comme suit:

> Le salaire servant de base à la fixation des rentes s'entend pour l'ouvrier occupé dans l'entreprise pendant les douze mois écoulés avant l'accident, de la rémunération effective qui lui a été allouée pendant ce temps soit en argent, soit en nature.
>
> Pour les ouvriers occupés pendant moins de douze mois avant l'accident, il doit s'entendre de la rémunération effective qu'ils ont reçue depuis leur entrée dans l'entreprise, *augmentée de la rémunération moyenne qu'ont reçue pendant la période nécessaire pour compléter les douze mois, les ouvriers de la même catégorie.*

Si le travail n'est pas continu, le salaire annuel est calculé tant d'après la rémunération reçue pendant la période d'activité que d'après le gain de l'ouvrier pendant le reste de l'année.

La partie que j'ai soulignée est celle qu'il nous faut particulièrement examiner.

Je dois ajouter que cet article 7328 est la reproduction textuelle de l'article 10 de la loi française de 1898 et qu'en conséquence la jurisprudence et la doctrine française peuvent nous guider dans l'interprétation de notre texte.

Les faits sont les suivants:

Dans l'année qui a précédé l'accident, le demandeur a été d'abord environ neuf mois occupé comme débardeur dans le port de Montréal à raison de 35 cents de l'heure. Ensuite il a travaillé du 5 janvier au 1er avril 1918 comme aide-machiniste dans l'usine de la défenderesse à raison de 32½ cents de l'heure; et enfin pendant 19 jours il a travaillé comme tourneur à la pièce pour la défenderesse, ce qui lui rapportait environ $26 par semaine. Il y a donc eu trois périodes différentes qu'il s'agit de considérer: 1° celle du 19 avril 1917 au 15 janvier 1918; 2° celle du 5 janvier 1918 au 1er avril 1918; et enfin 3° celle du 1er avril 1918 au 19 avril de la même année.

Les deux dernières périodes qui se sont écoulées depuis le 5 janvier au 19 avril n'offrent pas de difficultés. La loi (art. 7328) nous dit que le salaire qui sert de base est celui que l'ouvrier a effectivement reçu depuis son entrée dans l'entreprise. Or, comme Lewis a reçu pendant cette époque-là $295.60, il n'y a pas de contestation et ce chiffre est accepté par les deux parties.

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Toute la difficulté est de déterminer le salaire de base pour la première période, c'est-à-dire du 19 avril 1917 au 5 janvier 1918, environ neuf mois. Est-ce le salaire que le demandeur a eu comme débardeur c'est-à-dire le salaire qu'il avait retiré en dehors de l'entreprise où l'accident a eu lieu ? En d'autres termes, devrions-nous appliquer les dispositions du 3ème paragraphe de l'art. 7328 qui dit que *si le travail n'est pas continu,* le salaire annuel est basé sur la rémunération reçue pendant la période d'activité et sur le gain de l'ouvrier pendant le reste de l'année ?

L'appelante dans son factum nous dit que l'honorable juge de la cour supérieure

calculated the wage basis as though the employment was a non-continuous operation.

Il est possible que cette affirmation soit exacte mais malheureusement nous n'avons pas de notes de l'honorable juge, et dans le jugement nous voyons simplement sur ce sujet le motif suivant:

Considérant que le demandeur a suffisamment prouvé que le salaire qui doit servir de base à la fixation de la rente sous l'empire de l'art. 7328, S.R.P.Q., est $960.

Il est assez difficile alors pour moi de dire quelle est la rémunération dont il s'est servi pour arriver à ce résultat. A tout événement, je suis d'opinion que le cas actuel est l'un de ceux où nous ne devons pas appliquer le troisième paragraphe de l'article 7328. Un examen des trois paragraphes de cet article me confirme dans cette opinion.

Le premier paragraphe, il est bien évident, réfère à l'ouvrier qui a régulièrement travaillé toute l'année dans l'entreprise; car il y est déclaré positivement que le salaire est celui effectivement payé à l'ouvrier qui

est occupé dans l'entreprise pendant les douze mois écoulées.

Ce premier paragraphe ne peut pas être invoqué dans la cause actuelle, parce que Lewis n'a été employé qu'environ trois mois dans l'entreprise.

Le deuxième paragraphe de l'article parle des ouvriers "occupés pendant moins de douze mois" dans l'entreprise. C'est bien le cas de Lewis, vu qu'il n'a été dans l'entreprise que quelques mois. Alors le salaire de base doit comprendre, outre la rémunération effective qu'il a reçue depuis son entrée, une somme supplémentaire qui est représentée par la rémunération moyenne qu'ont reçue dans la même entreprise pendant la période nécessaire pour compléter les douze mois les ouvriers de la même catégorie.

Le troisième paragraphe de l'article pourvoit au cas où le travail n'est pas continu; et alors il permet d'ajouter à la rémunération reçue par l'ouvrier dans l'entreprise les gains réalisés par lui dans l'année. Or cette disposition vise exclusivement les ouvriers occupés dans l'entreprise depuis plus d'un an mais d'une façon intermittente. (Dalloz, 1903-1-598; Sachet, édition de 1909, vol. 1er, nº 862; Loubat, éd. 1906, nºs 673 et suivants). Ce troisième paragraphe, par conséquent, ne couvre pas notre cas.

C'est donc le second paragraphe qui s'applique à notre cas, alors la première question qui se pose est de savoir à quelle catégorie d'employés il faut avoir recours pour fixer le salaire de base. Est-ce la catégorie des tourneurs à laquelle Lewis appartenait lors de l'accident, ou bien celle des aides-machinistes dont il faisait partie à son entrée dans l'usine. La solution de cette question est des plus importantes, car si c'est le salaire des tourneurs qui doit servir de base, alors le montant sera plus élevé que la somme permise pour se prévaloir de la loi des accidents du travail. Si, au contraire, c'est le salaire des aides-machinistes, Lewis peut probablement réclamer.

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Les auteurs sont divisés sur ce point. Quelques-uns disent que si l'indemnitaire a appartenu successivement à plusieurs catégories distinctes, c'est d'après la rémunération de la catégorie dans laquelle il a été rangé à son entrée dans l'établissement et non d'après la catégorie à laquelle il appartenait au moment de l'accident (Cabouat, Accidents du Travail, vol. 2, n° 581: Baudry-Lacantinerie, vol. 21, n° 2090).

Sachet, au contraire, prétend que le salaire gagné au moment de l'accident doit servir de base. (Sachet, édition de 1909, nos 847-856). Sirey, 1901-2-293.

Il y a cependant un jugement de la Cour de Cassation qui tranche la question. Ce jugement est rapporté dans la Gazette du Palais (1) et décide que

> Lorsque l'ouvrier accidenté employé depuis moins d'un an a dans cette période successivement occupé dans l'entreprise des emplois différents inégalement rétribués, il y a lieu, pour compléter fictivement les douze mois de travail devant concourir à la détermination du salaire de base, de prendre en considération le salaire afférent à la première catégorie d'ouvriers dans laquelle le demandeur avait tout d'abord été admis lors de son embauchage et non celui qu'il touchait en dernier lieu lors de l'accident.

La Cour de Revision, dans une cause de *Pelletier* v. *Montreal Locomotive Works* (2), a jugé dans le même sens.

Ces jugements me paraissent bien fondés. En effet, pour déterminer la rente annuelle due à la victime, on recherche le salaire gagné par lui dans l'année qui a précédé l'accident. Il avait nécessairement espoir qu'à l'avenir il continuerait à toucher, s'il restait dans l'entreprise, un salaire plus élevé et correspondant à celui qu'il avait lors de l'accident. Cependant les salaires de base ne sont pas la réalisation des projets d'avenir, mais la représentation des salaires payés dans le passé, soit à l'ouvrier lui-même, soit à ses compagnons de travail.

(1) 1906-1-437. (2) 25 R.L. (N.S.) 76.

Dans le cas actuel si Lewis avait travaillé pendant tout le temps pour la défenderesse, il aurait reçu comme aide-machiniste pendant onze mois et dix jours 32½ cents de l'heure. Pendant les derniers 20 jours, il aurait été payé comme tourneur à raison de 15 cents la pièce. Il aurait certainement gagné dans son année moins de $1,200, en tenant compte des chômages ordinaires et légaux. Alors ces jugements de la Cour de Cassation et de la Cour de Revision ne font que mettre à exécution le principe qui doit servir de base à la détermination du salaire effectivement payé. Il me semble juste qu'on alloue à Lewis le salaire des aides-machinistes et non pas le salaire des tourneurs avec qui il a travaillé dans les derniers vingt jours.

Je suis obligé alors de différer d'opinion avec la Cour d'Appel qui, par l'entremise de l'honorable juge Pelletier, a dit que pour déterminer le salaire de base

> il faut prendre la moyenne de ce qu'ont les ouvriers de la même catégorie, c'est-à-dire la catégorie dans laquelle se trouvait l'ouvrier lorsque l'accident est arrivé.

Le jugement de la Cour d'Appel a donc fait erreur en appliquant ce principe.

Maintenant la catégorie d'aides-machinistes doit-elle comprendre, en outre des quinze personnes gagnant le même salaire que Lewis, c'est-à-dire 32½ cents de l'heure, aussi les aides-machinistes gagnant un salaire différent? Si nous consultons la discussion qui s'est faite sur ce point au sénat français, et que nous retrouvons dans Dalloz, 1898-4-74, note 12, il me paraît évident que les ouvriers de la même catégorie s'entendent de ceux qui ont le même salaire, car le sénateur Scheurer-Kestner, qui est industriel, dit, en parlant des tourneurs qu'il prit pour exemple, qu'il y a plusieurs catégories et que cette expression se

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comprend bien facilement par ceux qui sont dans l'industrie et que ce sera facile à appliquer. Ce qui fut dit ensuite par le rapporteur sur le sujet élucide la question. En effet, il a clos la discussion en disant:

> Cela signifie, comme le disait tout à l'heure notre collègue, M. Scheurer-Kestner, que s'il s'agit par exemple de tourneurs ayant *gagné tel salaire* on doit appliquer à un ouvrier de cette catégorie le salaire correspondant.

Sachet, au n° 854 de son ouvrage, édition de 1909, rapporte cette discussion du sénat et ajoute:

> De cette discussion il semble résulter que l'on doit entendre par ouvriers de la même catégorie ceux qui dans un établissement industriel ont à peu près le même emploi *et touchent le même salaire que la victime.*

Je croirais donc que dans le cas actuel la moyenne du salaire des ouvriers de la même catégorie serait celui des quinze aides-machinistes qui recevaient le même salaire que Lewis.

Maintenant quelle est la moyenne des salaires payés dans l'usine de la défenderesse aux aides-machinistes appartenant à la catégorie du demandeur depuis le 1er avril 1917 au 5 janvier 1918?

La preuve à ce sujet n'est pas très satisfaisante. Tous les aides-machinistes étaient employés à l'heure; et il me semble que la défenderesse aurait dû avoir en sa possession le nombre d'heures que chaque employé avait travaillé à l'usine, afin d'établir une moyenne de la rémunération reçue par chacun d'eux. Mais le comptable de la compagnie défenderesse nous informe qu'il lui est impossible de fournir cet état.

Il a bien cependant déclaré dans une autre partie de son témoignage que la moyenne que tous les aides-machinistes avaient reçue était de $25.85 par semaine et que des tourneurs avaient eu $32.64 par semaine.

Comment en est-il arrivé à ce résultat? Je ne puis pas facilement m'en rendre compte et ce n'est pas clair dans son témoignage. D'abord qu'entend-il par semaine? Est-ce 6 jours ou 5½ jours? Chaque jour comprend-il dix heures, neuf heures ou huit heures? Il ne nous le dit pas.

S'il a procédé, comme je le crois, à prendre le temps de chaque homme puis à additionner tout ce temps pour dire: Cela constitue tant de semaines; c'est là une base de calcul erronée, car ce n'est pas la moyenne de la rémunération qu'il nous donne. D'ailleurs ce calcul demanderait plus de renseignements qu'il nous en a donnés. De plus, il est assez étonnant, s'il a procédé de la manière que je le suppose, qu'il n'ait pas été capable de dire le nombre d'heures que chacun a travaillé. Son calcul ne me paraît pas suffisant pour asseoir un jugement. Il se trouverait alors à éliminer tout chômage. (Dalloz, 1901-2-178; Sachet, 5ème éd. n^{os} 853-868). Cependant les ouvriers dans cette entreprise ont dû avoir des interruptions de travail, car il nous donne le salaire payé aux quinze ouvriers aides-machinistes et aucun n'a reçu plus de $380.90. Or par sa méthode de calcul cet ouvrier aurait dû recevoir le double de cela.

Comme la défenderesse n'est pas en position de fournir des renseignements précis sur la moyenne de la rémunération dans son entreprise, nous devons avoir recours aux présomptions qui peuvent nous guider dans un cas de cette nature. Je serais disposé, pour ma part, à suivre la décision de la Cour de Cassation qui, en examinant un cas semblable, c'est-à-dire un cas où on a de la difficulté à établir avec précision le total réel des salaires de tous les jours de travail, a décidé qu'on pourrait prendre pour base le salaire que le demandeur a gagné dans l'entreprise. Dalloz, 1902 1-381.

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Le salaire gagné par le demandeur comme aide-machiniste du 5 janvier 1918 au 23 mars 1918 (nous n'avons pas son salaire comme tel du 23 mars au 1er avril 1918) a été de 197.20. Cette période représente pour les soixante-dix-huit jours qui se sont écoulés un salaire de $2.53 par jour. Voilà la moyenne de sa rémunération pendant qu'il travaillait. Maintenant il y a 260 jours du 19 avril 1917 au 5 janvier 1918. En multipliant ces 260 jours par $2.53 nous arrivons à $657.80.

En ajoutant à ces $657.80 le salaire gagné par le demandeur du 5 janvier 1918 au 19 avril 1919, soit $295.60, nous arrivons à un total de $953.40, c'est-à-dire pratiquement au même montant que celui de $960 trouvé par la Cour Supérieure.

La Cour d'Appel avait trouvé, au contraire, que le montant aurait dû être de plus de $1,200; et, par conséquent, le demandeur, suivant elle, n'aurait pas eu le droit de poursuite sous "l'acte des accidents du travail" (art. 7326); mais tout de même elle aurait donné jugement pour le demandeur en se basant sur le droit commun. Le demandeur a fait un contre-appel et a demandé le rétablissement du jugement de la Cour Supérieure.

Pour ces raisons, l'appel devrait être renvoyé et le contre-appel maintenu, le jugement de la Cour Supérieure rétabli et celui de la Cour d'Appel modifié et rendu conforme à celui de la Cour Supérieure. L'appelante devra payer les frais dans toutes les cours, moins les frais de factum sur le contre-appel devant cette Cour.

Voici pourquoi les frais de ce factum ne devraient pas être taxés:

J'ai remarqué durant l'argument que les avocats de l'intimé avaient cité Sachet comme étant favorable à leurs prétentions, et ils avaient à cette fin donné la première partie du n° 856 de l'ouvrage de cet auteur où il donnait un résumé du jugement ci-haut mentionné et rapporté dans la *Gazette du Palais* (1906-1-437); mais en vérifiant j'ai trouvé que cette citation était incomplète et que de fait Sachet, à la fin du n° 856 déclarait que cette décision de la Cour de Cassation devait être acceptée avec réserve, et virtuellement il la combattait dans un autre paragraphe.

Dans ces circonstances, je suis d'opinion que les avocats de l'intimé n'auront pas le droit de réclamer de frais ou d'honoraires pour ce factum.

J'avais écrit l'opinion ci-dessus quand j'ai vu que deux de mes collègues étaient d'avis que le demandeur devait être débouté de son action et que mes deux autres collègues étaient d'opinion que la cause devrait être renvoyée en Cour Supérieure pour faire compléter l'enquête et élucider certains faits qui auraient dû être clairement prouvés. Comme l'opinion de ces derniers est plus conforme à mes vues, je suis prêt à m'y rallier afin qu'un jugement final puisse être rendu. Sans approuver entièrement l'opinion de mon collègue Anglin, je suis disposé cependant à adopter pour les fins de la présente cause les conclusions de son jugement. Le dossier devra donc être renvoyé en Cour Supérieure pour y être procédé de la manière indiquée dans son opinion.

MIGNAULT J.—Les opinions très travaillées de mes honorables collègues, MM. les juges Anglin et Brodeur, me permettront de m'exprimer avec quelque brièveté.

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La "loi des accidents du travail" de Québec (art. 7321 et suiv. S.R.Q., 1909) est presque la copie de la loi française du 9 avril 1898. Il y a cependant une différence notable entre les deux lois, car la loi française régit tout ouvrier dans ses rapports avec son patron, quelque élevé d'ailleurs que soit son salaire (art. 2), tandis que la loi de Québec, telle qu'elle se lisait lors de l'accident en question, ne s'applique pas à un ouvrier dont la rémunération annuelle dépasse $1,200 (art. 7326). Ainsi la loi française exclut absolument l'action de droit commun contre le patron, quelque soit le salaire de l'ouvrier, alors que cette action n'était écartée, dans la province de Québec, que pour les salaires ne dépassant pas $1,200, et ce chiffre, cette année, a été porté à $1,500.

Qu'entend-on par "rémunération annuelle" dans le dernier alinéa de l'article 7326? Est-ce la même chose que le salaire dont parle l'article 7328, et qui, selon le mode de calcul que cet article impose, est soit la rémunération effective reçue par l'ouvrier pour douze mois de travail continu dans l'entreprise, soit, quand l'ouvrier n'y a été occupé que pendant un terme plus court, la rémunération effective qu'il a reçue, plus la rémunération moyenne payée aux ouvriers de la même catégorie pendant la période nécessaire pour compléter les douze mois, soit, quand le travail n'a pas été continu, la rémunération reçue par l'ouvrier pendant la période d'activité et son gain ailleurs durant le reste de l'année?

Nous ne pouvons nous aider ici de la loi française, car elle ne contient pas une disposition semblable à celle du deuxième alinéa de l'article 7326. Cependant je ne puis croire que la rémunération annuelle dont parlent les deux alinéas de l'article 7326 soit une rémunération autre que celle qui sert à la fixation des

rentes. Donc s'agit-il de savoir quelle rémunération annuelle écarte l'application de la loi des accidents du travail, ou quelle rémunération forme la base du calcul des rentes, il faut s'en rapporter à l'article 7328 pour la déterminer.

Autre question. Quelle est la "catégorie" dont parle le deuxième alinéa de l'article 7328? Je n'ai pu me défendre d'une certaine hésitation à cet égard, mais en vue de l'interprétation que la cour de cassation (Gazette du Palais, 1906, ler semestre, p. 437) donnait à l'alinéa 2 de l'article 10 de la loi française, lors de l'adoption de cette disposition par la Législature de Québec, je crois que la même interprétation s'impose ici. Lors donc, pour citer presque textuellement cette décision, que l'ouvrier accidenté, employé depuis moins d'un an, a, dans cette période, occupé dans l'entreprise des emplois inégalement rétribués, on doit, pour compléter fictivement les douze mois de travail, prendre en considération le salaire afférant à la première catégorie d'ouvriers dans laquelle le demandeur avait, tout d'abord, été admis, lors de son embauchage, et non celui qu'il touchait au jour de l'accident.

Reste le mode de calculer le salaire de l'ouvrier dans les cas d'application du deuxième alinéa de l'article 7328. J'adopte ici le mode indiqué dans l'opinion de mon collègue, M. le juge Anglin. On prend d'abord le nombre total de jours de l'engagement (pendant la période d'emploi du demandeur) de tous les ouvriers de la même catégorie que le demandeur—et j'entends par là les ouvriers faisant un travail similaire, sans exiger que leur salaire ait été absolument identique à celui perçu par le demandeur—et ensuite le montant total qui leur a été payé pendant le temps de leur engagement. En divisant le deuxième chiffre par le

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premier on obtient le salaire moyen par jour, lequel, multiplié par le nombre total de jours de la période requise pour compléter les douze mois, donne le salaire que l'article 7328, al. 2, présume que la victime aurait reçu dans l'entreprise pendant cette période. On tient ainsi nécessairement compte du temps perdu par les ouvriers, et il importe peu que les dimanches et jours fériés soient compris dans le chiffre total représentant la durée de l'engagement de tous les ouvriers de la même catégorie, car ils sont aussi comptés dans le chiffre représentant la période requise pour compléter les douze mois, et le calcul se fait sur la même base.

Il suffit d'indiquer ce mode de calcul pour les besoins de cette cause. Il y a bien la question du chômage extraordinaire ou forcé que traite mon honorable collègue, M. le juge Anglin. Je reconnais bien qu'il peut y avoir, dans chacun des cas visés par l'article 7328, des chômage extraordinaires et nullement voulus par les ouvriers, et qu'il ne serait pas juste, dans l'évaluation du salaire de l'ouvrier accidenté, de tenir compte de ces chômages pour réduire d'autant le salaire qui sert de base à la fixation des rentes. Je ne veux pas aller plus loin dans la présente cause, car je ne vois au dossier aucun indice que de tels chômages aient existé, et, tout en concourant dans les instruction que mon collègue croit que nous devrions donner à la Cour Supérieure au sujet de ces chômages, je ne le fais que pour les besoins de cette cause et pour permettre qu'elle soit finalement jugée sans autres appels, et je me réserve la plus entière liberté d'appréciation, si le débat se renouvelle devant nous, dans une autre cause, de tout cette question des chômages forcés ou involontaires.

Les éléments de preuve que nous trouvons au dossier ne nous permettent pas de faire le calcul du salaire d'après la règle du deuxième alinéa de l'article 7328. Il y avait quinze employés, aides-machinistes, qui recevaient le même salaire que le demandeur, mais il y avait en tout vingt-sept aides-machinistes qui étaient inégalement rétribués. Il aurait fallu tenir compte de tous les ouvriers de la même catégorie, sans s'arrêter rigoureusement à l'identité de salaire. Nous n'avons nulle part le terme de l'engagement de ces aides-machinistes, bien que nous ayons le chiffre total qui leur a été payé. Du reste, Dockrill, dans sa liste des quinze ouvriers qui recevaient 32½ cents de l'heure, fait voir de telles inégalités, qu'il est évident que certains de ces quinze ouvriers ont dû être employés un temps beaucoup moins long que les autres. Dans ces circonstances, et vu que l'honorable juge de première instance n'a pas indiqué la base de son calcul, nous n'avons d'autre alternative que de renvoyer la cause à la Cour Supérieure pour y être procédé confomément aux règles indiquées plus haut.

Je puis ajouter que le jugement de la Cour d'Appel ne peut être soutenu, car l'action, étant clairement intentée sous l'empire de la loi des accidents du travail, ne pouvait être transformée en une action de droit commun. Je favorise les amendements autant que possible, mais un tel amendement ne pourrait être permis, car il changerait la nature de l'action (art. 552 C.P.C.). La loi des accidents du travail fait voir que le recours en vertu de cette loi et le recours sous le droit commun ne peuvent coexister entre les mêmes personnes, patron et ouvrier. Ils sont inconciliables, et si on les incluait dans une même action contre le patron, le demandeur serait forcé d'opter entre eux (C.P.C. art. 177, paragraphe 6).

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Mignault J.

L'appel doit donc être maintenu et la cause renvoyée à la Cour Supérieure pour y être procédé suivant les instructions contenues dans l'opinion de M. le juge Anglin. Je concours dans l'adjudication des frais de la cause faite par mon honorable collègue.

Appeal allowed, new trial ordered.

Solicitors for the appellant: *DeWitt, Tindale & Howard.*

Solicitors for the respondent: *Audet & Brosseau.*

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*Mar. 11, 12.
*May 4.

GREAT NORTH WESTERN TELEGRAPH CO. (DEFENDANT)..... APPELLANT;

AND

EDOUARD TREMBLAY (PLAINTIFF)..... RESPONDENT.

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

"Workmen's Compensation Act"—Petition for authorization to sue—Part of the action—"Judicial demand"—Interruption of prescription—Telegraph operator—R.S.Q., 1909, *Arts.* 7321, 7345, 7347—*Arts.* 2224, 2227 *C.C.*—*Art.* 117 *C.P.C.*—*Arts.* 2111, 2244, 2245 *C.N.*

Under the Quebec "Workmen's Compensation Act," the petition for authorization to sue does not form part of the action and is not a "judicial demand" within the purview of Art. 2224 C.C.; and therefore this petition does not interrupt prescription. Idington J. *dubitante* and Duff J. *contra*.

Per Idington J.—A lineman employed by a telegraph company is entitled to claim relief under the Quebec "Workmen's Compensation Act."

Judgment of the Court of King's Bench reversed, Duff J. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, reversing the judgment of the trial court (1) and maintaining the respondent's, plaintiff's, action.

The respondent was a lineman engaged by a telegraph company, the appellant. When repairing its lines, he met with a serious accident resulting from an

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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electric current coming from the line of another company, both wires being attached to the same pole. The accident occurred on the 17th of August, 1917. The petition for authorization to sue under the "Workmen's Compensation Act" was presented and granted on the 30th of July, 1918. A first action for compensation was taken by respondent on the 5th of August, 1918, and was dismissed on the 23rd of December, 1918, on the ground that the statement of claim did not disclose that such petition had been granted and that the respondent was proceeding udder the "Workmen's Compensation Act". Article 7345 of the Revised Statutes of Quebec, 1909, enacts that any action under the Act shall be instituted before the expiration of one year after the accident. The respondent then took a second action on the 25th of February, 1919, using the same authorization to sue as granted for the issuing of the first action.

L. A. Taschereau K.C. for the appellant.

Alleyn Taschereau K.C. for the respondent.

IDINGTON J.—This appeal presents a number of curious points for our consideration. Some of them suggest the reflection that a plaintiff having a rather difficult problem for solution in order to found his action, might, by a little care, have avoided the needless complications that have ensued.

The important question raised is whether or not a lineman, engaged by a telegraph company, as the appellant is, in repairing its lines, when meeting with a serious accident resulting from an electric current, is entitled to claim relief under the Quebec "Workmen's Compensation Act."

The electric current which produced the injury was that from another line than the one belonging to appellant.

However both that wire and that of the appellant on which respondent was engaged, were attached to the same poles.

These facts need not be considered further than to illustrate the nature of the service which respondent was engaged in and the risks attendant thereon.

The statute relied upon is rather curiously worded. And to interpret its language, said facts, and possibly many others of a like nature which may exist in carrying on the business of a telegraph company, suggest that the legislature, in framing an Act designed to protect workmen engaged in employments of a rather more hazardous character than those of mere mercantile enterprises, could hardly be supposed to have intentionally left workmen so engaged as respondent was, outside such protection.

The section 7321 defines the industries covered by the Act.

> 7321. Accidents happening by reason of or in the course of their work, to workmen, apprentices and employees engaged in the work of building, or in factories, manufactories or workshops: or in stone, wood or coal yards: * * * or in any gas or electrical business * * or in any *industrial enterprise*, in which explosives are manufactured or prepared, or in which machinery is used, moved by power other than that of men or of animals, shall entitle the person injured, etc., etc.

If the fact that the basis of the telegraph business is the application and use of electric force and necessarily implies the use of the mechanical contrivances adapted for its control, and in turn the application of means such as wires and poles for conducting it, do not constitute the business an electrical business, I fail to see how it can be classified.

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Idington J.

It is quite beside the question to say that it is a commercial enterprise or business. It would be hard to conceive of anything in the way of business which in one sense is not commercial.

Nor does the innocent minded argument demonstrating how little risk is run from the very moderate current ordinarily used in the actual operation of the line to produce the mechanical results needed, seem to me a very convincing reason for holding that it cannot be designated as essentially an electrical business.

And it is none the less so because by reason of commercial and other necessities, it is being forced to keep the company of other electrical businesses, using the same poles to carry wires charged with a heavier current and possibly neither being proof against the induction we sometimes hear of.

I am of the opinion that the telegraph business falls within the very language of the statute above quoted.

Passing to the legal curiosities which respondent's stumbling efforts to claim the benefit of the Act have developed, I do not think that the production of an abortive declaration which failed to disclose or allege the existence of the essential factors of the claim being within the Act, can be said to have been any proper exercise of the permission that was given, not to proceed to produce an abortive but a real and valid assertion of claims within the scope of the permission given.

The resultant judgment given, on that abortive declaration, can neither be set up as an exercise of the permission given, nor as a *res judicata* to answer the declaration herein upon which the court below has given relief by the judgment appealed from.

The other point raised that the action is prescribed might have been fairly arguable before the jurisprudence of Quebec had established that the application for permission having been heard in presence of all those concerned, and the order made therefor, suspends the operation of the prescription relied upon, but in face of such a jurisprudence so well established, does not seem to me now arguable.

Since writing the foregoing I have read the opinions of my brothers Brodeur and Mignault holding that the Quebec jurisprudence relative to prescription has not been definitely settled and in deference thereto I, somewhat hesitatingly, assent to their view relative to a point in which local opinion should govern.

DUFF J. (dissenting).—The appeal in my judgment fails on all points and should be dismissed with costs.

ANGLIN J.—I have had the advantage of reading the opinions to be delivered by my brothers Brodeur and Mignault. I entirely concur in their conclusion and in the reasons on which they base it.

The terms of Art. 7347 R.S.Q. make it clear that the petition for authorization to sue, which it prescribes, is not a part of the action which, under Art. 7345, is "subject to a prescription of one year." The petition is a proceeding which the plaintiff is obliged to take "before having recourse to the provisions of this Act"— a preliminary step requisite to qualify him or give him a status to bring the action. On the other hand if it had been an integral part of the first action, as held by Mr. Justice Gibsone, it must have fallen with it and the plaintiff would lack the authorization necessary to maintain the present action.

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Anglin J.

In the absence of special provision in the statute, any question of interruption of the prescription which it imposes must be determined by reference to the articles of the Civil Code dealing with that subject. In answer to the plea of prescription the respondent relies upon Arts. 2224 and 2227 C.C., which he successfully invoked in the Court of King's Bench. The Quebec Civil Code has not reproduced Art. 2245 of the Code Napoleon.

As to Art. 2224 C.C., my brother Brodeur has fully stated the reasons why the petition for authority to sue cannot be regarded as "a judicial demand" within its purview. An additional ground for that view is afforded by the express enumeration in its second paragraph of "seizures, set-off, interventions and oppositions." The plaintiff's first action having been dismissed cannot serve as an interruption of prescription. Art. 2226 C.C.

As to the payments made by the appellants to the respondent, those prior to the month of May would rather seem to have been compassionate in their character and the subsequent payments were merely of wages earned by the respondent after his re-engagement by the appellants. The burden is on the respondent to establish an interruption of prescription. In order that payments made by the appellants may avail him for that purpose he must adduce evidence of circumstances warranting an inference that they implied recognition by the appellants of a legal obligation, either under the "Workmen's Compensation Act" or at common law, to compensate him for his injuries. Unless that inference can properly be drawn payments made to the respondent cannot be successfully invoked by him. *Hall* v. *Devany* (1). There are no circumstances in evidence, in my opinion,

(1) 3 R.L. 453.

which would justify the conclusion that in making the payments in question the appellants acknowledged any legal obligation to compensate the respondent. On the contrary from the first they appear to have challenged his legal right to claim compensation from them and from that position they never varied.

BRODEUR J.—Il s'agit d'un appel d'un jugement de la Cour de Banc du Roi qui a renversé la décision de la cour supérieure (1).

La présente action a été instituée par l'intimé contre l'appelante sous la loi des accidents du travail (arts. 7321 et suivants des S.R.P.Q.).

L'accident pour lequel l'intimé réclame une indemnité avait eu lieu le 17 août 1917.

Le 30 juillet 1918 l'intimé avait présenté une requête au juge suivant les dispositions de l'art. 7347 S.R.P.Q. pour obtenir l'autorisation de poursuivre l'appelante. Le dossier ne nous fait pas voir si le juge qui avait eu à considérer cette requête avait tenté de concilier les parties et éviter un procès ainsi que la loi l'autorisait; mais il n'y a pas de doute que le juge a dû s'autoriser des dispositions de cet article 7347 pour amener les parties à faire un compromis, que ses efforts n'ont pas été couronnés de succès; et alors il a simplement accordé la requête autorisant la poursuite.

Le 5 août 1918, une première action avait été instituée, mais le demandeur ayant omis d'alléguer dans sa déclaration que la compagnie défenderesse était assujettie à la loi des accidents du travail, cette action a été renvoyée le 23 décembre 1918 sur le motif que le demandeur n'avait pas allégué les faits et les conditions qui pouvaient donner au demandeur le droit de poursuivre sous la loi des accidents du travail.

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Brodeur J.

La cour, au lieu de renvoyer l'action, aurait pu, ce me semble, permettre d'amender la déclaration et d'y alléguer que la compagnie défenderesse était bien assujettie à la loi des accidents du travail, et éviter par là même les frais d'une nouvelle poursuite et surtout exposer la nouvelle action à être renvoyée sur le principe que le droit d'action était prescrit. En effet, la loi prescrit que les actions en recouvrement des indemnités se prescrivent par un an (art. 7345, S.R.P. Q.) et comme l'accident avait eu lieu en août 1917, il pouvait être trop tard en décembre 1918 pour instituer une nouvelle action.

A tout événement, une nouvelle action, qui est la présente, a été prise le 25 février 1919, et la compagnie défenderesse, parmi ses moyens de défense, a allégué qu'il y avait prescription.

La défenderesse a également plaidé: 1° que les compagnies de télégraphe ne sont pas assujetties à la loi des accidents du travail; 2° qu'il y avait eu chose jugée; 3° que le demandeur aurait dû se faire autoriser à prendre la présente poursuite.

Vu la conclusion à laquelle j'en suis arrivé sur la question de prescription, il n'est pas nécessaire pour moi d'examiner ces derniers moyens de défense.

Le demandeur prétend que la prescription a été interrompue par la requête en autorisation et en conciliation qu'il avait présentée au juge sous l'art. 7347 des Statuts Refondus de 1909.

Voici ce que dit cet article:

> Avant d'avoir recours aux dispositions du présent paragraphe, l'ouvrier doit y être autorisé par un juge de la Cour Supérieure, sur requête signifiée au patron. Le juge, sans enquête ni affidavit, doit accorder cette requête, mais peut auparavant employer tels moyens qu'il croit utiles pour amener une entente entre les parties. Si elles s'accordent, il peut rendre jugement conformément à cette entente, sur la requête même, et ce jugement a le même effet qu'un jugement final de la cour de juridiction compétente.

L'article du code civil qui se rapporte à cette question d'interruption de prescription est l'article 2224, qui est dans les termes suivants:

Une demande en justice suffisamment libellée signifiée à celui qui veut empêcher de prescrire ou produite et signifiée conformément au Code de Procédure civile, lorsque la signification personnelle n'est pas requise forme une interruption civile.

La saisie, la reconvention, l'intervention, l'opposition comportent la demande.

L'interpellation extra-judiciaire même par notaire ou huissier et accompagnée de titres et même signée de la partie interpellée n'opère pas l'interruption s'il n'y a eu reconnaissance du droit.

Cet article 2224 du code civil est la reproduction des articles 2211 et 2244 du code Napoléon.

Il y a cependant dans le code Napoléon un autre article sur cette matière d'interruption de prescription mais qui n'est pas reproduit dans le code de Québec, c'est l'article 2245 qui déclare que la citation en conciliation interrompt la prescription.

Les procédures en conciliation du droit civil français n'ont jamais fait partie de l'ancien droit canadien. Elles n'ont été édictées en France qu'au 19ème siècle; il n'en était pas question dans l'ordonnance de 1667 qui a été en force dans la province de Québec jusqu'à la codification de nos lois de procédure en 1867.

Quand les lois civiles ont été codifiées en 1866, il n'y a pas été question de la citation en conciliation comme pouvant interrompre la prescription pour la bonne raison qu'elle était inconnue dans nos lois de Québec.

En 1909 la législature de Québec a jugé à propos de légiférer sur les accidents du travail et elle s'est évidemment inspirée de la loi qui avait été adoptée en France en 1898 sur la même matière. Nous retrouvons dans la loi de Québec à peu près les mêmes dispositions que celles que nous lisons dans la loi française de 1898,

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mêmes établissements industriels, même base de salaire et d'indemnité, même prescription et même requête en autorisation et citation en conciliation. Mais on a omis au sujet de la citation en conciliation de déclarer qu'elle serait interruptive de prescription. Ce n'était pas nécessaire de le déclarer dans la loi française pour la bonne raison qu'il y avait déjà dans le code civil, à l'article 2245, une disposition à cet effet.

Aussi quand les tribunaux en France ont été appelés à examiner la portée de la requête en autorisation ou en conciliation de la loi des accidents du travail, ils ont décidé qu'elle interrompait la prescription. Sirey, 1907-1-183-416. Sachet, vol. 2, n. 1299.

Il s'agissait pour eux, en France, de décider si la convocation en conciliation devait être considérée comme l'avertissement à comparaître devant le juge de paix, aux termes d'une loi de 1855, et qui n'était pas interruptive de prescription, ou bien comme une citation en conciliation qui, aux termes de l'article 2245 du code Napoléon, interrompt la prescription. Les tribunaux, comme je viens de le dire, ont conclu que c'était une procédure en conciliation.

Je suis d'opinion que notre article 7347 est une procédure en conciliation. Or, comme nous n'avons pas dans le code civil une disposition déclarant que cette procédure interrompt la prescription comme en France, ces décisions ou ces opinions des tribunaux et des auteurs français ne sauraient être invoquées.

Est-ce que l'on ne pourrait pas dire cependant que la requête en question constitue la demande en justice dont parle l'article 2224 du code civil? Qu'est-ce qu'une demande en justice? C'est, nous dit Pigeau, l'exercice d'une action, c'est-à-dire du droit de poursuivre en justice ce qui nous est dû ou la réparation du tort qui nous est fait.

Mais avant de former une demande il faut d'abord considérer ce qui doit être fait pour parvenir à l'exercice de l'action. Parmi les conditions préalables à l'institution de l'action sont les requêtes en autorisation de justice que les femmes et certaines autres personnes sont obligées d'obtenir. Garsonnet, dans son Précis de Procédure civile, éd. 1885, pp. 391-392, dit:

> Le but de la procédure est d'obtenir un jugement et le moyen de l'obtenir, c'est de le demander; mais *la demande en justice*, par où débutent toutes les instances, peut elle-même être précédée de certaines formalités.....2° Certaines demandes ne peuvent être introduites sans autorisation de justice; telles sont....les demandes de séparation de biens.....les demandes en séparation de corps.....4° les demandes introductives d'instances et susceptibles de transaction subissent au bureau de paix ou de conciliation, avant d'arriver devant les tribunaux de première instance, un essai, tentative ou préliminaire de conciliation, institué par le législateur dans une vue de concorde et de philanthropie, d'intérêt public et d'utilité privée.....

Ce dernier cas est bien celui dont parle notre article 7347 de la loi des accidents du travail. Avant d'aller devant la cour, la victime de l'accident est tenue de se présenter devant le juge en chambre pour avoir l'autorisation de poursuivre et pour donner en même temps l'occasion de faire faire un accord entre les parties. Naturellement si cette procédure en conciliation ne réussit pas, alors le demandeur devra instituer sa demande au moyen d'un bref d'assignation (art. 117 C.P.C.). C'est la demande judiciaire elle-même dûment signifiée qui interrompt la prescription, suivant l'article 2224 du code civil. Une demande d'assistance judiciaire pour engager une instance n'interrompt pas la prescription. Laurent, vol. 32, nos 87 et 92; Huc, vol. 14, no 385; Baudry-Lacantinerie, vol. 25, no 479; *Dupuis* v. *Canadian Pacific Railway Co.* (1).

(1) Q.R. 12 S.C. 193.

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Dans la présente cause il n'y a donc pas eu d'interruption de prescription par la simple présentation de la requête parce que celle-ci ne constituait pas la demande en justice, mais était simplement une formalité qui devait précéder la poursuite elle-même. Et l'action qui avait été instituée d'abord par le demandeur a été renvoyée parce qu'elle n'était pas suffisamment libellée (art. 2224 C.C.).

La jurisprudence dans Québec sur cette question a varié. D'abord dans une cause de *Ruffinen* v. *Quebec and St. Maurice Industrial Co.* (1) il avait été décidé que la requête n'interrompait pas la prescription. Plus tard, la cour supérieure dans la cause de *Francœur* v. *Cairnie* (2), la cour de revision dans les causes de *Fontaine* v. *Cabana* (3), et de *Squizzato* v. *Brennan* (4) ont décidé le contraire. Cette dernière décision a été rendue il y a environ deux ans. Je vois qu'on s'y est basé principalement sur l'opinion de Sachet, vol. 2, nº 1299. Mais cet auteur s'appuyait sur l'article 2245 du code Napoléon qui n'est pas reproduit dans notre code civil de Québec. Cette opinion de Sachet ne saurait donc être invoquée pour disposer de la question dans notre droit.

Le demandeur invoque aussi comme interruption de prescription le fait que la compagnie appelante aurait, pendant que le demandeur était incapable de travailler, payé son salaire. Il est possible que dans certains cas ces paiements de salaire pourraient constituer une reconnaissance de l'obligation, mais on devrait d'ordinaire les considérer comme de simples actes de charité. Dans les circonstances de la présente cause, je n'hésite

(1) 20 R.L.N.S. 85.
(2) 16 Que. P. R. 118.
(3) Q.R. 48 S.C. 230.
(4) Q.R. 51 S.C. 301.

pas à dire que ces paiements ne constituent pas une reconnaissance suffisante pour interrompre la prescription.

J'en suis donc venu à la conclusion que le jugement *a quo* devrait être renversé avec dépens de cette cour et de la cour d'appel. Je rétablirais le dispositif du jugement de la cour supérieure, mais je ne pourrais approuver les considérants de ce jugement où il est déclaré que la requête en autorisation et en conciliation peut interrompre la prescription et forme une partie intégrante de l'action originaire.

MIGNAULT J.—Je partage entièrement l'avis de mon collègue, M. le juge Brodeur, que l'action de l'intimé était prescrite longtemps avant son institution. Je suis également d'opinion, pour les raisons données par mon honorable collègue, que la requête pour autorisation de poursuivre n'a pas interrompu la prescription de l'action intentée plusieurs mois après que cette autorisation eût été accordée. L'intimé avait intenté une première action contre l'appelante sans alléguer l'autorisation de poursuivre qu'il avait obtenue et qui devait apparaître au dossier, et sans aussi alléguer que l'appelante était sujette à la loi des accidents du travail. Cette première action a été renvoyée par M. le juge Belleau dix-sept mois après l'accident, pour la raison que les allégations du demandeur étaient insuffisantes pour lui donner droit à une indemnité contre son patron en vertu des dispositions de la loi concernant les accidents du travail. A la date de ce jugement le droit d'action du demandeur était déjà prescrit, et, par le jugement de renvoi, le demandeur perdait le bénéfice de sa première action comme interruption de la prescription. Il me semble respectueusement que dans ces circonstances l'honorable

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juge, puisqu'il était d'avis qu'il y avait insuffisance d'allégations, aurait dû, avant de renvoyer l'action, donner au demandeur l'opportunité d'amender sa déclaration, et, si le demandeur avait décidé de risquer son action sans amendement, constater son offre au jugement. Si le demandeur avait appelé du jugement de l'honorable juge Belleau, j'aurais été d'avis—car l'article 54 de la loi de la cour suprême nous le permet—d'ordonner tout amendement nécessaire pour rendre justice au demandeur. Et le code de procédure civile devrait donner le même pouvoir à la cour d'appel, afin d'éviter le renvoi inutile d'une cause à la cour de première instance. Malheureusement nous ne pouvons rien faire pour venir au secours du demandeur, car la seule action qui soit devant nous est une action qui était prescrite quand elle a été instituée.

Je suis également d'avis que les paiements que la défenderesse a faits au demandeur ne sont pas une reconnaissance de la dette et partant interruptifs de prescription. La seule preuve de ces paiments se trouve dans la déposition du demandeur qui dit que pendant le temps qu'il était à l'hôpital la défenderesse lui a payé tout son salaire et à partir du mois de décembre la moitié de ce salaire. Au mois de mai le demandeur est entré de nouveau à l'emploi de la défenderesse et en a reçu des gages plus élevés que ceux qu'il recevait lors de l'accident. Il est évident que les paiements faits au demandeur jusqu'au mois de mai lui ont été versés par motif d'humanité, car la défenderesse a toujours prétendu qu'elle n'était pas sujette à la loi des accidents du travail, et il ne pouvait être dans sa pensée de reconnaître une obligation qu'elle contestait absolument. D'ailleurs les montants payés au demandeur excèderaient de beaucoup ce que la loi des accidents du travail lui donnait. Depuis le

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mois de mai le demandeur a été payé pour son travail, voilà tout. Il me paraît clair, dans ces circonstances, que la prescription n'a pas été interrompue par ces paiements.

Je suis, non sans regret, d'opinion que l'appel doit être maintenu et que le dispositif du jugement de la cour supérieure doit être rétabli, avec dépens contre le demandeur devant cette cour et devant la cour d'appel.

Appeal allowed with costs.

Solicitors for the appellant: *Taschereau, Roy, Cannon, Parent & Casgrain.*

Solicitors for the respondent: *Taschereau & Mayrand.*

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*May 4, 5.
*June 21.

ERNEST SALT (PLAINTIFF).....APPELLANT;

AND

TOWN OF CARDSTON, (DEFENDANT).....RESPONDENT.

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

Municipal corporation—Negligence—Highways—Non-repair—Municipal electric light system—Construction—"The Municipal Ordinance, (N.W.T.), Cons. Ord., (1905) c. 70, s. 87—Alta. S. (1907), c. 37, s. 20.

The appellant was injured by his horse running into an unguarded guy wire supporting an electric light pole erected by the municipality respondent within the road allowance.

Held, Brodeur J. dissenting, that the accident was not a case of non-repair within section 87 of "The Municipal Ordinance," but was a case of failure to construct a public work "so as not to endanger the public health or safety" within section 20 of chapter 37 of the Alberta statutes of 1907, and therefore, the appellant's claim was not barred by the limitation of six months provided by section 87. Judgment of the Appellate Division (15 Alta. L.R. 31) reversed, Brodeur J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) reversing the judgment of the trial judge Stuart J. (2), which maintained the appellant's action.

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*PRESENT:—Sir Louis Davies, C.J., and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 15 Alta. L.R. 31; [1919] 3 W.W. R. 646.

(2) [1919] 1 W.W. R. 891; 46 D.L. R. 179.

The appellant was driving cattle over the bridge at Cardston crossing, Lee Creek, which bridge occupies a portion of the road allowance, and some of the cattle having left the approach to the bridge and taken the roadway leading to the creek, the appellant rode his horse down the embankment. The horse ran into a guy wire, unprotected by any guard, supporting an electric light pole erected by the respondent as a part of its electric lighting system. The respondent's incorporating ordinance comprised the provisions of "The Municipal Ordinance," of which section 87 provides that the municipality shall keep in repair "all sidewalks, crossings, sewers, culverts and approaches, grades and other works made or done by its council;" and on default, the municipality is liable but the action must be brought within six months after the damages have occurred. The appellant took his action after that delay, but he based his claim on the ground that the electric light system had been constructed under the authority of chapter 37 of the Alberta statutes of 1907, section 20 of which provides that "the town shall construct all public works and all apparatus or appurtenances * * * wheresoever situated, so as not to endanger the public health or safety."

Eug. Lafleur K.C. and *C. F. Jamieson* for the appellant.

A. H. Clarke K.C. for the respondent.

THE CHIEF JUSTICE.—While, in my opinion, the damages assessed in this case are somewhat larger than I should have awarded and especially so in allowing the expenses of the wife and daughter in

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their trip to California with the appellant, I do not think that on this ground alone I should allow an appeal. I am of the opinion that, on the main question, the decision of the court appealed from was wrong and that the failure of the respondent to construct the work in question in a proper manner, which was the cause of the accident, did not come within section 87 of the statute invoked and that the limitation therein for bringing an action was, therefore, not applicable.

I concur, therefore, in allowing the appeal with costs and restoring the judgment of the trial judge.

IDINGTON J.—The learned trial judge found respondent municipal corporation liable for damages sustained by appellant by reason of the guy wire placed upon the road allowance to support a pole carrying wire for the use of an electric system of lighting.

The Appellate Division of the Supreme Court of Alberta reversed his judgment solely upon the ground that the cause of action was barred by section 87 of "The Municipal Ordinance" Act, which reads as follows:

> Sec. 87. Every municipality shall keep in repair all sidewalks, crossings, sewers, culverts and approaches, grades, and other works made or done by its council, and on default so to keep in repair shall be responsible for all damages sustained by any person by reason of such default, but the action must be brought within six months after the damages have been sustained.

He applied, in my opinion correctly, to the construction of this section the *ejusdem generis* rule, relative to the interpretation and construction of statutes.

The express language of the statute in question seems clearly to relate only to the liabilities incidental to the works relative to the maintenance of the high-

way and clearly does not extend to any of the other manifold businesses which such corporations are in these latter days empowered to carry on, besides the exercise of ordinary municipal jurisdiction over highways.

What the respondent did in its capacity of a corporate company, as it were, to carry on the business of electric lighting, had no necessary relation to its maintenance of the highway in a proper state of repair, or to the specified works of

sidewalks, crossings, sewers, culverts and approaches or grades.

These specified undertakings have each as a rule a necessarily close relation with the maintenance of the highway.

The carrying on of any system of electric lighting has no such necessary relation with the obstruction of any part of the highway and should not, I respectfully submit, be tolerated further than absolutely necessary.

When the municipal corporation sees fit to exercise the power conferred upon it to carry on an electric lighting system, it enters upon a business enterprise which has no implied right to obstruct the road allowance any more than another corporation duly authorized to carry on same.

And I much doubt if section 8 in the 1907 enactment which is relied upon to justify the erection complained of, can, upon a close examination of its express terms, carry any one acting thereon further than absolutely necessary for the execution of such a work as contemplated therein.

Moreover it is left on the evidence very doubtful if the structure in question was not erected before this enactment.

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Be all that as it may, section 20 of same statute provides as follows:

> Section 20. The town shall construct all public works and apparatus and appurtenances thereunto belonging or appertaining or therewith connected and wheresoever situated so as not to endanger the public health or safety.

It is upon this that the appellant's action rests and not upon any neglect of duty relative to the maintenance of the highway.

And that an action will lie for breach of obligations thus imposed I have no manner of doubt.

We are not referred to any sanction in the way of penalty imposed for the non-observance of such obligations nor can I find any such, or any other reason, why it must not be presumed to be one of those enactments which, in such circumstances, are presumed to carry in or with them a right of action to those suffering from a breach of the observation of the obligations imposed.

There is no express limitation in "The Municipal Ordinances" applicable determining the time within which the action can be brought.

The only statutory limitation therefor is the general one applicable to the like torts.

As to the damages I do not think we should interfere though possibly they are more than I would have assessed and in regard thereto the Appellate Division below might have been entitled to do so.

I think the appeal should be allowed with costs here and in the court below and the judgment of the learned trial judge be restored.

DUFF J.—I think the learned judge of the court below failed to appreciate the exact significance of section 20 of the Act of 1917. It imposes, I think,

a substantive obligation upon the municipality and its office is not restricted to limiting the protection which the town would derive from the statutes affecting it in respect of the construction of public works. The scope of the obligation I shall speak of presently.

Mr. Clark's argument based on section 87 fails, I think, for this reason, that although the subject matters of the two sections may in some slight degree overlap, I think it is quite clear that the conclusion of the trial judge that what is complained of here was done in the course of construction is a conclusion which is unassailable.

As to the scope of the obligation imposed by section 20, I think the effect of the section is that where public works are constructed in such a manner as to endanger, in fact, the public health and safety, the town is *primâ facie* responsible for any injuries arising from this circumstance; but in accordance with the long series of decisions relating to provisions expressed in similarly unqualified language, the town may escape liability in such cases by shewing that it has done everything possible for the protection of the public health or safety in view of all reasonably likely contingencies. I think the appeal should be allowed and the judgment of Mr. Justice Stuart restored.

ANGLIN J.—Not without some misgivings I have reached the conclusion that the failure to place a guard on the guy wire, which was the cause of the plaintiff being injured, was not a case of non-repair within s. 87 of "The Municipal Ordinance" (c. 70 of Con. Ord. N.W.T., 1905), but was a case of failure to construct a public work "so as not to endanger the public health or safety" within s. 20 of c. 37 of the Alberta statutes of 1907, and, as such, gave rise to a cause of

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action when injury resulted therefrom quite distinct from the default to keep in repair dealt with in s. 87 of the Consolidated Ordinance. With Mr. Justice Stuart I also incline to think that the electric light line in question was not one of the "other works made or done by (the) council," with which s. 87 deals.

No case of contributory negligence was established. The learned trial judge so found and it would not be possible on the evidence to reverse his finding.

I am also of opinion that there should be no reduction in the sum of $10,000 awarded by Mr. Justice Stuart as damages. He tells us that he thought that this sum was not excessive but that "it probably errs on the other side." The allowance of $2,500 in respect of travelling expenses, etc., is no doubt in great part very questionable for the reasons stated by Mr. Justice McCarthy. But I am not prepared to say that the whole sum awarded is too large.

I would allow the appeal and restore the judgment of the learned trial judge.

BRODEUR J. (dissenting): We are asked to decide whether or not the defendant municipal corporation was negligent in erecting the guy wire which caused the accident.

The law provided (sect. 20, ch. 37 of 1907) that the town in constructing all public works and all appurtenances thereto should make them "so as not to endanger the public safety."

Nobody disputes the power of the municipality to erect the pole which was necessary for its lighting system, and it was necessary also that a guy wire should be erected in order to strengthen the poles. If the pole had been erected in the travelling part of

the roadway, I could very well realize how dangerous the guy wire, as built, would have been. But the pole and guy wire in question were erected on a part of the roadway which was not used by the public.

I will not say that the plaintiff could not go down the embankment in order to get his cattle back on the travelling road, but in doing so he was bound to exercise the greatest care because he knew that he was not riding on the highway which was kept for travellers, and the municipal corporation, in erecting the pole and the guy wire at the place where they were installed, could not be considered as negligent in constructing them as they have done, because it was not to be expected that the public would go there.

As to the question of limitation. Section 87 of "The Municipal Ordinance" imposes the duty upon the municipal corporation to keep in repair all works erected by a municipality, and provided so that in default, the municipality should be responsible for all damages sustained by any person by reason of such default, but in such case the action must be brought within six months after the damages have been sustained.

The electric system which has been adopted by the municipality is, to my mind, one of the works contemplated by "The Municipal Ordinance," since it is especially provided in section 95 of the same Act that the municipality is authorized to pass by-laws for the erection of such works. If the guy wire in question was not properly kept, the municipality has failed in its obligation to keep the highway or the works in proper repairs. *Howse* v. *Township of Southwold* (1),

(1) 5 D.L.R. 709.

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In such a case any action instituted by reason of its default must be instituted within six months after the damages have been sustained. The present action was instituted long after the period mentioned in the statute.

For these two reasons, it seems to me that the appeal should be dismissed with costs.

MIGNAULT J.—In my opinion the liability of the respondent for the injuries suffered by the appellant rests on section 20 of chapter 37 of the Alberta Statutes for 1907, being an amendment of the charter of the town of Cardston, which says that

> the town shall construct all public works and all apparatus or appurtenances thereunto belonging or appertaining or therewith connected, and wheresoever situated, so as not to endanger the public health or safety.

I do not think that this is a case where section 87 of The Municipal Ordinance of Alberta, with its limitation of six months for right of recovery, applies. The respondent, as a part of its electric lighting system, had erected poles within the road allowance and one of these poles was supported by a guy wire unprotected by any guard. The appellant was driving cattle over the bridge at Cardston crossing Lee Creek, which bridge occupies a portion of the road allowance, and some of the cattle having left the approach to the bridge and taken the roadway leading to the creek, the appellant rode his horse down the embankment and started after the steers. It was then almost dusk and the appellant's horse ran astride the guy wire which without any guard was practically invisible at that hour, and the appellant was thrown to the ground and very seriously injured. Under these circumstances I do not think the accident was caused by a want of repair of the highway, but by reason of a defect of construction of the electric light system, so that the

limitation of six months provided by section 87 of the ordinance does not apply to the appellant's action which was taken after six months.

The question was discussed at bar whether, assuming that section 87 did not apply, the appellant could, in the absence of proof of negligence, succeed against the respondent which, in constructing its electric light line, had exercised a power granted it by statute.

Such a defence is often made, and I may perhaps refer to the recent decision of the Judicial Committee in *Quebec Railway, Light, Heat and Power Co.* v. *Vandry* (1), where their Lordships state on what grounds immunity from liability by reason of the exercise of a statutory power may be claimed:

> The application of enactments of this kind is familiar and well settled. Such powers are not in themselves charters to commit torts and to damage third parties at large, but that which is necessarily incidental to the exercise of the statutory authority is held to have been authorized by implication and therefore is not the foundation of a cause of action in favour of strangers, since otherwise the application of the general law would defeat the purpose of the enactment. The Legislature, which could have excepted the application of the general law in express terms, must be deemed to have done so in such cases.

The case made by the respondent does not come within the rule so stated. The damage here was caused by reason of the fact that the respondent improperly exercised its statutory authority, in other words, because, in supporting by a guy wire the pole erected by it on a part of the highway, the respondent neglected to protect the guy wire by a guard which would have rendered it easily visible. If the statute be relied on as a defence the respondent does not come within its terms, for it did not construct the line so as not to endanger the public safety. The learned trial judge stated that he had no doubt that had a board guard been placed on the wire, the accident would not

(1) 36 Times L.R. 296, at p. 300.

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have occurred. The evidence shows that it is customary to place guards over guy wires in places where the public may come in contact with them. Such an accident and the causes that brought it about could, I think, have easily been foreseen. I therefore think that the respondent is liable for the appellant's damages.

In the appellate division Mr. Justice McCarthy, who held that the respondent was liable, would have reduced the amount of damages granted by the learned trial judge for necessary expenses of the appellant. It is now well settled that where the jury, or the judge acting as a jury, has not taken into consideration matters which should not have been considered, the verdict ought not to be set aside or a new trial directed simply because the amount of damages may seem excessive to an appellate court. *Canadian Pacific Ry. Co.* v. *Jackson* (1). Here the learned trial judge undoubtedly could consider the expenses to which the appellant was put by reason of this accident. Even if he granted him some expenses which I would be inclined to think were not reasonably connected with the accident, still I feel that I should not interfere with his decision and substitute my estimate of the necessity of the expenses for the one which he formed at the trial.

I would therefore allow the appeal with costs here and in the appellate division and restore the judgment of the trial court.

Appeal allowed with costs.

Solicitor for the appellant: *C. F. Jamieson.*

Solicitors for the respondent: *D. H. Elton, Z.W. Jacobs.*

(1) 52 Can. S.C.R. 281.

ROY F. GOLD (DEFENDANT).....APPELLANT;

AND

CHARLES C. STOVER (PLAINTIFF).RESPONDENT.

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*May 5.
*June 21.

AN APPEAL FROM THE APPELATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Sale—Option—Time limit—Damages—Tender—Half-interest.

G. gave S. an option to purchase certain land. G. however, on payment of $300, could withdraw the option and sell the property but without any advertisement or the services of an agent. S. could exercise his option before the 1st of March, 1917, and would then have to pay half of the purchase price. Before expiry of the time limit, G. advised S. that he had sold the property. Later on, S., having satisfied himself that the sale had been effected through an agent, filed a caveat and brought an action in damages.

Held, affirming the judgment of the Appellate Division, that S. had the right to claim immediately the damages suffered by him on account of the breach of the contract of option by G., without being obliged to make a tender to G., before the expiry of the time limit, of the amount payable in cash on account of the purchase price.

Held, also, reversing the judgment of the Appellate Division, that S., although he had agreed to assign to one M. a one-half interest in the option, was entitled to recover not only one-half, but the entire damages, the apportionment of the amount received being a question of settlement of account between S. and M.

Judgment of the Appellate Division ([1919] 3 W.W.R. 503), affirmed in part.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) reversing the judgment of the trial judge, Stuart J. (2) and maintaining the respondent's action.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) [1919] 3 W.W.R. 503. (2) [1919] 1 W.W.R. 882.

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The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

A. H. Clarke K.C. for the appellant.

C. C. McCaul K.C. for the respondent.

THE CHIEF JUSTICE.—I concur in the reasons stated by my brother Mignault for dismissing the appeal with costs and the cross-appeal with costs, subject, however, as to the latter, to a reference as stated by him to determine respondent's damages if either party so desires.

IDINGTON J.—The appellant and respondent executed the following contract:

This agreement made and entered into this thirteenth day of November, A.D. 1916, by and between R. G. Gold of Minneapolis, Minnesota, party of the first part, and C. C. Stover of Milk River, Alberta, party of the second part, witnesseth:

The first party in consideration of one hundred dollars ($100) in hand paid by the second party, the receipt of which is hereby acknowledged, agrees and covenants with the second party to sell him the option to purchase the following described lands, the North West Quarter (N.W. ¼), of Section Four (4); all of section five (5); the north half (½), of section six (6), and the east half of section seven (7), all in township three (3), range fifteen (15), west of the fourth principal meridian, containing fourteen hundred and forty (1,440), acres more or less according to Government survey thereof for the sum of twenty-one thousand six hundred and ninety dollars ($21,690).

The second party shall have until March 1st, 1917, to pay the first half of the above, and in case he fails to do so shall forfeit all money paid down and this agreement shall become null and void.

The first party may have the right to sell the above property himself, without advertising same or through other agents, and in case he does sell at not less than sixteen dollars ($16), per acre, and in such case shall pay the second party three hundred dollars ($300), for such privilege.

(Sgd.) R. F. GOLD.
(Sgd.) C. C. STOVER.

The appellant on the 11th January, 1917, wrote the respondent as follows:

Minneapolis, Minn.

Mr. C. C. Stover,
Milk River, Alberta.

Dear Mr. Stover:—

As per my telegram to you, I herewith enclose you my check for $300 to take up the option which I gave you on the Countryman property. I have sold it to a pretty good man, who expects to handle it himself. You will have to buy me a dinner on this. Please return option to me.

Yours very truly,
R. F. GOLD,
Treasurer.

Jan. 11th, 1917.

The foregoing contract though presenting some unusual features clearly was made for a valuable consideration and hence valid, and binding the appellant to the due observance of all its terms. He chose to disregard the due observance of the term contained in the last clause thereof by selling through another agent than the respondent, and to improperly announce to him by the foregoing letter the sale of the property, as if made within the literal terms of the right reserved.

Upon the receipt of the said letter there enured to the respondent a right of action for damages arising from said breach.

And as an outcome thereof there seems to have arisen, I most respectfully submit, an unfortunate misapprehension of the legal results.

The learned trial judge, after reciting the salient facts in the story, seems to have overlooked the nature of the contract, and reached the conclusion that there could be no damages for such a breach of contract, unless and until the respondent had tendered the part of the purchase money, which was to have become payable on the 1st of March, 1917.

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The case of *Hochster* v. *De la Tour* (1), and many decisions in cases since, founded thereon, seem to have been overlooked.

The cause of action arose for breach of said contract within the principle upon which these cases proceeded, long before the 1st of March, 1917, and has been open to the respondent to pursue ever since.

The Appellate Division properly set aside the judgment of the learned trial judge but unfortunately seems to have approached the assessment of the damages which the respondent was entitled to, as if to be assessed upon the same basis as if the option had been effectively exercised.

And, in doing so, it allowed only the measure of damages which the respondent could have in fact received, because he had, before the breach, sold part of his chances of success to another party who had validly bargained with him for half the prospective profits and thus became entitled to half the fruits of the adventure, which, in the legal result, means, of course, though obviously not so intended, half the sum receivable herein by respondent under the assessment of damages allowed.

In so doing, in my opinion, the Court of Appeal erred gravely.

It is not what the personal results to the estate of the respondent alone or his personal profits might develop by reason of his calling in the assistance of partners but what, on such a contract, he was entitled to recover for the obvious breach thereof that should have been the guide to the assessment of damages.

(1) 2 E B. 678.

And that seems to have been proceeded upon by assuming that, as a certainty, the respondent could have reaped in profits the same sum as if he had in fact completed the anticipated contract of purchase.

Certainly that was an erroneous way of viewing the matter, for to complete the contract he must have raised half the purchase price named in the option and thereby, and in many other incidental ways, have incurred some expense of which he was relieved by the breach.

And again, he stood to have run the risk for two and a half months of the appellant selling by his own unaided efforts without advertising any price he was at liberty to receive, of not less than sixteen dollars an acre.

All these and the like considerations render it very difficult to say that the sum at which the damages were assessed is correct.

It may well be that even if the proper principles upon which the assessment of damages should have proceeded had been observed, the result would have been about the same, but how can we say so?

The misapprehension of the nature of the claim seemed to mislead also appellant's counsel into contending that, unless and until the respondent had tendered the price named in the option, he had no right to relief and no right to damages because he had not assented to the repudiation of the contract by the appellant.

I submit there is no foundation for such a contention and certainly nothing in *Roots* v. *Carey* (1), to uphold it.

(1) 49 Can. S.C.R. 211.

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That was a case of specific performance in which this court held that as there had been no binding acceptance of the proposal, or option given, there could be no such relief granted, and all said therein by the majority so holding must be read in view of that aspect of the case.

Counsel for appellant relied upon the conduct of respondent in filing a caveat early in February, 1917, following the above quoted letter of the appellant.

No copy thereof appears in the case, but assuming it claimed an interest in the lands in question, how can that in law affect the actual outstanding liability of the appellant for breach of his contract? Or the rights of respondent resting thereon?

The respondent seems to have had the impression that the appellant had played him false in securing a purchaser by means against which he had contracted, and to have assumed that thereby the necessity for a tender was waived.

Certainly that would have been a contention much more arguable than many of the several misapprehensions of the nature of the contract, and the legal results flowing from the breach thereof, which have been presented.

The respondent also seems to have supposed that in some way, not very clear, he had by virtue of the breach become entitled to an interest in the land by way of recovering damages.

Are we to deprive a man of his legal rights because he has pursued an erroneous view of the method and means by which they are to be enforced? I submit not.

And the only result of all that so transpired which we ought to consider is that the parties, after pursuing such erroneous paths and contentions, agreed

that the claims for specific performance should be abandoned, and respondent's claims and contention be reduced to the claim for damages and rely upon the bond of suretyship given to answer same.

In conclusion, if the parties wish, or either of them respectively think, that the amount awarded by the Appellate Division is too much or too little to be allowed for such a breach of contract as I have outlined, within the ordinary principles upon which damages are assessable for breach of contract, such as I have indicated this is, and desire a reference to proceed upon such principles instead of the erroneous basis upon which the Appellate Division proceeded, I would allow such a reference at the risk to either so contending of costs following the result.

Possibly the parties may shrink, as counsel seemed to do, from the suggestion when made by me in course of the argument, and feel that they have had enough of the game of chance involved in a lawsuit.

The assessment of damages upon such a repudiation of the contract by way of anticipatory breach has always been recognized as raising a difficult problem for those called upon to assess damages for such breach.

In the event of neither of the parties desiring such reference as suggested, the appeal should be dismissed with costs.

In the event of either, or both, of them desiring a reference, the costs of this appeal should await the result thereof. And, if resulting in a substantial increase or diminution of the amount found by the Appellate Division, costs thereof and of the appeal should be awarded accordingly.

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DUFF J.—I concur with Idington J.

ANGLIN J.—The defendant, appellant, comes into this court conceding the anticipatory breach or repudiation of contract alleged by the plaintiff, which he had stoutly contested in the provincial courts. He seeks to avoid consequential liability on a ground which appears not to have been taken below—viz., that the plaintiff elected not to treat the defendant's repudiation as a breach entitling him to bring action, but to maintain the contract—thus keeping it alive for both parties and for all purposes—and that he failed to take up the option before its expiry by efflux-ion of time and had therefore no ground of action for breach at that time.

I incline to think that such a *volte face* should not be permitted. But if it be open to the defendant to take that position, in my opinion it does not help him. Citing the judgment of Cockburn C. J., in *Frost* v. *Knight* (1), he treats the case as if it were one of breach of contract for sale and purchase. But it was not that. The defendant's contractual obligation was to keep an offer of sale open for a definite period, subject to its earlier termination on a condition which did not arise. He broke that contract and put it out of his power ever to fulfil it by selling the property to another. Thereupon a cause of action for damages—the only cause of action he ever would have, as I view the matter—vested in the plaintiff. He may have mistaken his rights and sought relief to which he was not entitled, but he did not forego the right to recover whatever damages the defendant's breach of contract entitled him to. That breach was permanent

(1) L.R. 7 Ex. 111, at p. 112.

in its effects and, once committed, the contract was at an end and could not be revived at the election of the "optionee." The case was not one for election at all.

Moreover, pending the action, some arrangement was made whereby the claim for specific performance put forward by the plaintiff was abandoned and a caveat which he had lodged to protect any interest that he might have acquired in the property was vacated in consideration of the defendant giving security for such damages as the court might find the plaintiff entitled to recover. I rather incline to think that the basis of that arrangement must have been that the plaintiff's right to maintain his action for damages, if he could establish the breach of contract (which he averred and the defendant denied), should be recognized, and that if the defence now raised had been advanced at the trial that understanding would have been proved.

In any event the defendant's appeal in my opinion should not succeed and must be dismissed with costs.

The plaintiff cross-appeals claiming that the damages awarded should be increased from $3,335 to $6,910. The Appellate Division found that the damage caused by the defendant was the difference between the sale price mentioned in the plaintiff's option and the actual value of the land. That difference it found amounted to $7,110. But, because the plaintiff had agreed to assign a one-half interest in the option to one Madge, he was held entitled to recover only one-half of the amount of the damages so ascertained, less $200 which he had already received from the defendant. With great respect I think the plaintiff was entitled to recover the entire damages—whatever they were. The option held by him was not assign-

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able at law and no right of action against the defendant was vested in Madge. Whatever equitable interest he may have acquired in the option, or in the plaintiff's rights under it, and whatever right he may have as between himself and the plaintiff to require the latter to account for the proceeds of any judgment he may recover, the plaintiff alone was entitled to maintain an action for damages for the breach committed by Gold and is entitled in that action to recover the entire damages arising therefrom. The authorities cited by Mr. McCaul are conclusive on that point. From those damages, however, there should be deducted not merely the $200 for which credit was given by the Appellate Division, but $300, which was the sum actually received by the plaintiff from the defendant at the time of the repudiation of the option.

But, again with profound respect, there would seem to have been a misapprehension as to the measure of damages. The option was treated as unconditional and damages were assessed as for the breach of a firm contract of sale. Now the option was on its face subject to the condition that, at any time before Stover had taken it up, Gold might sell the property at a price not less than $16 per acre, provided he did so without the intervention of an agent and without advertising, on paying to Stover $300 as compensation for his loss in being deprived of the option. Since the property has been found to have been actually worth $20 an acre the chance of this condition being fulfilled was by no means negligible and an option subject to it was obviously of less value than an unconditional contract of sale. It may well be that the damages for loss of such an option would fall short of the $3,335 for which the plaintiff has judgment.

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But, inasmuch as the defendant has not appealed in regard to the quantum of the recovery, I would be disposed not to disturb the present judgment unless the plaintiff insists on our doing so. If he is satisfied to accept it, I would dismiss the cross-appeal without costs.

But, although I understand that two of my colleagues share this view we do not constitute a majority. With some reluctance, because the appellant will hereby obtain relief which he has not sought, in order that an effective judgment may be pronounced I concur in the following disposition of the appeal and cross-appeal which, as I understand it, will meet the approval of my brothers Idington and Brodeur.

The appeal will be dismissed with costs. Upon the cross-appeal the question of damages will be referred to the proper local officer should either party so desire and within one month file an election to take such reference. If a reference is not so taken the cross-appeal will be dismissed with costs. If a reference is taken and results in the damages being assessed at more than $3,335 the defendant will pay to the plaintiff his costs of the cross-appeal and of the reference; if the damages be assessed at $3,335 or less the plaintiff will pay to the defendant his costs of the cross-appeal and reference.

BRODEUR J.—This is an action in damages arising out of an option agreement by which Gold agreed to sell to Stover a property for a price of about $20,000. Gold, however, on the payment of $300 could withdraw this option and sell the property to some other person, provided he would not utilize the services of an agent. Stover could exercise his option on or before the 1st March, 1917, and would then have to pay half of the purchase price.

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But before Stover exercised his option, Gold advised him on the 11th January, 1917, that he had sold the property to another person and enclosed with the letter a cheque for $300 payable under the terms of the option agreement.

As Stover had satisfied himself later on that the sale had not been made in accordance with the terms of the option and that Gold had utilized the services of a real estate agent to carry it through, he filed a caveat to protect his interest in the lands in February, 1917, and in October, 1917, he instituted the present action in damages.

This action was dismissed by the trial judge on the ground that Stover should have accepted the option and tendered the money.

This judgment was reversed by the Appellate Division. Gold now appeals.

There was some question as to the construction of the agreement but this point was not pressed before us. It seems to me very plain that the agreement means that Stover could not sell the property through agents; and it has been found by the two courts below that Gold sold the property through an agent, and in that respect the findings of this fact by two courts below should not be disturbed. The point which is now raised by Gold is that Stover, instead of considering the agreement as terminated by the repudiation, elected to have it specifically performed and filed a caveat.

This point has not been raised by the pleadings nor in the courts below. It may be that if this issue had been tried circumstances might have been adduced which would have set aside this contention.

The respondent Stover cross appeals on the ground that he should receive not merely half of the damages found by the court below but all the damages. The damages seem to have been ascertained as if the contract was a contract of sale between the parties and not a contract of option agreement. Both parties are willing that this question of damages should be referred to the Master to be fully inquired into.

The appeal should be dismissed with costs with a proviso that the whole question of damages be referred to the Master.

MIGNAULT J.—In this case both courts were of opinion, on the construction of the option to purchase granted by Gold to Stover, that the former, during the interval of time given by him to the latter to pay the first half of the purchase price, to wit until March 1st, 1917, could sell the property provided he did so without any advertising and without the services of any agent, and for a price of not less than $16.00 per acre. I accept this construction of the contract of option which does not appear to be open to reasonable doubt.

I also agree with the two courts in holding that, under the circumstances disclosed by the evidence, Gold committed a breach of his contract by selling the farm to Ponsford, inasmuch as, although the price was for more than $16.00 per acre, the sale was effected through an agent.

So far I am in agreement with the learned trial judge and with the learned Chief Justice of Alberta. I respectfully however differ from the former as to the effect of the breach by Gold of the contract of option he had given to Stover. The learned trial judge

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dismissed Stover's action because he had not, on or before March 1st, tendered to Gold the amount payable in cash on account of the purchase of the farm. In my opinion no such obligation was incumbent on Stover, for Gold, by his sale to Ponsford, had put it out of his power to sell to Stover, or, to the same effect, had definitely repudiated his obligation to sell to Stover if the latter carried out the conditions of the option. It does not appear to be open to Gold to answer that before he had actually made a transfer of the land to Ponsford in the land titles office, Stover had ample time to take proceedings under his option to force a sale to him and to file, as he actually did, a caveat to protect his right to a transfer of the land. The breach by Gold of the option and his sale to a third party gave Stover the right to claim immediately the damages suffered by him in consequence of this breach, and, in my opinion, he was not obliged to make a tender to Gold, when the latter had sold the property to a stranger. (Anson, Law of contract, 14th ed., p. 350).

There is therefore only a question of damages at issue, and although Stover unnecessarily alleged that he was still ready to carry out the option and to fulfil all its conditions, his action against Gold was for damages. It is true that Stover asked for a lien against the land for the amount of the damages, but, at least since a bond was furnished him, the question is reduced to one of damages, and no such lien has been granted him.

The Appellate Division found that Stover could have sold the land for $20 per acre, making a profit of $7,110, but inasmuch as one Madge had promised to furnish him the money to purchase the land on condition of obtaining a half interest therein,

Stover only obtained a judgment for one half of the above sum, to wit, $3,355, as being the amount of his share in the profit to be made on a resale, and now Stover demands the whole $7,110 by his cross-appeal.

Very respectfully, I cannot agree with the view adopted by the Appellate Division. It may well be that Stover would have had to pay Madge one half of the profit made by a resale, or of any damages recovered by him from Gold, but this is on account of an agreement between him and Madge, to which Gold was no party. As between Stover and Gold, I think the latter is not entitled to any deduction by reason of the agreement between Stover and Madge. I dis-discussed a somewhat similar situation recently in *Bainton* v. *John Hallam, Limited* (1).

This however does not mean that Stover is entitled to the same amount of damages as if he had made with Gold an agreement of sale which Gold had refused to carry out. He had only an option, under which Gold could sell if he obtained an offer of at least $16 per acre, without any advertising or the services of any agent, and then Stover was only entitled to $300 which Gold actually paid to him and which he has not returned.

The acceptance by Stover of Gold's cheque for $300 does not prevent the former from claiming full damages for the breach of the option, for this acceptance was induced by Gold's assurance that the sale to Ponsford had not been made through an agent, but clearly the only damages which Stover can obtain is for the breach of an option which reserved a right

(1) 60 Can. S.C.R. 325.

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of sale to Gold until Stover took up the option by paying on or before March 1st half of the purchase price. Under these circumstances the measure of damages is the value of Stover's right to purchase, qualified as it was by Gold's right to sell to a stranger, provided the sale was not advertised or made through an agent. On the construction of the option, it looks as though Stover himself had in view the sale of the property as agent for Gold, his commission being the excess of the sale price over and above the price mentioned in the option, and this construction is fortified by the words "or through other agents" in the last paragraph of the option, but be that as it may, the right of Gold to sell himself must be regarded as substantially diminishing the value of the option acquired by Stover and of which he was deprived by the latter's sale to Ponsford.

In this view of the case, the position taken by the parties before this court must be considered. Gold contended that Stover by his caveat and subsequent conduct had insisted on the agreement being specifically performed, and was deprived of any right of recovery inasmuch as he had not tendered half of the purchase price before March 1st. Stover considered the measure of his damages as being the same as if he had obtained a firm contract for the purchase of the property instead of a restricted and qualified option. Both parties have therefore misconceived their legal position. Under these circumstances, I think Gold's appeal is clearly unfounded and should be dismissed with costs.

Stover's cross-appeal involves the question whether, having been deprived of a restricted and qualified right of purchase—which he might have lost in case of a sale by Gold in accordance with the option, and

then his damages were fixed at $300—he is really entitled to more than he obtained in the appellate division on a basis which I respectfully think was erroneous. After full consideration, I have come to the conclusion that, if either party desires, there should be a reference to the proper local officer to determine the amount of damages to which Stover is entitled, the whole as stated in the judgment of my brother Anglin.

Appeal dismissed with costs.

Solicitors for the appellant: *Ball & Holyoak.*

Solicitors for the respondent: *Shepherd, Dunlop & Rice.*

1920

*June 7.
*June 21.

THE UNION NATURAL GAS COMPANY OF CANADA..... APPELLANT;

AND

THE CORPORATION OF THE TOWNSHIP OF DOVER..... RESPONDENT.

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

Assessment and taxes—Mineral lands—Income—Sinking and deepening oil or gas wells—Expenditure—Capital account.

In operating oil or gas wells in Ontario the expenditure for sinking new, or deepening existing, wells is expenditure on capital account and cannot be deducted from earnings to arrive at the net income that may be assessed under the provisions of R.S.O. [1914] Ch. 195, sec. 40 (6).

Judgment of the Appellate Division (47 Ont. L.R. 1) affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment of the Railway and Municipal Board which upheld the assessment on the income from appellant's oil and gas wells.

The head-note states the question raised for decision.

Tilley K.C. and *K. G. Kerr* for the appellant.

Pike K.C. for the respondent.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) 47 Ont. L.R. 1.

THE CHIEF JUSTICE.—I concur with Mr. Justice Anglin.

IDINGTON J.—I think the result which each of the courts below arrived at, is in accord with the correct interpretation and construction of the Assessment Act in question herein. To depart therefrom and attempt to apply the views maintained by appellant would lead to much confusion in many conceivable cases, as, for example, the case of a company doing business in two different municipalities.

If, as is quite conceivable, the section does an injustice and happens to produce results out of harmony with the general principles possibly supposed to be underlying the definition of "income" in the Assessment Act, or in the legislation set forth in the Mining Act, it is not for us to interfere.

The language used is definite and express and is not, as I read it, in conflict with the literal definition as given of the word "income" though it may be a limitation thereof as to a specified case and a departure from the supposed principles had in mind by the draftsman of the definition.

There is nothing remarkable in that, when the subject matter of any legislation in any place happens to be taxation.

The appeal should be dismissed with costs.

DUFF J.—I concur in the dismissal of this appeal.

ANGLIN J.—Subsection 3 of section 36 of the Ontario Assessment Act, of 1904, c. 23, reads as follows:—

(3) In estimating the value of mineral lands, such lands and the buildings thereon shall be valued and estimated at the value of other lands in the neighbourhood for agricultural purposes, but the income derived from any mine or mineral work shall be subject to taxation in the same manner as other incomes under this Act.

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By sec. 4 of c. 41 of the statutes of 1907 the following words were added to s.s. 3:—

> And the assessment on such income shall be made by, and the tax leviable thereon shall be paid to, the municipality in which such mine or mineral work is situate. Provided, however, that the assessment for income from each oil or gas well operated at any time during the year shall be at least twenty dollars.

As consolidated in the Revision of 1914 (c. 195, s. 40 (6)) these provisions now read:—

> (6) The income tax from a mine or mineral work shall be assessed by, and the tax leviable thereon shall be paid to, the municipality in which such mine or mineral work is situate. Provided that the assessment on income from each oil or gas well operated at any time during the year shall be at least $20.

An exemption for buildings, plant and machinery is provided by s.s. 4, and by s.s. 5 it is provided that mineral land is in no case to be assessed at less than the value of other land in the neighbourhood used for agricultural purposes.

Having regard to the history of this legislation I am, with great respect, unable to accept the view of the learned Chief Justice of Ontario that in the case of oil and gas properties each well operated is to be deemed a distinct "mine or mineral work" and that the income therefrom must be assessed separately. I cannot regard the amendment made in 1907 as intended to do more, in addition to providing for the localization of the assessment, than to provide that the minimum tax on any gas and oil producing property shall be $20 for each well in operation at any time during the year on such property.

The expression "mine or mineral work" is not defined in the statute and what it may include must, I think, in every case depend on the circumstances. In the case at bar there is no evidence to enable us to

determine whether each of the two wells assessed is in itself, or forms part of, a distinct mine or mineral working, or whether the two wells assessed are parts of the same "mine or mineral working."

But, however that may be, I agree with the view of the learned Chief Justice that expenditure on the sinking of new wells or the deepening of existing wells, whether productive or dry, is expenditure on capital account and is not deductible from earnings for the purpose of arriving at the "income" of the mine or mineral working assessable under s.s. 6 of s. 40 of the Revised Statutes of 1914.

I am quite unable to appreciate the grounds on which the appellant contends that an adverse difference between receipts and expenditure in one year, (the latter in this case including capital outlay) should be taken into account and deducted from earnings of a succeeding year in order to arrive at the "income" for the latter year. The definition of "income" in s. 2 (2) as

> the annual profit or gain derived (*inter alia*)

from any business in my opinion excludes any such deduction.

I would therefore dismiss the appeal.

MIGNAULT J.—On the ground that the expenditure incurred by the appellant in drilling wells where no mineral oil or natural gas was obtained, and which expenditure the appellant states was money totally lost, was properly capital expenditure for the development of the oil field, and not expenses which should be charged against the revenue derived from productive wells, I am of opinion that the appeal fails. With great deference, I cannot concur in the

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Mignault J.

view of the Appellate Division that the proviso added in 1907 to subsection 6 of section 40 of the Assessment Act (R.S.O. 1914, ch. 195) governs the construction of the first part of the subsection which was enacted in 1904. This proviso merely determined a minimum amount for the assessment on the income from each oil or gas well operated at any time during the year, but, in my opinion, did not make it obligatory to consider each productive gas or oil well as a separate entity the income of which should be separately assessed. Whether it should be so considered is a question to be determined according to the circumstances of each case.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Kerr, McNevin & Kerr.*

Solicitors for the respondent: *Wilson, Pike & Stewart.*

WARD v. HENRY AND DUMAINE.

1920

*May 25, 26.
*June 21.

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

Landlord and tenant–Fire–Liability–Fault–Presumption–Art. 1629 *C.C.*

APPEAL from the judgment of the Court of King's Bench, Appeal Side, (1), reversing the judgment of the Superior Court, sitting in review, and dismissing the appellant's, plaintiff's, action with costs.

The appellant sued the respondents, of whom Henry was his tenant and Dumaine a plumber employed by him, for damages resulting from the burning down of the dwelling house leased by appellant to respondent Henry. The appellant invoked against Henry the presumption of fault edicted by article 1629 C.C., and alleged also against both respondents the fault of respondent Dumaine, who, according to appellant, would have caused the fire by using a gasoline lamp to thaw frozen pipes in the house.

The trial court dismissed the action. The Superior Court, sitting in review, Greenshields J. dissenting, reversed this judgment and maintained the action for $2,000. The Court of King's Bench, Cross and Pelletier JJ. dissenting, restored the judgment of the trial court.

On appeal to the Supreme Court of Canada, after hearing counsel of both parties, the court reserved judgment, and, on a subsequent day, dismissed the appeal with costs, Idington J. dissenting.

Appeal dismissed with costs.

Paul St. Germain K.C. and *C.M. Cotton* for the appellant.

J.L. Perron K.C. and *R. Genest* for the respondent Henry.

A. E. J. Bissonnette K.C. for the respondent Dumaine.

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) Q.R. 28 K.B. 159.

1920

*Feb. 13, 16.
*May 4.

NOZICK v. DENNY.

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

Sale—Sale of land—Vendor's lien—Unpaid balance.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division, (1), reversing the judgment of Walsh J. at the trial and maintaining the respondent's, plaintiff's, action.

The action was one brought by the respondent, the vendor, for a lump sum, of a certain hotel premises, including a licence and furnishings; and the respondent asked for a declaration that he had a vendor's lien for the balance of the purchase price. The respondent took from the appellant promissory notes for part of the price, which notes were indorsed to a bank for security for advances; he also transferred the immovable property to a third party and the transfer contained a statement that he had received payment of the sum stipulated as its purchase price.

The trial judge dismissed the action on the ground that the appellant owned the money claimed to the bank and not to the appellant. The Appellate Division held that there was a lien on the real estate for the whole amount remaining unpaid under the agreement.

On appeal to the Supreme Court of Canada, after hearing counsel on behalf of both parties, the court reserved judgment and, on a subsequent day, allowed the appeal with costs, Idington and Mignault JJ. dissenting.

Appeal allowed with costs.

Parlee K.C. for the appellants.

E. Brice for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) [1919] 3 W.W.R. 366. (2) [1919] 2 W.W.R. 792.

SIMPSON v. TASKER-SIMPSON GRAIN CO.

1920

*Feb. 12, 13.
*April 6.

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

Evidence—Partnership—Claim of surviving partner—Onus probandi.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division, (1), affirming, on equal division, the judgment of Walsh J. at the trial and maintaining the counterclaim of the defendant, respondent.

The appellant claimed $8,147.99 for grain sold and delivered to the respondent. This claim was not disputed by the respondent, but he fyled a counterclaim for a greater amount claimed to be due him by appellant's husband upon transactions made on behalf of an alleged partnership between Tasker and Simpson, before the incorporation of the respondent company, the claim having been transferred by Tasker to the respondent. The whole question was whether the evidence of Tasker as to the existence of such partnership was sufficiently corroborated to satisfy the "Alberta Evidence Act" in a case of a claim against the executor of the estate of a deceased person, as in the present case the appellant had been named executrix of her husband's estate.

The trial judge found in favor of the respondent, and, the Appellate Division, upon an equal division of the court, affirmed this judgment.

On the appeal by the plaintiff to the Supreme Court of Canada, the court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, allowed the appeal with costs.

Appeal allowed with costs.

H. P. O. Savary K.C. for the appellant.

G. H. Ross K.C. for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) [1919] 3 W.W.R. 928.

1920

*Feb. 11.
*Mar. 8.

McNICHOL v. BURNS.

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

Negligence—Jury trial—Verdict—Inadequacy—Misdirection—Interference with an appeal.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division, (1), affirming the judgment of the trial judge with a jury and maintaining the appellant's (plaintiff's) action.

The action is for damages for the death of appellant's husband who was killed in a collision with a motor truck belonging to the respondent. The verdict of the jury, confirmed by the trial judge, awarded the appellant $2,450 damages. The grounds of appeal, before the Appellate Division and the Supreme Court of Canada were inadequacy of the verdict and misdirection by the trial judge.

On the appeal by the plaintiff to the Supreme Court of Canada, the court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs.

Appeal dismissed with costs.

R. B. Bennett K.C. for the appellant.

A. H. Clarke K.C. for the respondent.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 15 Alta. L.R.1; [1919] 3 W.W.R. 621; 49 D.L.R. 132.

1920

*Feb. 10.
*Mar. 8.

CUSHMAN MOTOR WORKS OF CANADA v. LAING.

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

Sale—Farm machinery—Conditions—Misrepresentation—Use of machine—Right to rescission.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), affirming the judgment of Stuart J. at the trial (2) and dismissing the appellant's, plaintiff's, action. The action is for the recovery of a lien note given by the respondent as part of the purchase price of a combination threshing outfit. The respondent pleaded that the machine did not fulfil the conditions and the warranties contracted for.

The trial judge and the Appellate Division found as a fact that the respondent never got the article he bargained for and also found, in the circumstances of this case, a sufficient explanation of the retention by the respondent of the machine for a long period.

On the appeal by the plaintiff to the Supreme Court of Canada, the court, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs.

Appeal dismissed with costs.

A. H. Clarke K.C. for the appellant.

J. W. McDonald K.C. for the respondent.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Brodeur and Mignault JJ.

(1) 15 Alta. L.R. 53; [1919] 3 W.W.R. 494; 49 D.L.R. 1.

(2) [1919] 2 W.W.R. 311.

1920

*Feb. 6.
*Mar. 8.

COCHRANE v. SCHETKY.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Debtor—Creditor—Agreement—Rescission—Fraud.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Hunter C.J. and maintaining the respondent's, plaintiff's, action.

The appellant, a shareholder in the Acadia Limited company, gave a promissory note of $7,250 in part payment of stock; and the company entered into an agreement with one C. who undertook to make the collection of all similar notes, including the above. Then C., with one E., obtained the incorporation of the Union Funding Company. Later on, C. and E. having virtual control of both companies, the companies entered into an agreement whereby the Acadia Limited transferred to the Union Funding Co. all the promissory notes. After the Acadia Limited went into liquidation, the appellant negotiated with the Union Funding Company and recovered his note on payment of $1,500. An action was taken by the liquidator of the Acadia Limited for rescission of the agreement between the two companies on the ground of fraud and for a declaration that the appellant was in wrongful possession of his note, such fraud being to his knowledge.

The trial judge dismissed the action; but this judgment was reversed by the Court of Appeal.

On appeal to the Supreme Court of Canada, the judgment of the Court of Appeal was affirmed.

Appeal dismissed with costs.

Hellmuth K.C. for the appellant.

W. J. Baird for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 26 B.C. Rep. 257.

WELLINGTON COLLIERY COMPANY v. PACIFIC COAST COAL MINES.

1920
*Feb. 5.
*Mar. 8.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Evidence—Trespass—Verbal consent by one now deceased.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Murphy J. and dismissing the appellant's, (plaintiff's), action.

The action is to recover damages for certain coal which, it was alleged, the respondent had fraudulently, secretly and wilfully taken from the appellant's mine. The respondent urges that it was justified doing so under a verbal agreement made with one Coulson, then manager of the appellant.

The agreement was sworn to by two witnesses and could not be contradicted on account of the death of Coulson before the trial.

The trial judge, in rejecting the testimony of these witnesses, stated that in justice to them and in order "that the hands of any appellate tribunal may be perfectly free," his conclusions "were not based on their demeanour in the witness box nor on the manner in which their evidence were given, but because he felt their evidence could not be accepted in view of all the facts." But this judgment was reversed by the Court of Appeal.

On appeal to the Supreme Court of Canada, the judgment of the Court of Appeal was affirmed, Brodeur and Mignault JJ. dissenting.

Appeal dismissed with costs.

H. B. Robertson for the appellant.

Geoffrion K.C. and *Brethour* for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) [1919] 3 W.W.R. 463.

1920

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

JUKES *v.* DONALD.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Debtor and creditor—Chose in action—Guarantee—Assignment of debt—Notice to surety, but not to primary debtor—Set-off.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Macdonald J., (2) and maintaining the respondent's, plaintiff's, action.

The action was for recovery of moneys under a covenant of guarantee which had been assigned to the respondent. The appellant guaranteed payment of moneys owing by J. After payment was due, the debt and covenant of guarantee were assigned to the respondent. A notice of the assignment was given to the appellant, the guarantor, but not to J., the primary debtor. The trial court and the Court of Appeal both held that this notice was sufficient to enable recovery against the appellant. But the Court of Appeal reversed the judgment of the trial judge, finding that the moneys advanced to J. by E. (to whom the guarantee was given) were really the moneys of the respondent and not of the estate of which E. was trustee and the respondent administratrix; and hence on the assignment to respondent the debt was hers in her own right; and the respondent was entitled to a judgment on her action.

The Supreme Court of Canada, after hearing counsel and reserving judgment, dismissed the appeal.

Appeal dismissed with costs.

Alfred Bull for the appellant.

F. H. Chrysler K.C. for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) [1920] 2 W.W.R. 209.

(2) [1919] 1 W.W.R. 169.

1920

*Oct. 26.
*Nov. 2.

GODSON *v.* GREER.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Principal and agent—Sale of ship—Commission.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming the judgment of the trial judge, Clement J. and maintaining the respondent's, plaintiff's, action.

The appellant promised the respondent a commission if respondent made sale of a ship. The respondent employed a broker as sub-agent who mentioned the matter to another broker and it was passed on through others until, about nine months after the agreement with the respondent, a broker to whom the matter was mentioned came to the appellant and made an arrangement directly with him resulting in a purchaser being obtained. The respondent however continued his services, which were accepted by the appellant, up to the time of sale, and was of assistance in procuring the government's consent to a transfer of the ship to a foreign registry.

The Supreme Court of Canada, having heard counsel and reserved judgment, dismissed the appeal.

Appeal dismissed with costs.

A. H. MacNeil K.C. for the appellant.

Eug. Lafleur K.C. for the respondent.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) [1920] 2 W.W.R. 217.

1920

*Oct. 13, 14.
*Nov. 2.

THE CORPORATION OF THE DISTRICT OF SURREY *v.* CAINE.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Municipal law—Right to "resume"—Injunction—"The Municipal Act" (B.C.) S. 1914, *c.* 52, *s.* 325.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Clement J. (1) and granting a perpetual injunction restraining the appellant from proceeding to "resume" land.

The trial court and the Court of Appeal held that certain land proposed to be taken by the municipality from the respondent for part of a public road under a "resumption" by-law pursuant to section 325 of the "Municipal Act" came within the exception of this section as being land "in use as gardens or otherwise for the more convenient occupation of" the respondent's buildings, and granted with costs a perpetual injunction restraining the municipality from proceeding to "resume" the land.

The Supreme Court of Canada, after hearing counsel and reserving judgment, dismissed the appeal; but the injunction was modified so as to make it clear that the defendant was not thereby precluded from instituting expropriation proceedings as to all the land in question or from asserting a right of resumption in a fresh proceeding as to certain portions of the respondent's land.

Appeal dismissed with costs.

W. N. Tilley K.C. for the appellant.

S. S. Taylor K.C. for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) [1920] 2 W.W.R. 681.

STANDARD BANK OF CANADA *v.* McCROSSAN.

1920

*Oct. 14.
*Nov. 2.

ON APPEAL FROM THE COURT OF APPEAL, FOR BRITISH COLUMBIA.

Bills and notes—Guarantee—Condition—Precedent or subsequent—Parol evidence.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming the judgment of the trial judge, Murphy J., which dismissed the appellant's, plaintiff's, action.

The trial court and the Court of Appeal held that the respondent was not liable on a guarantee signed by him to secure an account to the appellant bank, on the ground that when signing it he verbally stipulated to the local bank manager as a condition of its use against him that certain notes on which he was liable as guarantor should be paid out of the funds to be advanced, which was not done.

On the appeal by the plaintiff bank to the Supreme Court of Canada, the court, after hearing counsel for both parties reserved judgment, and, at a subsequent date, the appeal was dismissed without costs, the court being equally divided. Sir Louis Davies C.J. and Idington and Brodeur JJ. were of opinion that, according to the circumstances of the case, they must accept the evidence of the respondent as to the facts and conditions under which the guarantee sued upon was handed to the bank, maintained as

*PRESENT.—Sir Louis Davies C.J. and Idington, Duff, Anglin Brodeur and Mignault JJ.

(1) [1920] 2 W.W.R. 546.

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STANDARD BANK OF CANADA. v. McCROSSAN.

it was by the trial judge and confirmed by the Court of Appeal; and therefore they were of opinion that the appeal should be dismissed. Anglin and Mignault JJ., while not reversing the finding of facts of the trial judge, held that, in view of all the circumstances in evidence, the oral condition, to which the respondent deposes, was not a condition precedent to the use of his guarantee, but was rather a term of the guarantee, at the highest of the nature of a condition subsequent, and consequently that it could not be proved by parol evidence. Duff J. concurred in the allowance of the appeal.

Appeal dismissed without costs.

S. S. Taylor K.C. and *F. G. T. Lucas* for the appellant.

C. W. Craig K.C. for the respondent.

McCREA

1920

*Nov. 18.

v.

NAPIERVILLE JUNCTION RAILWAY CO.

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

Railway—Negligence—Station—Truck on the platform—Accident—Arts. 1053, 1056. *C.C.*

APPEAL from the judgment of the Court of King's Bench, Appeal side, province of Quebec (1) affirming the judgment of the trial judge, Monet J., which dismissed the appellant's action.

The appellant brought an action against the respondent company for $10,000 for herself and $10,000 for her three children, as damages for the death of her husband who was killed by a train of the respondent company. The station agent at Napierville is also the agent of an express company. On the arrival of each train, he placed a truck on a earth elevation near the tracks and placed in it the goods unloaded from the train, in order that the persons interested could take delivery of these goods. The appellant's husband, who was expecting some goods, went near the truck while speaking with a friend, and, in order to examine the contents, placed himself between the truck and the rails. He was then struck by a locomotive and instantly killed.

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) Q.R. 29 K.B. 414.

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McCREA v. NAPIERVILLE JUNCTION RAILWAY CO.

The trial judge dismissed the action, holding that the appellant's husband was entirely at fault. The Court of King's Bench affirmed this judgment.

The Supreme Court of Canada, at the conclusion of the argument of the appellant's counsel and without calling in the respondent's counsel, dismissed the appeal.

Appeal dismissed with costs.

F. J. Bisaillon K.C. for the appellant.

F. L. Beïque K.C. and *Fred. Beïque K.C.* for the respondent.

VAN DYKE AND CO. v. HAINS.

1920

*Nov. 11.
*Nov. 12.

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

Workmen's Compensation Act—Industrial company—Pulp and paper company—R.S.Q. (1909) *Art.* 7321.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the trial judge, Roy J., and maintaining the respondent's action.

The respondent's son was killed, while he was working for the appellant company. The respondent made a petition to be allowed to sue the appellant company under the "Workmen's Compensation Act." He then brought an action for $2,500 against the appellant, and the trial judge gave judgment for that amount. Upon the appeal to the court of King's Bench, the appellant urged principally the ground that the respondent had neither alleged in his declaration nor proved at the trial that the appellant company was an industrial company and within the terms of section 7321 of the Revised Statute of Quebec. The Court of King's Bench dismissed the appeal.

The Supreme Court of Canada, after argument by the appellant's counsel and the respondent's counsel, submitting his case upon his factum, affirmed this judgment and dismissed the appeal with costs.

Appeal dismissed with costs.

L. A. Cameron K.C. for the appellant.

Maurice Rousseau K.C. for the respondent.

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) Q.R. 29 K.B. 460.

1920

*Nov. 5.
*Nov. 23.

LAVIN v. GEFFEN.

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

Partnership—Oral agreement by one partner to buy other's interest—Land—Statute of frauds—"The Partnership Ordinance," (N.W.T.) Cons. Ord. [1905] *c.* 94, *s.* 24.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division, (1) reversing the judgment of the trial judge, Scott J., who had dismissed the respondent's action and ordering a new trial.

The respondent, plaintiff, and the appellant, defendant, were carrying on business in partnership as farmers, ranchers and general dealers in cattle. The respondent alleged that the appellant orally agreed to buy out the respondent's interest in the partnership on certain terms and sued for the price agreed. The appellant denied this, pleaded the statute of Frauds and counterclaimed for an order dissolving the partnership and for an accounting. Upon the case coming on for trial, the respondent admitted that among the assets of the partnership was a leasehold interest in some real estate. The trial judge then dismissed the respondent's action holding that such an agreement as the one in the present case was within the statute of Frauds and must be in writing. The Appellate Division held that such an oral agreement was not within the statute, where there is nothing in the

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) 15 Alta. L.R. 59; [1919] 3 W.W.R. 498, 584.

partnership agreement to show that "contrary intention" referred to in sec. 24 of "The Partnership Ordinance," which provides that unless such intention appears land which has become partnership property shall be treated as between the partners as personal estate.

The Supreme Court of Canada, after hearing counsel for both parties, reserved judgment, and, at a subsequent date, dismissed the appeal with costs, Duff J. dissenting.

Appeal dismissed with costs.

A. McL. Sinclair K.C. for the appellant.

J. B. Barron for the respondent.

1920

*Nov. 4, 5.
*Nov. 23.

NOLAN

v.

EMERSON-BRANTINGHAM IMPLEMENT CO.

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

Sale—Farm machinery—Statutory warranties—Breach—Quantum of of damages—Return of goods.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division, (1) varying the judgment of the trial judge, Stuart J.

The appellant purchased from the respondent farm tractors and the action was brought by him for rescission with damages, or, in the alternative, for damages for breach of warranty.

The trial judge held that a case had not been made out for rescission, but awarded $5,910.20 as damages, $4,610.20 as the full purchase price of certain of the machines, $400 the amount paid for freight, and $900 part of the purchase price of another machine. The Appellate Division disallowed the claim for freight and reduced the damages to $1,500; Ives J. dissenting, held that the judgment below should be varied by ordering the return to the respondent of the machines in respect to which the trial judge had awarded the whole purchase price as damages.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

(1) 15 Alta. L.R. 353; [1920] 2 W.W.R. 470.

1920

NOLAN v. EMERSON-BRANTINGHAM IMPLEMENT CO.

The Supreme Court of Canada, Sir Louis Davies C.J. dissenting, allowed the appeal taken to this court. It affirmed the judgment of the Appellate Division as to the second and third items of the first judgment but it increased the damages to the sum of $4,910.20. But the Supreme Court of Canada also held that, inasmuch as the appellant was receiving back the entire purchase price of four tractors, he should allow the respondent to take back such of them as are still under his control and should account for the net proceeds of any of them of which he may have disposed.

Appeal allowed with costs.

A. McL. Sinclair K.C. for the appellant.

A. H. Clarke K.C. and *Edmanson* for the respondent.

1920

*Oct. 20, 21.
*Nov. 23.

RODGERS v. WILLIAMS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Principal and agent—Sale of property—Commission—Judgment against other—Res judicata.

APPEAL from the judgment of the Court of Appeal for British Columbia, (1) reversing the judgment of the trial judge, Murphy J., and maintaining the respondent's, plaintiff's, action.

The appellant and one H. owned all the shares of a mining company. The appellant made a contract with the respondent by which he undertook to pay respondent a commission of $10,000 for the sale of the mining property. The respondent procured a purchaser. At the appellant's suggestion, the respondent brought action against H. and obtained judgment for $10,000, which he could not enforce in New York, where H. resided. The respondent then sued the appellant for $10,000.

The trial judge dismissed the action but the Court of Appeal allowed the appeal and directed judgment to be entered for the plaintiff.

The appeal to the Supreme Court of Canada was dismissed.

Appeal dismissed with costs.

Geo. F. Henderson K.C. and *J. G. Gibson* for the appellant.

J. J. Taylor K.C. for the respondent.

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) [1920] 2 W.W.R. 944.

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CODE OF CIVIL PROCEDURE

COMPANY—*Payment for shares—Loan to shareholders—Action by shareholder.—Status.*] A company, with a capital of $100,000, was formed to take over the business of J. B. H. & Co., in Toronto. S., a merchant of Glasgow, Scot., subscribes for $51,000 worth of the stock, it being agreed, as evidenced by a by-law of the company, that the money paid for it should be deposited with the firm of S. & Son, Glasgow, and used to finance the company,s purchases in Europe. S. sent to Toronto his cheque for $51,000 and it was indorsed by the company and remitted to the Glasgow firm. Some years after J. B. H. started a new business, and his wife, a shareholder in the company, brought an action, on behalf of all shareholders, to compel S. to pay the $51,000 to the company, and for a declaration that S., who had been president of the company since its organization, had never qualified as a director and all the acts of the company were, therefore, illegal and void.—*Held*, that the plaintiff, a minority shareholder, could not maintain the action against the will of the majority after acquiescence in and benefit from the operations of the company and the agreement as to the disposition of the cheque for $51,000.—*Held*, also, Davies C. J. *dubitante* and Duff J. expressing no opinion that the cheque for $51,000 accepted by the company as such constituted a valid payment by S. for his 510 shares and its remittance to the firm of S. & Son was not a loan by the company of the amount to S., a shareholder, prohibited by sec. 29 of the Companies Act.—Judgment of the Appellate Division (45 Ont. L.R. 215) reversing that at the trial (43 Ont. L.R. 617) affirmed. HENDERSON *v.* STRANG..... **201**

CONSTITUTIONAL LAW—*Succession duty—Situs of property—"Direct taxation within the province"—B.N.A. Act*, 1867, *s.* 92, *s.s.* 2—4 *Geo. V., c.* 10 (Que.)—*Art.* 6 *C.C.*] The Quebec Succession Duty Act (4 Geo. V., c. 10) imposes succession duties upon "all transmissions within the province, owing to the death of a person domiciled therein, of movable property locally situate outside the province at the time of such death."—*Held*, that the statute is *intra vires* of the legislative authority of the province over taxation, conferred by subsection 2 of section 92 of the B.N.A. Act, the succession duty imposed being "direct taxation within the province."—Judgment of the Court of King's Bench reversed. BARTHE *v.* ALLEYN-SHARPLES..... **1**

2 —— *Parliament— Order-in-Council — Newsprint—"Necessary of life"—Measures necessitated in real war—"War Measures Act*, 1914"—*"The Board of Commerce Act,"* 9 & 10 *Geo. V.*, c. 37—*"The Combines and Fair prices Act*, 1919," 9 & 10 *Geo.* V., *c.* 45, 9 & 10 *Geo. V., c.* 63.] The appellant appeals from an order of the Board of Commerce of Canada dated 6th of February, 1920. The Board, after declaring newsprint to be "a necessary of life," by clause 1 prohibits the appellant from taking any price exceeding $80 per ton for newsprint, and declares that any price in excess of that sum "shall be deemed to include unfair profit;" by clause 2, it forbids the appellant accumulating and witholding from sale any quantity of newsprint beyond an amount reasonably required for the ordinary purposes of its business; and by clause 4, the appellant is required by the Board to furnish at certain times and at fixed prices defined quantities of newsprint to designated purchasers.—*Held*, Brodeur J. expressing no opinion, that clauses 1 and 2 of the order had not been made by the Board in the exercise of jurisdiction conferred on it by "The Combines and Fair Prices Act," as newsprint could not be deemed to be "a necessary of life." *Ejusdem generis* rule applied.—*Per* Brodeur J.—"The Combines and Fair Prices Act" is *ultra vires* of the Parliament of Canada. *Held*, also, that clause 4 of the order could not have been deemed necessary "by reason of the existence of real * * war * * for the security, defence, peace, order and welfare of Canada," and that an order-in-council purporting to confer on the Paper Controller jurisdiction to make it therefore transcended the power vested in the Governor-in-Council by s. 6 of the "War Measures