REPORTS

OF THE

SUPREME COURT

OF

CANADA

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1922

25270—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

Page 398, line 9. Insert the pronoun "I" after "would."

Page 497, line 1. For "plaintiff" read "defendant."

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. 61 OF THE SUPREME COURT REPORTS.

Barthe v. *Alleyn-Sharples* (60 Can. S.C.R. 1). Appeal dismissed with costs, Nov. 25, 1921.

Board of Commerce, in *re* (60 Can. S.C.R. 456). Appeal allowed, Nov. 11, 1921.

Canadian Pacific Ry. Co. v. *Smith* (62 Can. S.C.R. 134). Leave to appeal refused, Nov. 19, 1921.

Git v. *Forbes* (62 Can. S.C.R. 1). Appeal allowed, Dec. 20, 1921.

Minister of Finance of B.C. v. *Royal Trust Co.* (60 Can. S.C.R. 127). Appeal allowed with costs, Oct. 28, 1921.

McKenzie v. *Walsh* (61 Can. S.C.R. 255). Leave to appeal refused, Mar. 16, 1921.

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ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

JEAN K. GIT AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

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*Feb. 11.
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AND

SYDNEY S. FORBES (PLAINTIFF) RESPONDENT.

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

Contract—Work and labour—Repugnant provisions—Rule of construction.

In a contract for altering a building the contractor covenanted "in consideration of the sum of $3,000 * * * that he will furnish the materials hereinafter mentioned and will perform services as hereinafter set forth." After setting out the character of such work and materials the contract provided that in case the cost should be more or less than $3,000, payment would be made on the basis of cost plus a percentage and that the contractor should be entitled "to the amount ascertained as paid by him for labour and material, plus 12½ per cent.

Held, Davies C. J. and Duff J. dissenting, that this last mentioned provision for payment is repugnant to that by which the contractor made an absolute covenant to do the work and furnish the material for $3,000, and there being no special reason for departing from the general rule the later clause must be rejected.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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Per Davies C.J. and Duff J.—The clauses are not repugnant but assuming that they are the fact that the intention of the parties as disclosed by the contract was that the sum of $3,000 was only an estimate of the cost and that the contractor was to be paid the price of his labour and materials plus a reasonable profit, constitutes a special reason for refusing to reject the later clause.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment at the trial in favour of the appellants.

The appeal involved the construction of a contract for altering a building so that it could be used as a restaurant. The material portions of the contract are set out in the head-note and appear in full in the opinions of the judges herein. The case was tried by the County Court Judge under the Mechanics Lien Act and His Honour held that the clauses were repugnant and effect should be given to the earlier. The Appellate Division held that they should be read together and effect given to the later.

Washington K.C. and *E. E. Gallagher for* the appellants.

J. L. Counsell for the respondent.

THE CHIEF JUSTICE (dissenting).—I concur with Mr. Justice Duff.

IDINGTON J.—The respondent brought an action upon a contract dated 5th March, 1919, made between him and the appellants whereby he agreed in consideration of the sum of $3,000 that he would furnish materials and perform the services thereinafter set forth.

The work thereinafter set forth consisted of carpenter work, plumbing, electric wiring, plastering, stairs, painting and decorating, as specified.

The respondent's statement of claim is somewhat ambiguous and may be read as if discarding said contract and relying upon an alternative contract in said agreement, presently to be referred to.

And the manner of presenting the evidence in support of his claim indicates a possible reliance upon such alternative contract as I tentatively express it.

But in the course of the trial counsel for respondent when challenged as to this, boldly took the following position:—

> Mr. Counsell: Mr. Washington admits that we were entitled to claim for extras. There is not a thing in the original contract that there is to-day. Mr. Washington overlooks entirely the fact that this bill of Mr. Forbes rendered is a bill for the whole work and not anything to do with the contract. He goes on the third clause in that contract, that is to say, that Mr. Git was to pay him for his time and material supplied. Both of them disregarded that contract.

That was so persisted in as to render the trial rather confusing.

The respondent claimed and claims he was to be paid for all the costs of work and material, plus $12\frac{1}{2}\%$ to be added thereto.

It seems rather a startling proposition in face of such an elaborate contract and specifications and the absolute covenant of the respondent with which the agreement set out binding him expressly to do the work and supply the materials for which he is to be paid the sum of $3,000 as follows:—

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Now this agreement witnesseth that in consideration of the sum of three thousand dollars ($3,000.00) to be paid as follows: one thousand dollars ($1,000.00) on the signing of this agreement, further sum of one thousand dollars ($1,000.00) when it appears to the satisfaction of all the parties hereto that materials have been furnished and services performed to the extent of twenty-five hundred dollars ($2,500.00) and the balance or sum of one thousand dollars ($1,000.00) thirty days after the completion of this agreement, the party of the second part covenants, promises and agrees to and with the parties of the first part that he will furnish the materials hereinafter mentioned and will perform the services as hereinafter set forth.

Immediately after that follows the entire contract regarding what has to be done by respondent for said consideration.

Then follows a provision in the agreement that if on examination of the building as disclosed by part of the work thus to be done it would not be consistent with the safety of the building to proceed, the work was to be abandoned and respondent entitled to compensation out of said $1,000.00 cash payment, and he to return balance thereof. Nothing arose out of this and its only possible use is as shewing what the nature of the contract was.

Next after that comes the following:—

The parties of the first part covenant with the party of the second part that in the event of the materials to be supplied and the labour performed amounting in value to more than three thousand ($3,000.00) then the parties of the first part will reimburse the party of the second part for such excess. The party of the second part covenants that in the event of such labour and materials being less in value than three thousand ($3,000.00) then the final payment will be the actual amount expended by the party of the second part over two thousand ($2,000.00) plus twelve and one half per cent. instead of one thousand as above stated. In estimating the value of the materials to be supplied and the labour performed the party of the second part on the final settlement of the amount due under this agreement shall produce all accounts paid by him for labour and materials and shall be entitled to the amount ascertained as paid by him for labour and materials plus twelve and one half per cent.

The learned trial judge held this inconsistent with the express contract to do all the said work and supply all materials necessary therefor for the fixed sum of $3,000.00.

He proceeded on that basis of the incompatibility of the above quoted covenant in the contract and that which followed, and determined accordingly that the work done under the terms of that part of the contract covered by the said covenant could not exceed the sum named, and found as a fact that it fell below the sum named, and then allowed for extras on that basis.

On appeal the Second Appellate Division directed a variation in his formal judgment of which the following is what directly concerns us now in appeal therefrom.

It reads as follows:—

2. This Court doth order that the said appeal be and the same is hereby allowed and that the said judgment dated the 19th day of February, 1920, be varied and as varied be as follows:

(1) This Court doth declare that according to the true construction of the agreement between the parties, dated the 5th day of March, A.D. 1919, the covenant contained in paragraph one of the said agreement and the subsequent covenant providing for the case of materials and labour amounting in value to more or less than three thousand dollars ($3,000.00) are to be read together and effect to be given to the later covenant.

I am, with great respect, unable, in light of the authorities I am about to cite, to accept the foregoing as the true construction in law of said agreement.

It seems impossible for me to read the first covenant to do the work and supply the materials, which I have set out above, for three thousand dollars, and the later agreement together, as the learned trial judge is directed to do. The latter, if adhered to, abrogates the first contrary to the general rule in such cases that the first must be observed and the latter discarded.

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Counsel for appellant relied on the decision in the case of *Furnivall* v. *Coombes* (1), and a number of later decisions and text books adopting that decision as law. I prefer to anything else I have seen the interpretation of same decision and text which appears in the case of *Williams* v. *Hathaway* (2), at page 549 *et seq.*, and applied with due discrimination in *Watling* v. *Lewis* (3), as safe guides.

The former is a decision of Jessel M. R., who in his opinion judgment seems, as usual with him, to go directly to the root of the matter and briefly, in terse language, to distinguish between a subsidiary provision which does not destroy the covenant and one which does. He says:—

> The first question is one of law. It is said that if you find a personal covenant, followed by a proviso that the covenantor shall not be personally liable under the covenant, the proviso is repugnant and void. I agree that that is the law; but that by no means applies to a case where the proviso limits the personal liability under the covenant without destroying it, thus leaving a portion of the original covenant remaining; in that case the proviso is perfectly valid.

If the covenant to do the specified work and supply the necessary material herein for three thousand dollars is not destroyed by the substituted bargain, then I fail to know how it could be destroyed.

The entire basis of a complicated contract and one of which the range might ultimately be difficult to determine is by a stroke of the pen obliterated, as it were, and another so simple in its character that it needed nothing more than the verbal expression—go ahead, do as I tell you and I will pay your expenditure and twelve and a half per cent for your care and supervision.

(1) 5 Man. & G. 736. (2) [1877] 6 Ch. D. 544.
(3) [1911] 1 Ch. 414.

Surely these are irreconcilable contracts in every way. Even in applying the test which the Master of the Rolls gives, lawyers and judges may differ, as these cases illustrate.

But the test, nevertheless, seems a good one and if it can be said not to destroy the covenant herein I fail to see what could.

So convinced was able counsel for respondent that he felt driven to assert his client's position in the language quoted above. I agree with him that if you can substitute in one and the same contract an alternative and harmonize them as one, he may be right.

I do not dispute that parties may in the same agreement provide for alternatives if the purview thereof makes it clear that such is their purpose.

That, however, is not this case, but one of an absolute covenant not anticipating by a line or word thereof departure therefrom followed by another and distinctively alternative contract in substitution of the former, although using one element thereof as an alternative basis of the latter.

It is, I repeat, impossible for the court to do as directed by this judgment of the Appellate Division.

The judgment thereof should therefore be set aside and that of the learned trial judge restored with costs.

DUFF J. (dissenting).—This appeal raises questions turning upon the construction of a deed the material clauses of which are as follows:—

Now this agreement witnesseth that in consideration of the sum of three thousand dollars ($3,000.00), to be paid as follows: One thousand dollars ($1,000.00), on the signing of this agreement, further sum of one thousand dollars ($1,000.00), when it appears to the satisfaction of all the parties hereto that materials have been furnished and services performed to the extent of twenty-five hundred dollars ($2,500.00), and the balance or sum of one thousand dollars ($1,000.00) thirty days

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after the completion of this agreement, the party of the second part covenants, promises and agrees to and with the parties of the first part that he will furnish the materials hereinafter mentioned and will perform services as hereinafter set forth.

* * *

The parties of the first part covenant with the party of the second part that in the event of the materials to be supplied and the labour performed amounting in value to more than three thousand ($3,000.00) then the parties of the first part will reimburse the party of the second part for such excess. The party of the second part covenants that in the event of such labour and materials being less in value than three thousand ($3,000.00) then the final payment will be the actual amount expended by the party of the second part over two thousand ($2,000.00) plus twelve and one half per cent. instead of one thousand as above stated. In estimating the value of the materials to be supplied, and the labour performed the party of the second part on the final settlement of the amount due under this agreement shall produce all accounts paid by him for labour and materials and shall be entitled to the amount ascertained as paid by him for labour and materials plus twelve and one half per cent.

The County Court Judge at Hamilton, by whom the action was tried, held that the second paragraph being repugnant to the first must be rejected. The Appellate Division has held that the two paragraphs must be read together and effect given to the later covenant as a modification of the earlier one. The question to be decided is whether the Appellate Division was right in reversing the decision of the judge. The case, in my opinion, is governed by two rules of construction. The first is laid down in *Shelley's Case* (1) at page 95b.

Such construction is always to be made of a deed that all the words (if possible) agreeable to reason and conformable to law may take effect according to the intent of the parties without rejecting of any, or by any construction to make them void.

The second is the rule laid down in *Grey* v. *Pearson* (2), at page 106, by Lord Wensleydale, namely, that the grammatical and ordinary sense of the words is not to be adhered to if that would lead to some absurdity or some repugnance or inconsistency with the rest of the

(1) 1 Coke, Pt. 1 93 b, (2) [1857] 6 H.L. Cas. 61.

instrument; and that in such case the grammatical and ordinary sense of the words is to be modified so as to avoid that absurdity or inconsistency. I confess I see no difficulty in reading these two paragraphs together in precisely the way in which the Appellate Division has done. In the event of the cost being less than $3,000 or exceeding $3,000 then the remuneration is to be upon "a cost plus percentage basis." True, since the chances of the cost being precisely $3,000, are very remote, the practical effect of reading the two clauses together, in this way, is to treat that sum as an estimate; and that is precisely what I think the parties intended and considering, as we are bound to do, the necessary uncertainty both as to the extent and as to the cost of the changes which might be required to carry into effect the object of the contract, it is precisely the meaning, in my judgment, which the tribunal called upon to construe the deed is entitled to ascribe to it and must ascribe to it.

As against this way of construing the deed there is brought into play an ancient maxim which is given in Sheppard's Touchstone, 88, in these words:—

> If there be two clauses or parts of the deed repugnant the one to the other the first part shall be received and the latter rejected except there be some special reason to the contrary.

It is to be observed that this rule of construction is given in the chapter on the Exposition of Deeds and that on the preceding page there are two rules laid down which are virtually the two to which I have already referred. 1st, that the construction must be upon the entire deed and that "one part of it doth help to expound another;" and 2nd, that where the deed cannot take effect according to the letter it must, if possible, be so expounded as to take effect according to the intention to be collected from the whole deed.

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The rule as to repugnancy, therefore, is obviously a rule to be applied only in the last resort and when there is no reasonable way of reconciling the two passages and bringing them into harmony with some intention to be collected from the deed as a whole.

This, as might have been expected, has more than once been decided. *Bush* v. *Watkins* (1). The rule has indeed been put into operation where by giving effect to the second of two inconsistent clauses the intention, as disclosed by the deed as a whole would be defeated or where the rejected clause was repugnant to the very nature of the transaction the parties were engaged in. But in *Walker* v. *Giles* (2), at page 702, it was laid down that where there are inconsistent parts, that part, without regard to their order, which is calculated to carry into effect the real intention of the parties as collected from the instrument should be given effect to. Indeed it would appear that the disclosure of the general intention of the deed when read alone, or when read in light of the circumstances where the circumstances can, as in the present case, properly be resorted to, may constitute a "special reason" within the meaning of the very words of the rule itself as given in Sheppard's Touchstone for refusing to reject the later clause.

The cases relied on present no real difficulty. In *Furnivall* v. *Coombes* (3), the effect of the proviso, if effect was to be given it at all, was of necessity to relieve the covenantors from any sort of personal obligation, a result held to be obviously inconsistent with the intention of the transaction. In *Solly* v. *Forbes* (4), a deed professing to be a release but reserv-

(1) 14 Beav. 425.
(2) [1848] 6 C.B.662.
(3) 5 M. & G. 736.
(4) 2 Bro. & B. 38.

ing rights against the sureties, was given effect to by treating the words of release as amounting to a covenant not to sue and the Court of King's Bench cited and applied the language of Lord Hobart in *Clanrickard's Case* (1) at page 277:

> I exceedingly commend the judges that are curious and almost subtil to invent reasons and means to make Acts, according to the just intent of the parties.

Again, Sir George Jessel, who afterwards in *Re Bywater* (2), at pages 19-20, described the converse rule governing the construction of wills as a mere rule of thumb, laid down in *Williams* v. *Hathaway* (3), at page 549, that the rule now under consideration "by no means applies" where the proviso limits the liability under the covenant without destroying it, thus leaving some portion of the original covenant remaining. Again in *Watling* v. *Lewis* (4), a proviso was rejected because it was held that the only effect that could be given to it would be to destroy the original covenant; and in *Re Tewekesbury Gas Co.* (5), at page 285, Parker J. considered that when there was an unqualified covenant to pay with a proviso that it should only be enforced at the "option of the covenantor" the proviso must be rejected as obviously destructive of the object of the instrument.

In all these cases the clause rejected was one incapable of reconciliation with the general intention of the instrument; and indeed the operation of the rule seems to be limited to those cases in which there are two clauses so inconsistent that effect cannot be given to the second without annihilating the first and that neither the nature of the transaction nor the terms

(1) Hob. 273.
(2) 18 Ch.D.17
(3) 6 Ch. D. 544.
(4) [1911] 1 Ch. 414.
(5) [1911] 2 Ch. 279.

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of the instrument sufficiently discloses an overriding intention affording a guide to the tribunal. The tribunal being thus left to the alternative of holding that the mutually repugnant clauses or the whole instrument must be inoperative for uncertainty or, on the other hand, rejecting one of the clauses, rejects the later clause.

It may be doubted whether it would not have been more consistent with sound sense to have adopted the former alternative; but the rule, although of limited application, seems to be a settled one and can only be altered by statute.

I repeat that I can entertain no doubt that it has no application to the instrument before us.

The appeal should be dismissed with costs.

ANGLIN J.—By the first clause of a contract under seal the plaintiff "covenanted, promised and agreed" to do certain specified work in the nature of alterations to a building for the sum of $3,000.00 payable in three instalments of $1,000.00 each. The document set out the specifications in detail and made provision for an abandonment of the work should it be found on removal or attempted removal of partitions that it would entail "serious damage" to the structure, and for payment in that event of the cost of labour expended. This clause followed:—

> The parties of the first part covenant with the party of the second part that in the event of the materials to be supplied and the labour performed amounting in value to more than three thousand ($3,000.00) then the parties of the first part will reimburse the party of the second part for such excess. The party of the second part covenants that in the event of such labour and materials being less in value than three thousand ($3,000.00) then the final payment will be the actual amount expended by the party of the second part over two thousand ($2,000.00) plus twelve and one half per cent. instead of one thousand as above stated. In estimating the value of the materials to be supplied and

the labour performed the party of the second part on the final settlement of the amount due under this agreement shall produce all accounts paid by him for labour and materials and shall be entitled to the amount ascertained as paid by him for labour and materials plus twelve and one-half per cent.

The plaintiff claims to recover $7,010.36 as the cost of the materials furnished and labour expended plus 12½% thereon, less $3,180 already paid. The County Court Judge at Hamilton, by whom the action was tried under the provisions of the Mechanics Lien Act, held that the clause above quoted should be rejected as repugnant to the absolute agreement to do the work for $3,000, and gave judgment for the latter sum plus $1,040.50 to which he held the plaintiff entitled for extras arising out of a number of changes in and departures from the specifications sanctioned by the defendants, less the $3,180 already paid.

The Appellate Division, after declaring that the covenant to furnish materials and do the work for $3,000.00 and the subsequent covenant providing for payment of the value of such materials and labour if amounting to more or less than $3,000.00 must

be read together and effect given to the latter covenant,

referred the matter to the local Master to ascertain the amount due to the plaintiff in accordance with this declaration. The defendants appeal and ask the restoration of the judgment of the trial judge.

The question presented is whether the later covenant in the contract, if given effect to, destroys the earlier one, or merely limits or qualifies its operation. In the latter case the cardinal rule of construction, that you must give effect to every part of a document if you can, must undoubtedly prevail; *Elderslie SS. Co.* v. *Borthwick* (1); *Williams* v. *Hathaway* (2); in the former the rule stated in Shepard's Touchstone at p. 38 (No. 7),

(1) [1905] A. C. 93. (2) 6 Ch. D. 544.

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that if there be two clauses or parts of the deed repugnant, the one to the other, the first part shall be preferred and the latter rejected, except there be some special reason to the contrary.

appears to be so clearly established that, as the later clause, the covenant providing for payment of cost plus percentage must be rejected. *Watling* v. *Lewis* (1); *Cheshire Lines* v. *Lewis & Co.* (2); *Furnivall* v. *Coombes* (3)—authorities cited by the appellants—are in point.

If the later covenant in the contract now before us were given effect to, the only possible operation of the first covenant would be in the event of the cost of the materials supplied and the labour expended, plus 12½% thereon, amounting to precisely $3,000.00. In other words the contract would impose on the defendants a simple and unrestricted obligation to pay the cost of materials and labour plus 12½%, the minimum being $2,000.00. That which was an absolute covenant to do the work for $3,000.00 thus becomes, if effect be given to the later covenant, conditional upon the cost plus 12½% amounting to exactly that sum. That in my opinion is not merely an alteration or qualification of the covenant to furnish the materials and do the work specified for $3,000.00. It is wholly inconsistent with and repugnant to that covenant and destroys it.

There is no ground for interference with the disallowance by the judge of a portion of the amounts which the plaintiff in the alternative claimed to be due to him for extras. He obviously accepted and acted on the evidence of Evans and McNeill, two experts employed by the defendants to report on the items preferred by the plaintiff as extras, and there is no ground for rejecting his appreciation of their testimony.

(1) [1911] 1 Ch. 414. (2) 50 L.J.Q.B. 121.
(3) 5 M. & Gr. 736.

I would allow the appeal and restore the findings of the County Court Judge. The judgment directed by the Divisional Court should be varied accordingly. The appellants are entitled to their costs in this court and in the Appellate Division.

BRODEUR J.—The appellants are Chinese restaurateurs and the respondent is a contractor.

At the beginning of the year 1919 the appellants, who were already running a restaurant in the City of Hamilton, leased from the defendant Mills a property situate on King street in that city for the purpose of establishing another restaurant in the same city. Alterations and repairs were needed since the property as laid down was not suitable for a restaurant. Partitions had to be removed; hard wood flooring had to be put in; private dining rooms, pantry, kitchen, a small sleeping room, and an archway at the entrance were needed. A contract was made on the 5th of March, 1919, between the appellants and the respondent for making the alterations and repairs therein specified for the sum of $3,000.00 payable in instalments, viz., $1,000.00 cash, $1,000.00 when the value of the work would have reached $2,500.00 and the remaining $1,000.00, thirty days after the completion of the work. This contract ends with the following clause, which is the cause of the whole trouble and which can hardly be reconciled with the fixed sum of $3,000 above mentioned:—

The parties of the first part (Jean Git, Jean B. Hong and Jean S. Wing) covenant with the party of the second part (Sidney S. Forbes) that in the event of the materials to be supplied and the labour performed amounting in value to more than three thousand ($3,000.00) then the parties of the first part will reimburse the party of the second part for such excess. The party of the second part covenants that in the event of such labour and materials being less in value than three

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thousand ($3,000.00) then the final payment will be the actual amount expended by the party of the second part over two thousand ($2,000.00) plus twelve and one-half per cent. instead of one thousand as above stated. In estimating the value of the materials to be supplied and the labour performed the party of the second part on the final settlement of the amount due under this agreement shall produce all accounts paid by him for labour and materials and shall be entitled to the amount ascertained as paid by him for labour and materials plus twelve and one-half per cent.

In the first part of the contract we have, then, a formal agreement that the work was to be done for a fixed sum, $3,000.00, and then in the latter clause we have a stipulation that if the work done is worth less than $3,000.00 a certain deduction would be made, or, in other words, the owner would not pay the $3,000.00 specifically stipulated. On the other hand, if the work was worth more than $3,000.00, then the owners would have to pay the amount actually expended by the builder plus 12½%, which would be his profit on the job.

The repairs were made and, as is usual in cases of that kind, extras were put in by the contractor but for most, if not all, of these extras, agreements were made as to the price. In the course of the progress of the work the contractor said at one time that those extras would not amount to more than $500.00, then later, on May 15th, when all the work was finished Git made the last payment due under the contract and he asked Forbes to bring in the bill for the extras, and he asked him how much they would cost and Forbes said in a jocular way, about $1,000.00. Git expressed his surprise at that but he was still more surprised when Forbes came with a total bill not only of $4,000.00, including the contract price and $1,000 for extras, but he presented a bill totalling $7,010.36, or more than double the contract price. The contractor claimed that he was entitled to all that under the clause in the contract above quoted.

The appellants, defendants, were very willing to pay $500.00 for extras, but refused to pay the rest. The present action was instituted claiming $3,830.36 after having deducted $3,180.00, which had already been paid. The action was based upon the contract though the plaintiff did not specifically rely upon the later clause. The action also claimed that in addition to the contract the plaintiff was requested to furnish other materials and to perform services not stated in the written contract.

The defendant pleaded that the agreement was for three thousand dollars and that they were willing to pay $500 for the extras.

The trial judge came to the conclusion that the clauses of the contract providing the first for a fixed sum and the later for a sliding scale were repugnant and gave effect to the first clause and in addition to that he found that there were extras to the extent of $1,632.05. But he found that on the contract proper work to the extent of $591.55 had not been performed. He gave judgment therefore in favour of the plaintiff for $1,040.50.

The Appellate Division reversed this decision, and came to the conclusion that the two clauses of the contract should be read together and that effect should be given to the later clause. Reference was ordered to determine the amount due under such a construction of the contract.

The case comes now before us.

It seems to me that these two clauses of the contract cannot be reconciled and that they are absolutely repugnant. In one case it is stated that the work is to be done for a fixed price, viz., $3,000.00, and later on

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we find a clause that this price will be increased or decreased according to the value of the work done. If we give effect to the latter clause the first one means nothing and I cannot see how we can read them together as ordered by the Appellate Division. Unfortunately we have no notes of the Appellate Division which could guide us. The parties evidently intended that the work would be done for $3,000.00. The proviso as to a sliding scale was inconsistent with this covenant and it becomes void and should be rejected. *Furnivall* v. *Coombes* (1); Halsbury, Vol. 7, pages 517, 518; *Cheshire Lines* v. *Lewis* (2).

The conduct of the parties later on shews that this second covenant was not intended to be carried out. Payments were made on a basis of the $3,000.00 contract. Extras were ordered and the contractor was asked how much in excess of the $3,000.00 these extras would amount to and he said about $500.00. This answer puts on the contract a construction which should not be departed from. Later on he seemed to be almost ashamed of himself when he suggested these extras could amount to $1,000. But now when he comes to claim $3,830.36 his action could not be reasonably maintained for such a large amount. The judgment of the trial judge has done full justice to the plaintiff's claim. The judgment *a quo* should be reversed with costs of this court and of the court below, and the judge's decision should be restored.

MIGNAULT J.—The two courts below arrived at different results mainly because they differed as to the rule of construction which should be applied to the contract between the parties.

(1) 5 Man. & Gr. 736.

(2) 50 L.J.Q.B. 121.

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The first court considered absolutely irreconcilable the clause in the contract that the respondent would for the sum of $3,000.00 perform the work and furnish the materials specified, and the subsequent clause that if the work and materials would cost more than $3,000.00, the appellants would pay the excess, with 12½%, and if less, that they would pay the actual amount expended by the respondent, over and above $2,000.00, plus 12½%. And the learned trial judge applied the rule of construction which in such a case rejects the second of two clauses which are so repugnant that they cannot stand together (Corpus Juris, Vol. 13, page 536).

The Appellate Division, on the contrary, held that the two clauses should be read together and that effect should be given to the later covenant.

It appears to me absolutely impossible to give effect to the two clauses. For on the one hand the work specified is to be done for a lump sum of $3,000.00, and on the other, if it costs more than $3,000.00, th respondent is to have the excess cost, with 12½%, and if less, the appellants are to pay him a minimum of $2,000.00, plus the actual amount expended over that amount with 12½% added thereto. In other words, the work, by the first clause, is to be performed for a fixed price, while, by the second, it is to be paid for on the basis of a *quantum meruit*, with a minimum of $2,000.00, and a percentage on actual cost of 12½%.

I fully recognize that when it is at all possible, it is the duty of the court to read together all the clauses of a contract, giving to each the meaning derived from the whole instrument. But where two clauses are irreconcilable, so as to be destructive the one of the

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other, one of these clauses must necessarily be disregarded, unless the whole contract is treated as void for uncertainty, and the rule appears to be to give effect to the first clause and to reject the other. Thus a proviso destroying a previously assumed personal liability, being repugnant to the covenant to pay and indemnify, was declared void of effect. *Watling* v. *Lewis* (1). Applying this rule I must find that there is absolute repugnancy between these two clauses and therefore I must disregard the second clause.

I therefore think that the basis of the judgment of the learned trial judge was the correct one, and that being the case I would not interfere with his decision with regard to the amount which is payable to the respondent for extra work not comprised in the contract, for which the respondent was granted a substantial sum.

I would therefore allow the appeal with costs here and in the appellate division and restore the judgment of the trial judge.

Appeal allowed with costs.

Solicitors for the appellant: *Brown & Gallagher.*

Solicitors for the respondent: *Bruce, Bruce & Counsell.*

(1) [1911] 1 Ch. 414

JOSEPH REMILLARD .....APPELLANT;

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*Feb. 24.
*Mar. 11.

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law —Principal guilty of manslaughter—Abettor afterwards convicted of murder—Charge—Explanations as to manslaughter—Sections 69, 262 *Cr. C.*

The appellant was tried for murder and found guilty. The victim had been killed by the appellant's son, at the instigation of his father. The son, having had his trial previously, had been found guilty of manslaughter.

Held, that the appellant could be convicted of murder.

The trial judge in his charge, after reading section 259 Cr. C., explained to the jurors the nature of murder and instructed them that they could find one of three verdicts against the accused, murder, manslaughter or acquittal. While he did not read section 262 Cr. C. which refers to manslaughter, in discussing provocation and the defences set up by the appellant of self-defence and protection of the home, he explained under what circumstances the verdict might be one of manslaughter.

Held, Brodeur J. dissenting, that the trial judge sufficiently instructed the jury as to what in law constitutes the offence of manslaughter.

Per Brodeur J. (dissenting).—There was sufficient evidence to justify the jury in finding a verdict of manslaughter, if they had been properly instructed.

APPEAL from a judgment of the Court of King's Bench, appeal side, Province of Quebec, dismissing an appeal by the appellant relating to questions of law arising on his trial for murder and upon a stated case.

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

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The appellant was charged with having murdered one Morissette and found guilty. Morissette was killed as the result of a rifle shot which was fired by the son of the appellant at the victim, who had called late at night under peculiar circumstances. The trial of the son was held first upon an indictment of murder; and he was found guilty of manslaughter. At the trial of the appellant the judge, in his charge to the jury, explained the nature of murder, quoting section 259 Cr. C. He also cited section 261 Cr. C., on the defence of provocation, section 53 Cr. C. dealing with self defence against assaults and section 60 Cr. C. on the defence of dwelling-house at night. The judge did not read section 262 Cr. C. as to manslaughter. The two questions submitted to the courts were: 1, as the son was convicted of manslaughter, the appellant, as aider and abettor, could not be found guilty of murder; and 2, the charge was illegal as the jury were not sufficiently instructed as to the distinction between murder and manslaughter.

N. K. Laflamme K.C. and *M. A. Lemieux K.C.* for the appellant.

Aimé Marchand K.C. and *Lucien Cannon K.C.* for the respondent.

IDINGTON J.—The appellant was indicted for murder and convicted therefor.

The Court of King's Bench has, with the exception of Mr. Justice Guerin, so answered the questions submitted in a reserved case relative thereto as to maintain the conviction.

The pith of the dissenting opinion of Mr. Justice Guerin in said court which gives appellant the right to come here, and is the measure of our jurisdiction to interfere, is that because appellant's son on another indictment for murder, resting on same killing, had on his trial been only found guilty of manslaughter, therefore the appellant cannot be found guilty of any greater offence than that of manslaughter.

The contention is a most remarkable one and seems to me to have been so well and effectually answered by the several opinions of the other judges in the court below writing opinions with which I substantially agree, that I do not feel at liberty to repeat same here. Some of them illustrate the unfounded nature of such pretensions as made, by various alternatives.

I only add another and that is if this case, as it might have been in law, had been tried before the other, despite what appellant's counsel suggests is customary in such cases, how could he have invoked the pretension of law now set up?

The appeal should be dismissed.

DUFF J.—I have carefully considered the charge of the trial judge and I am by no means satisfied that he instructed the jury insufficiently touching the elements of the offence of manslaughter and the distinctions between that offence and murder.

I am unable to perceive any force in the argument founded upon the verdict and judgment against the younger Remillard.

ANGLIN J.—In my opinion this appeal fails. The fact that in another trial another jury passing upon evidence which may have been somewhat different decided that the offence committed by Roméo Rémil-

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lard in killing Lucien Morissette amounted only to manslaughter is wholly irrelevant to the question whether Joseph Rémillard could rightly be put on trial for, and could upon proof that he had aided, abetted or instigated, the homicide, be convicted of murder. As between Romeo Rémillard and the Crown the verdict of the jury who tried him is no doubt conclusive as to the nature of his crime. As between Joseph Rémillard and the Crown it determines nothing. The character of the offence actually committed by each must be decided by the jury charged with the disposition of the indictment gainst him. To the first question in the reserved case the only possible answer was in the negative.

The learned judge, in my opinion, sufficiently instructed the jury as to the three verdicts which may be rendered on an indictment for murder and as to the distinction between murder and manslaughter. He discussed adequately and correctly all the relevant grounds on which in this case the culpable homicide charged to have been aided, abetted or instigated by Joseph Rémillard might possibly have been reduced from murder to manslaughter. Having read to the jury the definitive provisions of s. 259 of the Criminal Code dealing with murder, he instructed them that, if the homicide were not excusable, their verdict should be guilty of manslaughter, unless the facts proved warranted a verdict of murder. That was equivalent to a reading to them of s. 262 of the Code—the omission of which from the charge was made the subject of serious complaint. The learned judge also read and explained s. 261, which deals with the effect of provocation, and discussed the several matters suggested in the course of the defence by way of excuse and in palliation. Without characterizing the

charge as a model presentation of the case to the jury, with Mr. Justice Carroll I regard it as fulfilling the requirements of the law and not warranting interference by an appellate court on any ground covered by the reserved case.

The second and third questions should, in my opinion, be answered as they were by the Court of King's Bench.

BRODEUR J. (dissenting).—Trois questions principales nous ont été soumises. La première porte sur la validité d'un verdict de meurtre contre un complice quand l'auteur de l'homicide n'aurait été trouvé coupable que de *manslaughter*. Par les deux autres questions on nous demande si le juge qui présidait au procès a suffisamment expliqué la différence entre le meurtre et le *manslaughter*.

L'appelant est accusé d'avoir tué un nommé Morissette, et il a été trouvé coupable de meurtre. Ce n'est pas lui cependant qui a tiré le coup de fusil qui a été malheureusement fatal, mais c'est son fils Roméo. L'accusé dans la présente cause n'a été que le complice de l'infraction.

Certains témoins, qui, je le suppose, ont été crus par le jury mais dont le témoignage est contredit par d'autres témoins, ont déclaré que le père, l'accusé en la présente cause, avait incité son fils à tirer sur la victime. C'est à raison de cette circonstance, je suppose, que la Couronne a persisté tout de même à procéder sur une accusation de meurtre contre le complice quand l'auteur lui-même du crime n'avait été trouvé coupable que de *manslaughter*.

L'article 69 du code criminel justifie cette procédure, vu qu'il met sur le même pied l'auteur et le complice d'une infraction et il les déclare tous

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les deux coupables de l'offence elle-même. Celui qui aide, provoque ou conseille un assassinat peut donc être trouvé coupable de meurtre lui-même, malgré qu'il n'ait pas perpétré lui-même le fait qui a produit la mort.

Nos lois criminelles depuis leur codification ont fait disparaître cette classification un peu subtile des accusés en principaux au premier degré, en principaux au deuxième degré et en complices avant le fait. Elles ont mis tous ces criminels sur le même pied. Chacun d'eux peut être poursuivi pour l'offense principale elle-même, quand bien même il n'aurait qu'aidé, assisté ou conseillé l'auteur du forfait (Russell on Crime, 6ème édition, pp. 176-177).

Ainsi dans le cas d'assassinat, celui qui a simplement provoqué une personne à tuer peut être mis en accusation de meurtre comme s'il avait porté lui-même le coup qui a terrassé la victime. Hawkins, "Pleas of the Crown," 8ème édition, vol. 2 p. 439, déclare que, même dans un cas d'homicide, le complice pourrait être trouvé coupable de meurtre lorsque l'auteur lui-même du crime ne serait coupable que de *manslaughter*.

> All those who are present when a felony is committed and abet the doing of it, as by holding the party while another strikes him or by delivering a weapon to him that strikes him, or by moving him to strike, are principal in the highest degree in respect of such abetment, as much as the person who does the act, which in judgment of law is as much the act of them all as if they had actually done it: and if there were malice in the abettor and none in the person who struck the party *** it will be murder as to the abettor and manslaughter as to the other.

Dans le cas actuellement devant nous le jury pouvait rendre un verdict de meurtre même si l'accusé n'eut été que le complice et n'eut pas porté lui-même le coup fatal. Chaque cause pouvait être jugée suivant son propre mérite et suivant la

preuve qui serait faite dans chacune d'elle sur la nature de l'offense. Le verdict dans l'une ne devait pas nécessairement être adopté dans l'autre cause.

La première question qui nous est soumise devrait donc recevoir une réponse négative.

Quant aux deux autres questions qui ont trait aux instructions du juge au jury, je ne puis pas en venir à la même conclusion que la Cour du Banc du Roi.

La question dans la cause était de savoir d'abord s'il y avait eu homicide coupable. L'accusé a tenté d'établir que l'assassinat avait été commis sous l'effet d'une provocation et qu'il était accidentel. Ces deux moyens de défense auraient pu le libérer de toute offence criminelle s'ils avaient été prouvés.

Le juge, dans son allocution aux jurés, s'est attaché à démontrer que la provocation n'était pas suffisante pour justifier Roméo Rémillard de faire l'acte qu'il a commis et que le coup de feu qui a été tiré ne pouvait pas être rangé dans la catégorie des accidents.

Après avoir lu soigneusement toute la preuve, je me suis convaincu moi-même que la provocation qui a été invoquée n'était pas suffisante pour pouvoir justifier l'homicide; et je ne crois pas non plus que les circonstances où le coup de feu a été tiré peuvent ranger l'acte accompli dans la catégorie d'actions qui, purement accidentelles, peuvent libérer complètement l'auteur de l'acte ou ses complices. Il y a donc, suivant moi, homicide coupable. L'homicide n'était pas justifiable ni excusable.

Mais cet homicide était-il volontaire ou involontaire? En d'autres termes y a-t-il eu meurtre ou simplement *manslaughter*?

Le juge malheureusement ne paraît pas avoir fait ressortir suffisamment la distinction entre ces deux offenses de meurtre et de *manslaughter*.

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L'honorable juge Carroll qui présidait la Cour du Banc du Roi et qui a décidé contre l'appelant, après avoir déclaré dans ses notes que l'allocution du juge est légale dans son ensemble, ajoute cependant qu'elle a pu

produire chez les jurés l'impression qu'aucun autre verdict que celui de meurtre ne pouvait être rendu.

Dans ce cas, peut-on dire que le juge a suffisamment renseigné le juré sur les faits de la cause dans leurs rapports avec le crime de *manslaughter?* Il n'y a pas de doute, suivant moi, comme je l'ai dit plus haut, que la provocation et le caractère accidentel du coup de feu ne pouvaient pas empêcher l'accusé d'être coupable d'homicide; car quand bien même des personnes auraient jugé à propos de venir faire visite à sa femme à une heure indue de la nuit, l'accusé n'aurait pas été justifiable de prendre un fusil et de les tuer. La provocation n'était pas suffisante pour cela.

Mais si dans le but de protéger son foyer contre la mauvaise réputation que la visite nocturne de ces jeunes gens peut lui imputer et si prenant un fusil il tente de leur tirer dans les jambes et si comme résultat de l'excitation ou par maladresse le coup va porter sur une partie vitale de l'un de ces visiteurs, sans aucune intention de sa part de causer la mort, n'y a-t-il pas lieu alors pour le juge de bien faire la distinction entre l'offense qui constitue un meurtre et celle qui constitue un *manslaughter?*

C'est ce qui n'a pas été fait dans cette cause-ci. L'allocution, au contraire, a porté sur ces incidents comme éléments du crime de meurtre, lorsque la preuve démontrait plutôt que les jurés étaient en présence d'un crime de *manslaughter.*

Il me paraît évident, pour ma part, qu'il n'y avait pas intention de tuer mais simplement de faire une démonstration qui empêcheraient ces visiteurs de répéter leurs visites nocturnes et de les forcer, eux et leurs semblables, de respecter le foyer de l'accusé. Sa pauvre femme était malheureusement victime de la boisson et ses moeurs, comme il arrive d'ordinaire dans tous ces cas, étaient un objet de scandale pour sa propre famille. Alors l'accusé a voulu la protéger contre ceux qui seraient tentés de profiter de ces faiblesses pour déshonorer son foyer.

Cela ne saurait justifier un droit cependant de prendre une arme à feu et de tuer ces visiteurs. Mais si, comme dans le cas actuel, le juge doit insister pour dire aux jurés qu'il y a crime, il doit le faire de façon à leur faire bien comprendre ce qu'est le meurtre, ce qu'est le *manslaughter*. Prenant la phrase que j'ai détachée de l'opinion du juge Carroll, je dis que si l'allocution du juge a pu produire chez les jurés l'impression qu'aucun autre verdict que celui de meurtre pouvait être rendu, il doit y avoir un nouveau procès.

Le juge ne doit pas se contenter de citer généralement le texte du code qui nous dit que sur une accusation de meurtre un accusé peut être trouvé coupable de meurtre, de *manslaughter*, ou acquitté; il ne doit pas non plus donner une définition plus ou moins vague de ces deux offenses, mais il doit considérer ces deux offenses à la lumière des faits prouvés et dire aux jurés d'une manière claire et précise les relations des faits prouvés avec le crime de meurtre et de *manslaughter*. Le but de l'allocution du juge aux jurés est de leur expliquer la loi qui gouverne la cause, de montrer les points essentiels qui doivent être prouvés de côté et d'autre, les relations de la preuve aux points en litige. Aussi dans un cas où les faits prouvés sont

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tout à la fois susceptibles de produire un verdict pour deux offenses différentes, il devient nécessaire pour le juge de déterminer qu'il y a criminalité et aussi de montrer clairement le degré de cette criminalité en rapport avec les offenses dont l'accusé peut être trouvé coupable.

Le juge doit définir le crime imputé à l'accusé et il doit également expliquer la différence entre ce crime et tout autre dont il pourrait être trouvé coupable. Le défaut pour le juge de renseigner le jury sur le meurtre et le manslaughter a été jugé suffisant dans la cause de *The King* v. *Wong On* (1), pour ordonner nouveau procès.

Sir James Stephen, dans son ouvrage "General View of Criminal Law," 2ème édition, p. 170, dit ceci:

> I think that a judge who merely states to the jury certain propositions of law and then reads over his notes does not discharge his duty.

Une cause à peu près semblable à la présente a été décidée en Angleterre il n'y a que quelques années; c'est celle de *King* v. *Hopper* (2).

Il s'agissait, dans cette cause de Hopper, d'une accusation de meurtre; et l'accusé, comme dans la présente cause, plaidait provocation et accident. Au procès, le juge a fermement exprimé l'opinion que c'était un cas de meurtre ou d'acquittement. Il n'a pas voulu déclarer que la provocation et l'accident pouvaient être tels que l'offense pût être considérée comme *manslaughter*. Lord Reading, qui a rendu le jugement de la Cour d'Appel, a décidé que les circonstances prouvées pouvaient justifier un verdict de *manslaughter* et que le juge aurait dû instruire le jury en conséquence.

(1) [1904] 8 Can. C.C. 423. (2) [1915] 2 K.B. 431.

Dans le cause actuelle, le juge, il est vrai, n'a pas été aussi positif que dans la cause de Hopper; mais il a tout de même laissé le jury sous l'impression que le seul verdict qui pouvait être rendu était celui de meurtre.

Je suis d'opinion, pour ces raisons, que les instructions du juge au jury étaient incomplètes et par conséquent illégales.

Il devrait y avoir un nouveau procès et l'appel devrait être maintenu.

MIGNAULT J.—The appellant having been tried at Quebec on an indictment for the murder of one Lucien Morissette before Mr. Justice Désy and a jury, was found guilty and death sentence was passed on him. The learned trial judge refused to state certain questions for the opinion of the Court of King's Bench sitting in appeal, but on appeal to the latter court, he was ordered to state for the opinion of that court the following questions:

1°. Should I have told the jury, as a matter of law, that the author of the crime, Roméo Rémillard, having been by another jury previously convicted of the crime of manslaughter, the accused (if in the opinion of the jury he was an aider and abettor) could not be convicted of the crime of murder; but the only verdict that could be rendered was one for manslaughter or acquittal?

2°. (a) Should I have pointed out to the jury the three verdicts that could be rendered upon a charge of murder, viz.: guilty of murder, guilty of manslaughter, or not guilty?

(b) If yes, did I sufficiently so instruct the jury?

3°. (a) Should I have pointed out to the jury what in law constituted the offence of manslaughter?

(b) If yes, did I sufficiently so instruct the jury?

After hearing counsel, the Court of King's Bench answered the first question in the negative, the two branches of question two in the affirmative and the two branches of question three also in the affirmative.

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Mr. Justice Guerin dissented and would have answered question one in the affirmative, the first branches of question two and three in the affirmative and the second branches of these questions in the negative.

This dissent permitted the further appeal which has been taken to this court, and, in view of its terms, the whole case is open for review. It should be remarked, as to questions two and three, that the five judges were of opinion that it was the duty of the trial judge to direct the jury in the manner stated in the first branches of these questions, the majority of the learned judges being of opinion that the trial judge had sufficiently instructed the jury on the points referred to.

First question. Briefly stated the contention of counsel for the appellant is that the learned trial judge should have told the jury that inasmuch as Roméo Rémillard, the appellant's son, who fired the fatal shot, was previously tried on an indictment for the murder of Lucien Morissette, and found guilty of manslaughter only, the appellant, if in the opinion of the jury he was an aider and abettor, could not be convicted of the crime of murder, but that the only verdict that could be rendered was one for manslaughter or acquittal.

The circumstances under which the jury found a verdict of murder against the appellant are not mentioned in the reserved case, and cannot be perfectly ascertained by reading the charge to the jury, in which the learned trial judge commented on facts well known to the jury. I think however that we have only to deal with the facts assumed in question one, that is to say that Roméo Rémillard was the author of the crime, and was previously convicted by another

jury of manslaughter. We must also assume that there was evidence upon which the jury could find that the appellant was an aider and abettor in the crime committed by Roméo Rémillard.

Assuming these facts, in order to determine whether it was the duty of the learned trial judge to direct the jury that the only verdict they could find against the appellant was one for manslaughter or acquittal, it is necessary to consider certain sections of the Criminal Code. The old distinction between accessories before the fact and principals has been abolished, and section 69, paragraph 1, of the Criminal Code enumerates those who are parties to, and guilty of, an offence.

> Every one is a party to and guilty of an offence who,—
> (a) actually commits it; or
> (b) does or omits an act for the purpose of aiding any person to commit the offence; or,
> (c) abets any person in commission of the offence; or,
> (d) counsels or procures any person to commit the offence.

Paragraph (a) of subsection 1 applies to Roméo Rémillard, who actually committed the offence, and the other paragraphs comprise those who formerly were termed accessories before the fact, and who are now, equally with the perpetrator, parties to and guilty of the offence. If the jury were of the opinion that the appellant was an aider and abettor in the offence committed by Roméo Rémillard, they could undoubtedly find him a party to and guilty of this offence.

To aid or abet is defined as follows in Stroud's Judicial Dictionary, vol. 1, p. 64:

> To constitute an aider or abettor, some active steps must be taken, by word or action, with intent to instigate the principal or principals. Encouragement does not, *of necessity*, amount to aiding and abetting. It may be intentional or unintentional. A man may

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unwittingly encourage another in fact by his presence, by misinterpreted words or gestures, or by his silence or non-interference:—or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets; in the former he does not. It is no criminal offence to stand by a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent it and had the power so to do or at least to express his dissent, might, under some circumstances, afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged, and so aided and abetted. But it would be purely a question for the jury whether he did so or not (per Hawkins, J., *The Queen* v. *Coney* (1)).

It is obvious here that it was for the jury to determine whether a case of aiding and abetting was made out.

But it is contended that the offence committed by Roméo Rémillard was manslaughter, as shewn by the verdict rendered against him and which must be taken to have been justified by the evidence, and that therefore they could not find the appellant guilty of the greater offence, that of murder.

This reasoning necessarily implies that the verdict found in another trial against Roméo Rémillard is conclusive evidence in the trial of Joseph Rémillard of the nature of the offence committed by the former, of which offence question one assumes that the latter could be found to have been an aider and abettor. I think that this shews the fallacy of the appellant's contention, for what was decided in Roméo Rémillard's case was entirely irrelevant in the trial of his father, and the learned trial judge would have erred had he told the jury that because the son in another case had been found guilty of manslaughter, the father, when separately tried, could not be convicted

(1) [1881] 51 L.J.M.C. 66, at p. 78.

of the greater offence of murder, for that would have been giving to the verdict in the Roméo Rémillard case a conclusive effect in the Joseph Rémillard trial; in other words, treating it as *res judicata*, which it certainly is not. Unless the provisions of sect. 69 Crim. Code are borne in mind, confusion may be caused by treating the one as the actual perpetrator, the other as the aider and abettor, and measuring the guilt of the latter by the guilt of the former. Both are principals or rather parties to and guilty of the offence committed (sect. 69), that is to say culpable homicide, and culpable homicide is murder when committed with intent actual, or presumed in the cases mentioned in section 259, subsection (b), (c) and (d), to cause death, and manslaughter when that intent does not exist. So between two parties, within the meaning of sect. 69, to a culpable homicide, it is conceivable that one may be shewn to be guilty of murder and the other of manslaughter. And on the trial of the appellant, the jury could certainly determine what was the crime committed and, if the evidence justified the verdict, find the appellant guilty of murder, notwithstanding the fact that Roméo Rémillard in another trial was, for the same culpable homicide, convicted of manslaughter.

My opinion therefore is that question one must be answered in the negative.

Question two. I would answer both branches of this question in the affirmative. It is common ground that it was the duty of the learned trial judge to tell the jury that three verdicts could be rendered upon a charge of murder, to wit, murder, manslaughter, or acquittal, and the learned judge did so.

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Question three. The appellant's counsel greatly insisted on this question, contending that the evidence was such as would have rendered a verdict of manslaughter possible, and that the jury were not sufficiently instructed as to what constitutes the offence of manslaughter.

I have twice read the learned judge's charge. He very particularly explained to the jury the nature of murder, quoting the different provisions of the code which deal with this crime. There is no definition in the code of manslaughter, and section 262, stating that culpable homicide, not amounting to murder, is manslaughter, even if it could be regarded as a definition, was not read to the jury. However, at different parts of his charge, while discussing the defences urged by the appellant, the learned judge referred to manslaughter. Thus, on the defence of provocation, the learned judge cited section 261 of the code, the effect of which is that culpable homicide may be reduced to manslaughter where death is caused in the heat of passion occasioned by a sudden provocation. After reading the first and second paragraphs of section 261, he said:

> Vous vous demanderez si nous sommes dans ce cas là, et si on a eu le temps de reprendre son sang-froid avant que le coup de feu ne soit tiré.

And after reading the third paragraph of this section, he adds:

> Par conséquent, c'est une question qui doit être déterminée par vous-mêmes si une action quelconque qui aurait été prouvée ici, ou une insulte particulière, constitue une provocation, et si la personne provoquée a réellement perdu son sang-froid par la provocation. Ce sont là des questions de fait dont vous êtes les seuls maîtres et que vous devez déterminer après avoir examiné la preuve à la lumière des principes de droit qui vous ont été exposés.

Further on, the learned trial judge quoted from Russell on Crimes, vol. 1, p. 693, translating as follows:—

Pour réduire le crime de meurtre à l'homicide involontaire, la provocation, il faut que les circonstances justifient la conclusion que l'acte fait avec l'intention de causer la mort ou des blessures corporelles graves, n'a pas été le résultat d'une décision froidement prise après délibération et d'une malice réflective, et n'est imputable qu'à la faiblesse de la nature humaine.

And the learned judge thus commented on this passage:

Vous vous demanderez si la preuve démontre en dehors de tout doute que le projet qui a été exécuté entre minuit et une heure du matin le vingt-huit janvier n'était pas un projet qui avait commencé à se former et à s'exécuter graduellement depuis la veille au matin.

Vous examinerez les faits et gestes, pas et démarches de l'accusé à la barre, les déclarations qu'il a faites, vous examinerez toute sa conduite et vous donnerez la réponse à cette question.

Immediately following the passage I have quoted, the learned trial judge instructed the jury as to the claim made that the accused was justified in using force to prevent the breaking into of his house at night. He said:

L'article 60 du Code Criminel dit:

Quiconque est en paisible possession d'une maison d'habitation, et quiconque lui prête légalement main-forte ou agit sous son autorité, sont justifiables d'employer la force nécessaire pour empêcher l'effraction de cette maison d'habitation, de nuit, par qui que ce soit, s'il croit, pour des motifs raisonnables et plausibles, que cette effraction est tentée dans le but d'y commettre quelque acte criminel.

Est-ce que dans ce cas ici aucune personne a essayé à commettre une effraction chez l'accusé à la barre?

Est-ce qu'il n'est pas prouvé hors de tout doute que Morissette aprés avoir dépassé de quelques pieds la maison de Rémillard en se dirigeant vers chez les Baker, et étant dans le doute que la maison de Baker fût réellement ce qu'elle était et basant ce doute sur le fait que Baker ne les avait laissés qu'une demi-heure avant et qu'il n'y avait pas de lumière dans la maison de Baker puisqu'il y en avait dans la maison de Rémillard, est-ce que, dis-je, il y a eu effraction de la part de Morissette?

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Mignault J.

N'est-il pas vrai que Morissette a fait comme tout homme bien élevé qui arrive dans une maison respectable; qu'il a sonné à la porte avant d'entrer? Est-ce qu'il n'est pas prouvé qu'il a enlevé son chapeau et qu'il a posé poliment une question à la personne qui lui ouvrait la porte?

Again the learned judge, referring to the suggestion of the defence that the prisoner's wife was a prostitute and that the deceased and his companions had come to the prisoner's house at night in order to commit adultery with her, quoted from some unnamed authority as follows:

Si un homme en trouve un autre commettant l'adultère et le tue ou le tire dans le premier transport de sa passion, il n'est coupable que d'homicide involontaire, car la provocation est grave et la loi présume que le mari n'a pu se contrôler. Mais celui qui tue l'adultère délibérément et par vengeance est coupable de meurtre. Ainsi, si un père voit quelqu'un commettre avec son fils un acte contre nature et le tue instantanément ce ne sera qu'un homicide involontaire. Mais s'il en entend parler seulement, recherche ensuite cette personne et la tue, ayant eu le temps de reprendre ses sens, ce sera un meurtre.

And as to the claim made that the accused had acted in self defence, the learned judge said:

Si une personne recevant un coup se revenge immédiatement avec une arme ou autre instrument qui lui tombe sous la main, l'offense ne sera qu'homicide involontaire, pourvu que le coup ait été porté sous le coup de la colère résultant de la provocation, car la colère est une passion à laquelle sont sujets les bons comme les méchants. Mais la loi exige deux choses:

1°. Qu'il y ait eu provocation; 2°, que le coup puisse clairement être attribué à l'influence de la passion résultant de la provocation.

Y a-t-il eu assaut dans le cas actuel?

Le coup a-t-il été tiré sous le coup de la colère, colère provoquée par cet assaut, le tout à la connaissance de l'accusé en cette cause?

Si vous en arrivez à la conclusion que ce drame s'est déroulé sous l'influence soudaine de la passion, vous devrez appliquer la loi que je viens de vous exposer, mais si vous en arrivez à la conclusion que l'accusé d'abord a fait quelques actes d'omission ou de commission conformément aux principes de la loi que je viens de vous citer, et qu'il a agi ou refusé d'agir sans être sous l'influence soudaine de la passion, mais bien sous l'influence de cette disposition dépravée et de ce mauvais esprit que la loi nomme "malice" dans la définition du meurtre, alors l'offense ne sera pas l'homicide involontaire mais ce sera le meurtre.

In view of all this I cannot come to the conclusion that the learned trial judge did not sufficiently instruct the jury as to what in law constitutes the offence of manslaughter, at least in so far as was necessary to decide upon the different defences relied on by the accused, and as to these defences the learned judge told the jury under what circumstances, if they thought them established, a verdict of manslaughter could be returned. Such a method of instruction was probably more useful to the jury than citing to them sect. 262 of the Criminal Code, or theoretically explaining the differences between murder and manslaughter. The charge as a whole was a strong one against the prisoner and may have given the jury the impression that the proper verdict to return was a verdict of murder, while leaving them entirely free to appreciate the evidence and come to their own conclusions thereon. Even if I thought that this amounts to misdirection, and I cannot say that, I would not be justified in setting aside the verdict unless I felt convinced that some substantial wrong or miscarriage was occasioned by the judge's charge (sect. 1019 Criminal Code). I cannot come to this conclusion after carefully reading the learned judge's charge and the circumstances there referred to as far as disclosed, and if the learned trial judge's comments on the facts are fair, and no objection thereto was taken at the trial, my opinion is that no substantial wrong or miscarriage was occasioned, even if the impression was left on the minds of the members of the jury that the proper verdict to return was one of guilty of murder.

I would therefore answer both branches of question three in the affirmative.

As a result the appeal must be dismissed.

Appeal dismissed.

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*Feb. 24.
*Mar. 11.

EDMUND G. McCARTHY.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Criminal law—Manslaughter—Person killed by automobile—Criminal liability of driver—Degree of care—Sections 247 and 258 Cr. C.

The driver of an automobile, who fails to take reasonable precautions against, and to use reasonable care to avoid, danger to human life is, under section 247 of the Criminal Code, criminally responsible for the consequences.

Judgment of the Court of Appeal ([1921] 1 W.W.R. 443) affirmed.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), on a reserved case for the opinion of that court. The appellant was convicted of manslaughter for unlawfully killing a workman who was working in a manhole in the street by striking him with his motor car, and the conviction was sustained by the Court of Appeal.

The material facts of the case are stated in the judgments now reported.

Geo. F. Henderson for the appellant.

Harold Fisher for the respondent.

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

(1) [1921] 1 W.W.R. 443.

IDINGTON J.—The appellant whilst in charge of and driving an automobile in one of the streets of Regina, ran it over an obstacle described as follows by the learned trial judge:—

> The tarpaulin was thrown over a form extending about five or six feet from north to south, and looking at it from the north or from the south it was in the shape of an inverted V. The top of this V would be somewhere between four and five feet high. Possibly nearer four than five feet. The width of the bottom of the V would be between three and four feet. The measurements were not given at the trial, but a witness erected a tarpaulin at the trial, in the presence of the court and jury to represent its position at the time of the accident.

The structure so described covered a manhole in the street where three men were working for the provincial telephone department, and one of them was killed as the result of this adventure on the part of the appellant.

For so killing that man appellant was indicted for manslaughter and found guilty thereof.

The street in question was a wide one on which there was ample room for appellant to have driven the car in question over the unobstructed part of the street and passed the said structure in safety.

The learned trial judge submitted, after said conviction, a reserved case containing the following question:—

> 1. Did I properly instruct the jury as to the negligence which under the circumstances of the case, would render the accused guilty of manslaughter?
>
> 2.—In view of the fact that there was no evidence that the accused saw the deceased nor knew that the deceased was under the tarpaulin referred to in the evidence, could the accused be found guilty of manslaughter?

The learned judges of the Court of Appeal with the exception of Mr. Justice Newlands, answered these questions in the affirmative and sustained the conviction.

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Idington J.

The opinion of the majority was written by Mr. Justice Lamont who reviewed at length many decisions which support the judgment now appealed from, if any needed beyond the relevant section of the Criminal Code which I am about to quote.

Mr. Justice Newlands held that in light of some expressions in decisions of long ago that

> there must be gross negligence before there is criminal liability (and that) the want of ordinary reasonable care which an ordinary prudent man would have observed, although sufficient to render the accused liable in a civil action, is not sufficient in a criminal case.

Several of the cases he cites were mere *nisi prius* expressions which are not at the present day of much value, even if, as I submit, possibly relevant to the then state of the law.

The law applicable to this case is to be found in section 247 of the Criminal Code, cited by Mr. Justice Lamont, which reads as follows:—

> 247.—Everyone who has in his charge or under his control anything whatever animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care may endanger human life, is under a legal duty to take reasonable precautions against and use reasonable care to avoid, such danger and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.

This was first enacted in the Criminal Code of 1892, section 13.

It leaves no room for the refined distinctions between negligence and gross negligence.

It imposes an absolute duty on the part of him having charge of that which in its use may endanger human life, to take precaution and care.

It should not, I respectfully submit, be frittered away by any refinement on the part of judges.

The learned trial judge's charge throughout was absolutely correct until he momentarily, on objection, interjected the remark that there was a possible distinction between that which would render a man liable for civil damages for negligence, and that which would render him liable criminally.

Even if the distinction had been maintainable as I hold it is not in the application of this section, he seems to have covered the ground.

I should have preferred the charge before so amended.

Section 1019 of the Criminal Code, which reads as follows:—

1019.—No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the court of appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted,

might, if need be for which in my view there is none, be relied upon. If Mr. Justice Newland's view is correct it should be applied.

The negligence here in question which led to appellant's motor car running over such an obstacle on the street as the above description presents when ample space to pass it without doing so, was so palpably gross that there was not much to be found in the way of palliation even if the old saws about gross negligence could be invoked and relied upon.

There was, in my opinion, no miscarriage of justice.

The appeal should, I think, be dismissed.

DUFF J.—Section 258 of the Criminal Code does not I think, substantially change the common law. In this I agree with the opinion of Mr. Justice Sedge-

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Duff J.

wick delivered on behalf of the court, in the *Union Colliery Company's Case* (1). There may, I think, be cases in which the judges ought to tell the jury that the conduct of the accused in order to incriminate him under this section must be such as to imply a certain indifference to consequences, but such cases, I think, must be rare and this assuredly is not one of them. Where the accused, having brought into operation a dangerous agency which he has under his control, (that is to say dangerous in the sense that it is calculated to endanger human life), fails to take those precautions which a man of ordinary humanity and reasonably competent understanding would take in the given circumstances for the purpose of avoiding or neutralizing the risk, his conduct in itself implies a degree of recklessness justifying the description "gross negligence." The facts of course may disclose an explanation or excuse bringing the accused's conduct within the category of "reasonable" conduct. But as Vaughan J. said long ago in *Bushell's case* (2), the judge does not charge the jury with matters of law in the abstract but only upon that law as growing out of some supposition of fact; and it is much better in such a case as the present, (where, in the absence of explanation, the conduct of the accused—driving a motor through a frequented street at the rate of 12 miles an hour without seeing the road clearly before him—plainly inculpates him) that the trial judge should seek, as Mr. Justice Lamont did, to bring the jury to concentrate their attention upon the various matters alleged in explanation and excuse.

(1) [1900] 31 Can. S.C.R. 81 at p. 87. (2) [1677] Vaughan, 135; 6 State Trials, 999.

ANGLIN J.—I would dismiss this appeal. There was dissent in the court of appeal only upon the first question of the reserved case. To that question s. 247 of the Criminal Code precludes any but an affirmative answer. Failure to take reasonable precautions against, and to use reasonable care to avoid, danger to human life is thereby declared to entail criminal responsibility for the consequences. There is nothing in s. 16, referred to by Mr. Henderson, to qualify this explicit declaration; and s. 258 has no bearing, in my opinion, on a case of manslaughter. It would be most unfortunate if anything should be said or done in this court to countenance the idea that a motor car may be driven with immunity from criminal responsibility if reasonable precautions be not taken against, and reasonable care be not used to avoid, danger to human life. As Mr. Justice Bigham said on the trial of a chauffeur for manslaughter by running over a woman in a London street:—

> There is a greater responsibility on a person engineering a dangerous machine like a large motor car about the streets than on a man driving a one horse brougham. *Rex* v. *Davis*. (1)

What are reasonable precautions and what is reasonable care depends in every case upon the circumstances. Carelessness which ought to have been recognized as not unlikely to imperil human life cannot, in my opinion, be regarded as aught else than culpable negligence.

BRODEUR J.—This appeal arises out of a conviction for manslaughter in the case of a man driving negligently an automobile.

(1) [1908] 43 L.T. 38.

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Brodeur J.

It is contended by the accused that there must be gross negligence to incur criminal liability and that the degree of negligence must be higher in criminal cases than in civil cases.

A large number of cases have been quoted to us on this point and they might appear somewhat conflicting though I think that they could be reconciled by a careful examination of the facts in each case. But the language itself of the Criminal Code disposes of this issue. It says in article 247:—

> Everyone who has in his charge or under his control anything whatever, whether animate or inanimate * * * which, in the absence of precaution or care, may endanger human life, is under a legal duty to take *reasonable precautions against*, and use *reasonable care* to avoid such danger and is criminally responsible for the consequences of omitting without lawful excuse to perform such duty.

Nobody will dispute the fact that an automobile negligently driven is a dangerous thing. Then the driver of his automobile on the street is bound to take reasonable precaution and use reasonable care to avoid any danger.

If our legislators intended to state that there would be criminal liability only in the case of reckless or gross negligence, they would certainly have so declared their intent. But they simply incorporated in our criminal statutes these expressions so well known and so fully construed in the cases of civil negligence.

The absence of reasonable care in driving an automobile may then create a criminal liability. The following cases may be quoted in support of this contention: *Reg.* v. *Murray* (1); *Rex* v. *Grout* (2); *The Queen* v. *Dalloway* (3).

Even if we construe the judge's charge as the appellant contends, I consider it legal and sufficient.

The appeal should be dismissed.

(1) [1852] 5 Cox C.C. 509. (2) [1834] 6 C. & P. 629.
(3) [1847] 2 Cox C.C. 273.

MIGNAULT J.—The appellant was tried on an indictment for manslaughter for having, when driving a motor car in a public street of Regina, caused the death of one Percy Young. The learned trial judge, in charging the jury, directed them as to the law governing the case as follows:—

> It has been decided and I am going to tell you that the law is, that every person who drives a motor car has a duty to drive it with such care and caution as to prevent, so far as is in his power, any accident or injury to any other person; that is, he has got to use all reasonable precaution to see that no person is injured through his want of caution or precaution.

After the charge, counsel for the accused complained that the learned judge should have told the jury that a greater degree of negligence was required in a criminal case than in a civil one, and the learned judge recalled the jury and gave them this further direction:—

> I am also asked to direct your attention to the fact that in a criminal case the degree of negligence which renders a man culpably negligent is greater than in a civil case. I think that is quite so, and I am going to charge you to that effect—that while in a civil case a man may be liable to an action for damages, in a criminal case it would take a greater degree of negligence to render him liable. That is so. But in this case it is for you to say whether or not the accused, driving a vehicle of that sort along the streets of the city took that care which it was the duty of an ordinary prudent man to take in order to avoid doing damage to some person else on the street. If you come to the conclusion that he did not take that care, and that it was in consequence of that want of care that the death of Young took place, then he is guilty; if he did take that care he is not guilty.

Notwithstanding Mr. Henderson's able argument, I cannot come to the conclusion that the jury was misdirected. Section 247 of the Criminal Code states the law as follows:—

> Everyone who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or

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care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.

I think the charge is fully supported by this section. It was the duty of the accused to take reasonable precautions to avoid endangering human life, and the jury was told so. It was then for the jury to determine whether the accused had taken these precautions.

Naturally, in the offence of manslaughter, there may be a greater or less degree of guilt according to the circumstances of each case. I see no reason to doubt that the degree of guilt in this case will be duly considered when sentence is pronounced on the jury's verdict.

Appeal dismissed.

WILLIAM MILBURN AND OTHERS (DEFENDANTS)..... } APPELLANTS;

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*Feb. 4.
*Mar. 11.

AND

WILLIAM GRAYSON AND P. A. REILLY (PLAINTIFFS).....

AND

THE EXECUTORS AND ADMINISTRATORS TRUST COMPANY AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Will—Interpretation—Legacies—Condition precedent—Revocation—Residuary bequest—Interest—Real estate—Conversion—Personalty—Appeal—Question of costs.

By his will, one William Walsh, after bequeathing to the appellants the sum of $800 each, directed that the proceeds of two policies of insurance in two different companies should become part of his estate. By a codicil, he further declared that "in order that there may not be any possible misapprehension in respect" to the above bequests, "in the event of its being found that I have not effectually by the said will ordered that the moneys due under (one policy) and under (the other policy) should be and become part of my estate, * * * the said bequests * * * be and are hereby revoked." The order of the testator as to the moneys payable under one policy was effectual, but as to the other was ineffectual.

Held, Mignault J. dissenting, that, there being nothing in the context to warrant reading "and" as "or", the courts must adhere strictly to the intention expressed; and as the condition precedent upon which revocation of the legacies was to take place did not come into existence, the legacies have not been revoked.

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

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Per Mignault J. dissenting.—As the testator did not succeed in making the moneys due under one of the policies a part of his estate the legacies have been revoked.

By another clause of his will, the testator bequeathed "all the residue of my personal estate and effects" to certain persons therein designated "to be paid to them without interest when they reach the full age of twenty-one years." The question submitted to the court was whether the residuary legatees were entitled to the interest or income accruing from investments of the residuary personalty notwithstanding the words "without interest."

Held, that the legatees were entitled to such interest, as it remained part of his estate and passed under the residuary bequest of personalty.

After having bequeathed all the residue of his personal estate and effects as above stated, the testator bequeathed "all my real estate of every kind and all my personal estate and effects unto my executors * * * according to the nature thereof upon trust, that my trustees shall and will call in and convert (the same) into money * * * : to pay my funeral and testamentary expenses and debts (and) the legacies bequeathed by this my will."

Held, that the testator's intention, by the direction for conversion, was not to make the proceeds of his real estate personalty so that it should, as such, fall within his residuary bequest; and the surplus of the proceeds, after the payment of the debts and legacies must pass as on an intestacy.

The executors of the will commenced this action by way of originating summons in order to submit the above questions arising upon the construction of the will for the opinion of the court. They were represented by counsel in the trial court and, being served with notice of appeal, before the Court of Appeal but the latter court refused them any costs.

Held, Duff and Anglin JJ. dissenting, that this court should not interfere with the discretion exercised by the Court of Appeal on a question of costs.

APPEAL from the judgment of the Court of Appeal for Saskatchewan, reversing the judgment of the trial court, Bigelow J. and maintaining the cross-appeal of the official guardian, now respondent.

One William Walsh died on the 23rd day of May, 1914, having previously executed his will, dated the 26th day of April, 1912, and a codicil, dated the 6th day of May, 1912. Letters probate in respect of the

will and codicil were granted to the respondents, William Grayson and P. A. Reilly, the executors therein named. They then took out an originating summons for the determination of certain questions arising upon the construction of the following clauses of the will.

The first question was whether the appellants or any of them are entitled to any portion, and if so, what portion of the sum of $800.00 directed to be paid to each of them under the following clauses in the said Will and Codicil thereto, namely:

Clause A. (will): "I bequeath to my nephews William Milburn, Robert Milburn, Walter Milburn, and to my nieces, Mary Milburn, Ida Milburn, the sum of Eight Hundred ($800.00) Dollars each, to be paid to them without interest four years after my death."

Clause B. (will): "I hereby direct that the proceeds of my policy of insurance in the Independent Order of Foresters to the best of my recollection, number 57437, for Two Thousand ($2,000.00) Dollars, dated January 18th, 1893, and that the proceeds of my policy of insurance in the Ancient Order of United Workmen for Two Thousand ($2,000.00) Dollars, dated July 21st, 1892, notwithstanding any designation of beneficiary or beneficiaries herein shall be and become part of my estate directed to be distributed in this my will."

Clause C. (codicil): "In order that there may not be any possible misapprehension in respect to my bequests in my said will to my nephews and nieces, the children of my sister, Margaret A. Milburn, I hereby declare that in the event of it being found that I have not effectually by the said will ordered that the moneys due under the policy of insurance in

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the Independent Order of Foresters No. 57437 and under the policy of insurance in the Ancient Order of United Workmen, dated August 1st, A.D. 1892, should be and become part of my estate directed to be distributed under the terms of my said will, the said bequests to the said nephews and nieces, the children of my said sister, be and are hereby revoked."

After the testator's death his executors claimed and received from the Independent Order of Foresters the amount due under his insurance policy in the Order. The Ancient Order of United Workmen refused to pay the executors the amount of the policy in that Order, on the ground that there was no effectual designation of beneficiaries by the will, and that, the beneficiary designated in the policy having died before the testator, the amount of the policy was payable to the next-of-kin. The executors thereupon sued the Order for the amount of the policy; and Brown J., before whom the action was tried, decided that the amount of this policy formed no part of the testator's estate. There was no appeal from this decision, and the Order paid the amount of the policy to the next-of-kin.

The trial judge in the present action held that the appellants were entitled to the sum of $400 each; but the Court of Appeal held that the appellants were not entitled to any part of the legacies to them.

The second question was whether the entire residue of both real and personal estate including accrued interest or other income, if any, is payable to the children of the testator's nephew, represented in this case by the Trust Company and the official guardian, now respondents, and if not so payable, who is entitled thereto and in what proportions, the whole under the following clauses of the will:

Clause D. (will): "I bequeath all the residue of my personal estate and effects share and share alike to the following children of my nephew Frederick J. Walsh, Jean Mary Walsh, Kathleen Lillian Walsh, Marie Margaret Walsh, Thomas Robert Walsh, Frederick Michael Walsh, to be paid to them without interest when they reach the full age of twenty-one years."

Clause E. (will): "I devise and bequeath all my real estate of every kind and all my personal estate and effects, unto my executors and the survivor of them, and his successor, their and his heirs, executors and administrators respectively, according to the nature thereof upon trust, that my trustees shall and will call in and convert into money, and such thereof as shall not consist of money within four years from the date of my death, and shall call in and add to the monies produced on such sale, call in and convert and call in and add to my said moneys:

"1. Pay my funeral and testamentary expenses and debts.

"2. The legacies bequeathed by this my will."

The trial judge held that the above named children were entitled to the entire residue with the interest and income and that the proceeds of the real estate must all be considered as personalty and passed under the residuary bequest of personal estate; and the Court of Appeal maintained this holding.

The Court of Appeal gave costs to all parties, except the executors, out of the estate and gave no costs to the executors. The latter cross-appeal to this court against the award of costs to the appellants out of the estate and against the refusal of costs to them.

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Idington J.

Christopher C. Robinson for the appellants.

M. G. Powell for the respondents Grayson *et al.*

J. A. Ritchie for the respondents, the executors and Administrators Trust Co. and the official guardian.

IDINGTON J.—This appeal arises out of the submission made to a court below for a construction of the last will and testament of William Walsh, dated 26th April, 1912, and a codicil thereto dated 6th May, 1912.

The second question thus submitted was stated as follows:—

> (b) Whether William Milburn, Robert Milburn, Walter Milburn, Mary Milburn and Ida Lewis, formerly Ida Milburn, or any of them are entitled to any portion, and if so, what portion of the sum of $800.00 directed to be paid to each of them under the following clauses in the said will and codicil thereto, namely,—(see clauses A, B, C, page 51), in view of the fact that no moneys under the policy of insurance in the Ancient Order of United Workmen were paid or became payable to the estate of the said deceased.

Mr. Justice Bigelow before whom the application was first heard construed the said will and codicil as giving to the Milburn legatees each a share of the moneys due under the policy of the Independent Order of Foresters, which undoubtedly became part of the estate of the testator.

He seems to have observed the fact that the total amount of the two policies on their nominal face value of $2,000 each, would, when added together, amount to the sum of $4,000, which would produce to each of the Milburn legatees, the sum of $800, and that the intention of the testator, when illuminated by what appears in the codicil, was probably, when read in light thereof, to have the said legacies paid out of that fund.

The testator had not, whatever may have been in his mind, clearly expressed by his will any such intention. It may be highly probable that in light of what is now presented to us that it was from the fund these policies would produce that he desired to pay the said legacies.

The bequests are made in the most absolute form and hence payable out of his estate unless he has in some way *pro tanto* revoked his will.

Upon appeal to the Court of Appeal for Saskatchewan that court reversed the said judgment.

Curiously enough that judgment of reversal proceeded upon the assumption that the language of the codicil is plain and unambiguous and therefore held the said legacies to each of the Milburns had been revoked thereby.

They now appeal from that judgment to this court and their counsel points out (what is fairly arguable in my opinion) that so far from the said language of the codicil being "clear and unambiguous" it is capable of other meanings than that given it by the court of appeal below.

If the disjunctive "or" had been used instead of the conjunction "and," of course there would have been a clear revocation on account of one of the policies having, by its terms, been given to others designated in same, and hence did not fall into the testator's estate.

But the implied, if not the express, condition precedent upon which the alleged or intended anticipative revocation of the codicil was to take place, never came into existence, and the legacies stand unrevoked. In any event, unless and until a clear intention to revoke appears we should not hold the bequests revoked.

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The bequests to appellants and the direction that the proceeds of the policies should become part of testator's estate, were in the will separated by five paragraphs, each distinctly dealing with other matters.

Yet they were, I submit, improperly presented, in the question submitted relative to them, as if the bequests and directions had been so placed or connected in the will, suggesting a possibly close relation of these subject matters, and tending thereby to confuse.

No one could suspect any such relationship of subject matters from a mere reading of the will.

And the codicil is in the same question placed next after two independent clauses.

Whether all this has in fact confused I know not. But such a condition of things leads me to repeat that there never was in fact room for so blending, as it were, subject matters absolutely independent of each other, and each to be given only its own express force and effect by strict observance of the language used in each expression of thought so presented.

It is fairly arguable that the testator having disclosed by the codicil what he had in mind relative to the source from which these legacies were to be paid, we may, without resorting to mere speculative opinion of possible intention having any sphere in which to operate, clearly find that unless and until there was a failure to bring both policies into his estate, no revocation was intended.

The appeal should, therefore, be allowed with costs throughout to appellants out of testator's estate.

I agree that if such view as that of Mr. Justice Bigelow had been suggested to the testator framing this codicil, he possibly would have assented thereto but more probably would have considered who had

in fact been designated, and seen that they, or some of them, did not get the duplicate shares they were seeking, and getting, if the judgment appealed from stands.

Two other questions are raised by the same appellants in regard to which it occurs to me as quite possible that the nature of the estate and the relative parts thereof to bear its burden, may be such as to leave the appellants without any direct, or even indirect, interest in having same determined.

If they get paid the legacies bequeathed to them and cannot claim as heirs at law, they need not concern themselves with the determination of these questions. No objection of that kind having been taken by counsel for respondents, I presume it is deemed necessary to have same determined even if my view, or the alternative one of Mr. Justice Bigelow, is adopted in regard to the above question, No. 2, of the submission, with which I have dealt.

The first of these questions is thus stated in said appellant's factum:—

> In holding that the legatees of the residuary personalty are entitled to the interest or income accruing thereon between the date of the testator's death and their attaining the age of twenty-one years;

And in another form the question is, in same factum, presented thus:—

> The next question is whether the residuary legatees are entitled to the interest or income accruing from investments of the residuary personalty between the date of the testator's death and their attaining the age of twenty-one years, notwithstanding the express direction of the will that the residuary personalty is to be then divided among them "without interest."

The disposition thereof turns upon the interpretation and construction of the residuary bequest, which reads as follows:—(See Clause D, page 53).

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The question raised thereon is whether or not the words "without interest" therein can be given any effect and if so what.

I have tried to give these words some effect but failed to find anything rational to which direct effect can be given unless we extend the primary meaning of the bequest which is expressly confined to "the residue of" the "personal estate and effects" which certainly does not comprehend real estate. Surely that residue must comprehend all interest earned from investments of purely personal estate.

It might be surmised that if we attribute all intention on the part of the testator to exclude interest from the investments of proceeds of sales of real estate after the conversion of the latter, we might catch a glimpse of something possibly existent in his mind which the words would express. The decisions cited in the factums of counsel do not carry us very far.

The unfortunate expression may help by virtue of said decisions to maintain the position taken by appellants in their third contention, which is that the residuary request expressly limited to personal estate cannot be extended to include the proceeds of the conversion of the real estate and hence if anything thereof remains after applying same as specifically directed there would be an intestacy *pro tanto*.

There is much to be said for that contention.

The will provides, next after the above quoted residuary bequest as follows:—(See Clause E, page 53).

It was stoutly contended by counsel for the official guardian that the case of *Singleton* v. *Tomlinson* (1), is decisive of the question raised, and it certainly would be if the provisions in the will there in question were either identical or quite analogous.

(1) [1878] 3 App. Cas. 404.

The will in that case started out with a direction to convert the estate, real and personal, and then proceeded to dispose of "the proceeds" of such conversion in manifold ways with one exception specifically dealt with and subject thereto ended by constituting a party named the testator's legatee.

How could he be supposed to be residuary legatee of anything save the balance of the fund thus produced?

Here the provision for conversion comes last and after the residuary bequest above quoted which restricts its operation to the personal estate.

With great respect, I fail to see much resemblance between the *Singleton Case* (1) relied upon and this, especially in light of the stress laid by Lord Cairns and others on the words "the proceeds."

Then to cover the ground of the effect of a direction to convert real and personal estate, there are numerous decisions shewing that such a direction, even when acted upon and the conversion completed, is in itself by no means decisive of the ultimate character and destiny of the fund so created, if there is open the question of intestacy as there is here, if the restricted nature of the residuary bequest is had in view.

Of the numerous authorities cited on either side and duly considered by me perhaps the case of *Amphlett* v. *Parke* (2), is the strongest in appellants' favour.

There the will only directed a conversion of the real estate which was to be considered as personal estate with a gift as here of the residue of the general estate.

The review of the decisions in the opinion judgment of that case is in itself valuable, as well as the judgment and though those affected thereby were proceeding to the House of Lords, they prudently settled the matter by dividing evenly.

(1) 3 App. Cas. 404. (2) [1831] 2 Russ. & M. 220.

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The net result of the authorities seems to me to be that the provisions of the will itself and the language used in making same must be kept in view in deciding whether or not there has been clearly intended a conversion of realty into personalty with interest, to determine the scope of the residuary bequest.

The best opinion I can form, keeping that in view, is that the restricted nature of the residuary bequest given by above quoted provision is such as to render it impossible to say that the testator really intended by his later creation of a trust to finally determine all the proceeds to become thereby personal property within the meaning of the residuary bequest.

The direction to pay thereout debts and legacies does not seem to be a satisfactory basis upon which to so decide. *To pay legacies* I should read as *to pay specific legacies*, and all the more so as payment in all cases involved, except when otherwise specified, was to be "without interest," which might reasonably be referable to interest on the real estate proceeds, and thus be made intelligible and effective.

I am of opinion that as to any proceeds of real estate so converted, if not eaten up by debts and specific legacies, the testator died intestate.

There is a cross-appeal by the executors against the ruling of the court below refusing them costs.

That was a matter entirely in the discretion of the court below and, by the settled jurisprudence of this court, we, even when we have jurisdiction, refuse to entertain any appeal merely as to costs.

Moreover I agree in the opinion of the court below that an executor's duty ends when he gets what he has asked and he is not supposed to take a partizan part.

Hence I think the cross-appeal must be dismissed with costs.

DUFF J.—The only question requiring examination is the question whether the residue affected by the testator's bequest of

all the residue of my personal estate and effects

includes the real estate directed to be converted. In my opinion the meaning of the will is plain. The bequest of the residue is a bequest dealing with the subject matter which is described as

the residue of my personal estate and effects.

The devise of the real estate is clearly, I think, a devise and the direction to convert is clearly, I think, a direction for the purposes of administration only and in consequence the bequest of the residue affects only property which was personal estate independently of the legal operation of the devise.

There is a cross-appeal as to costs. I can entertain no doubt that the executors and trustees were acting properly in the exercise of the statutory authority io submit questions arising upon the construction of the will for the opinion of the court; and having commenced an action by way of originating summons with that object, it was not only their right but their duty as well to be represented in the court of first instance and on any appeal that might be taken from the judgment of the court of first instance for the purpose of seeing that the court was correctly informed with regard to the considerations bearing upon the subjects brought before the court for examination. That being so, they are by law entitled to their costs by statutory right and the order of the Court of Appeal refusing them their costs was an order prejudicing them in a substantive right and one consequently of which they are entitled to complain by way of appeal.

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ANGLIN J.—To five children of his sister William Walsh by his will bequeathed the sum of $800 each. In a codicil he directed that:—(See clause C, page 51).

The testator had by his will directed that the proceeds of both these policies

should be and become part of (his) estate.

It is common ground that his order as to the moneys payable under the Foresters' policy was effectual, but that the like order as to the Workmen's policy was ineffectual. It was held by Mr. Justice Bigelow that, under these circumstances, the five legacies must abate to the extent to which the estate was augmented by the receipt of the insurance moneys; and by the Court of Appeal that the five legacies were wholly revoked. With great respect, I am unable to accept either view.

The testator provided for revocation of the legacies upon the happening of a single condition—that the proceeds of both policies should become part of his estate. It is quite probable that the judgment of Mr. Justice Bigelow would carry out what the testator actually had in mind. But, if that were his intention, he did not express it.

In the judgment of the Court of Appeal, on the other hand, the word "and" of the codicil seems to have been unconsciously converted into "or." For that construction I cannot find justification and I have little doubt that it would defeat the testator's purpose. The only safe course—the only course open to us—is to adhere strictly to the intention expressed and that is that revocation should ensue if, but only if, the condition prescribed has been entirely fulfilled.

The second question arises out of provisions making certain legacies payable more than one year after the testator's death without interest. I entirely agree

with the judges of the provincial courts that the interest of which the legatees were thus deprived remained part of the estate and passed under the residuary bequest of personalty. The words "without interest" in the residuary bequest are senseless and were no doubt introduced *per incuriam*. They should be ignored.

The remaining question is whether the testator's real estate was converted into personalty so that so much of it, or of its proceeds, as was not required to meet his pecuniary legacies passed under the residuary bequest couched in these terms:—(See clause D, page 53).

The only disposition of the real estate, made after all the legacies, including the residuary bequest, had been stated, is in these terms:—(See clause E, page 53).

Grammatically the word "personal" in the residuary bequest qualifies the word "effects" as well as the word "estate." Under this bequest, apart from the effect of the direction for conversion of the real estate, it would be abundantly clear that nothing except what was personalty at the testator's death would pass. "Effects" is no doubt a comprehensive term. The meaning to be attached to it depends on the context. It may carry real estate. *Kirby-Smith* v. *Parnell* (1); *Smyth* v. *Smyth* (2); *Attorney-General of Honduras* v. *Bristowe* (3); *Hammill* v. *Hammill* (4). Alone it will not. *Doe* v. *Dring* (5); and I know of no case where, used in such a context as "my personal estate and effects," it has been held to embrace realty. Such a context in my opinion excludes realty from its purview.

(1) [1903] 1 Ch. 483.
(2) [1878] 8 Ch. D. 561.
(3) [1880] 50 L.J.P.C. 15.
(4) [1885] 9 Ont. R. 530.
(5) [1814] 2 M. & S. 448.

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Did the testator intend by the direction for conversion to make the proceeds of his real estate personalty for all purposes so that it should, as such, fall within his residuary bequest? Such would be the effect of an absolute direction to sell not limited to any particular purpose. *Singleton* v. *Tomlinson* (1), was such a case. There the person constituted "my residuary legatee" was held entitled to the surplus proceeds of realty not required to satisfy the dispositions made by the will. The same result follows where the residue, though designated personal estate, is clearly intended to comprise what remains of a blended fund arising in part from proceeds of converted realty.

But here the testator has declared the purpose of a conversion to be the payment of his funeral and testamentary expenses, debts and legacies. In such a case surplus proceeds of converted realty will not pass under a bequest of residuary personalty. *Maugham* v. *Mason* (2), and *Collis* v. *Robins* (3), are authorities in point. *Amphlett* v. *Parke* (4); *Fitch* v. *Weber* (5); *Taylor* v. *Taylor* (6), and *Collins* v. *Wakeman* (7) (although the last mentioned case is questioned in Theobald on Wills, 7 ed., 256), may also be referred to.

I do not find in the will before us any expression or implication of intention that, notwithstanding the indication of certain purposes of the conversion, it is to be "out and out" and for all purposes. The leaning against intestacy will not supply the omission of words expressive of the intention that the residuary legacy of personalty should include undisposed of realty or its proceeds.

(1) 3 App. Cas. 404.
(2) [1813] 1 V. & B. 410 at p. 416.
(3) [1845] 1 deG. & Sm. 131, at p. 136.
(4) 2 Russ. & M. 220.
(5) [1848] 6 Hare, 145.
(6) [1853] 3 DeG.M. & G. 190.
(7) [1795] 2 Ves. 683.

The avoiding of intestacy is to be regarded in construing doubtful expressions but is not enough to induce the Court to give an unnatural meaning to a word.

In re Benn (1).

In cases of ambiguity you may, at any rate in certain wills, gather an intention that the testator did not intend to die intestate, but it cannot be that, merely with a view to avoiding intestacy, you are to do otherwise than to construe plain words according to their plain meaning. A testator may well intend to die intestate. When he makes a will he intends to die testate only so far as he has expressed himself in his will.

In re Edwards (2).

I would, therefore, with respect, answer question (c) of the summons in the negative as to realty or proceeds thereof not required to pay funeral expenses and legacies. Such residuary realty or proceeds thereof passed as on an intestacy.

There remains to be dealt with the executors' cross-appeal against the order of the Court of Appeal depriving them of their costs in that court. No doubt it is most unusual that an appeal should be entertained in this court on a mere question of costs. Here, however, the executors have been deprived of their costs not as a matter of discretion but on an erroneous view of the law, namely that, having received the advice of the court of first instance, although served with notice of the appeal they had no interest in it and should merely have awaited its result. They maintain, on the contrary, that it was their duty and their right to attend the hearing, to watch the proceedings and, if necessary, to assist the court in the disposition of a matter which they had originally brought before it. That right seems well established

(1) [1885] 29 Ch. D. 839, at p. 847. (2) [1906] 1 Ch. 570, at p. 574.

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in practice. *Carroll* v. *Graham* (1); *Catterson* v. *Clark* (2); *Fulton* v. *Mercantile Trusts Co.* (3). The executors in my opinion should have been allowed their costs in the Court of Appeal and should also have them here—on such moderate scale however, as is indicated in the cases cited. I do not regard this question as really the subject of a substantive appeal involving costs only but rather as an incident of the main appeal in which the merits of the litigation are before the court and the disposition of them by the provincial courts will be substantially varied. *Delta* v. *Vancouver Rly. Co.* (4).

All parties should have their costs of these proceedings throughout out of the estate. The questions involved are important. They concern the administration of the estate and arise out of dispositions made by the testator which are by no means free from difficulty.

BRODEUR J.—This appeal arises out of an originating summons to construe the will and codicil of William Walsh. Three questions had been submitted to the court below, but we have only to deal with two.

The first is whether the appellants are entitled to any portion of the legacy of $800 under the following clauses in the will and in the codicil: (See clauses A, B, C, page 51).

It is in evidence that no money under the insurance policy of the Ancient Order of United Workmen was paid or became payable to the Walsh estate. It is in evidence also that the insurance policy in the Independent Order of Foresters was paid to the estate.

(1) [1904] 74 L.J.Ch. 398.
(2) [1906] 95 L.T. 42.
(3) [1917] 41 Ont.L.R.192 at p. 194.
(4) [1909] Cam. S. C.Practice, 2 ed., 90.

The judge of original jurisdiction decided that the legacies to the appellants would be discharged by paying them the proceeds of the Independent Order of Foresters policy. The Court of Appeal reversed this decision and came to the conclusion that the legacies of $800 made to each of the appellants had been revoked by the codicil.

The codicil, it seems to me, is very explicit. It provides that if the two policies of insurance were not part of the estate, then the legacies in favour of the appellants would be revoked. It is true that only one of the policies was paid to the estate, but the condition of the codicil was that if it was found that the declaration of the testator was ineffectual as to both the policies then that would deprive the appellants of the bequest stipulated in the will in their favour. It may be that the testator did not express correctly what he intended. It may be that he did not intend to give his nephews a portion of their legacies if only one of the policies would form part of his estate, but the words are so plain and so explicit that we have not to look for an intention which otherwise is so clearly expressed.

The appeal is well founded as to the first question and I would answer it in the affirmative.

The other question which has also been submitted to the consideration of the court is whether the entire residue of both real and personal estate, including accrued interest or other income, is payable to the children of the testator's nephew, Frederick J. Walsh.

In the will the following clause is to be found:—
(See clause D, page 53).

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There is no provision for the residue of the real estate, except that the executors are empowered to convert the whole estate into money for the purpose of paying funeral and testamentary expenses and of paying the legacies. The words "personal estate and effects" could perhaps be construed as meaning in some cases personal and real property. The intentions of the testator could in some cases be determined so as to cover both personal and real property. *Kirby Smith* v. *Parnell* (1). But in this will no such intention can be found for, in another part of his will, the testator puts personal estate and effects in juxtaposition with real estate.

The only possible conclusion then is that the testator has failed to dispose of his real estate; and if there is to be found some real estate after the conversion ordered by the will, then this real estate should go to the heirs of the *de cujus*.

Collins v. *Robins* (2); *Ackroyd* v. *Smithson* (3); *Curteis* v. *Wormald* (4).

The point as to interest raised on this second question could not be of any benefit to the appellants, since this interest forms part of the residuary personalty and would not belong to them, even if their construction of the words "without interest" were correct.

I would then answer the second question in the negative as to the real estate and would state that the children of Frederick J. Walsh are not entitled to the real estate but they could receive the interest on their legacy.

The costs of the appeal should be paid out of the estate.

(1) [1903] 1 Ch. 483.
(2) [1845] 1 DeG.&Sm. 131 at p. 138.
(3) [1780] 1 Bro. C.C. 503.
(4) [1875] 10 Ch. D. 172 at pp. 174-175.

There is a cross-appeal on the part of the executors of the will who were condemned personally in the court below to pay their costs.

It is a question of discretion about which we should not interfere. The costs should not be large, if the executors simply appeared and held a watching brief. Of course they should be larger if they took an active part in the proceedings below. We have no way to ascertain the circumstances which brought this condemnation and we should not then interfere with the exercise of a discretion which might have been equitably exercised. If the executors had found it advisable to take a part in a contestation which was argued by the two interested parties, viz., the Milburns and the Walshs, it was certainly on their part a useless intervention which the court below could very well dispose of in the way it has done.

The cross-appeal should be dismissed with costs.

MIGNAULT J.—I propose to reply in the following order to the questions submitted with a brief statement of my reasons for each answer.

First Question:—Is the bequest of $800 by the late William Walsh to each of his nephews and nieces, to wit to William Milburn, Robert Milburn, Walter Milburn, Mary Milburn and Ida Milburn, all of them being children of his sister Margaret A. Milburn, revoked by reason of the codicil added to his will by the said William Walsh?

The will contained the following directions as to two policies of life insurance held by the testator: (See clause B, page 51).

In the codicil made a few days after the will the testator said: (See clause C, page 51).

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Of course, the testator's declaration in his codicil must be read with the directions given by him in his will as to the two insurance policies, and I construe the codicil as meaning that if the testator has not succeeded, by his will, in making the moneys due under these two policies a part of his estate to be distributed under the terms of his will, then the legacies to the nephews and nieces, the children of his sister Margaret A. Milburn, are revoked.

The testator did not succeed in making the moneys due under one of the policies a part of his estate and therefore in my opinion the legacies to his nephews and nieces are revoked.

It is contended that the revocation takes place only if the testator's directions fail as to both policies, and that if they succeed as to one of them and fail as to the other, the condition is not entirely fulfilled, and therefore there is no revocation.

I am unable so to read the condition. It deals with "the moneys due" under the policy of insurance in the Independent Order of Foresters and under the policy of insurance of the Ancient Order of United Workmen, as one fund, and if this fund does not become a part of the testator's estate by virtue of the directions of the will, the bequests to Margaret A Milburn's children are revoked.

A failure with respect to one of the policies prevents the moneys due under both policies from becoming a part of the testator's estate, and therefore the revocation takes place.

If I could resort to conjecture to determine the probable intention of the testator, I would unhesitatingly concur in the opinion of the learned trial judge that the revocation took place only *pro tanto* or in proportion to the amount of the policy which

did not form part of the estate. But conjecture as to the probable but unexpressed intention of the testator is entirely out of the question. If the testator desired the revocation to operate partially in the event which has happened, he has not stated his desire in the will. Therefore the answer must be either revocation or no revocation. My answer is that the legacies in question are revoked, and in that I agree with the Court of Appeal.

Second question:—Does the interest on the bequests payable more than a year after the testator's death, and which is not to be paid to the legatees, form a part of the residuary bequest?

There is no difficulty here. The interest which was not to be paid to the legatees on the bequests made payable more than a year after the testator's death, in my opinion, forms part of the residuary bequest, notwithstanding the words "without interest" in the latter bequest, which words should be disregarded. Any other construction would leave this interest entirely outside of the operation of the will. I may add that the residuary legatees do not take these moneys as interest on the residuary bequest, but as moneys forming part of the residue and which have never left the estate. Here again I agree with the Court of Appeal.

Third question:—Does the surplus of the conversion of the real estate, if there be any such surplus after payment of the funeral and testamentary expenses and debts and the bequests made by the will, form part of the residuary bequest of the personal estate and effects?

I will cite both the residuary bequest and the clause ordering the conversion of the real estate, the latter being very badly drafted:—(See clauses D and E, page 53).

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This is by far the most difficult question, and it appears to me that my answer will be more intelligible if it is briefly expressed.

In my opinion the residuary bequest is of the residue of the testator's personal estate and effects (and the word "personal" qualifies both the words "estate" and "effects") as it stood at the death of the testator.

I am also of opinion that when the conversion of real into personal estate is ordered by a will for certain specific purposes, any residue remaining after these purposes are satisfied, is not to be regarded as personal but as real estate in so far as the interests of those who upon an intestacy would take the real estate are concerned.

Now what are the purposes for which this conversion is ordered? They are:—

1.—The payment of funeral and testamentary expenses and debts,

2.—The legacies bequeathed by the will.

It would be idle to say that the residuary bequest is one of the legacies bequeathed by the will, because we would still have to determine what was the object of the bequest, and this object was the residue of the personal estate and effects of the testator, that is to say of what was personal estate and effects at the death of the latter. The surplus of the converted real estate would not be comprised therein. I find therefore that if there be a surplus from the conversion of real estate, after providing for the payment of funeral and testamentary expenses and debts as well as of the legacies bequeathed by the will, it does not form a part of the residuary bequest and does not pass under the will. Naturally one shrinks from coming to the conclusion that there is a partial intestacy but I can see no help for it.

I have not cited any authorities on this branch of the case and am content to rely on those contained in the judgment of my brother Anglin whose opinion I share.

My answer to this question is therefore no, and consequently, with respect, I differ from the Court of Appeal on this point.

The main appeal should therefore be allowed to the extent of answering this question in the negative. I would direct that the costs of the appellants and of the respondents be paid out of the estate. I would not give costs to the executors on the main appeal.

As to the cross-appeal, nothing more is involved than the question of costs in the Court of Appeal which the executors claim should have been granted them. The costs were refused because the executors applied to the Court for advice and received it, and had no further interest in the matter, except to await the result of the appeal. I am not ready to say that this was error on the part of the Court of Appeal. The practice may be different in England and perhaps in Ontario, but it is a matter of practice and I am not disposed to interfere with what has been done here. I would dismiss the cross-appeal with costs.

Appeal allowed in part.

Cross-appeal dismissed with costs.

Solicitors for the appellants: *Allan, Allan & Taylor.*

Solicitors for the respondents Grayson et al.: *Grayson, Emerson & McTaggart.*

Solicitors for the respondents The Executors and Administrators Trust Co. and the official guardian:

Mackenzie, Thom, Bastedo & Jackson.

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*Feb. 8.
*Mar. 11.

ALICE WYNNE (DEFENDANT).....APPELLANT;

AND

JOSEPH P. WYNNE (PLAINTIFF)..RESPONDENT.

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

Will—Execution—Testamentary capacity—Evidence—Reading of the will—Requisition of witnesses—Probate—Res judicata—Art. 851 *C.C.*

The day before his death, the testator made the following will: "I this day will my entire estate and all other effects to my wife Alice Wynne," the appellant. He was suffering from Bright's disease, and, to alleviate pain, morphine was administered each day at 11 a.m. and 8 p.m. The evidence of the attending doctor was that the effect of the narcotics would last two or three hours after the injection had been given. The circumstances of the execution of the will were related by the appellant. The testator was at first opposed to making a will, because he thought he would get better and also that it was unnecessary as he was of the opinion that his estate would go to his wife without it; but later on, he agreed to do so. Two days before his death, the will was drafted in pencil by an intimate friend of the deceased, copied by the appellant and shown to the testator at about 5 p.m. and again the next morning. The testator assented to it. Between 2 and 3 o'clock on the afternoon of the same day, the appellant handed the will to her husband who signed it without assistance. The appellant and the two witnesses to the will testified that the deceased was then *compos mentis*.

Held, Duff J. dissenting, that the evidence sufficiently establishes that the will expressed the true wishes of the testator and that he was *compos mentis* at the time of its execution, the more so as the will was simple and the disposition by the testator of his property to his wife was reasonable under the circumstances.

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Before the execution of the will, the appellant requested the attendance of two witnesses; and when they were at the testator's bedside, she asked them aloud if they "would witness the execution of the will." The appellant then handed her husband the will and he signed it. Then the witnesses immediately signed in the presence of the testator.

Held, that the signature by the testator implies both knowledge by him of the fact that he was executing his will and a request to the witnesses to act as such; and this implicit recognition is a sufficient compliance with Article 851 C.C. Duff J. expressing no opinion.

Per Mignault J.—Probate of a will, not being conclusive of its validity is not *res judicata* even against a party who appeared and objected to the probate.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, reversing the judgment of the trial judge, Surveyer J. and maintaining the respondent's action.

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

W. F. Ritchie K.C. for the appellant.

L. P. Crépeau K.C. for the respondent.

THE CHIEF JUSTICE.—Under the circumstances of the case, the disposition of all his property to his wife was not unreasonable, but on the contrary was such a disposition as the testator without any injustice to any one might fairly have made.

I am inclined to think the learned Chief Justice of the Court of King's Bench placed a much broader construction upon Doctor Anderson's evidence than its language warranted. I think the doctor, in giving the evidence he did, intended to limit his opinion as to the mental condition of the testator to the time that he was under the effect of the injection of morphia and not to extend it to the time when this effect had worn off.

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Accepting the evidence of the wife as I do, though she was the sole beneficiary, and also that of the two witnesses to the testator's signature, I cannot entertain a reasonable doubt of the capacity of the testator, when he signed the will, to do so or that the will embodied his real wishes and intentions.

I think this evidence shews the requirements of article 851 of the Civil Code to have been complied with. See *Faulkner* v. *Faulkner* (1).

I would allow this appeal and restore the judgment of the trial judge upholding the will.

IDINGTON J.—This is an appeal from the judgment of the majority of the Court of King's Bench of Quebec reversing the judgment of the Superior Court which affirmed the validity of the will in a suit which was first launched to set aside the probate as irregularly obtained, but by amendment of the pleadings involved the validity of the will itself, on the ground that the testator was *non compos mentis* at the time when he is alleged by respondent to have executed the said will.

The deceased signed a will of which the following is a true copy:—

Montreal, P.Q., November 2nd, 1918.

I this day will my entire estate and all other effects to my wife Alice Wynne.

Witness

That was attested to by two witnesses, called in for the purpose, on an occasion when the deceased was suffering from a severe illness. To ameliorate the said suffering the doctor in attendance had been in the habit of administering narcotics twice a day, at eleven o'clock in the forenoon and eight o'clock in the evening.

(1) [1920] 60 Can. S.C.R. 386.

It is urged that the pain and suffering thus alleviated rendered the deceased *non compos mentis* although the document was signed between two and three o'clock in the afternoon, and the doctor admits the acute effects of the narcotics would only induce from two to three hours sleep.

The deceased was sitting up and signed the document on a pad handed him by the appellant when in that position, which with his frail state of health amply accounts for the shaky appearance of his signature.

If the appellant's story is true, it was drafted by a pencil in the hand of an intimate friend of the deceased, the previous day, copied by her and shewn to her deceased husband the same day about 5 p.m. when he assented to it, at an hour when the influence of the narcotic injected at eleven a.m. must have almost entirely passed.

The learned trial judge accepted her entire story as true, and that of the witnesses who had attested the signature as true.

To hold such a will invalid for the technical reasons assigned by the learned judges of the Court of King's Bench, disregarding all the attendant circumstances, as evidence of an effectual compliance with the requirements of the law, would, as Mr. Justice Martin suggests, render invalid many apparently good wills.

In many of the essential features of the case, necessary to consider herein, it has a remarkable resemblance to the case of *Lamoureux* v. *Craig* (1), save that in my own view and that of others considering the facts in that case there was much to give rise to a

(1) [1913] 49 Can. S.C.R. 305.

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suspicion that the will was neither what the testatrix had previously intended or might have been expected to intend, and that the signature of the testatrix was thought by some of us to be illegible. In this case there was nothing but what one would expect to find, and what was consistent with the duty of the testator.

Moreover there was such a simplicity in the words used in question herein that all that which needed to be understood by him signing was so susceptible of comprehension at the slightest glance that, if any consciousness at all were left, they must have been understood by any one capable of executing the document as undoubtedly the deceased was.

In the *Lamoureux Case* (1) the deceased had rejected one will submitted to her for reasons she assigned and, when her vitality had been reduced below what the alleged testator here in question possessed, she had presented to her a will which needed the possession of very acute faculties to comprehend whether or not her wishes had been observed.

I quite agree with Mr. Justice Surveyer that if the will in that case, as the court above held, overruling us, was maintainable, certainly this is much more so.

I need not enlarge; for the learned dissenting judges in the court below have so fully and carefully covered the ground with more extended notes in all of which I concur, as to render it needless for me to repeat same herein.

The appeal should be allowed with costs here and in appeal below and the judgment of the learned trial judge restored.

(1) 49 Can. S.C.R. 305.

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DUFF J. (dissenting).—This appeal, in my opinion, should be dismissed. The onus rests upon those who propound a will of establishing that it was the will of a competent testator.

After fully examining the evidence I cannot resist the conclusion that the medical evidence points clearly to incompetency and I can find nothing in the other evidence relied upon to counterbalance the effect of this.

The appeal therefore, in my opinion, fails not merely because I am not satisfied that the conclusion reached by the majority of the court below is wrong but because as a result of an independent examination of the evidence I think the weight of evidence supports that conclusion.

ANGLIN J.—Two distinct issues are presented on this appeal—one as to the testamentary capacity of the testator, the other as to compliance with the requirements of Art. 851 C.C. in the execution of his will. The learned trial judge determined both in favour of the appellant, the sole beneficiary. The Court of King's Bench decided both against her by a majority of three judges to two.

The evidence of the doctor who attended him is relied on to establish the testator's incapacity. But, with great respect, I think it far from conclusive. It is not clear that he refers to incapacity other than that caused by the administration of narcotics. As to that he says it would not last more than two or three hours after the injection had been given. Three and a half hours appear to have elapsed between the last previous injection and the execution of the will. The appellant who was present at the execution says her husband was then "perfectly all right; he knew

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what he was signing." Robert Mellor, one of the witnesses to the will, says the testator recognized him and the other witness, James, and that he did not seem to be in a dazed condition but on the contrary "seemed to know what he was doing." In answer to an inquiry as to his health by Mellor he replied "not well; not well." James did not address him but thought the testator knew who he was. The appellant tells us that her husband sat on the side of his bed, that she gave him a writing pad which he put on his lap and then signed the will without other assistance. This statement is not contradicted. In fact it is corroborated by Mellor except that he thinks a table was used and not a writing pad. The signature itself, while somewhat shaky, is remarkably good for a man who died the next day from Bright's disease. The trial judge evidently believed both the appellant and the witness Mellor and, so far as one can judge by reading their testimony in print, it seems to be perfectly candid and entirely credible.

The will itself is reasonable, having regard to the testator's circumstances. It consists of only sixteen words—a simple devise to the widow of the entire estate and effects, which are said to amount to about $12,000. The appellant tells us it was drafted in pencil the day before its execution by Mr. Tuck, an intimate friend of the testator, with his approval if not by his express instructions, that she copied this draft and shewed the copy so made to her husband the same afternoon and again the next morning and that he approved of it as expressing what he wished on both occasions.

Taking all these circumstances into account, while, had the will been lengthy or the dispositions at all complicated, I should have doubted the testator's

capacity to appreciate it, I am satisfied that the evidence of the appellant and the witness Mellor sufficiently proves that he had capacity on the afternoon of its execution to make a will such as that prepounded.

The only objections to the sufficiency of the execution under article 851 C.C. which call for attention are that the testator did not refer to the document prepounded as his will or acknowledge his signature to it in the presence of the witnesses and did not request them to attest the will. Compliance with all other formalities prescribed by that article is fully established.

Mellor tells us that when he and James came to her husband's bedside Mrs. Wynne "asked if we would be witnesses and put our signatures on his will; she said it aloud to both of us." The will was then placed before the testator and he signed it, as already described, in the presence of Mellor, James and Mrs. Wynne, and Mellor and James "immediately" signed as witnesses in his presence and in that of each other. The signature by the testator thus made requires no other acknowledgment as the learned Chief Justice of Quebec points out; and, with great respect, it implies in my opinion both knowledge by him of the fact that he was executing his will and a request to the witnesses to act as such. This implicit recognition of the document as a will and request that the witnesses should attest the signature of the testator are, I think, a sufficient compliance in these particulars with article 851 C.C.

I would for these reasons allow the appeal and restore the judgment of the learned trial judge. The respondent should pay the appellant's costs in this court and in the court of King's Bench.

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BRODEUR J.—La présnte action était originairement instituée dans le but de faire mettre de côté le jugement qui avait été rendu par le Protonotaire de la Cour Supérieure qui déclarait que le testament de John Francis Wynne avait été dûment vérifié. Cette action en annulation du jugement de vérification alléguait que les formalités voulues n'avaient pas été remplies et que la preuve qui avait été faite était mensongère.

Il appert, en effet, par la preuve qui a été faite en la présente cause, que l'affidavit du nommé Tuck sur lequel le Protonotaire avait basé sa décision rapportait des faits absolument inexacts. Ainsi il jurait qu'il était présent lors de la signature du testament par le testateur, tandis que la preuve incontestable démontre que cette assertion est inexacte. La défenderesse, qui soutient la validité du testament, est obligée d'admettre dans sa défense que cette partie de l'affidavit Tuck était erronée et elle plaide que cette erreur provenait du fait que l'avocat qui avait préparé l'affidavit n'avait pas compris parfaitement les informations qui lui avaient été données.

Le jugement de vérification aurait certainement été cassé sans la preuve additionnelle qui a été faite en la présente cause. Cette preuve est que le testament avait été préparé au crayon de mine par Tuck lui-même sur les instructions du testateur, qu'il aurait été transcrit à l'encre par la femme de ce dernier, que le testateur l'aurait signé ensuite en présence des deux témoins Mellor et James dont les noms apparaissent sur le testament, et que le lendemain le nommé Tuck y aurait lui-même apposé sa signature comme témoin. Il est incontestable que cette signature de Tuck ne donnait aucune valeur au testament, mais pouvait-elle avoir pour effet de le rendre nul si

autrement il était valide? Certainement non. La cour pouvait donc, dans ces circonstances, déclarer que le testament, vu la preuve additionnelle faite, était dûment vérifié.

Le demandeur a alors compris la faiblesse de sa position et il a demandé à amender sa déclaration pour alléguer que le testateur n'était pas *compos mentis* lorsqu'il a signé son testament.

La Cour Supérieure a renvoyé l'action du demandeur et ce jugement a été renversé en Cour du Banc du Roi. La vérification du testament n'a pas été, vu la preuve faite, le véritable sujet du litige; mais la discussion a porté sur la capacité du testateur et sur les formalités requises par la loi pour rendre un testament valide.

Le testateur était évidemment dans un grand état de faiblesse. De fait, il est mort le lendemain.

Le témoignage du médecin qui le soignait n'est pas très favorable à ceux qui réclament que M. Wynne était capable de tester. Il avait perdu espoir de le guérir et alors tout le traitement consistait à lui administrer soir et matin des drogues destinées à apaiser ses douleurs. L'effet de ces drogues était de le plonger dans le sommeil ou de le rendre inconscient pour une couple d'heures. Quand il a exprimé ses dernières volontés à son ami Tuck et à sa femme, il paraissait comprendre parfaitement ce qu'il faisait. Les témoins du testament jurent qu'il paraissait comprendre ce qu'il faisait quand il l'a signé en leur présence. Il n'a dit alors que deux ou trois mots qui portaient sur son état de santé; mais on ne saurait dire qu'il ne comprenait pas la portée de la signature qu'il donnait. Il pouvait être encore

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un peu sous l'influence des drogues qui lui avaient été administrées environ deux heures auparavant; mais le maintien qu'il avait et sa réponse à la question qui lui avait été faite par l'un des témoins dénotent un état d'esprit qui me paraîtrait incompatible avec l'incapacité.

Si on n'avait que la preuve des témoins du testament, il serait peut-être assez difficile de dire que le testateur savait que le document qu'on lui faisait signer était l'expression de ses dernières volontés, car la demande que la femme du testateur a faite aux deux témoins de signer le testament n'a peut-être pas été entendue par le testateur; mais par le témoignage de la femme, qui a été accepté par le juge, quoiqu'elle fût contredite sous certains rapports, nous avons la preuve bien complète et bien certaine que le testateur savait qu'il signait un testament.

Les circonstances d'ailleurs rendent probable le fait que ce testament doit représenter la volonté du défunt. Le testateur et sa femme, la légataire universelle, avaient été mariés depuis plus de vingt-cinq ans et ils n'avaient pas d'enfants. Il était assez naturel que le mari laissât à sa veuve, qui avait près de soixante ans, les quelques biens qu'il avait pour lui permettre de vivre confortablement le reste de ses jours.

Cette cause ressemble sous bien des rapports à celle de *Craig* v. *Lamoureux* (1) qui a été décidée par le Conseil Privé. Les faits de la présente cause paraissent plus favorables à la validité du testament que dans cette cause de *Craig* v. *Lamoureux* (1). Je reconnais bien le danger qu'il y a de maintenir des testaments sur le témoignage du légataire lui-même. Mais la décision du Conseil Privé dans la cause de *Craig* v. *Lamoureux* (1) favorise la validité des testaments dans des cas semblables à celui-ci.

(1) 49 Can. S.C.R. 305.

Quant aux formalités, je crois qu'elles ont été observées, surtout du moment que l'on accepte le témoignage de la légataire universelle. Le testament exprimerait la volonté du testateur. Il aurait été signé par lui en présence des deux témoins qui auraient également signé en sa présence. Il est bien vrai qu'il n'y a pas eu de demande expresse et formelle par le testateur à ces témoins de signer, mais comme ils ont signé en sa présence et immédiatement après lui il me semble que cette circonstance constitue une réquisition suffisante pour assurer la validité du testament.

L'appel devrait être maintenu avec dépens de cette Cour et de la Cour du Banc du Roi et le jugement de la Cour Supérieure rétabli.

MIGNAULT J.—The plaintiff, respondent in this court, complains of the will, in the form derived from the laws of England, of his brother the late John Francis Wynne, bequeathing his entire estate to his wife, the present appellant.

As originally drafted, the respondent's action aimed at having the probate of this will set aside, and most of the fifteen paragraphs of the declaration were of the nature of an attack on the judgment of probate, while the conclusions asked merely that this judgment be set aside. By an amendment permitted at the trial, the respondent further alleged as paragraph 14a, that at the time he signed the will, John Francis Wynne was not *compos mentis*, and was unable to make a will and to acknowledge his signature on a will previously made. And by the same amendment he added to his conclusions the prayer that at all events the said will be annulled, resiliated and cancelled.

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It is not unimportant to point out that up to the time of this amendment the respondent had apparently completely misconceived what was his remedy against the will in question. The judgment of probate has, in Quebec, a purely relative and *prima facie* effect, not going beyond identifying and proving the document presented as a will, so that authentic copies of the same (the will itself not being in notarial form never becomes authentic) may be delivered to interested parties. But, as stated by article 858 of the civil code,

> the probate of wills does not prevent their contestation by persons interested.

And as far back as 1872, in the case of *Migneault* v. *Malo* (1), the Judicial Committee of the Privy Council held that a judgment of probate in the province of Quebec was not conclusive, and that the heir-at-law of the deceased, although he had been cited and opposed the grant of probate, could nevertheless impugn the will. It is therefore evident that the judgment of probate is not *res judicata*, even as to a party who appeared and objected to the probate, and consequently the respondent's allegations concerning this probate are entirely unnecessary, not to say irrelevant, in an action attacking the will.

Irrespective of these allegations, the respondent's declaration attacks Wynne's will on four grounds:—

1. The will does not satisfy the requirements of article 851 C.C.

2. The appellant handed the said John Francis Wynne a document all written out, which Wynne signed but did not read to the witnesses, and when he signed it J. C. James was the only witness present, Robert Mellor was called in as a witness after the document was signed, and Fred Tuck was not present at all.

(1) [1872] L.R. 4 P.C. 123.

3. Wynne never spoke anything about the paper he signed nor referred to it as being his will, and did not in any way acknowledge his signature to the said document as having been subscribed by him to his last will and testament.

4. On the 2nd of November, 1918, when Wynne signed the said document he was not *compos mentis*, and was unable to make a will and to acknowledge his signature on a will previously made.

It is noticeable that the will is not attacked for undue influence or fraudulent manoeuvres (*suggestion et captation*) by the appellant. What Mrs. Wynne did is material only when taken in connection with the alleged grounds of nullity, and I must express the opinion that if Mrs. Wynne's testimony be believed—and it was believed by the learned trial judge—she did nothing improper to obtain the signing of the will. It is very unfortunate that Fred Tuck died shortly before the trial—and inasmuch as he died of a lingering illness the parties should have obtained his testimony, or at least they should have shewn that he was incapable of giving it—but Mrs. Wynne says that her husband was under the impression, and so stated, that she would get everything without a will. She adds that Tuck told Wynne that he had better make a will and he agreed to do so, and as Wynne expressed the intention to leave everything to his wife, Tuck wrote out a very short form which the appellant copied and which eventually became the will attacked in this case. Like many persons, Wynne disliked the idea of making a will, but this certainly does not shew that the will in question was forced on him, and I cannot see anything in the evidence that could support a charge of undue influence, if such a charge had been made.

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Discussing now the grounds of nullity alleged by the respondent, and dealing first with the fourth ground, the learned trial judge found on the facts that the will was signed by Wynne when of a free and disposing mind, and of sound intellect. What gives great weight to this finding is that it necessarily reposed on the credibility of the witnesses, especially of Mrs. Wynne. Moreover the physician called, Dr. Anderson, did not prove a general state of incapacity of the testator. He said that Wynne, who was dying of Bright's disease, was suffering very great pain; that twice a day, at eleven in the morning and at eight in the evening he administered morphine to quiet him, and that the effect of the narcotic would last two or three hours. This will was signed after two p.m., and in view of the testimony of the witnesses to the will, James and Mellor, it seems impossible to conclude that the finding of testamentary capacity by the learned trial judge should be set aside.

I will now consider together the three first grounds of nullity which relate to the execution of the will itself. It is true that Mrs. Wynne handed her husband a document all written out, and that Wynne signed it but did not read it to the witnesses, nor was it necessary that he should do so. When Wynne signed the will, both James and Mellor were present and signed as witnesses in presence of the testator. No formal attestation clause was required and their signatures as witnesses sufficed. Tuck was not present at the execution of the will and signed it afterwards, but he cannot be considered as a witness to the will which however does not matter because two witnesses are sufficient. Wynne did not speak to the witnesses about the will and did not acknowledge his signature to them as having been subscribed by him

to his will. However, as Wynne signed in the presence of the witnesses James and Mellor, it is immaterial whether he acknowledged this signature which they saw him make. It was entirely unnecessary that he should do so.

So far the will stands the test of article 851 of the civil code which is as follows:—

851. Wills made in the form derived from the laws of England, whether they affect movable or immovable property, must be in writing and signed at the end with the signature or mark of the testator, made by himself or by another person for him in his presence and under his express direction, which signature is then or subsequently acknowledged by the testator as having been subscribed by him to his will then produced, in presence of at least two competent witnesses together, who attest and sign the will immediately, in presence of the testator and at his request.

Females may serve as attesting witnesses and the rules concerning the competency of witnesses are the same in other respects as for wills in authentic form.

But it is said that the witnesses, who undoubtedly signed the will in the testator's presence, did not do so "at his request." Mellor testified as follows:—

Q. Who was present when you signed that will as a witness? A. Mr. James, Mrs. Wynne, myself and the deceased, the late Mr. Wynne.

Q. Who received you at the door? A. I think it was Mrs. Wynne; I am not sure. I walked right in.

Q. Did Mrs. Wynne talk to you about the will, then when she opened the door for you? A. No, only when we walked right up to the bed.

Q. What did she say then? A. She asked me if we would be witnesses and put our signatures on his will; she said it aloud to both of us.

Mellor also says that when he entered he asked Wynne how he was, and the latter answered "not well, not well." Both James and Mellor say that the testator recognized them.

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As to the signature of the witnesses at the request of the testator, undoubtedly this is a requirement of article 851 C.C., although it is not mentioned in the English Wills Act, 1 Vict., ch. 26, from which article 851 C.C. is derived. But it is to be remarked that when the will is signed or marked by another person than the testator, article 851 requires the "*express* direction" of the testator, while with regard to the signature of the witnesses at the request of the testator, nothing is said as to the form of this request. In my opinion, inasmuch as the legislature, in speaking of the direction or request of the testator, requires it to be expressed in one case and not in the other, it follows that this request can, in the latter case, be implied by reason of the circumstances surrounding the execution of the will. Here Mellor testified that Mrs. Wynne, when the witnesses and she had walked right up to the bed, asked them if they would be witnesses and put their signatures on the will, and that she said this aloud to both of them. The request she thus made to James and Mellor must have been heard by Wynne, who then signed the will and saw or could see the witnesses sign it in his presence. In my opinion, but I say this with every deference for the majority of the learned judges of the Court of King's Bench who thought otherwise, it would be pushing formalism too far to reject this will for the lack of an expressed request of the testator to the witnesses, and the more so as this is an essentially simple and popular form of will, which undoubtedly the legislature desired to render as easy as possible to the least educated of the population.

If it be contended that Mrs. Wynne who went for the witnesses and asked them to attest the will, had no mandate from Wynne to do so, I would answer

that evidently no express mandate was required. And the question really is whether Wynne intended to make a will and dispose in favour of his wife, and unless Mrs. Wynne's testimony be discredited, I must find that he did. The obtaining of witnesses, although essential, was not, under the circumstances disclosed by the evidence, a matter requiring any kind of mandate from the testator, for if we must take it as established that he wished to make a will, getting the witnesses necessary for the validity of the will was merely carrying out his desire.

It may be that this will is quite near to the danger point, but after full consideration I find myself unable to set it aside and nullify the very natural and reasonable disposition which Wynne made of his property, for he and his wife had been long married and had no children. Of course, Tuck's affidavit in support of the probate was untrue, as he did not see Wynne sign the will, although he probably could identify his signature. But nothing would now be gained by annulling the probate, for the testimony of James and Mellor shews that Wynne really signed the will. And, in my opinion, the attack on the will itself fails.

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.

Appeal allowed with costs.

Solicitor for the appellant: *W. F. Ritchie.*

Solicitors for the respondent: *Elliott & David.*

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*May 23.
*June 7.

ST. JOHN AND QUEBEC RAILWAY COMPANY (PLAINTIFF).... APPELLANT;

AND

WENDELL P. JONES AND OTHERS (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK.

Constitutional law—Provincial railway—Operation by provincial government—Removal of directors—"Work for general advantage of Canada" —Express declaration—Lease to Dominion Government.

Where the government of a Province is authorized by the legislature to assume control of a provincial railway its act of removing the directors and appointing others is *intra vires* of its powers.

If, under the provisions of s. 92, s.s. 10 (c) of the B.N.A. Act, a provincial public work can be made a "work for the general advantage of Canada" without an express declaration by Parliament therefor a lease of it to, and its subsequent operation by, the Dominion Government is not equivalent to such a declaration. But;

Held, Idington and Duff JJ. expressing no opinion, that the express declaration is necessary in every case.

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick affirming the order of the Chief Justice who set aside the writ of summons in the cause as having been issued without authority.

Two questions were raised on this appeal. One that the lease of the railway to the Dominion Government made it a "work for the general advantage of

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Canada," and the government of New Brunswick had, therefore, no power to remove the directors. The other was that the Act of the legislature authorrizing the provincial governments to assume control and take over the stock was *ultra vires* as affecting the civil rights of the bondholders. As to this two of their Lordships held that the facts of the case did not bring it within the principle of the decision of the Judicial Committee of the Privy Council in *Royal Bank of Canada* v. *Rex* (1), relied on by the appellant, and two, that this question could not be raised. The remaining Judge did not deal with it.

J. J. F. Winslow for the appellant.

W. P. Jones K.C. and *P. J. Hughes* for the respondent, were not called upon.

THE CHIEF JUSTICE.—This action was one brought in the name of the St. John & Quebec Railway Company at the instance of Arthur P. Gould and his associates claiming to be the legal directors of the said company to restrain the defendants, the *de facto* directors, from acting as directors and for an account.

The learned Chief Justice of New Brunswick, the Honourable Sir J. Douglas Hazen, on an application made to him in chambers to set aside the writ of summons in this case on the ground that the same had been issued without the authority of the defendants who claimed to be the legal directors of the plaintiff company, granted the application and set aside the writ with costs to be paid by the plaintiffs (appellants') solicitors.

(1) [1913] A. C. 283.

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The Chief Justice.

On appeal to the Appeal Division of the Supreme Court of New Brunswick the judgment or order of the Chief Justice was unanimously upheld in a judgment delivered by Crocket J. with costs to be paid by the plaintiffs' solicitors.

From this latter judgment this appeal was taken to this court.

At the conclusion of the argument of Mr. Winslow for the appellant the court, being unanimously of the opinion that the appeal failed, did not call upon respondents' counsel, but dismissed the appeal with costs to be paid by the appellant plaintiffs' solicitors.

The main points to determine were:

First, whether the Act of the provincial legislature in 1915 dispossessing and dismissing the then directors of the road, and providing for the appointment of other directors in their place, was legislation *intra vires* of the legislature of that Province. This hardly was or could be contested unless it was shewn that the railroad had previously passed from being a provincial road by Dominion legislation declaring it to be one for the general advantage of Canada. The contention was that the Dominion Act of 1911 authorizing the Dominion to take a lease of the road and the subsequent taking of that lease, combined with the statute of 1912, ch. 49, as amended by the Act of 1914, ch. 52, providing that the Dominion might build and own bridges on and over the road, amounted impliedly to a statutory "declaration that the work was one for the general advantage of Canada." We were quite unable to accept or accede to that argument. It has never yet been decided by any court that the declaration required by the B.N.A. Act to change a provincial road into a Dominion one can be implied by or from such legislation as is here relied on, legislation

which is quite consistent with the work in question being and remaining, as in fact it was and is, a purely provincial one. Nor have I ever been able to hold that anything short of the statutory declaration the Confederation Act requires can accomplish such a transfer.

The remaining point Mr. Winslow pressed was that laid down by the Privy Council in the case of the *Royal Bank of Canada* v. *Rex* (1), that provincial legislation affecting civil rights outside of the province was *ultra vires*.

The difficulty counsel here had was to establish facts at all analogous to those in the case which he cited and relied on. In fact no such analogous or other facts existed in this case which brought it within the principle on which the *Royal Bank of Canada* v. *Rex* (1) was decided.

The appeal is, therefore, dismissed with costs to be paid by the appellants' solicitor.

IDINGTON J.—The appellant was incorporated by the legislature of New Brunswick for the purpose of constructing a railway in that province. In course of time five directors were appointed. The management of the adventure produced such results that in 1915 the legislature saw fit for what seemed to it good and sufficient reasons to declare shares of the capital stock of the said appellant company to be vested in His Majesty the King, in behalf of the Province of New Brunswick, and at the same time authorized the Lieutenant Governor in Council to nominate, in place of the then directors, others whom he should be advised to so name. The original directors being

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those then in office were, by virtue of the said legislation, and the action of the Lieutenant Governor in Council, absolutely displaced from their respective offices as directors. From time to time, from thenceforward till this action was brought, the office of director of appellant was filled by the Lieutenant Governor in Council or by legislative enactment of the legislature of the province. Very important steps by way of carrying out the enterprise have been entered upon since, amongst others an agreement to enter into a lease of the whole line of railway, when fully constructed and equipped, to His Majesty the King on behalf of the Dominion of Canada.

The appellant, moved by some parties other than the *de facto* directors appointed in the manner above stated, instituted this action to remove the said *de facto* directors. The writ of summons was set aside by the order of the Chief Justice of the province. His judgment in that regard was upheld on appeal to the court of appeal for New Brunswick, and from that judgment the present appeal is taken. The pretension is set up that what was done by the legislature of the Province of New Brunswick as above recited was *ultra vires* and hence that the old original directors had never been displaced. The colour of pretension for this is alleged to be the leasing, or agreement to lease, to His Majesty the King on behalf of the Dominion of Canada. It is not pretended that there was any declaration such as required by the British North America Act by the Dominion Parliament declaring the work in question to be a work for the general advantage of Canada or for the advantage of two or more of the provinces. It is merely pretended that such is to be implied from the fact of the agreement to lease or leasing above referred

to. It is my opinion that there is no foundation in fact or in law upon which to rest such alleged implication, in any event at the time when the appellant company's directors were displaced by the order of the Lieutenant Governor in Council pursuant to the above enactment.

There can be no doubt but that the said legislature had then full power over appellant and its organization.

The other questions sought to be raised as to the legislation which accompanied the displacement of the directors and the reconstituting the board of directors of appellant on the ground that these other enactments were *ultra vires*, can have nothing to do with what is involved in the bare question of the reconstitution of the board. The attempt made to bring this action, under all the attendant circumstances, as disclosed in the history of the road in the past four or five years, seems rather a bold attempt and one which should not be encouraged.

The appeal should be dismissed and the costs be paid by those who promoted this litigation.

DUFF J.—The Legislature of New Brunswick had full authority to enact legislation touching the ownership of the shares in this company which was a provincial company. There is nothing in the arrangement made between the company and the Dominion of Canada or in the Dominion legislation which affects this jurisdiction. The company's railway is nowhere declared in terms to be a work for the general advantage of Canada; and assuming that, in the absence of a declaration in terms to that effect, an intention to characterize a particular work as a work for the general advantage of Canada manifested by neces-

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sary implication from the language of a Dominion enactment could take effect under section 92 (10) of the B.N.A. Act and give to the Dominion Parliament exclusive jurisdiction under section 91 (29) and the provisions of section 92 (10)—assuming this I am still clearly of the opinion that no such implication arises from the provisions of the Dominion enactments in question. On the contrary the intention of Parliament appears to be to treat the company's railway as a provincial work.

The appeal should be dismissed with costs.

BRODEUR J.—The present action is to restrain the defendants respondents, Jones et al., from acting as directors of the St. John and Quebec Railway Company.

The defendants were appointed under legislation passed in 1915 by the legislature of New Brunswick. It is contended by the appellant company that the railway was originally a local work and was then under the legislative control of the province but that it was later on operated under lease by the Dominion of Canada and was impliedly declared to be a "work for the general advantage of Canada," and that the provincial legislature had lost its jurisdiction concerning the company which was the owner of that railway.

It is contended also by the appellant that the provincial legislature could not legislate as to bonds which had been issued by the company when it was under provincial control because they are situate outside the province, and it relies in support of this ground on the authority of *The Royal Bank* v. *The King* (1).

(1) [1913] A.C. 283.

On this latter point raised by the appellant I may say that it cannot be validly raised in the present action which is instituted for the purpose of testing the validity of the election on the appointment of the respondents as directors of the appellant company. The Act of the legislature which authorized the election of the respondents might be *ultra vires* in that respect; but we are not concerned as to whether some other dispositions of the Act as to the bonds are legal or not. This is a suit involving the internal management of the company; and if the legislature had still in 1915 legislative control over the undertaking of the company, then its legislation concerning the status of directors is valid.

It is common ground that there never was any formal federal enactment declaring the railway in question to be a "work for the general advantage of Canada" under the provisions of s.s. 10, item (c) of sec. 92 B.N.A. Act. The appellant contends that such an implied declaration is to be found in some federal statutes, which authorized the Dominion Government to lease the railway and granted some railway subsidies. The power of the federal authorities to operate a provincial railway should not be construed as divesting the provincial authorities of any legislative authority as to this railway. There is nothing in The Railway Subsidies Act which should be considered as a declaration that the railway is declared a work for the general advantage of Canada. The different subsidy Acts of the federal Parliament provide not only for the subsidizing of federal railways but of local railways as well.

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I am of the view that the declaration which the British North America Act authorizes the federal Parliament to make concerning a provincial work, should be made in express terms. It should be done in such a way that there should be no doubt as to the will of the federal Parliament to assume legislative control over a provincial work.

The point was discussed in the case of *Hewson* v. *Ontario Power Co.* (1), and there it was stated by Mr. Justice Davies, who is now the Chief Justice of this court, that he was inclined to think that with respect to a work of a purely provincial kind solely within the jurisdiction of the provincial legislature, a declaration by the federal Parliament to assume jurisdiction should not be inferred from its terms or deduced from recitals of the promoters in the preamble, but should be substantially enacted by the Parliament.

I agree with such a proposition of law. I consider that the declaration should be a formal one.

As I am unable to find in the statutes quoted by the appellant company such a formal declaration its appeal should be dismissed with costs.

MIGNAULT J. concurs with the Chief Justice.

Appeal dismissed with costs.

Solicitor for the appellant: *J. J. F. Winslow.*

Solicitor for the respondent: *Peter J. Hughes.*

(1) 36 Can. S.C.R. 596.

LA CORPORATION DU COMTÉ D'ARTHABASKA (DEFENDANT)... } APPELLANT;

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*May 3
*June 7.

AND

LA CORPORATION DE CHESTER EST (PLAINTIFF)..... }

AND } RESPONDENTS.

LA CORPORATION DE ST-NORBERT (MISE-EN-CAUSE)..... }

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

Appeal—Jurisdiction—Title to lands—Municipal law—Procès-verbal—Opening of road—Expropriation—R.S.C., c. 135, s. 46 "Supreme Court Act."

In an action to quash a *procès-verbal* passed by a municipal council for the purpose of opening a road and acquiring land by way of expropriation or otherwise, the controversy relates to a title to lands and an appeal lies to the Supreme Court of Canada. Idington J. dissenting. *Murray* v. *Town of Westmount* (27 Can. S.C.R. 579) followed.

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 maintaining the respondent's action to quash a *procès-verbal* and a resolution homologating same, passed by the appellant for the purpose of opening a road and acquiring land by expropriation or otherwise.

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

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The Registrar

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.

THE REGISTRAR.—This is a motion to affirm the jurisdiction of the Court. The facts of the case are in part as follows:—

On the 15th August, 1917, Jos. N. Poirier, named *surintendent spécial* of the municipal council of the county of Arthabaska by virtue of a resolution passed on 13th of June of the same year, made a *procès verbal* for the construction of a road as therein set out. The said *procès verbal* recited the regularity of the proceedings which led up to the same and ordered that a road should be opened and that certain lands should be expropriated for the highway and that the work should be executed by the appellant as provided by the municipal code, but at the cost and charges of the respondent and mise-en-cause. On the 12th September, 1917, this *procès verbal* was homologated and public notice thereof as required by the municipal code was duly given on the 19th September. By by-law No. 60 of the appellants, dated 11th September, 1918, a delay was granted for the completion of the work. On February 19th, 1919, an action was instituted by the present respondents to have the said *procès verbal* declared illegal and *ultra vires* and asking to have the resolution homologating the same annulled on a number of grounds. The case was inscribed *en droit* and argued before Mr. Justice Pouliot, who states in his judgment that the mayors of the respondent and mise-en-cause corporations had concurred in the resolution appointing Poirier as *surintendent spécial* of the projected work and in the resolution of Sept. 12th, 1917, of the appellants which homologated the *procès*

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verbal. The learned judge also says that the respondent corporation, by resolution of 10th Sept., 1917, supported the request of certain inhabitants of the respondent corporation who would be contributories to the expense of this work asking that some amendments should be made to the *procès verbal* in order that the road should be declared a county road and be at the charge of the county for opening and maintenance or at the charge of the petitioners, Boulanger et al, or to declare it a local road at the charge of the Corporation of St. Norbert, the mise-en-cause, and that consequently the plaintiff corporation could not be permitted to ask that the *procès verbal* be declared illegal as it had implicitly admitted its legality.

The said judgment also states that the proceedings in the expropriation had been made in execution of the said *procès verbal,* that arbitrators had been appointed, the lands valued and that indemnities had been accorded to the various proprietors, which indemnities had been paid to the parties expropriated and accepted by them and that the monies so paid amounted to $2,825, and the learned judge concludes his judgment by dismissing the plaintiff's action with costs.

On appeal to the Court of King's Bench, the judgment of Mr. Justice Pouliot was reversed and from this judgment the present appeal is taken to the Supreme Court of Canada. The respondents in this court oppose the motion relying strongly upon the decision of *Toussignani* v. *Nicolet* (1), the head-note of which says:—

> The Supreme Court of Canada has no jurisdiction to entertain an appeal in a suit to annul a *procès verbal* establishing a public highway notwithstanding that the effect of the *procès verbal* in question may be to involve an expenditure of over $2,000 for which the appellant's lands would be liable to assessment by the municipal corporation.

(1) [1902] 32 Can. S.C.R. 353.

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The judgment of the court was pronounced by Sir Henri, then Mr. Justice, Taschereau in which he held that the jurisprudence of the court was against the right to entertain the appeal. He says:—

> The fact that the *procès verbal* attacked by the appellants' action may have the result to put upon them the cost of the work in question, alleged to be over $2,000, does not make the controversy one of $2,000. There is no pecuniary amount in controversy; in other words there is no controversy as to a pecuniary amount or of a pecuniary nature. It is settled law that neither the probative force of a judgment, nor its collateral effects, nor any contingent loss that a party may suffer by reason of a judgment are to be taken into consideration when our jurisdiction depends upon the pecuniary amount or upon any of the subjects mentioned in sec. 29 of the Supreme Court Act.

At the conclusion of his judgment he says that certain decisions of the court are authorities against the appellants' claim to an appeal based upon s.s. (g) of sec. 24 of the Act, (now sec. 39 (e)) and proceeds:—

> Then this is not a case of a by-law, but of a *procès verbal*. And it is a private action, not a petition to annul under the Municipal Act. The distinction between these two proceedings was made in *Webster* v. *The City of Sherbrooke* (1), and *McKay* v. *Township of Hinchinbrooke* (2).

I am of the opinion that the authority of this decision has been much shaken by subsequent decisions. So far as it holds that where a municipal by-law is attacked in a private action that the judgment quashing the by-law would only be binding as between the parties it is seriously controverted by some of the judges in the case of *Shawinigan Hydro-Electric Co.* v. *Shawinigan Water & Power Co.* (3). In the latter case also the majority of the court held that although the proceeding was one nominally for an injunction, the court would look at the substance of the appeal which in that case was the validity of a contract involving $40,000 and on that ground held that the court had jurisdiction to hear the appeal.

(1) [1894] 24 Can. S.C.R. 52. (2) [1894] 24 Can. S.C.R. 55.
(3) [1910] 43 Can. S.C.R. 650.

More recently in the case of *Bisaillon* v. *the City of Montreal* (1), it was held in an action brought to annul a resolution of the City of Montreal and for an injunction to restrain the city from proceeding to expropriate lands, that the Supreme Court had jurisdiction under sect. 46 s.s. e of the "Supreme Court Act" ont he ground that it involved title to lands and other matters or things where rights in future might be bound. The most recent case of all is that of *La Ville de La Tuque* v. *Desbien*, decided in February, 1920, and reported shortly in the Supplement to Cameron's Supreme Court Practice, p. 35. At the time of the publication of the supplement the reasons for judgment were not available. I have them now so far as any were delivered, viz., those of Mr. Justice Brodeur (concurred in by Mr. Justice Idington) and of Mr. Justice Mignault. In that case the declaration alleges that the municipal council of La Tuque had passed a resolution ordering the opening of a new road according to the terms of the petition. The declaration alleged that the road had been opened to the public for three or four weeks; the resolution of the council was attacked on the ground that it was illegal and *ultra vires*, as the municipality had no power to buy the land required for the opening of the road; and that the proceeding by way of by-law and resolution was not sufficient to make valid the procedure of the municipal council. Mr. Justice Gibsone in the Superior Court found in favour of the plaintiff and declared the resolution illegal and *ultra vires* and ordered the road to be closed and his judgment was confirmed by the Court of King's Bench. Thereupon an appeal was taken to the Supreme Court of Canada and the respondent moved to quash for want of jurisdiction. Mr. Justice Brodeur says:—

(1) 2 Cameron's Sup. C. Pract. 176.

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S'il s'agissait que de la légalité de la résolution ordonnant l'ouverture d'une rue, il n'y aurait pas de doute que nous n'aurions pas juridiction. *Verchères* v. *Varennes* (1); *Bell Telephone Co.* v. *Québec* (2); *Dubois* v. *Ste. Rose* 3).

Mais cette résolution comporte l'acceptation de donation et l'achat des terrains pour une somme excédant $2,000. Ces terrains, dont le titre était en faveur de la corporation, cessent par là même d'être la propriété de la corporation municipale et les vendeurs ou les donateurs qui ont été mis en cause redeviennent les propriétaires des terrains qu'ils avaient cédés.

Je ne vois pas la différence entre la présente cause et celle de *Murray* v. *Westmount* (4), où nous avons décidé que dans une action pour annuler un règlement pour l'expropriation d'un terrain le litige a trait à un droit immobilier, "title to lands."

Je pourrais aussi citer la cause de *Shawinigan Hydro-Electric Co.* v. *Shawinigan Water & Power Co.* (5), où il s'agissait d'un règlement ordonnant l'achat de certaines propriétés. La majorité de la cour a décidé que nous avions jurisdiction.

La cause de *Bisaillon* v. *La Cité de Montréal* (6) avait été instituée pour annuler une résolution par laquelle la cité se désistait de l'expropriation de certains terrains et limitait son expropriation à d'autres propriétés; et nous en sommes venus à la conclusion que cette cour avait jurisdiction.

La motion doit être renvoyée avec dépens.

Mr. Justice Mignault in his judgment states:—

Je suis d'opinion que l'affaire en litige s'élève à la somme ou valeur d'au moins deux mille dollars.

Le maintien de l'action de l'intimé a nécessairement l'effet de rendre nulles les ventes de terrains que les mis-en-cause ont fait à l'appelante, car s'il a été jugé que la résolution en question est illégale, *ultra vires* et nulle, et s'il est fait défense à l'appelante de donner suite à la dite résolution, il restera décidé que l'appelante n'avait pas le droit d'acheter ces terrains pour l'ouverture de la nouvelle rue, et elle ne pourra pas payer la balance qui reste due sur les achats, car ce serait donner suite à la résolution qu'elle a adoptée. Le montant ou valeur en contestation est d'au moins $2,000.

Pour cette raison je suis d'avis que le droit d'appel existe, mais ce droit d'appel pourrait également se justifier sous l'opération du paragraphe (b) de l'article 46 de l'"Acte de la Cour Suprême," car l'affaire en litige "a rapport à un titre de terres ou tenements".

Je suis donc d'avis que la motion de l'intimé doit être renvoyée avec dépens.

(1) [1891] 19 Can. S.C.R. 365. (4) 27 Can. S.C.R. 579.
(2) [1891] 20 Can. S.C.R. 230. (5) 43 Can. S.C.R. 650.
(3) [1892] 21 Can. S.C.R. 65. (6) Cameron's Sup. C. Pract. Vol. 2, 176.

The present case, I think, is clearly distinguishable from *Toussignant* v. *Nicolet* (1) in this regard that in the latter the proceedings were taken as soon as the resolution of the municipal council was passed homologating the *procès verbal*. In the present case after homologation the road was laid out, lands were expropriated, moneys paid to the property owners in amount exceeding $2,000 and the lands became the property of the municipality. If the present judgment appealed from should stand it would mean that the municipality will have no title to the lands expropriated. There is therefore clearly a title to lands involved and a sum of money exceeding $2,000 and these are not matters collateral to the *procès verbal* but are the very substance and essence of the matter in controversy between the parties.

I am therefore of opinion that there is jurisdiction in this court to hear the appeal. At any rate the question of jurisdiction is sufficiently doubtful, putting it most favourably to the respondent, that I conceive it my duty to allow the application because no special prejudice will arise to respondent. He still has the right to move to quash the appeal for want of jurisdiction at the opening of the court. April 8th, 1921, E. R. Cameron, Registrar.

Alleyn Taschereau K.C. and *W. Girouard* for the motion.

Antonio Perreault K.C. contra.

THE CHIEF JUSTICE.—I concur with Mr. Justice Mignault.

(1) 32 Can. S.C.R. 353.

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Idington J.

IDINGTON J. (dissenting).—This suit being essentially nothing but a struggle between appellant, a county municipality, and the respondents, which are other municipal corporations within same, as to the validity of a *procès verbal* of the appellant and proceedings pursuant thereto for the purpose of constituting a county highway and of imposing the burden of creating and maintaining same, or respective parts thereof, upon the respondents, I fail to understand how either the title to land or the amount which might be involved in the execution of the project if carried out, are at all in question. Probably some day we will hear the argument put forward that we have jurisdiction because two thousand dollars had been spent by the parties in litigation and that hence it is necessary to see which party we should direct to pay that sum.

I am of the opinion that we have no jurisdiction to entertain the appeal and that the affirmation by the registrar's order of such right must be reversed with costs of the application before him and of this motion.

DUFF J.—I concur in the result.

ANGLIN J.—I concur with Mr. Justice Mignault.

MIGNAULT J.—L'intimée demande la cassation de cet appel, prétendant que nous sommes sans juridiction pour en connaître. Le savant greffier de cette cour, M. Cameron, sur une motion de l'appelante, a déclaré que nous avions juridiction, mais l'intimée n'en demande pas moins que l'appel soit cassé.

L'action de l'intimée, rejetée par la cour supérieure mais maintenue par la cour du Banc du Roi, est en cassation d'un procès-verbal homologué par le conseil

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de l'appelante, et par ses conclusions l'intimée demande l'annulation du procès-verbal et de la résolution d'homologation. Le procès-verbal ordonne l'ouverture d'un chemin et l'acquisition à l'amiable ou par expropriation du terrain nécessaire, et la résolution du conseil de l'appelante, en homologuant ce procès-verbal, ordonne par là-même cette acquisition ou cette expropriation. L'intimée a attendu si longtemps avant d'intenter son action que le terrain à être occupé par le chemin avait été, lors de la signification des procédures, non seulement exproprié mais payé, la dépense totale se montant à $2,825.00.

Je suis d'opinion qu'il y a lieu d'appliquer ici la décision de cette cour dans *Murray* v. *The Town of Westmount* (1). Dans cette dernière cause une résolution du conseil municipal ordonnait l'élargissement d'une rue et l'acquisition ou l'expropriation du terrain requis. Ici c'est une route qu'on veut ouvrir et le procès-verbal et la résolution d'homologation décrètent l'acquisition à l'amiable ou par expropriation de l'emplacement du chemin. Il y a donc parité complète entre les deux espèces, et puisque dans *Murray* v. *Town of Westmount* (1) nous avons décidé que nous avions juridiction, le litige se rapportant "à un titre, à des terres ou tenements" (art. 46, "Loi concernant la cour suprême"), il faut nécessairement en arriver à la même conclusion ici.

Je suis d'avis de renvoyer la motion de l'intimée avec dépens.

Motion dismissed with costs.

(1) 27 Can. S.C.R. 579.

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*May 3, 4.
*June 7.

THE STANDARD BANK OF CANADA (DEFENDANT)..... } APPELLANT;

AND

FRANCIS J. FINUCANE (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Debtor and creditor—Banks and banking—Whole output hypothecated to bank—Part given as security for outside loan—Bank's approval—Liability to account.

The R. Co., pulp manufacturers, being indebted to the appellant bank, had hypothecated to it their whole output. Respondent made a loan to R. Co. of $5,000; and, as security, R. Co. undertook to pay him "$10 per ton from the proceeds of each ton of pulp manufactured and sold." This agreement was marked approved by the bank. All the proceeds of pulp sales were deposited in the appellant bank to the credit of R. Co. Certain sums were paid to respondent by the bank, pursuant to this agreement; but later the bank refused to honour cheques drawn by R. Co. in favour of the respondent who brought action against the bank.

Held, that the appellant bank was liable to account to the respondent for $10 per ton from the proceeds of pulp sales actually received by it from R. Co.

Per Duff J. and *semble* Anglin J.—Such agreement was an equitable assignment to the respondent of $10 per ton of the proceeds of pulp sales received by the appellant bank.

Per Anglin and Mignault JJ.—This agreement created an equitable charge on such proceeds to the extent of $10 per ton.

Judgment of the Court of Appeal ([1921] 1 W.W.R. 456) affirmed.

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

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

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

E. A. Lucas for the appellant.

E. P. Davis K.C. for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal fails and should be dismissed with costs. I do not consider that the construction of the agreement in question admits of any reasonable doubt. The bank was liable under it to account to the Holley Mason Hardware Co. in consideration of that company's advancing $50,000 to the Rainy River Pulp and Paper Company, for $10 of the proceeds of each ton of pulp deposited with it by the Rainy River Pulp and Paper Company. All the output of that company was hypothecated to the bank as security for the advances made by the bank to this company from time to time. The bank instead of recognising and acting upon its liability under the above agreement with the Holley Mason Hardware Co. paid out the whole of the proceeds of the pulp deposited with it by the Rainy River Pulp and Paper Company to third parties on the cheques and orders of the Rainy River Co. and now disputes its liability to the Holley Mason Co. for that $10 per ton of the proceeds of the pulp deposited with it.

(1) [1921] 1 W.W.R. 456.

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The Chief Justice.

I cannot doubt their liability so to reserve and account to the Holley Mason Hardware Co. for this $10 per ton of pulp received by it and so would dismiss the appeal.

IDINGTON J.—I would dismiss this appeal with costs.

DUFF J.—The appeal should be dismissed with costs. I can have no doubt that the instrument in question operated as an equitable assignment and that it affected the funds which came into the hands of the bank.

ANGLIN J.—I would dismiss this appeal.

The document executed by the Rainy River Pulp and Paper Company and assented to and approved by the appellant bank, if not an equitable assignment to the plaintiff's assignor of $10 per ton of the proceeds of its product hypothecated to the bank and received by it (as I incline to regard it) was at least an equitable charge to that extent on such proceeds. It was well understood by all parties when the document was executed that the bank would handle, as it did in fact, all the proceeds of the Rainy River Company's output. The purpose of the document given by that company to the plaintiff's assignor was to give the latter effective security on those proceeds for the sum of $50,000 which it was advancing to improve the financial position of the Rainy River Company. In order to make that security effective it was essential that the part of those proceeds intended to go to the plaintiff's assignor should be held for it; and that fact was of course well known to the bank. By its assent to and approval of the instrument the bank, in my

opinion, impliedly undertook that out of the monies to be received by it as proceeds of the output of the Rainy River Company there would be withheld from other disposition by that company sums sufficient to satisfy the security on those proceeds given to the plaintiff's assignor. The bank, with full knowledge of what was being done, became a party to the fund so appropriated being diverted, while in its hands, by the Rainy River Company to third parties. The bank probably benefitted indirectly from such diversion. But apart from deriving benefit therefrom, the fact that it became a party to the diversion renders it liable to the plaintiff. Its officers knew that money in its hands belonging in equity to the plaintiff's assignor or which it was entitled to have held for its benefit was being misapplied by the bank's customer and the bank participated in that misapplication by honouring the cheques by which it was made.

MIGNAULT J.—The judgment of the first court contains the following admission of the parties:—

> It being admitted and agreed in lieu of an accounting that 844 tons of pulp were manufactured and sold by the Rainy River Pulp and Paper Company during the months of November and December, 1918, and January, 1919, and that the proceeds of the sale of 724 tons thereof were deposited in the defendant bank to the credit of the Rainy River Pulp and Paper Company, and that the proceeds of the balance, 120 tons, were paid to the assignee of the said Rainy River Pulp and Paper Company.

On this admission of facts, the learned trial judge, instead of ordering an accounting, condemned the appellant to pay the respondent $10.00 per ton on 724 tons, in all, $7,240.00.

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Mignault J.

The question whether he was right in so doing—and his judgment was affirmed by the Court of Appeal, Mr. Justice McPhillips, dissenting—stands to be determined on the construction of the letter of the Rainy River Pulp and Paper Company, to the Holley-Mason Hardware Company (now represented by the respondent), dated May 13th, 1918.

By this letter, the former company promised to repay $50,000 loaned to it by the latter company, and as security to pay $10.00 per ton from the proceeds of each ton of pulp manufactured and sold by it from the 1st of June, 1918, until full re-payment. The letter added (I copy textually from the plaintiff's exhibit No. 1):—

> It is understood that our bankers, the Standard Bank of Canada, to which all our output is hypothecated for advances from time to time, has full knowledge of this arrangement and approves of it, and will waive its security to that extent.

At the foot of the letter the approval of the appellant is given by the word "approved" followed by the signature of the bank per G. C. Perkins, manager.

Mr. Perkins was replaced as manager of the Vancouver Branch of the appellant bank on October 1st, 1918; by Mr. J. M. Sutherland, who, in his examination on discovery, states that so far as he knows every cent of the money that was received on account of sales of pulp went into the account, in the appellant bank, of the Rainy River Pulp and Paper Company. The latter company issued drafts against the sale and shipment of pulp and discounted them with the appellant, to whom it was indebted and remained so for large advances. One draft appears to have been sent to another bank, the Bank of Kentucky, but this is immaterial in so far as the issues here are concerned. The whole output of the Rainy River Company was

hypothecated to the appellant, so that the security obtained by the Holley Mason Hardware Company required the consent of the appellant, and this consent was given no doubt because the loan of $50,000 was for the advantage of the Rainy River Company and presumably also of the bank, its creditor, where the proceeds of the loan were deposited. I may add that the Rainy River Company made monthly returns to the Holley Mason Hardware Company of its sales of pulp, accompanied by its cheques for the 10 per cent, and, although in one instance at least no sufficient funds stood to the credit of the Rainy River Company, these cheques were accepted and paid by the bank until December 1918, when, on the instructions of Mr. Sutherland, further payments were refused, the Rainy River Company not having sufficient funds to meet the cheques issued by it in favour of the Holley Mason Hardware Company.

The material facts are therefore, that the proceeds of pulp sales were deposited in the bank to the credit of the Rainy River Company, that the latter was allowed by the bank to draw out these proceeds, that for some months the ten per cent on the pulp sales was paid to the Holley Mason Hardware Company by cheques drawn on the bank, and accepted by the latter, although in one instance at least there were not sufficient funds to the credit of the Rainy River Company, and that from December, 1918, the bank refused to pay any further cheques issued in favour of the Holley Mason Hardware Company, although the Rainy River Company continued to discount its drafts and draw cheques on its account. It does not appear that the debt due the bank was reduced by

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means of these discounts. I may add that all drafts discounted were charged in the usual course to the Rainy River Company and their payment credited to it.

Neither of the parties referred us to section 96 of the "Bank Act," the effect of which is to exempt a bank from liability by reason of a trust affecting a bank deposit, although the bank has notice thereof, and the receipt of the depositor is declared to be a sufficient discharge to all concerned for the payment of any money payable in respect of such deposit.

I am disposed to think that unless the approval given by the bank to the transaction between the Rainy River Company and the Holley Mason Hardware Company is more than a mere acknowledgment of notice of the trust affecting the deposit of the proceeds of the pulp sales, this approval would not give a cause of action to the assignee of the Holley Mason Company against the bank. But this approval seems to me much more than an acknowledgment of notice of this trust. In terms, it waives the bank's security to the extent of ten per cent, and not only this waiver but the approval of the whole transaction in my opinion takes the matter out of the terms of a general provision like section 96. It seems unquestionable that an equitable charge was created on the proceeds of the pulp sales to the extent of the ten per cent, and when these proceeds were deposited in the bank, the latter, in view of its assent to the letter of the 13th of May, 1918, could not, either by asserting its own lien, or by allowing the Rainy River Company to draw on the proceeds, defeat the claim of the Holley Mason Company to the ten per cent. In other words when the bank received these proceeds of pulp sales on deposit it took them subject to the charge

affecting them and became a trustee towards the Holley Mason Hardware Company for the payment to it of the ten per cent. On that ground I think the trial judge and the Court of Appeal rightly held the appellant liable for the ten per cent of the proceeds of pulp sales actually received by it from the Rainy River Company.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Lucas, Lucas & Richmond.*

Solicitors for the respondent: *Zennie & Clark.*

1921

May 10.

HIS MAJESTY THE KING.....APPELLANT;

AND

NAT BELL LIQUORS, LIMITED.RESPONDENT.

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

Appeal—Certiorari—"Criminal charge"—"Supreme Court Act," s. 36, as enacted by 10-11 *Geo. V., c.* 32.

A judgment quashing a conviction for an infraction of a provincial liquor act is a judgment in a proceeding arising out of a criminal charge within the exception to section 36 of the "Supreme Court Act" as enacted by 10-11 Geo. V., c. 32. *Mitchell* v. *Tracey* (58 Can. S.C.R. 640) applied.

APPEAL by the intending appellant from an order of the Registrar refusing to affirm the jurisdiction of the court and approve the security.

The intended respondent was convicted before a magistrate in the Province of Alberta after the 1st of July, 1920, for unlawfully selling liquor in contravention of the "Alberta Liquor Act." The liquor,which was seized and was of considerable value, was also declared forfeited to His Majesty. The conviction having been brought before Mr. Justice Hyndman of the Supreme Court of Alberta on *certiorari* was quashed and the order of forfeiture set aside. On appeal, the Appellate Division sustained that judgment, the Chief Justice dissenting. From this latter judgment it is now sought to appeal to this court.

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

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THE KING.
v.
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The Registrar

THE REGISTRAR.—This is an application to affirm the jurisdiction of the court.

The facts shortly are: That an information was laid on the 7th day of October, 1920, against the respondent before Geo. B. McLeod, a magistrate in the Province of Alberta, charging that he did "unlawfully sell a quantity of liquor contrary to the Liquor Act and amendments thereto." After trial the respondent was convicted in the language of the information and was adjudged to pay $200 and costs and at the same time an order was made declaring that the liquor seized, of very considerable quantity and value, should be forfeited to His Majesty to be sold or otherwise disposed of as the Attorney-General might direct. Thereupon a motion by way of *certiorari* was made before the Honourable Mr. Justice Hyndman to have the conviction quashed which was granted on the 21st of December, 1920, and at the same time an order forfeiting the goods seized was set aside and quashed. From these orders of Mr. Justice Hyndman an appeal was taken to the Appellate Division of the Supreme Court of Alberta, where his judgment, by a judgment dated Feb. 21st, 1921, was sustained, the Chief Justice dissenting.

The contention on behalf of the Crown is that this is not a criminal appeal and that the amount involved exceeds $2,000. The case is one falling under the amendment to the "Supreme Court Act" by 10-11 Geo. V, ch. 32. I will assume for the purposes of my judgment that the amount involved exceeds $2,000, there being evidence to that effect in the appeal book, as I am of the opinion that this case is one of *certiorari* arising out of a criminal charge which is excepted from the court's jurisdiction by section 36.

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The Registrar

Previous to the decisions of *Re McNutt* (1) and *Mitchell* v. *Tracey* (2), a strong argument might have been presented to the Court that an order for *certiorari* to set aside a conviction under a "Liquor License Act" was a civil and not a criminal proceeding. Apparently the case of *Bigelow* v. *the Queen* (3), was one of this kind and the court assumed there was jurisdiction and dismissed the appeal. By the recent decisions above mentioned I am of the opinion that the question of the jurisdiction of this court is now settled and that a proceeding by way of prohibition, *certiorari* or *habeas corpus* arising out of a conviction made pursuant to the "Liquor Act" of Alberta or the "Nova Scotia Temperance Act" are proceedings "on a criminal charge" within the meaning of the "Supreme Court Act" and that a judgment in such case of the Appellate Division of the Supreme Court of Alberta is not the subject of a further appeal to the Supreme Court of Canada. If the conviction falls the order for a forfeiture necessarily accompanies it.

S. B. Woods K.C., for the intended appellant.—Since the adoption of the new section 36 of the "Supreme Court Act," enacted by 10 & 11 Geo. V, c. 32, *Mitchell* v. *Tracey* (2) is no longer an authority upon the interpretation of the words "arising out of a criminal charge." Those words closely follow the words "except in criminal causes." The adjective "criminal" must be given the same meaning throughout the section. The words "in criminal causes" replaced the former provision contained in clause (b) of s. 36, "there shall be no appeal in a criminal case except as provided in the Criminal Code." It is therefore

(1) 47 Can. S.C.R. 259. (2) 58 Can. S.C.R. 640.
(3) 31 Can. S.C.R. 128.

quite clear that "criminal causes" in the new section 36 relates to crimes cognizable under the criminal code. The distinction made between "criminal case" in clause (b) and "criminal charge" in clause (a) of the former section chiefly depended upon the fact that these terms were found in different contexts and in separate sub-clauses of the section. It being clear that "criminal causes" means proceedings instituted under the criminal code, "proceedings * * arising out of a criminal charge" should be given the same construction.

C. C. McCaul K.C., for the intended respondent.—While it is clear that the exception of "criminal causes" in the new section replaced clause (b) of the old s. 36, it is equally clear that the exception of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a "criminal charge" replaces the corresponding provision of clause (a) of the former section. The words "except as provided in the criminal code" were dropped as tautologous because covered by the provision of new s. 43. In construing it the history of the new section cannot be ignored. There is nothing to indicate that parliament intended to change the law. On the contrary, everything points to consolidation and abbreviation having been the purposes of the change made. Had parliament intended the construction contended for on behalf of the Crown, we should have found the words "arising thereout" instead of "arising out of a criminal charge." The fact that the latter words, which had received judicial construction, are re-enacted, cannot be ignored.

At the conclusion of the argument the judgment of the court was delivered by:—

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The Chief Justice.

THE CHIEF JUSTICE.—Notwithstanding the ingenious and able argument advanced by Mr. Woods, we are unanimously of the opinion that we are without jurisdiction to entertain this appeal and that our decision in *Mitchell* v. *Tracey* (1), governs the construction of the words "arising out of a criminal charge" in s. 36 of the "Supreme Court Act," as enacted by 10-11 Geo. V, c. 32.

Appeal dismissed with costs.

(1) 58 Can. S.C.R. 640.

G. W. LEECH (PLAINTIFF).....APPELLANT;

1921

May 12, 13.
June 7.

AND

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

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

Negligence—Collision—Tramways—Right of way—By-law—Obligation to look-out—Jury trial—Misdirection.

The appellant, while driving an automobile, was injured by collision with a tram car operated by the respondent. In an action for damages, the jury found that both the appellant and the respondent were at fault. Evidence was adduced of a by-law giving the street car a right of way over other vehicles; and the trial judge in his charge said in substance that this by-law relieved the motorman, when travelling at a proper rate of speed, from the obligation to keep a look-out.

Held, Idington J. *contra*, that this was misdirection; but

Held also, Duff J. dissenting, that in view of the findings of the jury, read in the light of the evidence, no substantial wrong or miscarriage resulted therefrom.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta affirming the judgment of the trial judge with a jury 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.

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

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J. H. Leech K.C. for the appellant.

W. S. Ball for the respondent.

The Chief Justice.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs. I think the findings of the jury are fully justified by the evidence.

A question was properly raised by appellant's counsel to the effect that there was misdirection on the part of the trial judge as to the street cars "right of way," but I do not think, looking at the case as a whole, that the jury were misled by any such misdirection, or that any substantial wrong or miscarriage resulted from it.

The plaintiff's negligence found by the jury on evidence fully warranting it was not affected by the misdirection complained of.

IDINGTON J.—The appellant driving an automobile on one of the streets of Lethbridge which crosses at right angles another street a hundred feet wide, whereon the respondent has a double track street railway, attempted to cross said railway. After crossing the first track in safety and getting on the second of said tracks, a street car moving thereon struck his car "amidships," as one of the witnesses aptly describes the results. This happened between one and two o'clock p.m. and not as a result of appellant's car being stalled or hampered in any way, or his vision obscured, unless by his own want of care in closing the side curtains of his automobile.

The appellant sued respondent herein for damages arising from said collision alleging they resulted from said street car being operated negligently, carelessly and recklessly, and at excessive speed, and, in contravention of the law, was in charge of a motorman whose

physical defects unfitted him for the proper discharge of his duties. These allegations were denied by the pleadings of the defendant (now respondent) and the latter alleged in its defence that the damages claimed were the result of reckless and careless driving by the plaintiff (now appellant) and that he was unable to see the street car by reason of the enclosed sort of car which he was driving and that he was driving at a high rate of speed and drove it into the street car of respondent.

The learned trial judge charged the jury in a most fair and impartial spirit though some isolated sentences may contain propositions liable to criticism as possibly capable of better expression of the exact law bearing on the subject. What charge is not?

None of such were, if the jury is to be assumed as possessed of common sense, at all likely to mislead in a case which required only the application of such sense to properly dispose of all involved.

He submitted five questions to the jury.

The only objection taken to the charge was to ask the correction of a statement relative to some minor matter of evidence, which was duly acceded to.

It was admitted in argument herein that the said questions had been submitted to the counsel engaged at the trial and no objection of any kind was taken thereto, or any request made for further questions.

The first three questions submitted were as follows and answered as appears set opposite each respectively:–

1. Was there any negligence on the part of the defendant? A. Yes.

2. If the answer to the first question be "Yes," in what respect was the defendant negligent? A. Inasmuch as the motorman did not exercise the necessary observation in failing to see plaintiff's car approaching from the north.

3. If there was any negligence on the part of the defendant, could the plaintiff have avoided the accident by the exercise of reasonable care and diligence? A. Decidedly yes.

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In light of the pleadings, the evidence, and the learned judge's charge, these answers would seem conclusively to dispose of the whole case.

The fourth question related to damages if assessed, but in the result no need therefor. I will refer to the fifth question presently.

It is to be observed that the first question does not distinctly raise the question of negligence of the defendant causing the accident.

One of the peculiarities of the case is that there is nothing proven as to the alleged excessive speed or anything in the way of neglect in way of outlook or otherwise, which could properly be held to have caused the accident if the plaintiff had observed common sense and prudence.

Hence the importance of the answer to the third question. The answers to the first two questions no doubt were the result of evidence as to the defective eyesight of the motorman upon which the learned trial judge made some pointed remarks in his charge.

The finding being confined to the outlook question all the other allegations of negligence on the part of respondent presumably failed and hence are impliedly negatived by the answer of the jury.

When we read the evidence of the appellant and find from his own story such a remarkable mass of evidence of neglect, on his part, of the exercise of ordinary care and prudence, we can realize the import of the answer "Decidedly yes."

The facts, that there was no objection as now taken to the learned judge's charge, or to the questions put, or request for further questions thus submitted, would have furnished at almost any of said respective stages in the development of these aspects of trial by jury, an impassable barrier to the plaintiff seeking a new trial.

But to put an end, if possible, to such departures from that violation thereof as had become too common, an imperative prohibition was introduced in England and other jurisdictions into the rules against granting new trials, unless some substantial wrong or miscarriage had been occasioned on the trial.

That so far as Alberta is concerned appears in section 329 of its Judicature Ordinance, as follows:—

> 329.—A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the court to which application is made some substantial wrong or miscarriage has been thereby occasioned on the trial; and if it appears to such court that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the court may give final judgment as to part thereof, or some or one only of the parties and direct a new trial as to the other part only or as to the other party or parties.

Having, in order to be able to observe the terms of this rule, read the entire evidence, I fail to understand how any claim can be reasonably made on the part of one so far disregarding, as appellant did, the most ordinary rules of prudence and thereby placing himself where he and his car were injured.

Not only is it quite obvious that he must not have exercised due care, looking from where he claims he did, to see if a street car was in sight, but that his venturing to cross at a moment when, if he had looked or listened properly, he must have realized collision was inevitable unless he stopped or turned his car aside.

Indeed the street cars in Lethbridge may, by some secret method unexplained, travel in silence instead of making the noise the like cars make elsewhere, especially if running at high speed as charged, quite enough to awaken any ordinary dreamer gliding quietly along in his auto.

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Idington J.

There is no evidence on that point, but I rather think from the evidence we have of Commissioner Freedman that the use of whistles and gongs is forbidden unless in case of absolute necessity that might serve a useful purpose, as in the case of an auto driver threatening to intrude upon the right of way of the street cars as they in moving make quite enough noise.

Notwithstanding the said evidence the appellant swore as to such warnings, as follows:—

Q.—Do you know whether that is the custom where there is any one crossing the track?

A.—I could not say as to that; I know it is customary to get a signal at an intersection; I know we have been saved a good many times; I am saying that from my own experience.

Q.—That is, if crossing a track you get a signal?

A.—Not always, but I know I have scores of times got a signal as I was approaching a street car on an avenue or street, which has in many cases saved me.

Is it to be inferred that he must have been habitually an offender by getting in the way of street cars?

However all that may be I am not surprised that the Appellate Division, possessed of local general knowledge which we are not, dismissed his appeal without making any remarks.

The fifth question submitted to the jury, and answer thereto is as follows:—

5. If there was negligence on the part of the defendant and contributory negligence on the part of the plaintiff, could the motorman have then avoided the accident by reasonable care?

A.—No. As the motorman had right of way.

There was in the evidence no need of this question as very often exists to elicit the facts as to possible ultimate negligence.

The appellant's car came in sight of the motorman of the street car when, as he expresses it, the two were within six or eight feet of each other and he

instantly reversed and did all possible to save the situation, and that is corroborated by the uncontradicted evidence of the mechanical condition of the street car when examined after the accident.

The reference in the answer to the motorman having the right of way must be read in light of the learned judge's charge correctly stating the law as fixed by the bylaws when travelling at a reasonable rate of speed.

I submit the appeal should be dismissed with costs.

DUFF J. (dissenting):—The learned trial judge seems to have misstated the law to the jury in a very important point. Nothing in the city by-law could excuse the failure of the motorman to keep a proper lookout; and to tell the jury that this was not required so long as a moderate speed was maintained necessarily must have had the effect of misleading them in respect of the material issues.

The failure to take the objection does not, I think, preclude the appellant from raising the point on appeal. Even when the error complained of is misdirection this is not the necessary consequence of failure to take the objection at the trial; *White* v. *Victoria Lumber & Manufacturing Co.* (1); and it seems that, the learned trial judge having explained his view in the clear, precise and concrete terms used by him, no objection taken by counsel was at all likely to lead to an amendment.

The point to be considered is whether it is clear that there has been no substantial wrong or miscarriage of justice. Now it is plain enough that on the evidence it was quite open to the jury to find excessive speed and furthermore to find that by reason of excessive speed the motorman had disabled himself from avoiding

(1) [1910] A.C. 606.

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Duff J.

the consequences of appellant's negligence; *Columbia Bithulitic Limited* v. *British Columbia Electric Ry. Co.* (1); and also that the motorman by failing to maintain a proper lookout had negligently prevented himself becoming aware of the appellant's negligence in time to avoid the consequences of it. In other words, on the evidence it was quite open to the jury to have found the facts in such a way as to bring the case within *Loach's Case* (2). In truth the jury probably thought there was excessive speed; otherwise the jury's finding is not easily to be understood. And at all events the finding in answer to the last question is obviously the result of the learned judge's erroneous direction as to the necessity of a proper lookout.

The appellant has I think suffered substantial wrong and there should be a new trial.

ANGLIN J.—Although there was undoubtedly grave misdirection in telling the jury that the by-law giving right of way to the defendants' street car on the streets of the town relieved their motorman when travelling at a proper rate of speed from keeping a lookout, the findings of the jury read in the light of all the evidence satisfy me that no substantial wrong or miscarriage on the trial resulted therefrom. (R. 329). The misdirection had to do only with the negligence of the defendants. The jury found that the defendants were negligent in that their "motorman did not exercise the necessary observation" and that finding was not challenged. The negligence charged and found against the plaintiff was not affected by the direction complained of. Apart from misdirection no ground for interference with that finding was suggested.

(1) [1917] 55 Can. S.C. R. 1. (2) [1916] 1 A. C. 719.

The only finding of the jury which could have been affected by the misdirection was that in regard to what has sometimes been termed "ultimate negligence." In answer to the question "if there was negligence on the part of the defendant and contributory negligence on the part of the plaintiff, could the motorman have then avoided the accident by reasonable care?" the jury said:—"No. As the motorman had right of way."

But the circumstances of the case were such that no issue of "ultimate" negligence on the part of the defendants arose.

Having regard to all the circumstances I think the finding that the plaintiff could by the exercise of reasonable care and diligence have avoided the accident was a sufficient finding of contributory negligence on his part.

The appeal in my opinion fails.

MIGNAULT J.—This is not a very satisfactory case. The appellant, who was driving an automobile in the streets of Lethbridge, was injured by coming in collision when crossing the street car line with a tram car operated by the respondent. The appellant's side curtains were closed and the only way he could see was through the glass windshield, which would give him a range of vision on either side of about 150 feet, and he says he looked when approximately 20 feet from the street on which the cars ran, but saw no car. The motorman saw the automobile only when it was on the track and then of course it was too late to avoid the collision. My impression is that he was not keeping a proper lookout, but on the other hand it seems to me that had the appellant

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Mignault J.

acted as a reasonably prudent man would have done he should have seen the tram car in time to stop before reaching the tracks. After hearing the evidence, the jury came to the conclusion that both the appellant and the motorman were at fault, the latter because he did not exercise the necessary observation, and their reply to the third question, whether, if there was negligence on the part of the defendant, the plaintiff could have avoided the accident by the exercise of reasonable care and diligence, was "Decidedly yes." The appellant's action was dismissed, and the judgment of the learned trial judge was unanimously affirmed by the Appellate Division of the Supreme Court of Alberta.

The answer of the jury to the third question would be conclusive against the appellant if the jury were properly directed. That however is the difficulty here. The learned trial judge, referring to a by-law of the City of Lethbridge giving the street cars a right of way over all other vehicles travelling on the highway, said to the jury:—

> The effect of that is that travelling at a proper rate of speed when approaching a crossing it is the duty of the automobile owner to avoid a collision and not the duty of the motorman in travelling at a proper rate of speed to keep a lookout.

Further the learned trial judge stated:

> It appears to me that, although to a lesser extent, the street car having the right of way and proceeding at a reasonable rate of speed under the circumstances and an automobile comes in contact with it, the owner of the automobile is responsible for the damage sustained and that the owner of the street railway would not incur responsibility. That appears to me to be the effect of this by-law.

With all deference I cannot think that this was a proper direction to the jury. The by-law giving right of way to the street cars certainly did not relieve the

motorman, even when travelling at a proper rate of speed, from the obligation to keep a proper lookout in order to avoid coming in collision with vehicles crossing the car tracks.

The difficulty in the way of the appellant is however twofold.

In the first place no objection was taken on behalf of the appellant at the trial to this direction of the learned trial judge, and I cannot but believe that if such an objection had been made the learned judge would have found it advisable to qualify his statement. The appellant by failing to object seems to have taken the chance of the jury's verdict.

In the second place, the jury, notwithstanding the statements I have quoted, evidently thought the motorman should have taken a proper observation of the roadway, for they found the respondent negligent because he had not done so. And they considered the appellant guilty of the ultimate negligence which caused the accident. No miscarriage therefore occurred on account of the judge's charge.

As a result I would not interfere with the verdict and the appeal should in my opinion be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *John R. Palmer.*

Solicitor for the respondent: *W. S. Ball.*

1921

*May 13.
*June 20.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT).. } APPELLANT;

AND

THOMAS W. SMITH AND MARY SMITH (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Negligence—Railway—Level crossing—Approaching train—Absence of statutory warnings—Failure to look out—Negligence of driver—Action by injured passenger.

The respondents, father and daughter, while driving in a motor car, were about to cross the appellant's railway at rail level, when a train was approaching. The father, who was driving, heard the horn of an automobile behind him, and thinking the driver wished to pass, he proceeded to cross the track, the road being very narrow at that point. The train struck the motor car and the respondents sustained injuries for which they both brought action. The train whistle was not sounded or bell rung as required by statute. The father swore to his belief that he did look for the train, because he always did so instinctively; but he did not "remember actually turning (his) head and looking to see if there was a train or not." The trial judge took the case from the jury on the ground of contributory negligence, but the Court of Appeal ordered a new trial.

Held, (reversing the judgment of the Court of Appeal), Idington and Anglin JJ. dissenting, that, notwithstanding the assumed negligence of the appellant owing to the absence of statutory warnings, the father must be held negligent in attempting to cross the tracks without looking for the approaching train, as no evidence was given of circumstances which would warrant a jury in finding he was excused from doing so.

Held, also, (affirming the judgment of the Court of Appeal), that the contributory negligence of the driver of a motor car, when he is neither the servant nor the agent of a passenger injured, is no defence in an action brought by the latter against the party causing the accident; and the action of the daughter should not have been dismissed by the trial judge.

Judgment of the Court of Appeal (13 Sask. L.R. 535), varied.

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

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APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) reversing the judgment of the trial judge with a jury (2), which had dismissed the respondents' action and ordering a new trial.

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.

Tilley K.C. for the appellant.

Barr K.C. for the respondent.

THE CHIEF JUSTICE.—The reasonable and salutary rule frequently laid down by the court with respect to persons crossing level railway crossings is that they must act as reasonable persons should act and not attempt to cross without looking for an approaching train to see whether they can safely cross. If they should choose recklessly and foolishly to run into danger, they must take the consequences.

The rule so requiring persons crossing railway tracks to look for a possible approaching train may not be an absolutely arbitrary one. Circumstances may exist which might excuse their not looking, but those circumstances must be such as would reasonably warrant a jury in finding they were excused from their duty in that regard. It is not enough to prove that some precautions required on the part of the railway, such as whistling or ringing the bell before coming to the crossing, were not observed or followed by the train officials, of which there was evidence on which a jury might so find in this case. Mr. Tilley, for the company, admitted that he had to argue his case on

(1) 13 Sask. L.R. 535; [1920] 3 W.W.R. 1028. (2) [1920] 2 W.W.R. 957.

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the basis that the train did not either ring the bell or sound the whistle. But he contended that notwithstanding this assumed negligence on the part of the train officials, the plaintiff's injuries, and those of his daughter in the car with him, were caused by his own contributory negligence in running his car on to the railway track without looking to see whether a train was approaching. The learned trial judge withdrew the case from the jury holding that there was no evidence which would justify them in finding either that the plaintiff did look for the train before attempting to cross the railway track or would excuse his not having done so.

On appeal from this judgment of the trial judge the Court of Appeal in Saskatchewan, by a majority judgment, allowed the same on the ground, as I understand the reasons of Mr. Justice Lamont, who delivered the judgment of the majority of the court, that

> there were considerations from which a jury might reasonably conclude that it was the failure to give the statutory warnings rather than the plaintiff's own recklessness that was the *causa causans* of the injury and that those considerations must be passed upon by the jury.

If I could reach such a conclusion, I would gladly do so, but I cannot. The plaintiff's own evidence, coupled with that of the witnesses in the motor which was following that of the plaintiff, removes the possibility of any finding that he did look. If he had looked he could not have failed to have seen the approaching train. The suggestions by counsel as excuses for his not looking, relied on it is true by the majority of the Court of Appeal as sufficient for granting a new trial, seemed never to have entered into the plaintiff's own mind as he in his evidence did not suggest them. On the contrary, he said he believed he did look because he always did but did

not remember having done so in this instance, and the inference from his evidence and that of the other witnesses examined is irresistible that he did not look and so justified the trial judge in dismissing his personal action. I am quite unable to accept these suggestions of counsel as constituting any excuse for his not looking.

While, however, I am of opinion that plaintiff's personal action was rightly dismissed, I am also of opinion that the daughter's action stood in an altogether different position. She was simply a passenger in the motor with her father and was in my judgment in no sense responsible for his contributory negligence. Nor can it be said that he was her agent or so identified with her that she was responsible for his negligence. Supposing an action had been brought by some one injured by his negligence in driving, could it be successfully contended that the passenger who had no control or right of control over the driver would be liable? I cannot for a moment think that such a contention could be sustained and I cannot find any authority supporting it.

I think that the law which must govern in this case is that laid down by the House of Lords in the well-known case of *The Bernina* (1), where it was held, affirming the decision of the Court of Appeal (2), that a collision

having occurred between the steamships *Bushire* and *Bernina* through the fault or default of the masters and crews of both, as a result of which two persons on board the *Bushire*, one of the crew and a passenger, neither of whom had anything to do with the negligent navigating of the steamship, were drowned, * * the deceased persons were not identified in respect of the negligence with those navigating the *Bus hire*, and that their representatives could maintain the action.

(1) [1888] 13 App. Cas. 1. (2) 12 P.D. 58.

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This decision overruled *Thorogood* v. *Bryan* (1), and decisively settled once and for all the doctrine of "identification" on which *Thorogood* v. *Bryan* (1) was based. The very question, as Lord Herschell said in delivering his judgment in the *Bernina* case (2), was whether the contributory negligence of the driver of the vehicle was a defence as against the passenger when suing another wrongdoer. In his speech he said:

> It humbly appears to me that the identification upon which the decision in *Thorogood* v. *Bryan* (1) is based has no foundation in fact. I am of opinion that there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified to any extent whatever with his negligence. He is the servant of the owner, not their servant; he does not look to them for orders, and they have no right to interfere with his conduct of the vehicle except, perhaps, the right of remonstrance when he is doing, or threatens to do, something which is wrong or inconsistent with their safety. Practically they have no greater measure of control over his actions than the passenger in a railway train has over the conduct of the engine-driver. I am, therefore, unable to assent to the principle upon which the case of *Thorogood* v. *Bryan* (1) rests. In my opinion an ordinary passenger by an omnibus, or by a ship, is not affected either in a question with contributory wrongdoers or with innocent third parties, by the negligence, in the one case of the driver, and in the other of the master and crew by whom the ship is navigated unless he actually assumes control over their actions, and thereby occasions mischief. In that case he must of course, be responsible for the consequences of his interference. * * * The theory that an adult passenger places himself under the guardianship of the driver so as to be affected by his negligence appears to me to be absolutely without foundation either in fact or law.

I cannot see any reason why the law as definitely stated in the *Bernina* case (2) with respect to the non-liability of passengers on board of omnibus cabs and steamships is not applicable in the absence of any special facts to the contrary to those travelling in *private* motors. The reasons which negative such non-liability in the one case are equally cogent and

(1) [1849] 8 C.B. 115. (2) 13 App. Cas. 1.

convincing in the other. The case of *Dixon* v. *Grand Trunk Railway Co.* (1), was cited in the appellant's factum in support of the contention that it was the duty of the girl to look out for an approaching train and if she entrusted that duty to the driver of the car she is affected by his negligence. But the basis of the judgment in that case was that the driver of the motor-car was acting as the agent or servant of his companions and that the five men in the car were the persons having the control of it. The learned Chief Justice Meredith, in delivering the judgment of the court said:

> My view is that the five men had control of the motor-car. It was hired by them, although Scott was the one who acted for his companions as well as for himself in hiring it. It was they who entrusted the driving to Scott. In my opinion, the *Bernina* case (2) has no application if Scott in driving the motor-car was acting as the agent or servant of his companions. That he was acting as their agent is clear, I think, because it is also clear that he was entrusted by them with the duty of driving the car. The five men in the motor-car were, in my opinion, the persons having control of it.

That decision, of course, therefore, has no bearing on the liability of the daughter Mary for the contributory negligence of the driver of the automobile as he was neither her servant or agent but was the owner and the driver of the car having sole control of it with which she had neither the right nor the power to interfere.

In the sixth edition of Shearman and Redfield, Vol. 1, p. 164, 166, I find the following statement of the law on this point in the United States:

> *66. Doctrine of Identification.* As already stated, the fact that the injury was caused by the joint negligence of the defendant and a mere stranger is universally admitted to be no defence. But in the famous

(1) [1920] 47 Ont. L.R. 115. (2) 13 App. Cas. 1.

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case of *Thorogood* v. *Bryan* (1), an English Court invented a new application of the old Roman doctrine of identification, and held that a passenger in a *public* vehicle, though having no control over the driver, must be held to be so identified with the vehicle as to be chargeable with any negligence on the part of its managers which contributed to an injury inflicted upon such passenger by the negligence of a stranger. In former editions, we devoted much space to the refutation of this doctrine of "identification." But it is needless to do so any longer, since the entire doctrine has, since our first edition, been exploded in every court, beginning with New York and ending with Pennsylvania. It was finally over-ruled in England a few years ago. The only remnant of the doctrine which remains in sight anywhere is the theory that one who rides in a *private* conveyance thereby makes the driver his agent, and is thus responsible for the driver's negligence, even though he has no power or right to control the driver. This extraordinary theory, which did not even occur to the hair-splitting judges in *Thorogood* v. *Bryan* (1), was invented in Wisconsin, and sustained by a process of elaborate reasoning; and this Wisconsin decision, in evident ignorance of all decisions to the contrary, was recently followed with similar reasoning in Montana, and in Nebraska without any reasoning whatsoever; which last is certainly the best method of reaching a conclusion directly opposed to common sense and to the decision of twenty other courts. The notion that one is the "agent" of another, who has not the smallest right to control or even advise him, is difficult to support by any sensible argument. This theory is universally rejected, except in the three states mentioned, and it must soon be abandoned even there.

Apart, therefore, from the exploded doctrine of "identification" I find nothing to justify the theory that the driver in this case was either the servant or the agent of the daughter Mary.

In the result, I would allow the appeal so far as the plaintiff's personal action is concerned and dismiss such action with costs throughout and would dismiss the appeal as far as the action is brought on behalf of Mary Smith, who was 17 years of age when the action was tried, with costs.

IDINGTON J. (dissenting in part).—The respondent, Thomas W. Smith, was driving his automobile, in which he was accompanied by his two daughters,

(1) 8 C.B. 115.

westward on the highway toward Regina. A passenger train of the appellant company running south toward Regina, at the intersection of the said highway with said railway, struck the said automobile, wrecked it, and so seriously injured one of the said respondent's daughters that she died a few days later, and very seriously injured the surviving daughter, one of the respondents herein, as well as the respondent so driving the automobile.

For the respective injuries in question, to the survivors and the said automobile, this action was brought by said Thomas W. Smith and his surviving daughter by him as her next friend, alleging that the accident was caused by reason of the failure of the appellant either to give the statutory warning of whistling, or to ring the bell.

The learned trial judge dismissed the action which was being tried with a jury, at the close of the plaintiff's case, alleging as ground therefor, the contributory negligence of the respondent driver, Thomas W. Smith.

In doing so he said:

> In this case the evidence of negligence is as follows: That the bell did not ring and that the whistle did not blow as provided by statute. In dealing with the question of contributory negligence one must consider the natural situation of the ground. At a point three-quarters of a mile south of a bend in the defendant's railway, the railway is crossed almost at right angles by a road which runs itself for something less than half a mile to another railway, the Grand Trunk Pacific railway. A train on the said C.P.R. track approaching from the north, from the time it passes the bend till it gets to the crossing, is continuously in view of any person who is coming along this road from the Grand Trunk Pacific Railway crossing. There is evidence that it takes a minute and a quarter for the train to travel the distance, and that there is nothing whatsoever in the nature of an obstruction to the view.

The appellant's negligence, according to this finding, is clear, and it is equally clear that the entire negligence of the respondent driving (if any) was the failure to

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have discovered the coming train, within the minute and a quarter that elapsed whilst driving from the point where it first became possible for him to have seen it to the intersection of the highway and railway.

The train, it is clearly proven, would be coming along a down grade of the railway track which would accelerate its rate of speed, and would have no steam or smoke assuredly visible, for, as expressly stated by one of the witnesses, it merely coasted along that part of its road.

There, of course, is need for a careful driver to look both ways for trains.

The respondent driver in this case was seated on the left hand side of his automobile. On one side of him the curtain was drawn but, as the learned judge finds, there was on the side next the train an apron which contained mica glasses described, possibly it was the reverse but that curtain, as I understand respondent's evidence, was on the left side and the front seat not curtained off from the approaching train.

The learned trial judge omits entirely to refer to the evidence given by the respondent driver relative to his usual care in looking for the train and belief that he did on this occasion, which ought to have been considered.

He testifies as follows:—

Q.—What were you giving attention to as you were rising up the grade, or what was occupying your attention as you were rising up the grade just before crossing the track?

A.—Well, the automobile coming behind me having blown his horn on me, I figured he wanted to pass, and I was considering letting him pass as soon as I got across the railway crossing.

Q.—Did you look to see if the train was coming as you came along from the Grand Trunk crossing towards the C.P.R. crossing?

A.—I believe I did.

Q.—Why do you say that?

A.—Well I always do that. It is natural.

His Lordship: That is not a reason. Do you remember whether you did or not?

A.—I don't remember actually turning my head and looking, or anything like that, but I believe I did.

Q.—But you don't know whether you did? You don't remember whether you did or not?

A.—No. I can't say I remember turning my head and looking to see if there was a train or not.

and on cross-examination, as follows:—

Q.—Is Regina your trading town?

A.—Generally. Sometimes I go to Pilot Butte.

Q.—But at any rate, Mr. Smith, you have been into Regina during that twenty years a great many times?

A.—Quite a few, yes.

Q.—Well, hundreds of times, I suppose?

A.—Well, the average number of times that any farmer would come, I suppose.

* * * *

Q.—Let me, then, call your attention to this, Mr. Smith. When would a prudent man look for a train? At what distance would he look for a train coming?

A.—Well, when he knew that there was a railway crossing he would lock probably several times.

* * * *

Q.—And, as you said in your examination by my learned friend, you cannot say that you ever looked to see whether there was a train coming or not after you passed over the Grand Trunk Pacific crossing?

A.—I said that I believe I looked.

Q.—I know, but you said you could not remember that you did. Is that not correct?

A.—I said I believe I looked.

Q.—Never mind that?

A.—Let me finish my answer, please—please.

Q.—You can't remember that you looked for the train after you passed over the Grand Trunk Pacific crossing?

A.—No, I can't remember the actual act of looking.

The evidence is clear that if he looked when he would have been distant a space more than a minute and a quarter of time as he travelled, he could not see the coming train by reason of buildings between that point and the coming train obstructing the view.

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The question of whether he actually looked or not was one for the jury to consider. The probability is that he looked, but possibly at a minute and a quarter too early, and surely it was for the jury to decide whether or not he was negligent, or merely erred in judgment.

And immediately after that narrow margin of time had begun to run, his attention was distracted by a car behind him, and his asking his daughters if the driver thereof seemed desirous of passing, and when they looked back and concluded, and reported, that the driver thereof did not seem desirous of passing, his attention was directed to crossing the railway to get to a better place to pass than the grade approaching the crossing.

To make matters more distracting and worse, the driver of the car behind saw the train at that stage and kindly desiring to warn respondent driver, blew his horn loudly and sharply in such a way as calculated to arrest his attention.

That had the effect of giving the respondent the impression that the driver of the car behind wished to pass and accordingly hasten on for next fifty feet or so with the purpose of securing the better place to pass when across the railway track.

Before reaching that goal the appellant's engine had fifty feet or yards away, given two "toots" of its whistle. All that was too late; and if ever there was a case for the jury to have been called upon for its verdict of whether respondent driver had been negligent, or merely mistaken in judgment, which that situation called for the assistance of the jury to determine this was one, and the case should not have been withdrawn from them.

Such was the opinion of the majority of the Court of Appeal for Saskatchewan better qualified, by local knowledge of the actual condition of things to be considered, than we can be, as to whether or not the respondent driver was, when due regard is had to the alternative propositions presented by that master of our law, Lord Cairns, in the case of *Dublin, Wicklow & Wexford Rly. Co.* v. *Slattery* (1), quoted by the majority judgment herein of the Appellate Court below, to have been condemned as clearly guilty of that contributory negligence which deprived him of the right to have his conduct passed upon by a jury.

The two alternatives presented by Lord Cairns in said case are quoted in said judgment, and, properly as I think, the second acted upon, as that which fits this case.

I so entirely agree with the reasoning of the judgment of the majority of the court below, based on other authorities, as well as the speech of Lord Cairns in the House of Lords in said *Slattery Case* (1), that I need not repeat same here.

If there is a driver of any vehicle who can be excused from failure to look at the exact moment of time that will be effective, it is the driver of an auto whose mind, if discharging his duty, is concentrated primarily on the safety and rights of those using the same highway as he is himself travelling over.

I think this respondent driver was far more excusable than the unfortunate in the *Slattery Case* (1) by reason of the absolute necessity for concentration of his mind on the said duties as such devolving upon him.

(1) [1878] 3 App. Cas. 1155.

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The question is raised by those of my brother judges taking another view than I do of the facts and relevant law, that in any event the alleged contributory negligence does not attach to the case of the infant respondent.

In my view that is not necessary to be decided, but, if driven thereto, I agree that there is not that identification of her (an infant being carried) with the case presented by her father.

I would dismiss the appeal entirely, with costs.

DUFF J.—As regards the infant plaintiff, I am quite unable to distinguish this case from *The Bernina* (*Mills* v. *Armstrong* (1). On that point I have nothing to add to the judgment of the Chief Justice in whose opinion I fully concur.

I am, however, unable to agree with the view of the Court of Appeal as to the claim of the adult plaintiff. Contributory negligence is, I think, virtually admitted. In point of law the case is entirely governed, I think, by the judgment of Lord Cairns in *Slattery's Case* (2), and the judgments of Campbell C. and O'Connor L.J. in *Neenan* v. *Hosford* (3).

ANGLIN J. (dissenting in part):—The main question presented on this appeal is whether contributory negligence on the part of the adult plaintiff is such an irresistible inference from the evidence adduced by him that the learned judge was justified in withdrawing the case from the jury on that ground. The Court of Appeal for Saskatchewan has determined that it is not, and has ordered a new trial. Is that order so clearly wrong that it should be reversed?

(1) 13 App. Cas. 1. (2) 3 App. Cas. 1155.
(3) [1920] Ir. R. 2 K.B. 258.

The alleged contributory negligence consisted in failing to look for an approaching train before driving an automobile upon the railway crossing where it was struck. The appellant alleges that there was evidence upon which a jury might have found that the adult plaintiff did in fact look or that, if he did not, there were attendant circumstances upon which a jury might reasonably have found that his failure to do so did not amount to negligence. Although the case is undoubtedly very close to the line, careful consideration of it has led me to the conclusion that it should have been submitted to the jury, if not upon both issues, at all events upon the latter. The judgment of the House of Lords in *Dublin, Wicklow & Wexford Rly. Co.* v. *Slattery* (1), and of this court in *Wabash Railway Co.* v. *Follick* (2), and in *Ottawa Electric Railway Co.* v. *Booth* (not yet reported), go far to support that view.

The adult plaintiff himself swore to his belief that he had in fact looked for the train though unable to say as a matter of positive recollection that he had done so. There were circumstances which indicated that he might have looked when within 300 or 400 yards of the crossing and been unable to see the train. There were also circumstances deposed to which indicated that his mind may have been so fully taken up with other duties arising out of his position at the moment that failure to remember that he was approaching a railway crossing and should look out for approaching trains would be excusable. I am not prepared to say that no jury could reasonably so find. As the case should, in my opinion, go back for a new trial I refrain from any discussion of the evidence beyond what is necessary to indicate the grounds on which I think the judgment appealed from may be supported.

(1) 3 App. Cas. 1155. (2) [1920] 60 Can. S.C.R. 375.

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Not, I confess, without some hesitation, but because I have not been convinced that the judgment *a quo* is erroneous I would dismiss this appeal.

But if I were of the opinion that the defendants should succeed as against the plaintiff Thomas W. Smith because his contributory negligence was so clearly established that his personal claim was properly withdrawn from the jury, for the reasons stated by my Lord the Chief Justice I should nevertheless dismiss the defendants' appeal as to the claim of the infant plaintiff Mary Smith.

MIGNAULT J.—The question here is whether the learned trial judge was justified in withdrawing the case from the jury at the close of the plaintiff's evidence and dismissing the action. On appeal, this judgment was reversed by the Court of Appeal of Saskatchewan, Elwood J. A. dissenting, and a new trial was ordered.

The pertinent facts may be briefly stated. The plaintiff had left his home, some miles from the city of Regina, about two o'clock in the afternoon of the 29th of September, 1919, to bring his daughters, Mary and Edna, to school in the latter city. He drove himself a two seated Reo car, occupying the front seat with his daughter Edna, the plaintiff being on the left side, and his daughter Mary sat on the rear seat where also their baggage was placed. The curtains were closed on the right side but there were mica windows through which persons sitting on the front and rear seats could see; the other side of the car was open. The road at the place in question runs from east to west (the plaintiff was going west) and is intersected, at a distance of half a mile the one from the other, by two lines of railway; the Grand Trunk Pacific Ry. Co. and the Canadian Pacific Ry. Co., the

latter being to the west of the former. The country is flat and a person going west along the road has full view of the defendant's line, there being no obstructions of any kind. The plaintiff drove at a speed of from ten to fifteen miles an hour, probably the latter speed, and at the time he crossed the Grand Trunk Pacific line, the defendant's train was about one mile from the place of the accident, and was then travelling in a southerly direction at a speed of thirty miles an hour down a slight grade, where to the plaintiff's knowledge, for he had often used this road, it was customary to close off the steam and the exhaust of the engine. As the plaintiff drove along the road after crossing the Grand Trunk Pacific line, he was followed at a distance of some twenty yards by another car occupied by three persons and which travelled at the same speed as the plaintiff. Two of these persons were called at the trial and swear that they saw the defendant's train from the time they crossed the Grand Trunk Pacific, and that they had no difficulty whatever in seeing it. They also say that the engine did not whistle at any time—there is a whistling post at the usual distance north of the road—until it gave two short blasts immediately before the accident, nor did the bell ring. The plaintiff states he did not hear the whistle or the bell before these two short blasts were blown, and then the front portion of his car was already on the tracks and it was impossible to prevent the accident.

On the vital question whether he looked to see if a train was approaching before attempting to cross the railway, the plaintiff stated that he believed he did, but that he did not actually remember turning his head and looking. As this point is extremely important, I will quote the plaintiff's testimony:

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Q. Did you look to see if the train was coming as you came along from the Grand Trunk crossing towards the C.P.R. crossing?

A.—I believe I did.

Q.—Why do you say that?

A.—Well I always do that. It is natural.

His Lordship: That is not a reason. Do you remember whether you did or not?

A.—I don't remember actually turning my head and looking, or anything like that, but I believe I did.

Q.—But you don't know whether you did? You don't remember whether you did or not?

A.—No. I can't say I remember turning my head and looking to see if there was a train or not.

I think the testimony of the men in the automobile following the plaintiff's car clearly shows that had the plaintiff looked, he would undoubtedly have seen the approaching train, for these men saw it without any difficulty. It is true that the plaintiff states that there are some buildings on the other side of the railway more than a mile from the crossing, against and opposite which the train as it rounds a curve appears from the road to come head on and cannot be easily noticed apart from these buildings which serve as a back ground. But while the plaintiff's witnesses say that by a casual glance a person on the road might not notice the approaching train as it stands against this background, they add that if such a person took any precaution other than a casual glance he would be bound to see the train. Surely the plaintiff did not discharge the duty of taking reasonable precautions before crossing the railway or of acting as an ordinary prudent man would have done if he cast a mere casual glance towards the railway, and he is not sure that he even did that. And the fact that the train might be taken at a casual glance to be a part of these buildings and that it generally went down the grade silently and with the steam shut off was well known to the

plaintiff who had often travelled along this road, and it was obviously his duty before crossing the railway to look in time so as to be able to stop his car if a train was approaching.

It is true that the plaintiff's witnesses prove that the engine did not whistle as it passed the whistling post and that the bell was not rung. But notwithstanding this negligence of the company, had the plaintiff been reasonably careful he would have seen the train in time, and the fact that the statutory warnings were not given cannot, in my opinion, excuse him in rushing with his eyes open to his own destruction. I may simply refer to the often quoted passage from Lord Cairns' judgment in *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery* (1), as a complete answer to any contention based on the absence of the statutory warnings.

The plaintiff also says that when approaching the railway he heard several toots from the automobile behind him, that he thought this automobile wished to pass him as several others had already done, and that as the place was not suitable for crossing, he went ahead with the idea of letting it pass him further on. As a matter of fact, this tooting was resorted to in order to warn the plaintiff of his imminent danger, but it is said that it confused him and that under the circumstances he should not be considered as lacking in ordinary prudence.

I would indeed be slow to say as my deliberate opinion that even such a circumstance can excuse an automobile driver in rushing across a railway without first looking to see whether the line is clear. Moreover the plaintiff by keeping his position on the road could have prevented any car passing him. And should the

(1) 3 App. Cas. 1155.

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defendant under such circumstances be held liable for an accident which, notwithstanding the failure to give the statutory warnings, I must hold was brought about solely by the recklessness of the plaintiff?

The learned counsel for the respondent relied on several decisions of this court, and from the bench his attention was called to the recent case of *The Ottawa Electric Ry. Co.* v. *Booth* (not yet reported), where I concurred with the majority of the court in sustaining the jury's verdict. It is obvious that the special facts of each case must be considered, and no decision is conclusive unless the circumstances are the same. In the *Booth* case, probably the nearest in point, the victim crossed behind a tram car which stopped at a street corner, and was struck by another car running on the far track at an excessive speed and without ringing its gong. There certainly the victim had no time for reflection and he followed quite a common though not commendable practice in crossing behind the car from which he had just alighted. Here the plaintiff was in full view of the approaching train for a distance of half a mile and, in my opinion, was the author of his own misfortune. In the words of Lord Cairns, it was the folly and recklessness of the plaintiff, and not the carelessness of the company, which caused the accident.

Naturally one hesitates before removing from a jury a case of which normally they are the proper judges. But if in such a case no jury could reasonably find in favour of the plaintiff, I think it is the duty of the trial judge, if he feels convinced that a verdict for the plaintiff could not be sustained, to take the responsibility of dismissing the action. I would certainly not say that the learned trial judge was wrong in taking this responsibility in the present case, in so far as Smith's personal action is concerned.

With regard to the representative action taken by him on behalf of his daughter Mary, an infant, I think that the latter is not identified with her father and that the contributory negligence of Smith does not disentitle her to recover any damages to which she may be entitled as against the appellant. On this branch of the case I am satisfied to rely on the reasons given by my Lord the Chief Justice.

I think therefore, that the judgment of the appellate division should be affirmed in so far as it orders a new trial on the issue raised by the action on behalf of Mary Smith, and set aside as to the order of a new trial of the plaintiff's personal action, which should stand dismissed.

I concur in the disposition of the costs by my Lord the Chief Justice.

Appeal allowed in part.

Solicitors for the appellant: *Allan, Allan & Taylor.*

Solicitors for the respondents: *Barr, Stewart, Johnston & Cumming.*

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*May 25.
*June 20.

JACK COLLINS.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Speedy trial—Election—Requirement by the Attorney-General—Jury trial—Panel box—66 jurors instead of 60—Sections 446, 777, 778, 825, *s.s.* 5, 826, 827, 873, 927, 1019 *Cr. C.—Arts.* 3438, 3455, 3459 *R.S.Q.*

The appellant was arrested on a charge of highway robbery, and, when brought before a judge of the Sessions of the Peace, he did not elect for a speedy trial, pleaded "not guilty" and was duly committed for trial. The Grand Jury found a true bill upon an indictment preferred by the Attorney-General. The appellant was then arraigned and again pleaded "not guilty." On the day of the trial his counsel made an application to have the case postponed to the next term of the assizes to permit the accused to elect for a speedy trial, if he so decided, but the application was refused. Under article 3438 R.S.Q., sixty petit jurors had been summoned; but the sheriff, on receiving notices of claims for exemption, summoned additional jurors and returned before the court the first panel with the additions made to it. As the claims for exemption were disallowed, the names of sixty-six petit jurors remained in the panel box. On the day of the trial, six jurors were absent; none of the jurors called were challenged by the accused and the twelve called were sworn without any objection, except that counsel for appellant objected to the fact that the panel box contained more than the names of sixty jurors. This objection was also overruled, and the appellant was tried and found guilty. A reserve case was granted the appellant; and the questions submitted were as to the constitution of the panel and as to whether the accused had wrongly been refused the right to elect for a speedy trial.

Held, that the alleged irregularities are not sufficient to entitle the accused to a new trial.

Per Idington J.—The appellant, having previously renounced any desire for a speedy trial and having later pleaded to the indictment without raising any objection, had waived any right he had to elect for a speedy trial.

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

Per Duff and Brodeur JJ.—The right of the appellant to elect to be tried summarily had been taken away by the requirement by the Attorney-General for a jury trial, the preferment of the indictment by the Attorney-General under sect. 873 Cr. C., constituting such requirement within the meaning of sect. 825, s.s. 5, as enacted by 8-9 Ed. VII, c. 9, s. 2.

Per Anglin and Mignault JJ.—The application made on behalf of the accused for a postponement of the trial to permit him to re-elect was not an election for a speedy trial; and, therefore, there was no refusal to grant *acte* of an option made by the accused.

Held, also, that, in not discharging the six additional jurors, the trial judge exercised a discretion conferred on him by art. 3459 R.S.Q., and moreover, the appellant, under the circumstances, did not suffer any substantial wrong on that account.

APPEAL from a judgment of the Court of King's Bench, appeal side, Province of Quebec, dismissing an appeal by the appellant relating to questions of law arising on his trial and upon a stated case.

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.

Alleyn Taschereau K.C. for the appellant.

Aimé Marchand K.C. and *Lucien Cannon K.C.* for the respondent.

IDINGTON J.—The accused having when charged before the magistrate expressly renounced any desire for speedy trial without jury and later notwithstanding pleaded to the indictment without raising any sort of objection thereto, in my opinion, had waived any legal right he had up to that time to elect for a speedy trial.

Such was the settled state of the law until the decision of this court in the case of *Giroux* v. *The King* (1).

(1) [1917] 56 Can. S.C.R. 63.

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Idington J.

I am not quite sure in light of that decision, what the law so laid down really is, but when applied to this case which is, as it were, the counterpart of that, I think it has no application.

If that decision should, necessarily, govern in regard to the point I raise, I would bow to it, though I dissented therein, but it does not, I think, and therefore I hold the pleading to the indictment, under the attendant circumstances, fatal to the appellant's contention herein.

There the accused was allowed, even after plea to an indictment, to withdraw his plea and elect to go to trial before a judge without a jury.

I thought then there was no jurisdiction in the courts to so proceed.

This case is quite distinguishable from the case of *Minguy* v. *The King* (1), where the accused had indicated his desire to elect, as he was entitled to have done, for a trial without a jury before he was forced to plead to an indictment and thereby, as I held, improperly deprived of his right to elect.

I am, notwithstanding the doctrine laid down in the case of *Giroux* v. *The King* (2), unable to see that it necessarily governs this case.

I therefore would answer the first question of the stated case in the negative.

And as to the second question I am of the opinion that, under all the attendant circumstances, the error if any, which is disputed, would not necessarily be fatal to the validity of the trial, and therefore answer it also in the negative.

The appeal therefore, in my opinion, should be dismissed.

(1) [1920] 61 Can. S.C.R. 263. (2) 56 Can. S.C.R. 63.

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DUFF J.

DUFF J.—The appeal, in my opinion, should be dismissed.

1st. As to the constitution of the panel. In this respect no substantial prejudice was suffered by the accused. It is unnecessary to repeat the observations contained in the case as stated and signed by the Chief Justice of the Superior Court and in the judgment of Mr. Justice Martin with which I concur.

2nd. As to the right of the accused to elect to be tried by a judge. Admittedly the accused had that right under sections 826 and 827 of the Criminal Code unless by virtue of a requirement by the Attorney-General under s.s. 5 of sec. 825 Cr. C., that right was taken away. In *Minguy* v. *The King* (1) I concurred in the opinion of the Chief Justice of this court that where the Attorney-General prefers a bill of indictment under sec. 873 or where the bill of indictment is, by the special direction of the Attorney-General, so preferred that in itself constitutes a requirement that the case should be tried by a jury within the meaning of section 825, s.s. 5.

I am not at all impressed by the argument that the power given by section 873 is a different power from that given by s.s. 5 of sec. 825. They are not the same power, no doubt; but it does not follow that each must be exercised by an independent proceeding. A proceeding under sec. 873 may and *prima facie* does import a determination that the accused shall be tried by jury, a determination negativing his right to be tried without a jury and at all events, in the absence of some qualifying declaration it is an exercise of the authority given by sec. 825, s.s. 5. I may add that the decision in *Giroux* v. *The King* (2) (a case in which the judges who took part in it proceeded upon diverse grounds) is not an authority having any relevancy to this question.

(1) 61 Can. S.C.R. 263. (2) 56 Can. S.C.R. 63.

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Duff J.

I think that in this case there is sufficient evidence and there was sufficient evidence before the trial judge that the Attorney-General had required that the case should be tried by a jury within sec. 825, s.s. 5.

It is important, I think, to add that had it not been for s.s. 5 of sec. 825 of the Criminal Code, I should have been constrained to hold that in the language of sec. 1019 Cr. C., "something not according to law was done at the trial" and consequently that the conviction must be set aside. The accused, as I have already said, was entitled, in the absence of action by the Attorney-General under sec. 825, to have the benefit of the procedure provided by sections 826 and 827. Through no fault of his own but through the default of the officers of the Crown he was put upon his trial without being given the opportunity to take advantage of those provisions; and had it not been for the intervention of the Attorney-General he could not, I think, have been tried legally in these circumstances.

It is not so much a question of jurisdiction. The Court of King's Bench had jurisdiction to decide whether or not the accused could legally be tried as it had jurisdiction to decide all other questions of procedure and substantive law touching the liability of the accused to be tried and convicted of the offence with which he was charged. The point is that the trial of the prisoner in such circumstances would not have been a trial according to law; an objection which could properly be raised by way of stated case and dealt with on appeal under the provisions of the code.

For the reasons given I am of opinion, however, that these last-mentioned considerations are without application in the present case.

ANGLIN J.—Two questions are submitted by the reserved case granted the appellant:

1. Was there error in refusing to grant *acte* of the option made by the accused for a speedy trial before a judge of the Sessions without the intervention of a jury?

2. If it was the fact, that cards to the number of 66, bearing the names, numbers and addresses of 66 petit jurymen were placed in the panel box for the purpose provided, did it constitute an irregularity or illegality sufficient to entitle the accused to the relief sought?

One of the learned judges of the Court of King's Bench dissented from the majority of the court on both points.

(1) Although the argument travelled over the whole field of the rights of a person committed for trial to elect for a speedy trial—the duties of the sheriff and the judge, under secs. 826-7, to accord him an opportunity to make such an election being specially dwelt upon as imperative and as such affording a basis for the contention that because those sections had not been complied with, the Court of King's Bench lacked jurisdiction to try the appellant—the first of the two questions actually presented for decision lies in a very much narrower compass. The only thing approaching "an option made by the accused for a speedy trial" of which the record contains any evidence is to be found in the following extract from the procedure book of the Court of King's Bench:

> Avant de procéder à tirer au sort les cartes contenant les noms et les numéros des Petits Jurés, Mtre Alleyn Taschereau, procureur de l'accusé, demande la remise de la cause aux prochaines assises, pour permettre à l'accusé de réélire, s'il le juge à propos, suivant le Code Criminel et ses amendments.
>
> Mtrs Lucien Cannon s'oppose de la part de la Couronne à cette demande;
>
> La Cour décide qu'il faut procéder.

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Anglin J.

The only application made to the court was for a postponement of the trial to the next assizes to permit the accused to re-elect, if he should think fit. That motion was simply refused. Apart from the fact that there had been no previous election and the case was therefore not one for re-election, what took place at the assize court certainly did not amount to an election for a speedy trial. There was not even an intimation that such an election would be made if the postponement asked for were granted. There was therefore no refusal "to grant *acte* of an option made by the accused for a speedy trial." He had made no such option and an *acte* of such an option therefore was not and could not have been sought or refused. The first question must be answered accordingly. It is not within our province, as was held by a majority of this court in the recent case of *Scott* v. *The King* (24th of Feb., 1921), materially to modify, qualify or enlarge the scope of a question in a reserved case merely because it does not cover the ground of appeal which counsel presents to the court, although that should appear to be what the appellant conceives to be his substantial grievance.

(2) In not discharging the six additional jurors over the required panel of 60 (R.S.Q., Art. 3438) the court exercised a discretion conferred on it by R.S.Q., Art. 3459. The six additional jurors having been lawfully retained I am not satisfied that their names were not properly placed in the panel box (Crim. Code, s. 927), from which the names of the petit jury were drawn. As is pointed out by Mr. Justice Martin, only sixty jurors answered the roll call on the day of the trial. Six were absent. No juror called for the trial was in fact challenged by the appellant. The only objection taken on his behalf on this branch of

the case which appeared to be of moment, viz., that the proportion of peremptory challenges which he was entitled to exercise was disturbed by the presence of the six additional jurors, thus appears to be lacking in substance. His right of challenge was not in fact affected. Even if there was something done at the trial not according to law, the right of challenge not having been interfered with, s. 1019 of the Criminal Code precludes the granting of a new trial since no substantial wrong or miscarriage was occasioned.

BRODEUR J.—Il s'agit d'un appel dans une cause criminelle. Deux questions nous sont soumises. La première a trait à la juridiction de la cour qui a condamné l'accusé. La seconde est de savoir si le petit jury a été validement constitué.

L'accusé avait été arrêté pour vol à main armée sous la disposition de l'article 446 du Code criminel. Il a été amené devant le juge des Sessions de la Paix le 18 septembre 1920, pour y subir sommairement son procès: mais, comme il en avait le droit, il a opté pour un procès devant la cour du Banc du Roi (arts. 777-778), c'est-à-dire, un procès par jury.

Le juge des Sessions de la Paix a alors procédé à l'enquête préliminaire et l'accusé a été, le 12 octobre, condamné à subir son procès. Le dossier constate qu'avant la déclaration du juge qu'il y avait matière à procès (commitment) l'accusé s'est évadé de la prison où il était incarcéré.

Le 13 octobre, un acte d'accusation (indictment) fut présenté au grand jury par les avocats de la Couronne, qui l'avaient signé comme suit:

L. A. Taschereau, Attorney-General, by Aimé Marchand, Lucien Cannon, duly authorized.

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Cet acte d'accusation portait en outre sur le dos l'inscription suivante signée de la main du Procureur-Général lui-même:

This indictment is preferred by the undersigned, the Attorney-General for the Province of Quebec.

L. A. Taschereau,
Attorney-General for the Province of Quebec.

L'acte d'accusation fut rapporté comme fondé le même jour par le grand jury et de suite l'accusé fut mis en jugement (arraigned) et il plaida non-coupable.

Le 15, au moment où son procés devait commencer et avant que l'on procédât à choisir le petit jury, l'accusé par son avocat a demandé verbalement à la cour

la remise de la cause aux prochaines assises pour permettre à l'accusé de réélire s'il le juge à propos.

La Couronne s'y est objectée et le procès a eu lieu et l'accusé a été condamné. Il prétend maintenant qu'il a été illégalement privé du droit d'opter pour un procès expéditif et que lorsque les petits jurés ont été tirés au sort il y avait dans la boîte où les cartes étaient déposées soixante-six noms, c'est-à-dire six de plus que le nombre déterminé par la loi.

Ce dernier point ne paraît pas avoir été soulevé en temps utile. D'ailleurs rien ne démontre qu'aucun texte de loi ait été violé.

Le shérif, sous les dispositions des articles 3438 et 3455 des statuts revisés de Québec, avait le pouvoir d'assigner plus que soixante jurés. Et si après avoir examiné les demandes d'exemption des jurés il reste plus de soixante jurés présents, le juge peut renvoyer le surplus. La loi ne lui en fait pas une obligation: au contraire, elle paraît laisser cela à sa discrétion. Il peut arriver, en effet, que le terme soit bien chargé, qu'un grand nombre de causes aient à être décidées et jugées: et alors, suivant sa discrétion, le juge peut garder

plus de soixante jurés. C'est ce qui a été fait dans le cas actuel. Le juge n'a donc violé aucun texte de loi: mais il a simplement exercé une discrétion qu'il pouvait exercer.

L'autre question qui nous est soumise touche à la juridiction de la cour et a trait au droit de l'accusé d'opter pour un procès expéditif.

La Cour du Banc du Roi avait certainement juridiction pour juger l'accusé. L'offense qui lui était imputée désignait ce tribunal comme ayant le droit de juger l'accusé.

Un acte d'accusation a été porté contre l'accusé et le grand jury a rapporté cet acte d'accusation comme bien fondé. Sur le dos de cet acte d'accusation on trouve la signature du procureur-général déclarant que cet acte d'accusation avait été présenté au grand jury sur ses instructions formelles.

Avant l'amendement du code criminel de 1909, un accusé d'une offense comme celle qui est imputée à Collins avait le droit absolu de demander à subir son procès devant le juge des Sessions de la Paix: mais par l'amendement de 1909 ce droit lui est refusé lorsque (825-5) le procureur-général requiert que le procès se fasse devant un jury. La loi ajoute que le Procureur Général peut faire cette demande bien que l'accusé ait consenti à être jugé par le juge des Sessions.

Il me semble que la signature du procureur-général sur l'acte d'accusation constitue cette demande dont parle l'article 825-5 du code criminel. Je serais enclin à croire d'un autre côté également que du moment que le procureur-général, sous l'article 873, porte devant la grand jury une accusation, qu'il y ait eu enquête préliminaire ou non, dès ce moment-là la cour du Banc du Roi est dûment saisie de la cause et qu'elle peut la juger et en disposer. Nous n'avons pas

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à examiner ce qui s'est passé antérieurement; et si l'accusé, comme il l'a fait dans le cas actuel, demande un procès expéditif, la cour a parfaitement le droit de lui refuser ce privilége et de procéder à faire juger la cause par un jury.

Dans le cas actuel, je considère que l'action du procureur-général en signant lui-même l'acte d'accusation démontre d'une manière explicite qu'il requérait que la cause fût jugée par un jury (825-5 C.C.). C'est là un droit absolu de la part du procureur-général, et il a suffisamment exprimé le désir d'exercer ce droit pour qu'on ne puisse pas prétendre que la cour soit sans juridiction. Il serait désirable cependant que cette réquisition fût insérée dans le dossier originaire afin d'enlever au juge des Sessions toute apparence de juridiction.

Nous ne pouvons pas mettre de côté une condamnation, même s'il été fait quelque chose de non conforme à la loi et si des instructions erronées ont été données, à moins qu'il n'en soit résulté un tort réel ou un déni de justice. Je suis incapable de trouver dans la cause actuelle aucune illégalité qui ait pu constituer un déni de justice (art. 1019 C.Cr.).

La Couronne avait le droit de requérir que l'accusé subisse son procès devant la Cour Criminelle; la cour, dans sa discrétion, était justifiable de refuser à l'accusé un ajournement; le choix des petits jurés ne s'est pas fait illégalement. La condamnation qui a été infligée à l'accusé doit être maintenue.

L'appel doit être renvoyé avec dépens.

MIGNAULT J.—This appeal comes to this court on two questions as to both of which Mr. Justice Greenshields dissented from the majority judgment of the Court of King's Bench:

1. Was there error in refusing to grant *acte* of the option made by the accused for a speedy trial before the judge of the Sessions without the intervention of a jury?

2. If it was the fact that cards to the number of 66 bearing the names, numbers and addresses of 66 petit jurymen were placed in the panel box for the purpose provided, did it constitute an irregularity or illegality sufficient to entitle the accused to the relief sought?

First question. The appellant's counsel argued this question as if it were quite a different question, namely, whether under section 826 et seq., Criminal Code, he should have been brought before a judge and the statement required by sect. 827 made to him, at which time and on which statement being made to him he would have been afforded the opportunity of exercising, if he saw fit, an option for a speedy trial or to be tried in the ordinary way. I think I sufficiently stated in *Minguy* v. *The King* (1), what procedure should be followed in cases like this one.

But this is not the question we have to answer. And I propose to reply to the question submitted in the negative because the appellant never made an option for a speedy trial, and therefore there was no option of which *acte* (to use the language of the question) should have been granted.

This does not necessarily mean that I disagree with what Mr. Justice Greenshields said on this first point, but under the question put to the court there is no necessity of expressing any opinion on this point.

Second point. I would also answer this question in the negative for the reasons given by Mr. Justice Martin in the Court of King's Bench, which are entirely satisfactory to me.

The appeal should be dismissed.

Appeal dismissed.

(1) 61 Can. S.C.R. 263 at p. 280.

1921

*May 27.
*June 20.

GRACE AND COMPANY (PLAINTIFF)..... APPELLANT;

AND

C. E. PERRAS (DEFENDANT) ..... RESPONDENT.

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

Vendor and purchaser—Contract—Verbal agreement—Letter sent by purchaser containing it—Silence of the vendor—English doctrine of estoppel—Not part of the law in Quebec.

Where one of two parties to a verbal commercial agreement thereafter writes a letter to the other purporting to state the terms of a contract arrived at between them, the failure of the latter to repudiate such contract within a reasonable time does not *de jure* import an assent to it, and, in this case, the circumstances did not warrant that inference of fact from the silence of the recipient of the letter.

Per Mignault J.—The doctrine of estoppel, as it exists in England and the common law provinces of Canada, is no part of the law in Quebec.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, (1) affirming the judgment of the trial judge and dismissing the appellant's action.

The action taken by the appellant was for $74,532.77 for damages for a pretended breach of contract entered into by the appellant with the respondent, by which the latter were to deliver 5,400 sides of chrome patent cow hides. The respondent pleaded that he had received a verbal order from appellant for 1,200 sides,

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

(1) Q.R. 31 K.B. 382.

which were delivered and paid for. There was no written contract; but, subsequently to verbal negotiations with an employee of the respondent, the appellant sent a letter to the respondent as follows: "We herewith beg to confirm our verbal purchase from you of 450 dozen sides * * * . Kindly let us have your confirmation in due course for our records * * * * ." The letter was delivered to the same employee of the respondent, the latter being then absent from Canada, but it was never answered. At the trial, the employee testified that he left the letter on his desk without paying any more attention to it, and the respondent swore that he knew of its existence only after the institution of the action. The 1,200 sides were delivered to the appellant after the sending of the letter.

H. N. Chauvin K.C. for the appellant.

Ernest Lafontaine for the respondent.

IDINGTON J.—I do not think I can add anything useful to what has been said in the courts below.

Without affirming all that has been so expressed I agree in the result and conclude that having regard to the entire evidence there was no such contract established as contended for by the appellant.

I therefore think the appeal should be dismissed with costs.

DUFF J.—The questions on this appeal are questions of fact. I can see no adequate ground for differing from the conclusion of the court below.

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Anglin J.

ANGLIN J.—I cannot accept the appellant's contention that as a matter of law wherever one of two parties to a verbal commercial negotiation immediately thereafter writes a letter to the other purporting to state the terms of a contract arrived at between them the failure of the latter to repudiate such contract within a reasonable time imports an assent to it and affords conclusive evidence that the contract in fact exists in the terms stated. There may no doubt be—perhaps in the majority of such cases there are—circumstances which warrant that inference from the silence of the recipient of the letter. If followed by action on the part of the sender thereby induced, a case of estoppel may arise. But the presumption or inference is one of fact and the circumstances may be such that it should not—often cannot—be drawn.

The courts below have so regarded this case; and so far am I from being convinced that their view of it was erroneous that I incline to agree with it. The evidence of the two parties to the oral negotiations is in accord that a contract was made but is in direct conflict as to the quantity of goods agreed to be furnished to the plaintiff by the defendant. The circumstances that the defendant had expressly instructed his agent to make no sale that he had not arranged a purchase to cover and that the agent had arranged such a purchase for the precise quantity which he says he agreed to sell to the plaintiff tend to corroborate his version of the result of the negotiations. Taken with the fact that the plaintiff's letter appears never to have come to the personal notice of the defendant these circumstances go far to preclude the inference of assent that might otherwise have been drawn from the defendant's silence.

The plaintiff in my opinion has not established the contract on which he sues. The appeal therefore fails.

BRODEUR J.—La demanderesse appelante, Grace and Company, prétend que le défendeur-intimé, Perras, s'est obligé, en mai 1919, de lui vendre et livrer 5,400 demi peaux de vache. Ce dernier nie l'existence de ce contrat; il prétend en outre qu'il ne s'est obligé de n'en livrer que 1,200 et qu'il a exécuté son obligation. Il n'y a pas d'écrit de la part du défendeur. L'article 1235 du code civil déclare que dans les matières commerciales excédant cinquante dollars aucune action ne peut être maintenue contre une personne sans un écrit signé par elle dans le cas d'une vente d'effets, à moins que l'acheteur n'en ait accepté ou reçu une partie.

Dans la présente cause il y a eu livraison d'effets, mais cette livraison s'est-elle faite en exécution d'un contrat de 5,400 articles ou seulement d'un contrat de 1200? Sur ce dernier point la preuve est contradictoire.

Je serais porté à croire que la prétention de la demanderesse est bien fondée, que le contrat intervenu entre les parties couvrait bien la quantité de 5,400 peaux, vu que la lettre de la demanderesse en date du 13 mai, addressée à la raison sociale du défendeur, dit formellement:

> We herewith beg to confirm our verbal purchase from you of 450 dozen sides,

et cette lettre est restée sans réponse écrite. D'un autre côté le silence de celui à qui une déclaration est faite de l'existence d'un contrat n'implique pas consentement ou obligation de sa part en règle générale. Son défaut de réponse n'équivaut pas en lui-même à un refus. Pour consentir et s'obliger il faut un fait positif. Baudry Lacantinerie, Obligations, vol. 1er, no. 44.

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Brodeur J.

Le même auteur cependant dit au no. 515 du même traité que l'acceptation peut être induite du silence dans certains cas: et il parle de décisions où en matière de commerce l'absence de réponse à une lettre écrite

à l'occasion de relations d'affaires entamées doit être réputée valoir comme consentement.

Il déclare cependant que cette proposition des tribunaux est trop absolue.

Dans la présente cause la demanderesse, à la fin de sa lettre demandait la confirmation du contrat dont elle alléguait l'existence. Il y avait d'autant plus de raison pour elle de demander cette confirmation qu'elle savait n'avoir eu de négotiations qu'avec un subalterne et que le défendeur lui-même, dans une circonstance antérieure, n'avait pas voulu confirmer (et ce à la connaissance de la défenderesse) ce qui avait été fait par son employé.

La confirmation du contrat allégué par la demanderesse ne s'est pas effectuée: au contraire, au retour de son voyage, le défendeur a formellement répudié le contrat.

De plus la preuve testimoniale est contradictoire et le juge qui présidait au procès en Cour Supérieure a eu l'avantage de voir les témoins et il a pu se former une meilleure opinion que nous sur la véracité de ces témoins. Il en est arrivé à la conclusion que le contrat qui a été fait entre les parties n'avait trait qu'à 1,200 articles.

Dans ces circonstances, nous ne pouvons considérer le défendeur Perras comme s'étant obligé de livrer à la demanderesse la quantité de peaux qu'elle allègue.

Le jugement qui a renvoyé son action doit être confirmé avec dépens.

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MIGNAULT J.—This case comes to this court with the findings of facts of the learned trial judge unanimously concurred in by the Court of King's Bench, and the dispute being as to the quantity of sides of chrome patent cow hides which were sold by the respondent to the appellant, is certainly a question of fact. So far as the matter rested on the testimony of Osborne (the plaintiff's representative) on the one hand or of Hubbell (the defendant's employee) and the defendant himself on the other, the trial judge accepted the statements of the latter. And, assuming that under art. 1235 of the civil code the contract could be proved by parol evidence in view of the deliveries which the appellant claims were referable to the larger contract, the respondent to the smaller one, there would be no difficulty whatever had not the appellant written to the respondent the letter of May 13th, 1919, purporting to confirm a contract of sale of 450 dozen sides, which letter was received by Hubbell who never answered it, but is shown not to have come to the knowledge of the respondent who was then absent from Montreal.

The value of this letter is of course merely as evidence of a contract which the learned trial judge on the testimony found had not been entered into. It is noteworthy that the appellant has suffered no prejudice by reason of the failure of a reply to its letter, for during the previous month it had committed itself to a Paris firm to which it had undertaken to sell 500 dozen sides, and no action on its part was induced by the respondent's silence. On this phase of the case, Mr. Justice Greenshields suggested that if it was the duty of the respondent to answer this letter, and if his failure to do so induced the appellant to do some-

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thing which would not otherwise have been done and which resulted in damages, an action might lie, and if an action on these grounds were brought,

it may be that the respondent would be estopped in his defence upon the principle that where a man has kept silent when he ought to have spoken, he will not be permitted to speak when he ought to keep silent.'

I have no doubt whatever that Mr. Justice Greenshields will fully agree with me when I venture to observe that the doctrine of estoppel as it exists in England and the common law provinces of the Dominion is no part of the law of the Province of Quebec. This, however, does not mean that in many cases where a person is held to be estopped in England, he would not be held liable in the Province of Quebec. Article 1730 of the civil code is an example of what, in England, is referable to the principle of estoppel, and where a person has by his representation induced another to alter his position to his prejudice, liability, in Quebec, could be predicated under articles 1053 and following of the civil code. Whether such liability could be relied on as a defence to an action, in order to avoid what has been called a "circuit d'actions," is a proposition which, were it necessary to discuss it here, could no doubt be supported on the authority of Pothier. May I merely add, with all due deference, that the use of such a word as "estoppel," coming as it does from another system of law, should be avoided in Quebec cases as possibly involving the recognition of a doctrine which, as it exists to-day, is not a part of the law administered in the Province of Quebec.

In this case my opinion is, under the circumstances disclosed by the evidence, that the appellant could not create a contract by its letter affirming that contract had been entered into, that the failure of an

answer, under the same circumstances, cannot serve as evidence of a non-existing contract, and while I would certainly not say that under no circumstances the neglect to answer a letter cannot give rise to liability or serve as a tacit admission, my opinion is that in the present case Hubbell's failure to answer the appellant's letter cannot be used as evidence that the respondent entered into a contract which the learned trial judge, on the evidence, finds was never made.

The opinions of the learned judges in the court of King's Bench are so satisfactory to me that I respectfully express my concurrence therein.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Heneker, Chauvin, Walker & Stewart.*

Solicitor for the respondent: *Ernest Lafontaine.*

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*June 2.
*June 20.

ANTOINE HÉBERT AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

SCHOOL COMMISSIONERS OF ST-FÉLICIEN (DEFENDANTS) ..... RESPONDENTS.

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

School commissioners—Powers—Purchase of built property—Sanction of Lt. Gov. in Council—Illegality—Appeal to Circuit Court.—Arts. 358, 1472, 1533, 1777, 2009, *s.8. C.C.—Art.* 50 *C.C.P.—Sections* 2610, 2635, 2707, 2709, 2723, 2724, 2727, 2746, 2787, 2903, 2981, 2982, 2988, 2990 *R.S.Q.*

The appellants brought an action to annul a resolution passed by the respondents, purporting to authorize the purchase of a hotel property for school purposes.

Held, that the respondents were authorized, under sections 2635 and 2723 R.S.Q., to make such purchase without the sanction of the Lieutenant Governor in Council, such power not being restricted by section 2724 R.S.Q.

Per Brodeur and Mignault, JJ.: The proper remedy to quash the resolution was an appeal to the Circuit Court under section 2981 R.S.Q., and not an action in the Superior Court under the supervisory power conferred by article 50 C.C.P.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1) reversing the judgment of the Superior Court sitting in review (2) and affirming the judgment of the trial court.

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.

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

(1) Q.R, 31 K.B. 458. (2) Q.R. 59 S.C. 119.

Belcourt K.C. for the appellants.

G. Barclay for the respondents.

IDINGTON J.—This appeal arises out of proceedings taken to quash and annul the resolution of respondent, which reads as follows:

Il est proposé par M. Philippe Tremblay et unanimement résolu que la Commission achète l'hôtel Chibougamou et le terrain attenant au dit hôtel pour le prix de vingt-six mille piastres ($26,000.00) aux conditions suivantes: quinze cents piastres ($1500.00) comptant et la balance à cinq cents piastres ($500.00) par année sans intérêts; il est convenu avec les vendeurs de payer le comptant dans l'espace de cinq ans (5) moyennant intérêt de (7%) et que le président et le secrétaire-trésorier soient autorisés de signer le contrat après que la dite résolution sera en force.

I have grave doubts of our jurisdiction to hear this appeal.

The case of *Shawinigan Hydro Electric Co.* v. *Shawinigan Water & Power Co.* (1), relied upon was differently constituted, for there the action was brought not only against the municipality but also the company that had contracted with the said municipality and that contract was impeached by a ratepayer as plaintiff and an injunction was sought restraining the carrying out of such an *ultra vires* contract, as that was, for several reasons. See that case as reported (2), on motion to quash.

Here the vendor is not a party and what we are asked to interfere with is a mere resolution of the council which may be executed by the adoption of proper methods even if there is anything objectionable in the initital step.

(1) [1912] 45 Can. S.C.R. 585. (2) [1910] 43 Can. S.C.R. 650.

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Idington J.

It may be quite competent for the courts below acting under Art. 50 of the Code of Civil Procedure, or other like legislation giving a superintending power to deal with such a resolution, yet be quite incompetent for us, who are not given the right to hear appeals in that regard, to attempt to do so.

The whole matter involved is, as Mr. Justice Allard in the reasons he assigns in support of the judgment appealed from says, purely a matter of administration.

Passing that objection I made to hearing the appeal, but for which I got no support, and therefore to the merits of the appeal, I am unable to see how the express terms of section 2723, R.S.Q. 1909, can be overruled.

Sections 2 and 3 thereof are as follows:—

> 2. To acquire and hold for the corporation all moveable or immoveable property, moneys or income, and to apply the same for the purposes for which they are intended;
>
> 3. To select and acquire the land necessary for school sites; to build, repair, and keep in order all school-houses and their dependencies; to purchase or repair school furniture; to lease temporarily or accept the gratuitous use of houses and other buildings, fulfilling the conditions required by the regulations of the committees, for the purpose of keeping school therein.

There is no such restriction upon these express powers as to entitle us to interfere.

The implications sought in other sections do not seem to me available.

And when we find counsel for appellant driven to the resort of submitting that the credit given for a term of years must be read as if a loan, I cannot follow him.

It might well be that legislation declaring that to be the effect or implication of such a bargain as before us would be wise, but to so read the Act seems to me would be to legislate, and that is not within our province.

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Idington J.

I am unable either to read these subsections as implying that land bought for such a purpose must be free from buildings or structures of any kind, either useful or useless.

It is quite conceivable that the draftsman of the Act never contemplated such a good bargain chance as this possibly is. But that surmise does not help us for where are we to draw the line

The other objections, certainly at this stage of the litigation, are not such as would entitle us to reverse the court below.

In the *Shawinigan Case* (1), relied upon, there were involved such express statutory restrictions upon both the nature of the bargain and the term of credit, as are not to be found in the legislation invoked by the appellants to help out their contentions, so far as we are entitled to consider them.

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

DUFF J.—I concur with the view of the Court of King's Bench that the authority given by the third sub-section of art. 2723 R.S.Q. is not conditioned by art. 2724 in such fashion as to require the school authorities to obtain the sanction of the Lieutenant Governor in Council before exercising it. Art. 2724 confers, in my opinion, supplementary powers.

The appeal should be dismissed with costs.

ANGLIN J.—Mr. Justice Allard has dealt so satisfactorily with the several objections taken by the appellant to the validity and legality of the resolution in question in this action that I feel I cannot do better than adopt his reasons for holding those objections ill founded.

(1) 45 Can. S.C.R. 585.

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Anglin J.

It may be that a transaction such as that before us is one which the law might very properly make subject to the approval of the Lieutenant-Governor in Council, or, at least, to that of the Superintendent of Public Instruction, in order that School Commissioners may not find themselves loaded with a costly building which may not be approved of as suitable for school purposes. But the law has not so provided. On the contrary it has entrusted the acquisition of immovables for their purposes to the discretion of the School Commissioners.

There may also be some ground for suspecting the wisdom or even the singleness of purpose of the acquisition of a hotel property for school purposes. The appellant would invoke in that connection the supervisory power conferred by Art. 50 C.C.P. on the Superior Court. But since the Court of King's Bench did not regard this as a case calling for intervention under that extraordinary jurisdiction, I cannot but think it would be a mistake for this court to attempt to exercise it even were there in the record evidence of facts from which indiscretion or a lack of good faith on the part of the Commissioners might be inferred. No such facts are shewn and not a single witness has deposed to his belief either that the projected purchase is improvident or that the Commissioners in undertaking it were actuated by any motive other than a desire to discharge their duty to those whom they represent.

BRODEUR J.—Les demandeurs poursuivent les Commissaires d'écoles de St Félicien pour faire déclarer nulle une résolution que ces derniers avaient adoptée le 12 octobre 1919. Cette résolution pourvoyait à l'achat de l'hôtel Chibougamou au prix de $26,000,

dont $1,500 devaient être payés durant les cinq années suivantes et la balance $500 par année sans intérêt. Il était bien compris que cette propriété était achetée pour la convertir en maison d'école.

L'article 2610 des statuts refondus de la province de Québec fait un devoir aux commissaires de maintenir une école dans chaque arrondissement.

Or comme la maison d'école dans l'arrondissement en question était en mauvais état et ne répondait plus aux exigences de la loi, qu'elle avait été condamnée par les autorités sanitaires, qu'elle était construite sur un terrain qui ne leur appartenait pas, il devenait nécessaire pour les commissaires d'en construire une autre; et alors ils ont jeté les yeux sur cet hôtel et ont décidé de s'en porter acquéreurs.

L'avis public requis par l'article 2787 S.R.P.Q. a été dûment donné le 2 novembre 1919. Les contribuables intéressés avaient trente jours pour appeler à la cour de circuit de cette décision des commissaires (arts. 2981-2982 S.R.P.Q.) mais ils n'en ont rien fait. Ce droit d'appel donne à la cour de circuit le droit de rendre la décision que les commissaires auraient dû rendre et donne, par conséquent, à ce tribunal les pouvoirs nécessaires d'empêcher toute illégalité ou injustice que les commissaires pourraient commettre (art. 2988). Tant que le jugement n'est pas rendu sur cet appel, la décision des commissaires est suspendue (art. 2990 S.R.P.Q.).

Aucun appel n'a été institué par les appelants Hébert & al. ou par d'autres contribuables. Les demandeurs ont préféré procéder par action devant la cour supérieure et ils demandent que la résolution soit cassée et annulée "comme étant illégale, injuste et *ultra vires*."

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Brodeur J.

La cour supérieure n'est pas un tribunal d'appel des décisions des commissaires d'écoles. La juridiction de la cour supérieure dans les affaires scolaires lui est donnée par l'article 50 du code de procédure civile. C'est un pouvoir de contrôle et de surveillance seulement, bien différent des pouvoirs d'une cour d'appel. Une cour d'appel substitue son opinion sur le mérite de la cause à l'opinion de la cour qui a rendu le jugement originaire, tandis que la cour supérieure, sous l'autorité de l'article 50 C.P.C. n'a pas le droit d'empiéter sur les attributions qui appartiennent exclusivement aux autorités scolaires et de substituer son opinion à celle de ces autorités sur le mérite de leurs ordonnances passées régulièrement et dans les limites de leurs attributions (*Thériault* v. *Corporation de St-Alexandre* (1).

Ainsi dans le cas actuel la cour de circuit aurait eu pleine et entière juridiction pour s'enquérir de l'injustice de la résolution attaquée, mais la cour supérieure peut tout au plus rechercher si la corporation scolaire a agi au delà de ses pouvoirs, si elle a commis une illégalité ou bien si la résolution attaquée constitue un déni absolu de justice. *Brunelle* v. *Corporation de Princeville* (2), *Corporation de St-Pierre* v. *Marcoux* (3), *Giguère* v. *Corporation de Beauce* (4), *Corporation de Ste-Julie* v. *Massue* (5), *Thériault* v. *Corporation de St-Alexandre* (1), Nous avons donc à rechercher d'abord si l'achat du terrain en question est *ultra vires*.

Comme je l'ai dit plus haut, les commissaires sont tenus d'avoir dans chaque arrondissement une maison d'école (art. 2610). Ils doivent voir à y faire mettre à exécution les règlements concernant l'hygiène (art. 2707-9). Or il est en preuve que la maison où on

(1) [1900] 8 Rev. de Jur., 526.
(2) [1907] Q.R. 17 K.B. 99.
(3) [1908] Q.R. 17 K.B. 172.
(4) [1910] Q.R. 19 K.B. 353.
(5) [1904] 13 K.B. 228.

faisait l'école était devenue insalubre. C'était donc un devoir impérieux pour eux de construire une nouvelle maison d'école. Le terrain sur lequel était cette vieille maison d'école ne leur appartenait pas; et alors ils ont cru devoir acheter l'hôtel Chibougamou qui probablement pourrait être convertie en une maison d'école.

Avaient-ils le pouvoir d'acheter cet immeuble? On a beaucoup discuté l'article 2723 des lois scolaires, mais suivant moi ce n'est pas dans cet article qu'il faut rechercher le pouvoir des corporations scolaires. Cet article 2723 en effet se trouve sous la rubrique "Des devoirs des commissaires et des syndics relativement aux propriétés scolaires." Il faut plutôt rechercher la nomenclature des pouvoirs des corporations scolaires; et nous la trouvons à l'article 2635 des Statuts Refondus. Cet article 2635, après avoir déclaré que les commissaires forment une corporation, ajoute:

> Ils ont succession perpétuelle, sont habiles à ester en justice et *font tous les actes qu'une corporation peut faire pour les fins pour lesquelles ils ont été constitués.*

Nous retrouvons au code civil (art. 358) qu'une corporation peut exercer tous les droits qui lui sont nécessaires pour atteindre le but de sa destination. Ainsi elle peut acquérir, aliéner et posséder des biens, contracter, s'obliger et obliger les autres envers elle. Si par les lois générales applicables à l'espèce ces pouvoirs d'acheter ou d'aliéner étaient restreints, une corporation serait naturellement obligée de respecter ces lois. De même, si des devoirs lui étaient imposés par la loi qui la régit, elle devrait les respecter.

Quant aux corporations scolaires, elles ont le pouvoir d'acheter des terrains pour des fins scolaires, ainsi que je viens de le démontrer. Nous avons maintenant à voir si dans les lois scolaires il y a quelques articles qui peuvent restreindre son droit.

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L'article 2723–3, qui est invoqué par l'appelant, bien loin de restreindre ces pouvoirs, fait au contraire un devoir aux commissaires d'écoles d'acquérir les terrains nécessaires pour les emplacements de leurs écoles. La loi exige cependant que leurs maisons d'écoles soient construites conformément aux plans et devis fournis par le surintendant. Mais rien ne restreint le pouvoir des commissaires d'acheter un terrain sur lequel il y aurait une maison. Ils ne pourraient cependant faire l'école dans cette maison que si elle est construite de manière à rencontrer les exigences des autorités départementales (art. 2746 S.R.Q.). Mais ces dispositions ne sauraient affecter le droit des commissaires d'acheter une maison. Il n'est pas prouvé dans cette cause que cette maison qui a été achetée ne peut pas faire une excellente maison d'école. Par conséquent, il n'y a rien dans la cause qui puisse nous justifier même de dire que cette vente n'est pas désirable.

On invoque aussi, au soutien de l'idée que la résolution est *ultra vires*, l'article 2724 des S.R.P.Q. Cet article déclare que les commissaires d'écoles ne

> peuvent conclure des conventions pour des fins scolaires avec toute personne, institution ou corporation qu'avec l'autorisation du Lieutenant-Gouverneur en conseil donnée sur la recommandation du surintendant.

Cet article n'est peut-être pas aussi clair qu'on voudrait le voir. Si on l'interprétait à la lettre, il pourrait vouloir dire que les commissaires seraient pratiment incapables d'adopter une résolution sans aller devant le lieutenant-gouverneur en conseil pour se faire autoriser. Il s'agit évidemment, dans cet article, comme le disent plusieurs juges dans les cours inférieures, d'une restriction imposée aux commissaires de ne pas conclure de conventions avec une maison d'éducation pour instruire leurs enfants pour une période couvrant

plusieurs années sans avoir l'autorisation voulue. On est anxieux de voir à ce que l'instruction qui est donnée dans les écoles réponde aux exigences de la morale et de la religion; et alors les autorités départementales se réservent le pouvoir d'aviser les commissaires avant qu'ils ne s'engagent et qu'ils ne lient la corporation scolaire. Voilà l'objet de l'article 2724.

La résolution n'est donc pas *ultra vires*.

On dit aussi que la résolution est illégale parce que l'achat a été fait à crédit, que cela constitue un emprunt et que les corporations scolaires ne peuvent pas emprunter sans l'autorisation du lieutenant-gouverneur en conseil (art. 2727 S.R.Q.).

Nous sommes ici non pas en présence d'un contrat de prêt, mais d'un contrat de vente à crédit. Ce sont deux choses bien différentes. Qu'est-ce qu'un prêt? C'est un contrat par lequel le prêteur livre à l'emprunteur une certaine quantité de choses à la charge par ce dernier de lui rendre autant de la même espèce (art. 1777 C.C.). La vente est un contrat par lequel une personne donne une chose à une autre moyennant un prix en argent (art. 1472 C.C.). L'acquéreur peut avoir délai pour le paiement du prix (art. 1533 C.C.). Il y a attachés à ce contrat de vente des droits que nous ne retrouvons pas dans le cas du prêt (art. 2008-9 C.C.).

Le prêt à intérêt et la vente à crédit avec stipulation d'intérêt ont, je l'admets, beaucoup de similitude; mais il ne faudrait pas les confondre l'un avec l'autre, surtout quand il s'agit *d'ultra vires* ou d'illégalité. Si la loi défend à une personne d'emprunter, cela ne veut pas dire que cette personne-là est également incapable d'acheter. Au contraire, si on lui a donné formellement le pouvoir d'acheter, elle ne commettra pas d'acte outrepassant ses pouvoirs en se portant acquéreur d'une chose.

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Les appelants prétendent aussi que la résolution aurait dû pourvoir au mode de paiement, soit par une imposition, un emprunt ou une émission d'obligations. L'article 2903 S.R.Q. semble admettre qu'une dette peut être contractée sans la formalité d'un emprunt. Les commissaires peuvent acquérir une propriété par vente à crédit et, par conséquent, endetter la municipalité scolaire.

Une décision à cet effet a été rendue en 1881 par la cour d'appel dans une cause de *La Corporation du Village de l'Assomption* v. *Baker* (1). Cette jurisprudence paraît avoir été acceptée et la législature n'est jamais intervenue pour la mettre de côté, du moins en tant que les corporations scolaires sont concernées.

Quant à la question d'injustice soulevée par l'appelant, je crois que cette question est du ressort presqu'exclusif de la cour de circuit comme cour d'appel. Il n'y a rien dans la cause qui puisse nous induire à déclarer qu'il y a eu un déni absolu de justice.

Pour toutes ces raisons, l'appel doit être renvoyé avec dépens.

MIGNAULT J.—Cette cause, où on demande l'annulation pour illégalité d'une résolution des intimés pour l'achat d'un hôtel qui devra être transformé en maison d'école, a atteint cette cour après avoir déjà passé par trois tribunaux. La cour supérieure et la cour d'appel se sont prononcées en faveur des intimés; la cour de revision, au contraire, a donné raison aux appelants, et tant en cour de revision qu'en cour d'appel il y a eu des opinions dissidentes. Il me semble que lorsque tous les tribunaux de la province de Québec ont été appelés à se prononcer sur la validité

(1) [1881] 4 L. N. 370.

d'actes administratifs ou autres d'une corporation municipale ou scolaire, le débat devrait se trouver épuisé, et sans qu'il y ait lieu, sous la loi qui régissait le droit d'appel à cette cour lors de l'institution de la présente action, de douter de notre juridiction à nous prononcer en quatrième lieu sur la contestation mue entre les parties, ce n'est qu'avec regret que je constate la persistance des parties à se ruiner ainsi en frais pour faire décider une question qui est d'une importance locale très minime. Je ne puis m'empêcher de regarder le débat comme étant au fond une querelle de village. D'autre part, les commissaires d'écoles pour la municipalité de Saint-Félicien me paraissent avoir recherché de bonne foi à se procurer un local plus convenable que celui qui sert actuellement d'école pour l'arrondissement n° 1 de cette municipalité, et que l'autorité compétente a condamné comme étant insalubre.

J'ai lu tout le dossier et je n'ai aucune hésitation à renvoyer l'appel pour les raisons données par l'honorable juge Allard auxquelles j'adhère complètement.

Appeal dismissed with costs.

Solicitor for the appellants: *Thos. Ls. Bergeron.*

Solicitor for the respondents: *Armand Boily.*

1914
*March 4, 5.
*Oct. 13.

F. X. ST.-CHARLES & COMPANY (DEFENDANT)..... } APPELLANT;

AND

DAVID S. FRIEDMAN AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

ON APPEAL FROM THE SUPERIOR COURT OF THE PROVINCE OF QUEBEC, SITTING IN REVIEW AT MONTREAL.

Lease—Resiliation clause—Ejectment—Sale — Subrogation — Notice — Change—Registration—Articles 1608, 1609, 1642, 1657, 1663, 2128 *C.C.*

An unregistered written lease of real estate by H. to S. reserved the right to terminate the lease in case of a sale of the property, by giving three months' notice. At the expiration of the term, five years, the lease was extended for three years, terminating 1st of May, 1915, upon the same conditions. Subsequently H. sold the property to M. subject to the lease; and M. afterwards sold it to F. with subrogation in all his rights under the lease then current and an undertaking that the lease would be cancelled on 1st of May, 1913, and the premises then vacated. M. notified S. of this sale, requesting him to pay the rent to the purchaser, and, on the 29th of January, 1913, H. and M. gave notice to S. of cancellation of the lease to take place the 1st of May following. F. gave no notice but continued to collect the rent until the end of April following. In an action by F. for the ejectment of S.,

Held, Idington and Anglin dissenting, that the lease should be declared cancelled.

Per Fitzpatrick C.J. and Brodeur J.:—Under the provisions of Articles 1663 and 2128 C.C., the lease exceeding one year which has not been registered cannot be invoked against a subsequent purchaser. Idington and Anglin *contra*.

Per Fitzpatrick C. J., Idington, Anglin and Brodeur JJ.:—As the rights of the lessor had passed to the subsequent purchaser, cancelling could be demanded by him under the stipulation in the lease in favour of the original lessor; and

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

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Per Fitzpatrick C.J. and Brodeur J.—The notice of cancellation given by H. and M. was effective in favour of F., Idington and Anglin J.J. *contra.*

Per Anglin J.—The plaintiffs, having acquired the property expressly subject to the defendant's lease and taken subrogation to the lessor's rights thereunder, cannot invoke Article 2128 C.C. to avoid such lease.

Judgment of the Court of Review (21 R.L. n.s. 96) affirmed, Idington and Anglin JJ. dissenting.

APPEAL from the judgment of the Superior Court, sitting in review at Montreal (1), affirming the judgment of Dunlop J. at the trial and maintaining the respondent's action.

In March, 1907, Harris Vineberg leased property on Windsor Street in Montreal to the appellant for five years from the 1st May, 1907, reserving the right of terminating the lease in case of a sale of the property by three months' notice. On 29th June, 1911, while appellant was still in occupation of the premises under the lease, an agreement was made to extend the lease for another period of three years from 1st May, 1912, to 1st May, 1915, with the same conditions. In June, 1911, Harris Vineberg sold the premises to Moses Vineberg, subject to leases which the purchaser assumed and nothing was done to cancel the lease until the 2nd of May, 1912, when Moses Vineberg served a notice on appellant to terminate the lease on 3rd August, 1912. The appellant remained in possession after 3rd August, 1912, and Vineberg took no steps to have him ejected and continued to collect the rents until the 20th January, 1913, when he sold the property to the respondent subrogating them in all his rights and obligations under the lease then current and undertook to cancel the lease on the 1st of May, 1913, and have the appel-

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lant vacate the premises on that date. On the same day, after the sale was made, Moses Vineberg notified the appellant of the sale to the respondents and requested him to pay the rent to them. On 29th January, 1913, Harris Vineberg and Moses Vineberg notified the appellants of cancellation of the lease to take place on the 1st of May following. The respondents, who were then proprietors, gave no notice, but continued to collect the rents up to the month of April. On May 5th, respondents took the present action to declare the lease cancelled and eject the appellant.

In the Superior Court the action was maintained and this judgment was affirmed by the Court of Review at Montreal.

Lafleur K.C., and *A. Perreault*, for appellant.

Jacobs K.C., and *Couture*, for respondents.

CHIEF JUSTICE.—I would dispose of this case on this very short ground:

At the time this action was brought, the defendants, now appellants, were in possession of the premises under a lease from Harris Vineberg, of 29th June, 1909, which was made subject to the following, among other conditions:

> The lessee will have the right to continue the present lease from year to year after the expiration of the said term, and until the property will be sold, upon the same condition and for the same rental as hereinbefore mentioned: and during such continuance of this lease, will have the right to bring the lease to a termination at the end of any year, by giving the lessor three months' notice in writing of its intention, as well as to continue this lease, as afterwards of terminating it. Failing such notice at the end of the said term, the lease will continue. And the lessor will have the right, in the event of the property being sold, to bring the lease to an end, at any time, *whether during the said term of three years*, or afterwards, by giving the lessee three months' notice in writing to that effect.

The lease, which was for a term of three years from May 1st, 1912, with a right of renewal, was not registered when the property was sold on the 1st of June, 1912, to Moses Vineberg, from whom the respondents Friedman et al. purchased. Moses Vineberg gave the required notice to cancel the lease *en temps utile*.

It appears to me obvious that, in these circumstances the case comes under article 2128 (C.C.) which reads as follows:

> The lease of an immovable for a period exceeding one year cannot be invoked against a subsequent purchaser unless it has been registered.

It is evident that, the lease not having been registered, the defendants (now appellants) cannot invoke its terms as against the plaintiffs (now respondents), subsequent purchasers of the property, and this is sufficient to dispose of the case.

It is quite true that, taken literally, it is difficult to conciliate the provisions of articles 1663 and 2128 C.C., but having considered the Report of the Codifiers (see 12 Bibliothèque du Code Civil, page 753, and 18 Bibliothèque du Code Civil, page 135) one may safely say that, after some discussion, the system adopted by the Legislature in the Code, as finally enacted, provided that leases were to be considered as charges on the immovables with respect to which they were passed and subject, as a consequence, to the ordinary rules as to registration of real rights.

I am of opinion that the appeal should be dismissed with costs.

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IDINGTON J. (dissenting).—Harris Vineberg by a writing dated 28th June, 1909, "let and leased" to appellant the property in question herein for the term of three years to be reckoned from the 1st of May, 1912. The appellant happened to be in possession of the premises on the date of this lease, but as nothing, so far as I can see, turns upon the terms of that holding I will avoid the confusion apt to be created by referring thereto.

The inducement to the making of a lease nearly three years ahead of the time from which it was to run would seem to have been that the lessee agreed by this lease

> to put up a new front to the stone building on the property according to the plans prepared, to cost at least twenty-eight hundred dollars, and to have the said improvement done forthwith,

failing which the lessor had the right to demand cancellation of this lease.

Nothing unusual appears in this lease save the foregoing and the following clause:—

> The lessee will have the right to continue the present lease from year to year after the expiration of the said term, and until the property will be sold, upon the same conditions and for the same rental as hereinbefore mentioned; and during the continuation of this lease, will have the right to bring the lease to a termination at the end of any year by giving the lessor three months' notice in writing of its intention, as well to continue this lease, as afterwards of terminating it. Failing such notice at the end of the said term, the lease will continue. And the lessor will have the right, in the event of the property being sold, to bring the lease to an end, at any time, whether during the said term of three years, or afterwards, by giving the leassee three months' notice in writing to that effect.

It is upon the last sentence of this clause that the various questions arising herein must turn.

Harris Vineberg sold the property to Moses Vineberg on the 5th of June, 1911—over a year before the last sentence of this clause could become operative.

Having regard to the expected expenditure of $2,800 on the erection of a front in 1909, it could hardly be supposed that anyone could conceive of this clause on behalf of the lessor becoming operative before the term began to run. Besides that, the express language used as to bringing the lease to an end is

at any time whether during the said term of three years or afterwards.

I am, therefore, of the opinion that it never was competent for the lessor to bring the lease to an end by three months' notice until after the term had begun to run.

Then by the time the term had begun to run the original lessor had ceased for nearly a year to have any interest in the matter.

At that time the only person having a right to interfere with the appellant, the tenant, was the vendee, Moses Vineberg.

According to some notions prevalent in the minds of those concerned and, indeed, put forward in argument herein it was only the original lessor who could give notice or act in the matter. Such does not seem to me to be a position either in accord with the law when viewed historically or with the construction of this lease.

What has to be borne in mind is that it was originally the law that the vendee upon the sale taking place had the right to enter as a matter of course. It was for him to determine whether or not he should avail himself of this right. There was nothing binding him to do so. It might be for his advantage to continue the lease.

It is not necessary for our present purpose to define accurately the relative rights of such parties; which varied in many cases by custom and otherwise.

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All I am concerned with here is to indicate the general nature of the relation which was existent before the code, in order to appreciate the use of the term "lessor" in this lease and also the provisions of the code which modified the relative rights of the landlord and tenant in such cases as sale by a lessor.

Now, in this case I may observe that the term "lessor" is used throughout the lease in relation to a number of things to be enjoyed by him as well as in the clause above quoted, and I see not the slightest reason to construe it in one sense in one place and in another sense in other places. It means the owner who is landlord for the time being in relation to any of the other things to be done or submitted to.

It cannot, therefore, be construed as meaning only the original landlord who may have died or disappeared. Hence, I think, Harris Vineberg had nothing to do with what Moses Vineberg or any succeeding landlord might do or wish to be done.

From this it seems to me that Moses Vineberg had the right to give the notice which he gave upon the 2nd of May, 1912, declaring the lease terminated in August following and, in the language of the clause in question, "to bring the lease to an end." The only condition precedent to his doing so was that there must have been a sale and that sale having taken place gave this vendee that right which he exercised at the earliest possible moment specified in the instrument.

Supposing the sale had taken place only a week before or the same day, he was the man to declare his intention and right and what difference can it make that the sale had taken place a year before? There must be some lapse of time long or short between the sale and the declaration of the vendee's intention.

I was at first blush inclined to think that only a sale within the term might be effective, but I do not think that view is tenable. Let us observe the provision binding the appellant, the lessee, to erect the new front in 1909, and the condition therein contained that in default "the lessor" could demand the cancellation of this lease, and ask ourselves what would have been the rights of Moses Vineberg in relation thereto in case of default had he purchased in 1909 soon after the execution of the lease?

Can there be a doubt that he would have had on such default the right in 1910, before the term had begun to run, to insist upon the cancellation of the lease?

It seems to me there could not and that illustrates the position of these parties in relation to each other at any time after Moses Vineberg became the landlord. By one term of it cancellation could have been insisted on by him before the term, or after for that matter, but by another term it clearly was not intended such a thing as termination upon notice was to take place until another time which must occur within the term.

Then it was argued that he had become bound by the deed to him to maintain the leases then subsisting as if that forbade him or his successor giving notice to terminate.

But the provision is only

> to maintain the leases of the said premises now subsisting *until the due termination of the same under the provisions thereof.*

And the question simply is whether or not the notice given on the second of May was a due termination thereof. I think it was, and there the matter should end but for what transpired later. It may well be that the parties in truth intended something else but, if I understand English, they have not so expressed it.

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It seems nothing more was said. The appellant stayed in possession, paid monthly the rent to Moses Vineberg till January following.

Five months' rent was thus paid and accepted after the lease had effectually been brought "to an end" in the terse language of the term providing therefor.

What right has anyone to say it was restored? There was absolutely nothing in the conduct of the parties from which to imply a waiver of the notice. There simply arose as between them that relation which the law implies from the actual condition of things when a lease is at an end. It was not argued that this was a *tacite reconduction*, and probably to do so would not have helped in any view of this case.

I shall presently revert to the legal situation thus created in light of the provisions of the code.

Moses Vineberg sold the premises in question to respondents on the 20th January, 1913, and conveyed same to them by notarial deed of that date. And then, on same day, served on appellant written notice of said sale requesting it to pay its rent in future to the respondents

as I have nothing more to do with the rents.

In the vendor's declarations contained in the said deed is the following clause:—

(4) That he hereby transfers to the said purchasers the rental of said premises as and from the date hereof, hereby subrogating and substituting them in all his rights under the lease of said premises.

This is followed by the following provision under the caption "Possession":—

The purchasers will be the absolute owners of said property with immediate possession, subject to the existing lease which, however, the vendor undertakes to cancel not later than the first of May next and have the present tenant vacate on or before that date.

Under such facts and circumstances the said Harris Vineberg and Moses Vineberg, on the 29th January, 1913, gave notice, as if given pursuant to the clause above quoted from the lease, to the appellant to quit on the first of May then next.

It is upon such notice that this action is founded.

This action was begun on the 5th of May following. The appellant, tenant, proceeded to pay the rent monthly as it had been requested to the respondents, getting receipts from them which made no reference to the notice to quit or recognized it in any way.

The notice to quit contained the following:—

> That by deed of sale passed on the day of January instant, the said Moses Vineberg sold and transferred the said property to Charles Workman and David S. Friedman.

This reference to deed of sale probably refers to the deed of 20th of January, but does not so expressly state for no date is given but "on the day of January instant." And in terms it is otherwise inaccurate in referring thereto for that deed only contained the provision above quoted as to cancellation of the lease which might have bound the grantors to procure it in various other ways.

The provision is treated as if the respondents had been empowered thereby to give notice as agents of the vendors or as if the vendors had been authorized to give notice in name and on behalf of the vendees.

I assume it might have been quite competent for the vendor and vendees to have had the vendor constituted, as between them, the vendees' agents to use the names of the vendees or that of the vendors and vendees in giving notice, and to have provided for the vendor assuming the burden of the expense of giving proper notice and all that was needed to get possession. But it has not expressly done so and, with deference I submit, has not impliedly done so.

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It is quite obvious the parties concerned had some such notion as I have already adverted to, that the notice had to be given in the name of the vendors who were no longer lessors and did not fall within the terms of the clause enabling the lessor to give notice in writing to put the lease at an end.

I have already given my reasons for thinking that it is only the actual lessor at the time who can under this lease give notice. Such is the express term of the provision and it seems, I respectfully submit, a perversion of the language used to try and make it express something else.

Besides that the tenant is entitled to have in black and white what his landlord demands and to know exactly with whom he is dealing and to have the lessor (*i.e.*, the actual landlord) clearly bound to abide by what is proffered.

If, by the 1st of May, the advantages of the situation had been reversed so that the respondents did not wish to eject the tenant and the appellant did not wish to continue tenant, how could it have availed itself of this notice as an answer to the continuation of the tenancy?

Though holding the opinion that Harris Vineberg had after his conveyance to Moses Vineberg no longer power to give notice, yet I can conceive of an interpretation of this peculiar contract which intended that the clause for termination was only to become operative by him and in his name in the event of a sale by him, and upon any such hypothesis he carefully eliminated himself and his personal power by the express stipulation that the leases were to be maintained by his vendee to whom he transmitted such rights as he had and reserved nothing for himself.

I think this notice was void and even the institution of this action cannot give it vitality.

But the many complications of this maze of going the wrong way about a very simple business are not yet ended.

The situation created by the first notice, and what ensued thereupon after the 2nd of August, has to be viewed in light of the obvious fact that thenceforward from that date the appellant held on sufferance.

To that situation article 1608 of the Civil Code may apply. But if we have regard to the acts of the parties they seem to have created a situation in which article 1642 is applicable and a monthly tenancy is to follow.

In either case, article 1657 is made applicable and no notice in accord therewith has ever been given.

It is answered that the notice of January is sufficient. I reply again there was no notice by the landlord at all; and that a landlord entitled to give a monthly notice cannot give one unsuitable to the tenancy and which would not bind both himself and the tenant. It is a notice that both can rely upon which the law requires if confusion is to be avoided.

Lastly, we have, if what I have said regarding the termination in August or otherwise is unfounded, the express language of article 1663 as follows:—

1663. The lessee cannot, by reason of the alienation of the thing leased, be expelled before the expiration of the lease, by a person who becomes owner of the thing leased under a title derived from the lessor; unless the lease contains a special stipulation to that effect and be registered.

In such case notice must be given to the lessee according to the rules contained in article 1657 and the articles therein referred to; unless it is otherwise specially agreed.

I am unable to see why this very clear and express language is to be changed or discarded.

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With that accepted there is a complete answer to the respondents' contention in any way it can be presented as there does not seem to have been registration of this lease.

With great respect, I cannot think that there is anything which renders it necessary to import article 2128 into the discussion. That was adopted for the very obvious reasons assigned, and finds its proper place under the 18th title of the Code which is devoted to the registration of real rights and has its analogue in, I suppose, all of such systems of registration.

This article 1663 is found in another place where the subjects of lease and hire dealt with are of an entirely different character.

I see no inconsistency and there is much that is cogently put forward in the argument of Mr. Lafleur to show that the ground taken in the judgment of Mr. Justice Delorimier is not satisfactory.

I think the appeal should be allowed with costs.

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

ANGLIN J. (dissenting).—The plaintiffs sue for a declaration that a certain unregistered lease made by their predecessor in title, one Harris Vineberg, to the defendants, dated the 29th June, 1909, for a term of three years from the 1st of May, 1912,

is resiliated and cancelled and came to an end on the 1st May, 1913

This lease contained the following clause:—

The lessee will have the right to continue the present lease from year to year after the expiration of the said term, and until the property will be sold, upon the same conditions and for the same rental as hereinbefore mentioned; and during such continuation of this lease, will have the right to bring the lease to a termination at the end of any

year by giving the lessor three months' notice in writing of its intention, as well to continue this lease, as afterwards of terminating it. Failing such notice at the end of the said term, the lease will continue. And the lessor will have the right, in the event of the property being sold, to bring the lease to an end, at any time, whether during the said term of three years, or afterwards, by giving the lessee three months' notice in writing to that effect.

By deed of the 5th of June, 1911, Harris Vineberg conveyed the property in question to Moses Vineberg, who covenanted to maintain the subsisting leases and was subrogated to his vendor's rights in respect of them.

By deed of the 20th January, 1913, Moses Vineberg conveyed the property to the plaintiffs. This deed contained the following clause as to possession:—

> The purchasers will be absolute owners of said property with immediate possession, subject to the existing lease which however the vendor undertakes to cancel not later than the first of May next and have the present tenant vacate on or before that date.

The purchasers were expressly subrogated to all the rights of the vendor under the lease. On the same day the vendor, Moses Vineberg, gave to the defendants written notice of the sale and required them thereafter, to pay their rent to the plaintiffs, who accordingly received the rent for the months of February, March and April, 1913.

The plaintiffs allege that the defendants' lease was terminated by two notarial notices given to them—the first on the 2nd of May, 1912, on behalf of Moses Vineberg, and the other on the 29th January, 1913, on behalf of Harris Vineberg and Moses Vineberg. They base their claim to the declaratory judgment above mentioned and to an order for possession against the *mis-en-cause*, who are sub-tenants, solely on this ground.

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The Superior Court decided in their favour, holding that the lease had been terminated by the notices and that the defendants, by their sub-tenants, were, therefore, illegally in possession of the premises.

In the Court of Review (1), this judgment was affirmed. But, in his opinion, Mr. Justice de Lorimier, who spoke for the court, said that the first notice was of little consequence because it had not been acted on by mutual consent, and the lease had been treated as still subsisting after the 3rd of August, 1912, the date fixed by the notice for its termination. He deemed the notice of the 29th of January, 1913, to have been validly given by Harris Vineberg and Moses Vineberg in their own interest as well as in that of the plaintiffs. He was also of the opinion that article 1663 C.C. was inapplicable, but that article 2128 C.C. applied, and that, under it, the lease was void as against the plaintiffs, as purchasers, because it had not been registered. On these grounds the appeal of the defendants was dismissed.

It is against that judgment that the present appeal is taken.

For the reasons stated at some length by Mr Justice de Lorimier, in upholding the validity of the notice given on behalf of Moses Vineberg on the 2nd May, 1912, I agree in his view that the right to terminate the lease in question was not personal to the original lessor, Harris Vineberg, but passed with the ownership of the property first to Moses Vineberg and afterwards to the plaintiffs, who became, each in turn, the "lessor" within the meaning of that term as used in the clause of the lease providing for resiliation. But I incline to think that the notice of May, 1912,

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was ineffectual because it was given in respect of a sale which had taken place eleven months before the term of the lease began and before the notice itself was given. The resiliatory clause provides that the lessor may terminate the lease

> in the event of the property being sold * * * at any time, whether during the said term of three years or afterwards

by giving notice, etc. The notice could only be given during the term or afterwards. Moses Vineberg recognized that to be the case and therefore deferred giving notice in respect of the sale of the 5th June, 1911, until the 2nd May, 1912. It cannot have been in contemplation of the parties to the lease that the lessee should be kept in uncertainty for eleven months whether the landlord intended to exercise his option to cancel or meant to continue the lease. It was, I think, the clear intent that the option should be exercisable only at the time of the sale—a reasonable delay being allowable for the giving of notice. The fact that the notice could be given only during or after the three-year term affords a strong indication that it could not be given at all in respect of a sale which took place before the commencement of the term.

But, if I should be mistaken in thinking that the notice of the 2nd May, 1912, never was effectual, I agree with the Court of Review that it was waived and the lease continued by mutual consent. The plaintiffs recognized it as subsisting on the 20th January, 1913, by the very deed which they put in evidence to establish their title, and by the notarial notice of the 29th January, 1913, on which they also rely. The defendants plead that it is still in force. As put by the respondents themselves in their factum:—

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The notices of May, 1912, are of little importance as nothing was done in furtherance thereof and the appellant was allowed to continue its occupation until the sale to the present respondents.

On the whole evidence I am satisfied that after the 3rd August, 1912, the occupation of the defendants was not under a tacit renewal (Art. 1609 C.C.), or under a tenancy by sufferance (Art. 1608 C.C.). There was a waiver of the notice and a continuance of the three years' lease by mutual consent.

Applying the reasoning of Mr. Justice de Lorimier as to the rights of the purchaser under the clauses of the lease which provides for its resiliation, on the sale from Moses Vineberg to the present plaintiffs they became the lessors of the defendants and entitled to cancel the lease under that clause. The right to give the notice only arose on the sale, by which full ownership was vested in the purchasers. On the very day of the conveyance—the 20th January, 1913—Moses Vineberg notified the defendants of the sale and of the subrogation of the plaintiffs to his rights as landlord. Thereafter his status as landlord or lessor to the defendants was completely at an end. Assuming that the notarial notice of the 29th January, 1913, was in time and otherwise sufficient, (it abounds in mistakes and misrecitals) in my opinion it could not be lawfully given by or on behalf of Moses Vineberg but could be so given only by or on behalf of the plaintiffs, who were then the lessors. The notice does not purport to be given on behalf of the plaintiffs and there is nothing in evidence to show that Moses Vineberg had any power or authority to give a notice on their behalf. On the contrary, the special clause as to possession in the deed from Moses Vineberg to the plaintiffs, above quoted, is an undertaking by the former on his own account to cancel the lease and to

have the tenant vacate the premises. I cannot regard the notarial notice of the 29th January, 1913, as something done by Vineberg on the plaintiffs' behalf which they might ratify and adopt and thus obtain the benefit of. On his own behalf, Moses Vineberg had not the right to give the notice. His undertaking to cancel the lease and secure possession of the premises for the plaintiffs did not empower him to exercises rights which had passed to them and for any abuse of which they would be accountable. Harris Vineberg's right had ceased on the 5th June, 1911.

But, if the notice of the 29th January could be deemed an exercise of the right of resiliation conferred by the lease, I would regard article 1663 C.C. as presenting a fatal obstacle to its efficacy. That article reads as follows:—

1663. The lessee cannot, by reason of the alienation of the thing leased, be expelled before the expiration of the lease, by a person who becomes owner of the thing leased under a title derived from the lessor; unless the lease contains a *special stipulation to that effect and be registered.*

In such case notice must be given to the lessee according to the rule contained in article 1657 and the articles therein referred to; unless it is otherwise specially agreed.

The requirement of registration in this article is no doubt, difficult to understand. But the text is explicit and I am, with great respect, unable to restrict its application in the case of immovables to leases for a term not exceeding one year, as Mr. Justice de Lorimier thinks should be done. See Mignault, Droit Civil Canadien, Vol. 7, p. 357. The reference in the second paragraph of the article to

article 1657 and the articles therein referred to

was relied upon at bar as indicating that the application of article 1663 should be so restricted, it was said article 1657 and the articles therein referred to deal

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only with leases for one year or less. But, on reference to article 1657, it will be seen that it deals with leases where the term is uncertain, or where the lease is verbal whatever its duration. Sir François Langelier, C. J., in his "Cours de Droit Civil," Vol. 5, at p. 239, discussing Art. 1663, says:—

> C'est par erreur que les rédacteurs de notre code ont exigé cet enregistrement; il n'y avait aucune raison de le faire.

This view of the learned commentator may be correct. Mr. Mignault says in his valuable work, Vol. 7, at p. 356:

> Il y a une contradiction, du moins apparente, entre les articles 1663 et 2128.

The latter article is as follows:

> 2128. The lease of an immovable for a period exceeding one year cannot be invoked against a subsequent purchaser unless it has been registered.

Explicit as is the text of this article, that of article 1663 is equally so. I cannot find any satisfactory ground for holding that one must yield to the other, or that article 1663 should receive a construction which will confine its operation to leases not within article 2128. To so restrict its application would be to introduce into the article a qualification which there is nothing in the text to justify. As put by Mr. Mignault, at p. 357 of the 7th vol. of his work:

> Dans ce cas, l'article 1663 est une disposition inutile, puisque le tiers-acquéreur ne saurait avoir plus de droits que son auteur, le bailleur, et que celui-ci n'aurait pu expulser le locataire sous un bail annuel avant l'expiration de l'année.

It was by article 1663 that the purchaser's right to expel his vendor's tenant, recognized in the old jurisprudence, was done away with. If article 1663 applies in the case of immovables only to leases for terms not

exceeding one year, does the old right of expulsion still exist in regard to other leases? Was it the purpose of article 2128 to extinguish that right? In their report the codifiers tell us that by the adoption of article 1663 leases became charges on immovables and like other charges should be subjected to the publicity of registration. Hence, they say the introduction of article 2128. The statement is scarcely intelligible if the leases dealt with in article 2128 are not covered or affected by article 1663, since on that assumption, they do not become charges on the immovables leased and the reason assigned for requiring their registration does not exist.

The more article 1663 is considered the more apparent does it seem to be that its application cannot be restricted to leases for one year or less.

The contradiction between article 1663 and article 2128 is only apparent. Both may be given full effect although they do, no doubt, partly overlap. One makes registration a condition of the exercise of the right of resiliation by those claiming under the lessor; the other makes it a condition of the lessee and his assigns or sub-tenants claiming the protection of a lease for more than one year as against a transferee of the lessor's title, apart from any contractual provision requiring him to respect or maintain it. *McGee* v. *Larochelle* (1).

It may be, as Mr. Mignault suggests in his note at the foot of page 356, that the legislature in enacting article 1663 had in mind the protection of assigns and sub-tenants of the lessee and inadvertently made use of language broad enough to cover the lessee himself; it may be, as Sir François Langelier says, that the

(1) [1891] 17 Q.L.R. 212, at p. 216.

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provision requiring registration was inserted in article 1663 by mistake. But we may not on mere surmises deny to the lessee the advantage to which the plain and unambiguous words of the article entitle him.

In the present case article 2128 C.C. cannot be successfully invoked by the plaintiffs. In the first place they do not in their declaration rest their case on that article. No reference is made to the non-registration of the defendant's lease. On the contrary, they treat the lease as subsisting and binding on them and they claim relief not against it, but under it. Nor could they have done otherwise, because, by the deed on which they base their title and claim to possession, they expressly took "subject to the existing lease" and had themselves subrogated and substituted to all the rights of their grantors under that lease. While mere notice or knowledge of the lease before they acquired title would not prevent the plaintiffs taking advantage of its non-registration (Art. 2085 C. C.), having taken their title expressly subject to it, they cannot invoke article 2128 C.C. against it. They cannot thus escape from their express assumption of it. *Dunn* v. *Wiggins* (1). This seems to me to constitute a peremptory ground for the dismissal of this action.

For these reasons, I would, with the most profound respect, allow this appeal with costs in this court and in the Court of Review and would direct judgment dismissing the action with costs.

BRODEUR J.—Il s'agit dans cette cause d'une action en expulsion contre un locataire par un tiers acquéreur.

La cour supérieure a maintenu l'action.

(1) [1884] 4 Dor. Q.B. 89.

La cour de revision (1) a confirmé le jugement de la cour supérieure et la défenderesse appelle de cette décision de la cour de revision.

Certains points soulevés par l'appelante devant les cours inférieures ne sont pas mentionnés dans son factum et, par conséquent, je présume qu'ils sont abandonnés. Alors je ne vais référer qu'aux trois questions qu'elle a discutées dans la plaidoirie écrite et orale qu'elle a faite devant nous.

Voici ces trois points:—

1. Le nouveau propriétaire n'a pas le droit d'expulser le locataire parce que le bail n'a pas été enregistré suivant les exigences de l'article 1663 C.C.

2. Le privilège de résiliation stipulé dans le bail était personnel et ne pouvait être exercé que par le locateur originaire.

3. Les avis de congé requis par la loi et la convention n'ont pas été donnés.

Défaut d'enregistrement et portée de l'art. 1663 C.C.

Le bail est sous forme authentique et il couvre une période de trois ans. Il n'a pas été enregistré. Il contient une stipulation que le locateur pourra mettre fin au bail s'il vend la propriété. Le tiers acquéreur, s'autorisant de cette stipulation, demande l'expulsion de la défenderesse-appellante, mais cette dernière répond en disant: Vous ne pouvez me faire déguerpir parce que le bail n'est pas enregistré. Et elle se base sur l'article 1663 du Code Civil qui dit:

> Le locataire ne peut, à raison de l'aliénation de la chose louée, être expulsé avant l'expiration du bail, par une personne qui devient propriétaire de la chose louée en vertu d'un titre consenti par le locateur, à moins que le bail ne contienne une stipulation à cet effet et n'ait été enregistré.

(1) 21 R.L. N. S. 96.

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La prétention de l'appelante sur ce point est mal fondée.

Le défaut d'enregistrement du bail ne peut être invoqué que par le tiers acquéreur et non pas par le locataire. Il est de principe que l'enregistrement n'est en général requis qu'à l'égard des tiers. On exige l'enregistrement d'un bail pour le rendre opposable au tiers acquéreur. Mais, si le bail n'a pas été enregistré, rien n'empêche ce tiers de se prévaloir de la clause de résiliation qui y est stipulée et de demander l'expulsion du locataire.

Il suffit d'ailleurs d'examiner l'historique de cette législation pour s'en convaincre.

Sous le droit romain, en vertu de la loi *emptorem*, le bail n'engendrait qu'un rapport particulier entre le preneur et le bailleur; il ne produisait que des obligations de personne à personne et le nouveau propriétaire pouvait expulser le locataire. Le contrat de louage était terminé par la vente que le propriétaire faisait de la chose louée.

Cette disposition de la loi romaine a été suivie en France jusqu'au Code Napoléon et dans la province de Québec jusqu'au Code Civil. L'ancien droit français et canadien, tout en maintenant ce droit d'expulsion pour l'acquéreur, obligeait le tiers acquéreur de laisser jouir le locataire pendant l'année courante. Il ne pouvait pas l'expulser immédiatement. Pothier, "Louage," No. 297; Troplong, "Louage," No. 505.

Le Code Napoléon adopta une règle différente de la loi romaine et il déclara que la vente de la propriété louée ne mettait pas nécessairement fin au bail, mais à la condition que le bail fût authentique ou eût date certaine; ou à moins que le bailleur se fût réservé le droit de le résilier.

L'article 1743 du Code énonça cette règle dans les termes suivants:

Si le bailleur vend la chose louée, l'acquéreur ne peut expulser le fermier ou le locataire *qui a un bail authentique ou dont la date est certaine,* à moins qu'il ne se soit réservé ce droit par le contrat de bail.

Lorsque nos codificateurs ont présenté leur rapport le 20 février 1863, ils ont recommandé d'adopter la règle du Code Napoléon; mais l'article qu'ils proposèrent différait de l'article 1743 sous le rapport de la rédaction

et dans l'omission des mots qui restreignent la règle aux baux par écrit et ayant date certaine. Cette restriction, (ajoutent-ils), paru inutile. Le mode de constater la véritable date est laissé à l'opération des dispositions générales concernant la preuve.

Il est très important de lire l'article que les codificateurs ont alors soumis car il nous donne la clef de la contradiction apparente que nous retrouvons dans les deux articles 1663 et 2128 de notre Code Civil.

Voici donc est article:

Le locataire ne peut à raison de l'aliénation de la chose louée être expulsé avant l'expiration du bail par une personne qui devient propriétaire de la chose louée en vertu d'un titre consenti par le locateur, à moins que le bail ne contienne une stipulation spéciale à cet effet.

Rapport des codificateurs, éd. 1863, vol. 2, p. 96.

Il n'est nullement question, comme on le voit, de l'enregistrement du bail.

Dans leur rapport subséquent, du 1er juillet 1864, sur l'Enregistrement, les codificateurs, après avoir dit qu'ils avaient suggéré au titre du louage que la vente de l'immeuble ne mettrait plus fin au bail, ajoutaient

L'adoption de cette disposition ferait du bail une charge sur l'immeuble qu'on doit soumettre, comme toute autre charge, à la publicité.

Il est donc suggéré d'amender l'article 39*a* en étendant la règle à tout bail pour un terme excédant un an.

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Et ils ont proposé alors l'amendement suivant, qui fut adopté et qui est devenu le texte de notre article 2128:—

La bail d'immeubles pour un terme excédant un an ne peut être invoqué à l'encontre d'un tiers acquéreur, s'il n'a été enregistré.

Dans la seconde édition de leurs rapports, qui a été publiée en 1865, nous retrouvons de la part des codificateurs les mêmes observations sur l'article 1663 que nous avons reproduites plus haut, c'est-à-dire, que la vente ne mettait pas nécessairement fin au bail, mais qu'on ne devrait pas adopter la règle du Code Napoléon, qui exigeait un bail authentique, pour que le locatire pût rester sur la propriété.

Rapport des codificateurs, vol. 2, 2eme éd., (1865) p. 29.

Mais quand nous ouvrons ce même volume, à la page 92, nous trouvons qu'on a ajouté au texte de l'article quatre mots qui lui donnent un sens contraire à celui que les codificateurs proposaient.

Ces mots ont trait à l'enregistrement du bail.

Voici, d'ailleurs, le texte de l'article tel que nous le retrouvons à cette page 92:—

Le locataire ne peut à raison de l'aliénation de la chose louée être expulsé avant l'expiration du bail, par une personne qui devient propriétaire de la chose louée en vertu d'un titre consenti par le locataire, à moins que le bail ne contienne une stipulation à cet effet et *n'ait été enregistré.*

Comment ces quatre derniers mots se sont-ils glissés là? J'ai été incapable de le découvrir. Est-ce une erreur d'impression? C'est possible. Car, avec cette addition, l'article ne reproduit plus l'intention des codificateurs telle qu'ils l'ont exprimée dans leur rapport.

Et ensuite, cet article semble irréconciliable avec l'article 2128, qui traite de la même matière au titre de l'Enregistrement.

Les codificateurs, comme on le sait, après avoir présenté leurs premiers sept rapports sur les différentes parties du Code Civil, avaient préparé, le 21 Novembre 1864, un rapport supplémentaire pour expliquer certaines corrections qu'ils désiraient faire. Voici ce qu'ils disent au commencement de ce rapport supplémentaire:—

> Les commissaires, ayant terminé leurs travaux en tant que le Code Civil est concerné, auraient regardé ce travail comme imparfait s'ils ne l'eussent revisé en entier et avec soin, dans le but de faire au texte imprimé et soumis successivement de temps à autre les changements et additions nécessaires * * * *
>
> Le texte de ces changements proposés * * * se trouve ci-après dans l'ordre qui devra être finalement donné aux livres et aux titres du Code.

Nous examinons les changements faits au titre du louage et rien n'apparaît concernant l'article 1663 qui portait alors dans leurs rapports le No 56.

Alors on peut dire avec beaucoup de raison que cette référence à l'enregistrement dans l'article 1663 est due à une erreur. Nos commentateurs, Mignault et Langelier, trouvent cet article peu satisfaisant.

Cette différence que je viens de signaler entre le texte originaire et le dernier leur paraissait inconnue; du moins, ils n'en parlent pas dans leur ouvrage. Ce n'est pas étonnant, car cette première édition des rapports est très peu connue. J'en avais un exemplaire dans ma bibliothèque privée et je remarque que cette édition ne se trouvait pas ni à la Bibliothèque du Parlement, à Ottawa, ni dans celle de la cour suprême. La cour suprême cependant a pu se la procurer avec beaucoup de difficulté et a maintenant l'exemplaire qui paraît avoir appartenu au juge Beaudry, l'un des codificateurs.

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Mais cet article 1663 se trouve dans le Code avec ces quatre mots ajoutés et nous devons l'interpréter et le concilier, si possible, avec les autres dispositions de la loi et surtout avec l'article 2128.

Si nous lisons littéralement l'article 1663, nous voyons que le locataire ne peut être expulsé par le tiers acquéreur, à moins que le bail ne contienne une stipulation à cet effet et à moins qu'il ne soit enregistré.

Cela veut-il dire que si le bail ne contient pas la réserve d'expulser au cas de vente le locateur ne pourra pas expulser le locataire? Certainement non.

Le locataire a le droit de rester sur la propriété, à moins qu'il n'y ait une clause qui pourvoit à son expulsion. Cette clause est stipulée dans l'intérêt du propriétaire. Et si elle ne se trouve pas dans le bail, alors le nouvel acquéreur ne peut expulser son locataire de suite.

Il résulte que cette clause étant stipulée en faveur du propriétaire, ce dernier seul peut s'en prévaloir.

C'est ce qu'enseigne Baudry-Lacantinerie dans son premier volume du Traité du Louage, au n° 1296, où il dit:

> Lorsque le bail contient la réserve du droit d'expulser le preneur au cas de vente, la clause ne peut être invoquée que par l'acquéreur; elle ne peut pas l'être par le preneur.

Le même principe doit s'appliquer quant à l'enregistrement. Il n'y a que le nouveau propriétaire qui puisse se prévaloir du défaut d'enregistrement du bail.

On a voulu, au cours de l'argument, interpréter l'article 1663 suivant son sens grammatical et littéraire.

Je préfère donner à cet article une interprétation conforme aux idées générales de notre Code et suivre en cela l'opinion de M. de Chassat, "Interprétation des Lois," p. 101, où il dit:—

L'interprétation grammaticale et l'interprétation logique étant admises, quelle est celle des deux qui, dans le doute, doit l'emporter?

Lorsqu'elles concourent pour nous retracer les mêmes objets, la solution est facile; le sens naturel des mots étant aussi la pensée de la loi, il suffit à l'esprit d'en obtenir la certitude. Mais lorsqu'elles ne concourent pas, quelle est celle des deux qui est obligatoire pour le juge? Il est évident que les mots ne font pas le droit; c'est la volonté du législateur; les mots ne servent qu'à les manifester: *Non enim lex quod scriptum est, sed quod legislator voluit, quod judicio suo probavit et recepit. L. de quibus ff. de legibus.* Toutes les fois donc qu'il y aura une différence entre le sens des mots et la pensée du législateur, il faudra abandonner les mots, puisque ce n'est pas là qu'est le droit. De là l'obligation pour le juge de rechercher le vrai sens de la loi.

Que ces quatre mots de l'article 1663 soient le produit de l'erreur, ou qu'on ait voulu par là énoncer la règle du Code Napoléon quant à l'authenticité du bail, je crois qu'il faut faire prévaloir les dispositions de l'article 2128 sur celles de l'article 1663 et décider que dans le *bail d'immeuble d'un an le tiers acquéreur est obligé de maintenir ce bail: mais si le bail excède un an, il ne peut être invoqué contre le tiers acquéreur à moins qu'il ne soit enregistré.*

Sur son premier point, l'appellante doit donc faillir. L'opinion savante et élaborée de l'honorable juge deLorimier, qui a rendu le jugement de la cour de revision, est bien fondée.

II.

Le droit de demander la résiliation du bail est-il personnel au propriétaire qui a consenti le bail?

C'est la seconde question que nous soumet l'appellante qui prétend que ce droit est personnel au locateur originaire, c'est-à-dire à Harris Vineberg.

Le bail contient la clause suivante:—

The lessor will have the right, in the event of the property being sold, to bring the lease to an end at any time, whether during the said term of three years of afterwards, by giving the lessee three months' notice in writing to that effect.

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On a dit que les mots "at any time" dans cette clause donnaient au locateur le droit de mettre fin au bail en tout temps après la vente, qu'il pourrait laisser passer six mois, un an, ou plus après qu'il aurait été disposé de la propriété, et ensuite donner avis de résiliation.

Je suis d'opinion avec l'appellante que ces mots "at any time" se rapportent au cas où le propriétaire viendrait à vendre sa propriété, soit pendant les trois années du bail, soit pendant les années subséquentes.

Mais je ne puis partager son opinion que le bailleur seul puisse exercer ce privilège de résilier le bail et qu'il ne pourrait en vendant sa propriété transférer ce privilège au nouvel acquéreur. Tous les auteurs sont unanimes à dire que les droits stipulés dans un bail passent au nouvel acquéreur s'il désire continuer le bail. Voici ce qui dit Laurent, vol. 25, n° 395.

> L'acheteur est subrogé aux droits et aux obligations du bailleur; donc, si le bailleur a stipulé la faculté d'expulsion l'acheteur est aussi subrogé à ce droit. C'est sans doute pour ce motif que la loi n'exige pas que le contrat de vente investisse l'acheteur d'une faculté dont il jouit de plein droit en vertu de la subrogation. Il devient bailleur et il a tous les droits qui appartenaient au bailleur en vertu de son contrat. Enfin, on peut invoquer, à l'appui de l'opinion générale, le principe de l'article 1121; le bailleur qui stipule le droit d'expulsion fait une stipulation au profit d'un tiers, ce que la loi permet quand telle est la condition d'une stipulation que l'on fait pour soi-même; or, dans l'espèce, la faculté d'expulser, réservée par le bailleur dans l'intérêt de l'acquéreur, est la condition du bail, il faut dire plus, elle est stipulée dans l'intérêt du bailleur autant que dans l'intérêt de l'acquéreur, car elle a pour objet de faciliter la vente de la chose louée. On a dit que c'était une question d'intention; cela est certain en théorie, puisqu'il s'agit d'une convention; mais, en fait, l'intention des parties n'est guère douteuse. Pourquoi le bailleur a-t-il stipulé le droit d'expulsion? En faveur de l'acquéreur; donc cette faculté doit passer à l'acheteur, à moins que le vendeur ne déclare que l'acquéreur n'en pourra pas user.

Quand Harris Vineberg a vendu, le 5 juin, 1911, à Moses A. Vineberg, il aurait eu parfaitement le droit

de stipuler la résiliation du bail avec son acheteur. Mais il n'en a rien fait. Au contraire, il a déclaré dans l'acte de vente que l'acheteur s'obligeait

to maintain the leases of the said premises now subsisting, until the due termination of the same under the provisions thereof.

Les droits et obligations relevant du bail en question en cette cause sont donc passés entre les mains de l'acheteur et dès ce moment là Moses A. Vineberg devenait le créancier du droit de mettre fin à ce bail s'il venait à son tour à vendre la propriété.

III.

L'appellante prétend que les avis requis par la loi ou la convention n'ont pas été donnés.

En devenant acquéreur de la propriété, Moses A. Vineberg est devenu, comme je l'ai dit dans le paragraphe précédent, acquéreur de tous les droits et privilèges attachés au bail. L'un de ces privilèges était qu'il pouvait le résilier au cas où il la vendrait.

Le 20 janvier 1913, il a vendu aux intimés, Friedman et Workman, et il est stipulé dans l'acte de vente que le bail prendra fin, et ce dans les termes suivants:—

The purchaser will be the absolute owners of said property with immediate possession, *subject to the existing lease, which, however, the vendor undertakes to cancel not later than the first of May next and have the present tenant vacate on or before that date.*

Les nouveaux acquéreurs auraient pu parfaitement procéder à résilier eux-mêmes le bail; mais ils ont préféré en faire une condition de la vente que le vendeur lui-même donnerait l'avis de résiliation. Ils étaient bien prêts, je suppose, à se rendre acquéreurs de l'immeuble et à payer le prix élevé qui était convenu, mais à la condition que le bail fut annulé.

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Leur vendeur représentait que le bail pouvait se terminer; alors il s'est chargé d'en faire faire la résiliation de là au premier mai, 1913. C'était d'ailleurs une convention absolument conforme au bail qui avait stipulé que le bailleur en cas de vente pouvait mettre fin au bail.

Le bail devait cependant se continuer jusqu'au premier mai. Il ne pouvait pas d'ailleurs être résilié avant cela parce que la convention stipulait un avis de trois mois. Alors Moses A. Vineberg auquel s'est joint, suivant moi inutilement, Harris Vineberg, le premier bailleur, donne l'avis de congé de trois mois mentionné au bail à la compagnie appelante par protêt notarié.

Il allègue dans son protêt la vente qu'il a faite quelques jours avant à Friedman et Workman et il ajoute ceci:

> That it is one of the conditions of the said sale that the said F. X. St. Charles and Co., Ltd., the tenant of the said property, will by notification be obliged to vacate the same under the terms of the said lease.

En donnant cet avis, il est évident que Harris Vineberg et Moses A. Vineberg agissaient alors tant dans leur propre intérêt que dans celui des nouveaux acquéreurs. Il n'y a pas de doute que l'intention de tous les bailleurs passés et présents était de mettre fin à ce bail. L'appelant ne peut donc pas prétendre que l'avis de congé ne lui a pas été dûment donné.

Pour toutes ces raisons, l'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Gouin, Lemieux, Murphy, Bérard & Perrault.*

Solicitors for the respondents: *Jacobs, Hall, Couture & Fitch.*

DANIEL BERNIER (DEFENDANT)...APPELLANT;

AND

ALFRED PARADIS (PLAINTIFF)....RESPONDENT.

1921

June 7, 8.
June 20.

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

Crown lands—Colonization lots—Location tickets—Prohibition to sell—Sale of timber—Fraud—Order in council—Retroactive effect—Sect. 1572 *R.S.Q.* (1909).

On the 24th day of December, 1913, the appellant agreed to sell to the respondent the right to cut timber during 99 years on four lots then classified by the Crown for colonization purposes, for the sum of $400 payable after the appellant would have obtained letters patent. Section 1572 R.S.Q. (1909) provides that: "lots sold or otherwise granted for settlement after 1st July, 1909, shall not for five years following the date of the location ticket, be sold by the holder of the location ticket or otherwise alienated, wholly or in part." Location tickets for these lots were applied for on the date of the agreement by the appellant and relatives. On the 29th December, 1913, the Crown's Lands agent received authority to issue the location tickets but only upon the applicants making the statutory sworn statement that they were acquiring these lots in order to become *bona fide* settlers, that they were not lending their names to any other person and that they were not acquiring the lots for the sole purpose of cutting the timber or having it cut for sale by others. The applicants, having given the above affidavits, did clear part of the lots but did not comply with the statutory condition of permanent residence and letters patent could not be granted. On the 2nd July, 1918, an order-in-council was passed declaring these lots to be unsuitable for settlement and that they could be sold without conditions for a sum of $2.00 an acre. This price was paid by the appellant and letters patent were issued to him. The respondent then brought an action to enforce his contract.

Held, that the contract had been made with the intent of effecting a result contrary to the policy of the statute concerning colonization lands and was null and void *ab initio*, and that the subsequent order-in-council did not render such an agreement valid.

Judgment of the Court of King's Bench (Q.R. 30 K.B. 372) reversed.

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

1921

BERNIER v. PARADIS.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), reversing the judgment of Roy J. at the trial, and maintaining the respondent's action.

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

L. St.-Laurent K.C. for the appellant.

A. Perreault K.C. for the respondent.

IDINGTON J.—This appeal raises the question of the legality of the following contract between the parties hereto, who signed same:

> L'an mil neuf cent treize, le vingt-quatre décembre.
>
> Monsieur Daniel Bernier, cultivateur, de la paroisse du Cap. St. Ignace.
>
> Lequel reconnaît par les présentes avoir vendu, avec garantie et franc et quitte, à Monsieur Alfred A. Paradis, Ingénieur Civil, de DuGueslin, présent et acceptant acquéreur, le droit de la coupe de tout le bois, pour le terme de quatre-vingt-dix-neuf ans (99) à compter d'aujourd'hui sur les lots Nos. (16 & 17) seize et dix-sept rang B. du Canton Bourdages, avec droit de passer et vaquer et d'ériger toutes constructions sur les dits lots pour l'exploitation de cette coupe de bois.
>
> Cette vente de coupe de bois est faite pour le prix de quatre cent piastres ($400.00) payable quand le vendeur aura obtenu les lettres patentes du Gouvernement de la province de Québec pour les dits lots. Le vendeur s'engage à faire tous les travaux nécessaires y compris résidence, etc., sous le plus court délai possible. Il s'engage aussi à faire ses obligations aux endroits que l'acquéreur lui indiquera, et ne devra pas couper un seul arbre en dehors de ces obligations sans être responsable des dommages.
>
> En foi de quoi les partis ont signé en présence de messieurs Henri Michon et Adélard Morneau, tous deux de la paroisse du Cap St. Ignace, qui ont signé comme témoins après lecture faite.

The lands in question therein were at the date thereof Crown lands set apart with other like lands for the purposes of colonization and offered on such terms as to encourage those acquiring same to become actual settlers.

(1) Q.R. 30 K.B. 372.

A scheme far from being in harmony with the said public policy and more calculated to retard settlement and to promote speculation in timber on said lands, seems to have been conceived by the respondent and presented to the mind of the appellant, whereby each of four lots should be applied for in the respective names of appellant and others likely to co-operate in carrying out said scheme and secure to the respondent the timber on the two lots named in the said agreement.

Article 1572 of the R.S.Q. 1909, contains the relevant law governing the appellant and others in becoming locatees of the Crown in order to carry out anything like unto the said scheme.

It reads:—

> Lots sold or otherwise granted for settlement after the first day of July, 1909, shall not, for five years, following the date of the location ticket, be sold by the holder of the location ticket or otherwise alienated, wholly or in part, except by gift *inter vivos* or by will in the direct line ascending or descending or in the collateral line, or by abintestate succession, and in that case the donee, heir, or legatee shall be subject to the same prohibition as the original grantee.

The location tickets for each of the lots in question herein were duly applied for on the date of above agreement and the Crown Land's agent received authority on the 29th Dec., 1913, to issue location tickets to each of the respective applicants, but only upon his swearing to an affidavit in the form which the regulation required containing ten paragraphs intended to secure the execution of the public policy I have above adverted to.

Those bearing directly on the question raised herein, are as follows:—

> 4th. Je veux acquérir ce lot en mon nom, pour le défricher et le cultiver pour mon bénifice personnel.
>
> 7th.—Je ne suis le prête-nom d'aucune personne pour faire l'acquisition de ce lot.
>
> 8th. Je ne fais pas l'acquisition de ce lot dans le seul but d'y exploiter le bois ou de le faire exploiter par d'autres, mais dans le but d'en faire un établissement agricole sérieux.

1921

BERNIER v. PARADIS.

Idington J.

The respondent, notwithstanding the rather formidable obstacles in his way by reason of the article 1572 above quoted, and the said paragraphs in the oath taken by the respective applicant for each of said lots, named in the above quoted agreement, saw fit to bring this action after the patents had issued for the said lots.

The learned trial judge properly dismissed said action on the grounds of the illegality of the contract.

The Court of King's Bench, by a majority, the Chief Justice and Mr. Justice Carroll dissenting, reversed said judgment of dismissal.

Hence this appeal.

I have no hesitation in holding that the contract was null and void by reason of its violation of the article 1572 above set forth, and the impropriety of the affidavits upon which the title of respondent rests to acquire the cut of timber for ninety-nine years from the date of the agreement.

It seems to me idle to pretend that a sale of the most valuable part of the whole property to be acquired was not a sale of part of those lots.

And a sale that bound the patentee to refrain, for ninety odd years, from clearing and cultivation of the greater part of the land in question, seems directly in conflict with the public policy of promoting reclamation of the land pursuant to which, and that alone, the patent was to issue.

The pretension that discovery was made before the five years prescribed for doing settlement duties had expired that the land in fact should have been otherwise classified does not and cannot touch the question of the original illegality of the contract from the time it was executed or validate it.

The case of *Howard* v. *Stewart* (1), is partly relied upon by some of the judges comprising the majority of the court below. The argument therein, it is said, is applicable herein in great part.

For my part in that case, I may be permitted to refer to the following paragraph:

> I am unable to see how we can find such alleged policy of the law unless by express legislation, or clear implication thereof, cutting out the usual operative effect which the law gives to the contracts between parties.

Clearly that is against any use of that case to support the judgment appealed from.

And as to the affidavit in use at that time I said as follows:—

> In argument stress has been laid upon this affidavit. All it amounts to is that the applicant has an honest purpose at the time of making the application as specified in the affidavit. There is no pledging or promising in reference to the future disposition of the lot or the improvements. If it had been shewn that this locatee, Thibault, had conceived the purpose of selling to the Austin Lumber Company when he made his affidavit, the transaction, of course, would be fraudulent. Nothing of the kind appears in this transaction. I, therefore, fail to see any argument that can be founded upon this affidavit when we have in view the actual facts of this case. The affidavit itself is in harmony with the general expressions relative to sales used in the foregoing statutes.

I evidently had there the same conception as I have now as to the one in use at the time when the contract in question herein was made, and adopt here my language there as expressive of what I then and still think of such a project as respondent had in view in promoting such a bargain as he relies upon.

The law upon which that case was decided was changed by the Legislature just after the party there concerned had got his location ticket, and made, as result of experience, radically more restrictive as to what a locatee could do or could not do.

(1) [1914] 50 Can. S.C.R. 311.

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This question of trying to defeat the public policy in regard to Crown Lands' sales, has come up in other provinces. See the case of *Brownlee* v. *McIntosh* (1). And incidentally I had to consider it and cases thereon in another case heard before us this term.

I think the honest observance of such policy once legislatively declared should be rigorously enforced by the courts and all attempts such as in question herein of defeating it by circuitous methods defeated.

This appeal, should, therefore, be allowed with costs here and in the Court of King's Bench and the judgment of the learned trial judge restored.

DUFF J.—The question raised by this appeal is not I think strictly the question which was so much discussed on the argument, namely whether the agreement was an agreement transferring a *droit réel* in the lands to which it related. The agreement is, in my judgment, inoperative for a much more fundamental reason. The statutes of the Province relating to the disposal of the public lands provides for the acquisition of land suitable for settlement by persons intending in good faith to become settlers upon very advantageous terms. Under these provisions the consideration received by the public who are the owners of the lands in reality arises from the fact that the applicant for them is a person who does so intend and who presumably will carry out such intention by becoming a permanent resident upon them and making his livelihood by the cultivation of them. Such expectations no doubt frequently are not realized, but the form of the affidavit required from the applicant abundantly manifests the policy of the Legislature and the Government

(1) [1913] 48 Can. S.C.R. 588.

of Quebec and makes it abundantly clear that under that policy only *bona fide* intending settlers are to be given the benefit of the enactments touching this subject. The agreement which is in question in this litigation was, beyond all question, a part of a scheme by which lands which were not really suited for settlement were to be acquired—through the instrumentality of applications by applicants lending their names for the purpose of the scheme—with the object of enabling the respondent and the appellant to get possession of the timber on terms less onerous than those which would have been imposed had they attempted to buy the timber as such from the Government. The scheme necessarily involved the making of a statement by each of the applicants—a sworn statement—that he was acquiring the lot for which he applied in order to become a *bona fide* settler and further that he was not lending his name to any other person for the purpose of acquiring the lot. It is undisputed that the respondent understood all that would be involved in carrying out this scheme. It is impossible to contend, it seems to me, that an agreement so conceived having such intended consequences can be enforced by legal proceedings.

The appeal should be allowed and the judgment of the trial judge restored.

ANGLIN J.—The contract sued upon was made with the intent and for the purpose on the part of the parties to it of effecting a result contrary to the policy of the law. It was on this ground null and void *ab initio*. The property dealt with was to be obtained from the Crown under location tickets on applications

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purporting to be those of four *bona fide* intending settlers. The applicants did not in fact intend to become such settlers. The real purpose of the scheme to which they became parties at the instance of the respondent was to obtain for him and the appellant the timber upon the lots to be applied for. The applications were supported by affidavits containing misrepresentations of fact and intention. Each applicant was required to swear that he wished to acquire the lot applied for for the purpose of clearing and cultivating it for his own personal benefit; that he had not lent his name to any other person for the purpose of acquiring such lot; and that he was acquiring it in order to *bona fide* settle thereon and not for the sole purpose of cutting the timber thereon or having it cut for sale by others. These statements must have been false to the knowledge of the affiants as well as to that of the plaintiff by whom the making of such affidavits was induced. That the lands were subsequently found by the department to be unsuitable for settlement or cultivation cannot render valid an agreement which was void for illegality and fraud upon the Crown when it was made. While the defendant appellant, who sets up the defence of invalidity is certainly entitled to no sympathy, the courts may not lend their aid to a plaintiff seeking to enforce such a contract as that sued upon. I would, with respect, allow the appeal with costs here and in the Court of King's Bench and would restore the judgment of the learned trial judge.

BRODEUR J.—Paradis était en 1913 ingénieur pour la construction du chemin de fer du Transcontinental dans le comté de Montmagny. Il a trouvé que certains lots de terre de la Couronne qui étaient à proximité

d'un des stations du chemin de fer dans le canton de Bourdages pouvaient être avantageusement exploités comme terrains à bois. Et alors il s'en est ouvert à Bernier, cultivateur d'une des vieilles paroisses du comté, pour l'inciter à prendre ces lots comme colon. Bernier savait probablement qu'il ne pourrait pas remplir les conditions que les lois imposent à ceux qui veulent obtenir des lots de colonisation, mais Paradis lui représenta que ses relations avec certaines personnes influentes dans le département des terres et en dehors lui permettraient de passer outre. Bernier crut à ces représentations et il fit faire par ses parents et son associé les affidavits nécessaires pour obtenir des billets de location de ces lots. Auparavant cependant Paradis lui fit signer un acte par lequel il lui vendait

> le droit de la coupe de tout le bois pour le terme de quatre-vingt-dix-neuf (99) ans à compter d'aujourd'hui sur les lots 16 et 17, canton Bourdages

pour quatre cents dollars ($400) qui seraient payables quand Bernier aurait eu ses lettres patentes.

Bernier, ayant obtenu ses billets de location, a commencé à faire couper du bois en quantité suffisante pour rencontrer les exigences de la loi des terres, mais son exploitation était plutôt commerciale que colonisatrice. Il n'a pas, par exemple, rempli les conditions de résidence que son billet de location et la loi lui imposaient. Il ne pouvait donc pas obtenir ses lettres patentes. Cependant il a représenté que les lots étaient impropres à la culture; et il a pu induire le département à les classifier comme terrains forestiers, et moyennant une redevance additionnelle il a obtenu des lettres patentes.

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Il est bien évident pour moi qu'il n'était pas un colon de bonne foi et que dès le commencement Paradis et lui avaient l'intention de se prévaloir des lois de colonisation pour mettre illégalement la main sur des terres dont ils enlèveraient tout le bois, Bernier recevant quatre cents dollars ($400) pour sa part dans cette opération et Paradis recevant tout les profits qui seraient faits par la coupe et la vente du bois.

Paradis demande maintenant l'exécution du contrat qu'il a fait avec Bernier; et ce dernier plaide, entr'autres choses, que ce contrat est absolument nul.

La Législature de Québec, voulant mettre fin à des spéculations déplorables qui se faisaient autour des terres de colonisation par de prétendus colons qui n'étaient que des commerçants de bois déguisés, a, en 1909, cru bon d'amender sa loi en déclarant que les colons ne pourraient pas pendant cinq ans à compter du billet de location vendre les lots qu'ils avaient obtenus du département, excepté avec l'autorisation du ministre quand ce dernier serait convaincu qu'il est dans l'intérêt de la colonisation que ce transport soit fait. Et la loi ajoutait:

> Tout transport fait en contravention avec le présent article est radicalement nul entre les parties.

La cour supérieure a décidé que le contrat intervenu entre Paradis et Bernier était nul. La cour d'appel, à une majorité de trois contre deux, a décidé que le contrat pouvait valoir, vu qu'il s'agissait de la vente de droits postérieurs à l'octroi des lettres patentes.

Il est bon de remarquer à ce sujet que le contrat en question déclare formellement que le droit de la coupe du bois est vendu à compter du jour du contrat, c'est-à-dire depuis 1913. Il est vrai que le paiement ne devait s'en faire que lorsque les lettres

patentes seraient émises; mais il est incontestable que Paradis, si toutefois le contrat était valable, avait des droits sur le bois qu'il y avait sur cette propriété. Il résulte donc que Bernier aurait vendu et transporté des droits qu'il avait dans les lots en question.

La vente de ces droits était illégale en vertu de la loi de 1909 parce qu'il était expressément défendu au colon de disposer par vente de ses droits, excepté sur l'autorisation du ministre des terres. Sans discuter la moralité de la transaction intervenue entre le demandeur et le défendeur, sans rechercher si cette transaction était faite dans le but de frauder la loi des terres, je considère qu'un contrat par lequel Bernier entreprenait de disposer du droit de coupe sur les lots de terre qu'il avait sur billet de location, ou qu'il devait avoir sous peu sur billet de location, était un contrat qui, comme la loi le déclare, était radicalement nul et qui, par conséquent, ne peut être mis à exécution par les tribunaux.

Si un tel contrat pouvait avoir force de loi, ce serait simplement mettre à néant l'intention évidente du législateur de ne donner ces lots de colonisation qu'à des colons de bonne foi. On pourrait, en effet, comme on a fait dans le cas actuel, couper un peu de bois, ne pas résider sur les lots, et ce dans l'expectative de pouvoir faire un profit considérable avec le bois qui s'y trouverait. L'intention bien évidente de la législature était que ces terres de la couronne que l'on donnait pour rien ou à peu près rien ne seraient données qu'à des colons de bonne foi,et non pas à des personnes qui paraîtraient faire quelques opérations de colonisation mais qui en réalité n'auraient en vue que de faire le commerce de bois.

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Monsieur Antonio Perrault a, avec beaucoup d'habileté, plaidé que cette vente de 1913 était valable parce qu'il y avait eu en 1918 un ordre en conseil par lequel ces lots avaient été virtuellement classifiés comme terrains forestiers. Il a prétendu que cet ordre en conseil avait un effet rétroactif qui pouvait rendre valide le contrat fait en 1913 par Paradis et Bernier.

Je ne puis partager cette opinion. Rien dans la loi ne démontre que l'ordre en conseil pouvait avoir un effet rétroactif. Nous avons à considérer le contrat de 1913 à la date à laquelle il a été fait. Or, à cette époque, on vendait un terrain de colonisation ou une partie d'un terrain de colonisation. La loi défendait des ventes de cette nature; et ce contrat, par conséquent, se trouvait nul *ab initio*, et rien ne pouvait être fait pour le faire revivre.

Pour ces raisons, le jugement de la cour d'appel doit être renversé et le jugement de la cour supérieure rétabli, le tout avec dépens de cette cour.

MIGNAULT J.—Le 24 décembre, 1913, l'appelant a vendu à l'intimé

le droit de la coupe de tout le bois pour le terme de quatre-vingt-dix-neuf (99) ans à compter d'aujourd'hui sur les lots 16 et 17, rang B, canton Bourdages, avec droit de passer et vaquer et d'ériger toutes constructions sur les dits lots pour l'exploitation de cette coupe de bois.

Cette vente de coupe de bois est faite pour le prix de $400.00 payable quand le vendeur aura obtenu les lettres patentes du gouvernement de la province de Québec pour les dit lots. Le vendeur s'engage à faire tous les travaux nécessaires, y compris la résidence, etc., sous le plus court délai possible. Il s'engage aussi à faire ses obligations aux endroits que l'acquéreur lui indiquera, et ne devra pas couper un seul arbre en dehors de ces obligations sans être responsable des dommages.

L'appelant prétend que cette vente est nulle, et plusieurs textes ont été invoqués à l'appui de cette prétention. Avant d'entrer dans l'examen de la

question de validité, il convient de dire sous quelles circonstances la vente a été faite. Il faut bien convenir que ces circonstances paraissent assez étranges, pour ne pas me servir d'une expression plus forte.

L'intimé était ingénieur en chef du chemin de fer Transcontinental. L'appelant était cultivateur de la paroisse du Cap St-Ignace. L'intimé lui proposa de se rendre acquéreur de certains terrains du gouvernement en vue de lui en vendre la coupe du bois. Il se chargea de faire tous les arrangements nécessaires avec le gouvernement et, de fait, le 10 décembre 1913, il recommanda à l'honorable M. Joseph-Ed. Caron, ministre de l'agriculture et de la voirie, que les lots 15, 16, 17 et 18 fussent concédés "à de bons colons" savoir M. Adélard Morneau, M. Daniel Bernier (l'appelant), M. Joseph Bernier (fils mineur de l'appelant) et M. Philéas Bernier (frère de l'appelant),

qui offriront le plus de garantie au gouvernement pour bien remplir les obligations requises.

M. Caron envoya la lettre de l'intimé à son collègue l'honorable M. Jules Allard, ministre des terres et forêts, et le sous-ministre de ce dernier autorisa l'agent à Montmagny à faire cette vente.

Avant ces démarches, l'inspecteur du département, M. Frs Pouliot, avait certifié, le 1er décembre, 1913, au ministre des terres et forêts que ces quatre lots, d'après sa connaisaance personnelle, contenaient chacun d'eux 50% de terre à culture.

Lors de la vente de la coupe du bois, le 24 décembre, 1913, il n'y avait même pas de billets de location pour ces lots. Ces billets de location ont été octroyés le 29 décembre, 1913, et contiennent les conditions ordinaires de la concession des lots de colonisation. Dans l'affidavit requis pour la concession, chaque

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concessionnaire jura qu'il ne faisait pas l'acquisition dans le seul but d'y exploiter le bois ou de le faire exploiter par d'autres, mais dans le but d'en faire un établissement agricole sérieux. Il déclara de plus qu'après avoir visité le lot il le jugeait propre à faire un établissement agricole.

Les conditions que le billet de location impose aux colons paraissent avoir été remplies, sauf la résidence qui n'avait été que de huit mois par année. Mais précisément pour le défaut de résidence continue sur les lots, les officiers du département décidèrent que les lettres patentes de ces lots ne pourraient être accordées aux concessionnaires.

C'est alors qu'on fit intervenir des influences auprès du gouvernement pour obtenir que des lettres patentes fussent octroyées sans les conditions de la concession des lots de colonisation, et que les lots fussent vendus aux concessionnaires à $2.00 l'acre. Nous voyons au dossier plusieurs lettres écrites au ministre par le député du comté recommandant la concession. Il y a également au dossier une lettre adressée par le sous-ministre à un autre député qui paraît s'être intéressé à l'affaire. Dans son témoignage, l'intimé déclare aussi être allé au département pour demander l'émission des lettres patentes.

Pour surmonter la difficulté résultant du défaut de résidence suffisante, on imagina de faire vendre aux concessionnaires ces lots pour le prix que j'ai mentionné comme étant dans leur ensemble impropres à faire un établissement agricole. Ces démarches réussirent, et, le 2 juillet 1918, le gouvernement adopta un arrêté-en-conseil, constatant

qu'il appert que ce lot, est, dans son ensemble, impropre à faire un établissement agricole;

qu'il convient *de convertir cette vente en une vente sans les conditions ordinaires du billet de location.*

Et il fut ordonné que les lettres patentes fussent octroyées sans conditions, pourvu que le propriétaire payât un prix additionnel équivalant à $2.00 l'acre.

Ce prix fut payé par l'appelant qui reçut alors ses lettres patentes.

Cependant lorsqu'il se trouva muni de ces lettres patentes, l'appelant refusa d'accepter le prix de $400 que l'intimé lui offrait. Il paraît que le prix du bois avait très considérablement augmenté, et l'appelant ne voyait plus l'affaire du même oeil qu'en décembre 1913.

C'est alors que la justice fut saisie du différend.

J'ai raconté les faits ci-dessus sans en faire le moindre commentaire. De fait, ils peuvent très bien se passer de commentaires. Il m'est absolument impossible de croire que M. Pouliot s'est trompé en 1913 quand il certifiait, d'après les connaissances personnelles qu'il avait de ce territoire, qu'il y avait bien 50% de terre à culture sur chacun des lots. L'appelant, du reste, déclara dans son affidavit pour l'obtention du billet de location qu'après avoir visité son lot il le jugeait propre à faire un établissement agricole. Et que dire du serment qu'il fit, le 29 décembre, 1913, qu'il ne faisait pas l'acquisition du lot dans le seul but d'y exploiter le bois ou de le faire exploiter par d'autres, quand cinq jours auparavant il avait vendu à l'intimé la coupe de bois pour 99 ans? D'ailleurs, le certificat assermenté, en date du 13 septembre 1917, de M. Létourneau, qui visita le lot à la demande de l'appelant, affirme que le terrain avait été bien préparé pour une culture profitable et qu'il y avait alors $15\frac{1}{3}$ acres en foin. C'est après cela qu'on vient déclarer les lots impropres, dans leur ensemble, à faire un établissement agricole.

Maintenant il s'agit de savoir si l'intimé peut réclamer la coupe de bois ou si cette vente est nulle.

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On a invoqué ici divers moyens de nullité de la vente du droit de coupe. On dit qu'on a vendu la chose d'autrui, bien plus, une chose hors du commerce puisqu'elle appartenait alors au gouvernement. On réclame aussi l'application de l'article 1572 S.R.Q., qui défend aux colons de vendre ou autrement aliéner avant l'émission des lettres patentes les lots qu'ils tiennent sous billet de location.

D'après mon opinion, il n'est pas nécessaire de discuter ces moyens de nullité, car il y a une objection autrement grave contre l'action de l'intimé. Dès le commencement, celui-ci paraît avoir eu l'intention de se faire donner un droit de coupe de bois sur des terres destinées à la colonisation, et cela au mépris des lois qui protègent à la fois les colons contre les spéculateurs qui veulent s'emparer du bois, et le gouvernement qui, dans l'intérêt public, concède à des conditions très favorables des terres appartenant à la couronne dans le but de les faire ouvrir à la colonisation. Je ne puis croire que sans les instances de l'intimé l'appelant aurait jamais songé à demander cette concession. Et quand on lui oppose le défaut de résidence, l'intimé et d'autres personnages interviennent pour lui faire vendre ces lots sans les conditions très sages apposées aux octrois pour fins de colonisation. Tout cela visiblement a été fait pour permettre à l'intimé de profiter de la coupe de bois, car, d'après le contrat, l'appelant et ses héritiers n'y auraient aucun droit, et cela pour quatre-vingt-dix-neuf ans. Le gouvernement malheureusement paraît avoir facilité la fraude contre la loi en adoptant l'arrêté-en-conseil du 2 juillet 1918, mais il est possible qu'il ait ignoré l'achat fait par l'intimé qu'on a probablement eu la prudence de ne point lui dénoncer. Dans tous les cas, il y a eu fraude, et celui qui en profite,

si la vente du 24 décembre 1913 est maintenue, c'est l'intimé et non l'appelant. Cependant l'appelant s'est prêté à cette combinaison frauduleuse, et il a ainsi obtenu une concession de terres publiques à laquelle il n'avait aucun droit.

Je ne puis consentir à maintenir l'action de l'intimé, mais en même temps l'appelant ne devrait pas avoir de frais contre ce dernier, car il a participé à la fraude, et maintenant il est le seul à en profiter, la vente du droit de coupe étant annulée. Il peut se considérer heureux si le gouvernement ne révoque pas la concession qu'il a été induit à lui faire.

L'appel doit être accordé et le jugement de la cour supérieure rétabli, sans frais devant cette cour et la cour du banc du roi.

Appeal allowed with costs.

Solicitor for the appellant: *Réal Lavergue.*

Solicitors for the respondent: *Perrault & Perrault.*

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June 6.
June 20.

FRANÇOIS GIRARD (PLAINTIFF).... APPELLANT;

AND

CORPORATION OF ROBERVAL (DEFENDANT)..... RESPONDENT.

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

Appeal—Special leave to appeal—When to be granted by appellate courts—Section 41 *"Supreme Court Act," as enacted by* 10 *&* 11 *Geo. V, c.* 32.

Per Anglin, Brodeur and Mignault JJ.—Special leave to appeal to the Supreme Court of Canada should not be granted by the highest court of final resort in the provinces under section 41 "Supreme Court Act," as enacted by 10 & 11 Geo. V, c. 32, if neither an important principle of law, nor the construction of a public Act, nor any question of public interest is involved.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of the Superior Court and dismissing the plaintiff's action.

The appellant brought an action to annul a by-law passed by the respondent for the opening of a street. The street was lying entirely within the municipality, but at its limits had no issue. The Court of King's Bench, affirming the judgment of the trial court, held that the power to open the road was within the jurisdiction of the respondent; and special leave to appeal having been granted by the appellate court, this judgment was affirmed by the Supreme Court of Canada.

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

G. Barclay and *A. Boily* for the appellant.

Belcourt K.C. and *T. Lefebvre* for the respondent.

IDINGTON J.—I think this appeal should be dismissed with costs. It appears to me hardly arguable that the power to open a road over land lying entirely within a municipality is not in every respect within the jurisdiction of its council.

And the other objection as to its description being defective seems, if possible, less so when we turn thereto and find its boundaries so clearly defined as they are. The bit of land taken would hardly warrant a prudent litigant pushing such a case so far.

DUFF J.—I can discover no valid reason for differing from the conclusion reached by the Court of Appeal.

ANGLIN J.—I concur with Mr. Justice Mignault.

BRODEUR J.—L'appelant a demandé par son action que le règlement adopté par le conseil municipal de l'intimée le 30 juillet 1919, qui décrétait l'ouverture d'une route fut déclaré nul et de nul effet. L'appelant est propriétaire de l'un des lots qui ont été expropriés pour l'ouverture de cette route. Cette route devait se continuer dans la municipalité voisine pour atteindre la gare de chemin de fer de Val Jalbert; mais le demandeur appelant allègue que la route qui est maintenant ouverte et qui traverse sa propriété s'arrête à la limite de la municipalité de Roberval et qu'elle forme un cul-de-sac.

Il est fort possible que la corporation de Roberval ait commis une erreur administrative en ouvrant cette

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nouvelle route; mais elle agissait certainement dans les limites de ses attributions et il n'appartient pas à la cour supérieure de mettre de côté par action directe l'exercice de cette discrétion.

La route dont le conseil de Roberval a ordonné l'ouverture se trouve entièrement dans les limites de son territoire. Tout chemin situé dans une municipalité locale est de par la loi chemin local et en conserve le caractère tant et aussi longtemps que le conseil de comté ne se prévaut pas des prérogatives que lui confère le code municipal (*Brunet* v. *Hainault* (1), Art. 445 C.M.)

Je suis d'opinion que le conseil de Roberval avait jurisdiction pour ouvrir sur son territoire la route en question. Le jugement *a quo* doit être confirmé avec dépens.

Je regrette de voir que cette cause ait été portée devant cette cour. L'intérêt en litige ne paraît pas justifier la permission d'appeler qui a été donnée par la cour du Banc du Roi. Jusqu'à l'an dernier, nombre de causes affectant des droits immobiliers nous venaient de la province de Québec. Ces causes, pour la plupart, étaient à propos de misérables petites lisières de terre à peu près sans valeur et n'avaient trait qu'à l'exercice de certaines servitudes peu importantes. La plupart du temps il s'agissait d'arrêt d'espèce qui ne pouvaient offrir aucun intérêt général ou public.

Le parlement a jugé à propos l'an dernier (en 1920) d'amender la juridiction de la Cour Suprême de manière à ce que l'affaire en litige soit d'au moins deux mille dollars ($2,000). Cela écartait du coup tous ces appels au sujet de droits immobiliers qui étaient d'une valeur insignifiante. Cependant le parlement déclarait en même temps que la Cour d'Appel pouvait permettre au plaideur malheureux de porter sa cause en Cour

(1) [1911] 18 Rev. de Jur. 141.

Suprême. Il peut arriver, en effet, que la cause soulève une question d'intérêt public, ou une question de droit importante, ou bien l'interprétation d'un statut; et alors la cause peut être portée ici sur permission spéciale.

Il me semble que dans une cause comme la présente il n'y avait pas de raison pour donner la permission demandée. Il n'y avait aucun intérêt public en jeu. L'affaire en litige était d'une valeur insignifiante. La raison donnée par la cour inférieure pour donner la permission d'appeler est qu'il s'agissait d'une action pétitoire "involving a title to land." Cette raison ne me paraît pas suffisante, car le législateur a voulu évidemment refuser le droit d'appel dans les actions pétitoires "involving a title to land," excepté dans le cas où la valeur de la propriété en litige vaudrait au moins deux mille dollars ($2,000) ou bien dans un procès où le litige soulèverait une question d'intérêt public.

MIGNAULT J.—Dans cette cause, qui a originé subséquemment au 1er juillet 1920, date à laquelle la loi 10-11 Geo. V, ch. 32 modifiant la loi de la cour suprême est entrée en vigueur, le droit d'appel à cette cour n'existait qu'à la condition que la plus haute cour de dernier ressort dans la province de Québec—c'est-à-dire la Cour du Banc du Roi, juridiction d'appel—eût accordé une permission spéciale d'appel (art. 41).

Avant la passation de la loi de 1920, le droit d'appel existait *de plano* si l'affaire en litige impliquait, entre autres choses, le titre à un bien fonds ou quelque intérêt dans ce bien fonds. Grâce cependant à l'esprit processif des plaideurs, on avait très souvent porté devant cette cour des appels où il s'agissait bien de titres à des biens fonds ou de quelque intérêt dans

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ces biens fonds, mais où la valeur du droit en litige était insignifiante, de telle sorte que les frais du procès étaient devenus l'objet principal du débat entre les parties et le droit immobilier en dispute l'accessoire.

Pour prévenir ce fâcheux résultat, la loi de 1920 exige, pour que le droit d'appel existe *de plano*, que la valeur de l'affaire en litige portée en appel (*the value of the matter in controversy in the appeal*) dépasse $2,000 (art. 39). Cette disposition s'applique à toutes les provinces du Dominion.

Cependant, comme il peut très bien arriver qu'une question d'une très grande importance se présente dans une cause où la valeur de l'affaire en litige portée en appel ne dépasse pas $2,000.00, la loi de 1920 rend l'appel à la cour suprême possible si l'appelant a obtenu de la plus haute cour de dernier ressort de la province où les procédures judiciaires ont été instituées originairement une permission d'appel. Et si cette permission a été refusée, la cour suprême peut l'accorder dans les cas énumérés par l'article 41 de la loi de 1920.

Dans l'espèce la cour du Banc du Roi, juridiction d'appel, a accordé, l'honorable juge Flynn différant, la permission spéciale d'appel pour le motif suivant:—

> Whereas the action is a petitory action involving the title to real estate and special leave to appeal from such final judgment of this court should be granted.

Je suis d'opinion, très respectueusement, que cette permission spéciale d'appel n'aurait pas dû être accordée. Le motif qu'il s'agit d'un titre d'immeuble est manifestement insuffisant, car, même dans ce cas la loi de 1920 exige (sauf le cas d'une permission spéciale) que le droit immobilier en question dans l'appel vaille plus de $2,000.00. Et si un tel motif était suffisant, on obtiendrait, par voie de permission spéciale d'appel, ce que le législateur a cru bon de ne plus accorder de plein droit.

D'après la jurisprudence bien établie de cette cour, lorsque le droit d'appel dépend d'une permission spéciale laissée à la discrétion d'un juge ou d'un tribunal, cette discrétion d'accorder ou de refuser l'appel doit s'exercer judiciairement, c'est-à-dire pour des raisons suffisantes pour convaincre le juge ou le tribunal que cette permission devrait être accordée ou refusée.

Dans la cause de *Lake Erie and Detroit River Ry. Co.* v. *Marsh* (1), l'honorable juge Nesbitt, parlant au nom de cette cour, sans toutefois prétendre faire une énumération exclusive, a indiqué quelques cas où la permission d'appeler à la cour suprême pouvait bien être accordée. Il disait:

> Where the case involves matter of public interest, or some important question of law, or the construction of Imperial or domestic statutes, or a conflict of Provincial or Dominion authority, or questions of law applicable to the whole Dominion, leave may well be granted.

Dans une autre cause, *In re The Ontario Sugar Company (McKinnon's case)* (2), l'honorable juge Anglin a refusé la permission de porter un appel de la cour d'appel d'Ontario disant:—

> The proposed appeal raises no question of public importance. *Dominion Council of Royal Templars of Temperance* v. *Hargrove* (3). The affirmance or reversal by this Court of the judgment of the Ontario Court of Appeal would not settle any important question of law or dispose of any matter of public interest. *White Packing Co.* v. *Pringle* (4). These usual grounds for seeking leave to appeal are therefore absent.

Pour des motifs analogues, j'ai moi-même refusé la permission d'appeler dans la cause de *Riley* v. *Curtis's and Harvey (of Canada) Limited, and Apedaile* (5), où l'on poursuivait en recouvrement de la somme de $50,000.00, mais où il n'était question que de l'interprétation d'un contrat privé.

(1) [1904] 35 Can. S.C.R. 197.
(2) [1911] 44 Can. S.C.R. 659.
(3) [1901] 31 Can. S.C.R. 385.
(4) [1910] 42 Can. S.C.R. 691.
(5) [1919] 59 Can. S.C.R. 206.

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De tout cela il résulte que quand il s'agit d'accorder la permission spéciale d'appeler à cette cour, on doit se demander si la question en litige est assez importante, malgré l'insuffisance du montant réclamé ou de l'objet du procès, pour que la cause soit portée devant la plus haute cour du pays. Il pourrait notamment en être ainsi s'il s'agissait de mettre un terme à un conflit de jurisprudence.

Je crois donc—et comme il est question d'une loi nouvelle, il me semble que je dois exprimer mon opinion avec une entière franchise, mais avec beaucoup de respect—que dans le cas actuel on n'aurait pas dû accorder la permission spéciale d'appel qui a permis à l'appelant de porter sa cause devant cette cour, après avoir déjà parcouru deux degrés de la hiérarchie judiciaire sans avoir obtenu une seule opinion en sa faveur.

Au mérite, je renverrais l'appel comme mal fondé. Il s'agit d'un petit bout de chemin entièrement situé dans la municipalité de l'intimée et on attaque le règlement qui a ordonné l'ouverture de ce chemin. L'opportunité d'ordonner cette ouverture est une question qui doit être laissée à la discrétion du conseil municipal, qui ne me paraît pas avoir abusé de cette discrétion. Et le conseil municipal avait manifestement juridiction dans l'espèce.

L'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *Armand Boily.*

Solicitor for the respondent: *Thomas Lefebvre.*

THE CITY OF QUEBEC (DEFENDANT)..... APPELLANT;

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June 7.
June 20.

AND

THE UNITED TYPEWRITER CO. (PLAINTIFF)..... RESPONDENT.

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

Municipal law—Riot—Damages—Statutory liability—Prescription of action—Notice of action—Art. 983 *C.C.—Art.* 177 *C.C.P.—Arts.* 310 *and* 561, *Charter of the City of Quebec—(C.)* 1853, 16 *Vict., c.* 233—*(C.)* 1865, 29 *Vict., c.* 57, *s.* 39.—*(Que.)* 1892, 55 *&* 56 *Vict., c.* 50—*(Que.)* 1907, 7 *Ed. VII, c.* 62—*(Que.)* 1916, 6 *Geo. V, c.* 43, *s.* 11.

By c. 233 of 16 Vict., a statutory liability was imposed upon the city appellant "in case of injury to property by any mob or during riots in the said city," and this statute has never been expressly repealed. Article 310 of the charter of the city of Quebec, as enacted by s.s. 16 of sect. 39 of 29 Vict., c. 57, gives to the city appellant the power to pass a by-law providing for the payment of damages caused to property by riot; and it also declares that if such a by-law is not passed within six months from the day of the riot, the party who has suffered damages has a right of action against the city appellant.

Held, that there is no incompatibility between the provisions of the two statutes, and that, under both, the city appellant is liable for the damages to property by a mob, even without any fault or negligence on the part of the appellant.

Article 561 of the Charter of the City of Quebec provides that "every action, suit or claim against the city is prescribed by six months counting from the day when the right of action arose," and that notice of action should "be previously given to the city within thirty days from the date on which the cause of the damage happened."

Held, that the provisions of article 561 do not apply in a case of liability such as that enacted by article 310 of the charter of the city appellant.

Judgment of the Court of King's Bench (Q.R. 30 K.B. 281) affirmed.

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

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APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), reversing the judgment of Sir F. X. Lemieux C. J. at the trial, and maintaining the respondent'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.

F. Roy K.C. for the appellant.

L. St.-Laurent K.C. for the respondent.

IDINGTON J.—I think this appeal should be dismissed with costs.

DUFF J.—The decision of this appeal turns upon two points: 1° Was 16 Vict., ch. 233, repealed by s.s. 16, sec. 29 of 29 Vict., ch. 57? The answer to this question depends upon whether or not s.s. 3 of sec. 39 is "inconsistent" with the provisions of the former Act. It seems beyond argument that the later provision can stand and be read together with the earlier Act without any sort of incompatibility. This question must be answered in the negative.

2°. Is the present Act within sec. 11 of 6, Geo. V, ch. 43, which is in the following words:—

11. Section 8 of the Act 55-56 Victoria, chapter 50, as replaced by section 45 of the Act 7 Edward VII, chapter 62, is again replaced by the following:—

8. Every action suit or claim against the city for damages is prescribed by six months, counting from the day when the right of action arose, any article or provision of the Civil Code to the contrary notwithstanding. But no such action, suit or claim can be instituted unless a notice containing the particulars of such claim and the address of the domicile of the claimant, be previously given to the said city within thirty days from the date on which the cause of the damage happened, and no such action or suit can be taken before the expiration of thirty days from the date of such notice.

(1) Q.R. 30 K.B. 281.

The failure to give the above notice shall not deprive the claimants of their right of action, if they prove that they were prevented from giving such notice by irresistible force or other reasons deemed valid by the judge or the court, subject to the Act 29 Vict., ch. 57, sec. 39, paragraph 35.

It seems improbable that the legislature could have intended to require notice of action before a cause of action has arisen and that part of the enactment which relates to notice of claim seems to apply only to cases where the cause of action arises upon the happening of the "cause of damage." This probability is strengthened by the circumstance that in the French version "fait dommageable" in the first sentence is evidently regarded as the equivalent of "right of action."

My conclusion is that a right of action arising under the special statute upon which the plaintiff relies in this case does not fall within the class of cases contemplated by this section.

ANGLIN J.—After giving to this case careful consideration I find myself driven to the conclusion that neither the prescriptive provision nor the provision for notice of Art. 561 of the Charter of the City of Quebec (6 Geo. V, c. 43, s. 11) applies to a case in which the plaintiff's right to claim damages from the city can arise only six months after the happening of the injurious act for the consequences of which damages are sought.

As first enacted by 55-56 V., c. 50, s. 8, this provision probably did not extend to actions for damages caused by rioters. As it now stands the prescriptive clause cannot be meant to apply to a cause of action which only arises on the expiry of the prescriptive period. The provision for notice because found in the same section and introduced by the words "no such action" is almost certainly restricted in its application to

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actions that are subject to the prescription. It is unlikely that the legislature meant to require notice to be given containing particulars of a claim in respect of which a cause of action may never arise and cannot in any event come into existence until the expiry of five months from the period within which the notice is required to be given. The application of article 561 of the charter must, I think, be confined to cases in which the right to claim and sue for the damages sustained arises immediately upon their being incurred. I find nothing in this provision inconsistent with or repugnant to the provision of the statute, 29 Vict., c. 57 (3), by which the right of action originally conferred by the statute 16 Vict., c. 233, in circumstances such as exist in the case at bar appears to be reaffirmed.

The appeal fails and must be dismissed with costs.

BRODEUR J.—Les faits de la cause sont les suivants:

La compagnie United Typewriter a loué au gouvernement fédéral un certain nombre de dactylographes pour l'usage du bureau du régistraire à Québec. Le 29 mars 1918, des troubles eurent lieu dans cette ville et les émeutiers ont saccagé et pillé le bureau du régistraire et ont détruit ou endommagé plusieurs de ces dactylographes. La compagnie propriétaire de ces machines poursuit la Cité de Québec pour se faire indemniser des pertes qu'elle a subies aux mains de ces émeutiers.

La Cité de Québec, en vertu des lois spéciales qui la régissent et notamment de l'article 310 de sa charte, a le pouvoir de faire des règlements pour payer les dommages causés à la propriété des victimes des émeutes, et il est déclaré que si ce règlement n'est pas passé dans les six mois qui suivent le jour où ces dommages ont été ainsi faits, la personne lésée a droit d'action contre la corporation.

Je crois que cette disposition de l'article 310 est suffisamment explicite pour que la Cité de Québec soit tenue responsable des dommages qui sont causés à la propriété dans le cas d'émeute. S'il y avait doute à ce sujet, nous n'aurions qu'à consulter les sources de cette charte, et notamment l'acte 16 Vict., ch. 233, qui indique clairement l'intention du législateur.

Mais la cité de Québec dit que l'action doit être renvoyée parce qu'un avis de la réclamation n'a pas été donné en temps utile et parce que l'action n'a pas été instituée dans les six mois qui ont suivi le fait dommageable; et elle invoque à cette fin l'article 561 de sa charte (6 Geo. V, ch. 43, s. 11).

Cet article se lit comme suit:

> Toute action contre la cité, pour dommages, est prescrite par six mois à compter du jour où s'est produit le fait dommageable, nonobstant tout article ou disposition du code civil à ce contraire. Mais nulle telle action, poursuite ou réclamation, ne pourra être intentée à moins qu'un avis contenant les particularités de telle réclamation, et l'adresse du domicile du réclamant, ne soit donné à la cité dans les trente jours à compter de celui où le fait dommageable est arrivé, et telle action ne pourra être prise avant l'expiration des trente jours à compter du dit avis.
>
> Le défaut d'avis ne privera pas cependant les réclamants de leur droit d'action, s'ils prouvent qu'ils ont été empêchés de donner cet avis par force majeure ou pour d'autres raisons jugées valables par le juge ou le tribunal.

Cette disposition de la charte peut-elle s'appliquer à un cas comme celui-ci? Je ne le crois pas.

L'obligation pour la cité de Québec de payer les dommages résultant d'émeutes est une obligation imposée par la loi. En vertu des principes ordinaires concernant les délits, la cité ne pouvait pas être tenue responsable de ces dommages pour la bonne raison qu'il n'y a pas faute de sa part.

L'avis que les réclamants doivent donner sous les dispositions de l'article 561 de la charte ne s'applique qu'à ceux qui veulent se prévaloir de la faute délictuelle

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de la cité. Il est possible même que cet avis serait exigible dans le cas de faute contractuelle, ainsi que M. Roy nous l'a dit. Mais ce dernier point n'est pas en litige dans la présente cause et il n'est pas nécessaire alors de le décider.

Mais cet avis n'est certainement pas requis dans le cas où la réclamation est basée sur une obligation imposée par la loi. La jurisprudence est à l'effet que ces avis constituent une exception aux règles ordinaires qui régissent les personnes dans leurs relations entr'elles et alors ils ne doivent être donnés que dans les cas qui tombent clairement sous les dispositions du statut. *Robin* v. *Cité de Montréal* (1); *Newman* v. *Cité de Montréal* (2); *Del Sole* v. *Cité de Montréal* (3); *Québec* v. *Bastien* (4).

Mais quand ce défaut d'avis doit-il être invoqué? Est-ce par défense au fond, comme cela a été fait dans le cas actuel, ou par défense préliminaire?

L'article 177 du code de procédure civile énonce que la défenderesse peut par exception dilatoire arrêter la poursuite si le défendeur a le droit d'exiger l'exécution de quelque obligation préjudicielle.

L'avis qui doit précéder l'exercice d'un droit constitue-t-il une obligation préjudicielle?

Cette question s'est présentée dans une cause de *Mattice* v. *Montreal Street Railway Company* (5), où il a été décidé que le défaut d'avis que les victimes d'un accident sont obligées de donner à la Montreal Street Railway avant d'instituer leur action est une obligation préjudicielle dont l'inaccomplissement doit être invoqué par exception dilatoire.

(1) [1914] Q.R. 54 S.C. 2.
(2) [1912] Q.R. 53 S.C. 481.
(3) [1915] Q.R. 24 K.B. 550.
(4) [1916] Q.R. 25 K.B. 539.
(5) [1901] Q.R. 20 S.C. 222.

L'honorable juge Bélanger, dans la cause de *Kelly* v. *Montreal Street Railway Company* (1), avait également décidé que le défaut d'avis d'action doit s'opposer par exception préliminaire.

Dans la cause actuelle, un avis avait été donné, il est vrai, non pas par la demanderesse elle-même, mais par celui qui avait les machines avariées en sa possession et qui comme locataire pouvait être tenu de répondre des dégradations et des pertes qui arriveraient à la chose louée. L'avis avait été donné dans les délais accordés par la charte. Quatre mois plus tard, la demanderesse a produit une déclaration assermentée démontrant exactement la nature des dommages qu'elle avait soufferts. En exerçant la discrétion que la loi laisse au tribunal, les circonstances de la cause peuvent nous justifier de déclarer que l'avis réclamé par la loi a été donné en temps utile (art. 561 de la charte).

Maintenant l'action est-elle prescrite par six mois?

La prescription de six mois que la Cité de Québec invoque sous les dispositions de cet article 561 de sa charte ne peut empêcher la demanderesse de réussir. En effet, par cet article 561, la prescription commencerait à courir du jour où l'émeute a eu lieu. Cependant l'article 310 de la même charte dit que le droit d'action ne peut s'exercer qu'après six mois de la date de l'émeute. Il est vrai que cet article 561 a une rédaction différente en français et en anglais. Dans la version anglaise on parle d'une prescription qui serait acquise du jour où le droit d'action aurait pu être exercé. Dans la version française on mentionne, au contraire, une prescription qui partirait du jour où le fait dommageable se serait produit. Il y a

(1) [1898] Q.R. 13 S.C. 385.

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divergence entre ces deux textes. Toute loi de prescription doit être appliquée strictement. Si même l'article 561 s'appliquait à la cause actuelle, je serais obligé de dire que l'action a été intentée en temps utile, car il n'y avait pas encore six mois que le droit d'action était né quand il a été exercé.

On a prétendu que, le droit municipal dérivant du droit anglais et du droit américan, ce sont les décisions de ces deux pays qui doivent nous servir de guides.

Je dois dire que je ne partage pas cette opinion. Les autorités anglaises et américaines peuvent nous être sans doute d'un grand secours pour interpréter notre code municipal parce que ce dernier est copié en grande partie sur le droit anglais et le droit américain. Mais il ne faudrait pas conclure de là que toutes les lois anglaises sur la matière s'appliquent et notamment que les questions concernant les délits et les quasi-délits doivent être décidées d'après les principes du droit anglais ou du droit américain. Notre code civil a des dispositions formelles sur la matière et il y a également dans nos statuts des déclarations tendant à déterminer cette responsabilité. C'est, suivant moi, dans le code civil et dans ces statuts qu'il nous faut rechercher la responsabilité, car il est toujours dangereux de s'en rapporter à des décisions qui bien souvent violent des principes élémentaires de nos propres lois telles que nous les retrouvons dans notre code civil ou encore dans notre code municipal.

Le jugement *a quo* doit être confirmé avec dépens.

MIGNAULT J.—L'intimée en cette cause se base sur une obligation imposée par statut obligeant la cité de Québec à indemniser ceux qui souffrent des dommages par suite d'une émeute.

Il s'agit de la loi 16 Vict., ch. 233 (1853) qui n'a jamais été expressément abrogée, et qui, dans le but de pourvoir aux moyens de cotiser les citoyens résidant dans la cité de Québec pour les dommages provenant de torts causés à la propriété par des attroupements ou durant des émeutes, donne au conseil de cette cité le pouvoir de faire des règlements pour imposer une cotisation spéciale pour couvrir et défrayer la dépense d'indemniser le propriétaire de tout édifice ou autre propriété quelconque qui pourront être démolis, détruits ou détériorés par tout attroupement, assemblée tumultueuse ou émeutiers quelconques dans la dite cité, et cette loi, dont j'ai reproduit la phraséologie même, ajoute:

> Pourvu que dans le cas de démolition, destruction ou détérioration ou endommagement de quelque propriété dans la dite cité par tout attroupement, assemblée tumultueuse ou émeutiers, alors si le dit conseil omet de pourvoir par telle cotisation spéciale à défrayer les dépenses nécessaires pour indemniser le propriétaire d'icelle dans le cours des six mois qui suivront la destruction ou endommagement de telle propriété, la corporation du maire et des conseillers de la cité de Québec sera tenu de les payer, et le propriétaire de la propriété détruite ou endommagée pourra recouvrer le montant des dommages soufferts par la destruction ou l'endommagement d'icelle, au moyen d'une action contre la dite corporation.

Cette loi crée, à la charge de la cité de Quebec, une obligation dérivant de la loi seule (art. 983 code civil), et les conditions qui donnent lieu à cette obligation (pour m'exprimer plus brièvement que ne le fait la loi en question) sont: 1. le dommage causé à la propriété par des attroupements, ou pendant des émeutes; 2. l'omission du conseil de la cité de Québec, dans les six mois à compter des dommages, de pourvoir par une cotisation spéciale à défrayer les dépenses nécessaires pour indemniser le propriétaire.

Donc l'action du propriétaire ne prend naissance que lorsque le conseil municipal a laissé passer six mois sans imposer cette cotisation.

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A l'encontre de l'action de la compagnie intimée—qui a souffert des dommages par suite de la destruction de certaines machines à écrire lui appartenant, pendant une émeute, le 29 mars 1918, quand une foule tumultueuse d'émeutiers a envahi les bureaux à Québec du régistraire sous la loi du service militaire à qui avait été louées ces machines—l'appelante plaide: 1. prescription de six mois: 2. défaut d'avis d'action en recouvrement des dommages dans les trente jours après qu'ils ont été soufferts.

L'appelante se base sur l'article 561 de sa charte, tel qu'édicté par la loi 6 Geo. V, ch. 43, art. 11, et qui se lit comme suit:

> Toute action contre la cité, pour dommages, est prescrite par six mois à compter du jour où s'est produit le fait dommageable, nonobstant tout article ou disposition du Code civil à ce contraire. Mais nulle telle action, poursuite ou réclamation, ne pourra être intentée à moins qu'un avis, contenant les particularités de telle réclamation, et l'adresse du domicile du réclamant, ne soit donné à la cité dans les trente jours à compter de celui où le fait dommageable est arrivé, et telle action ne pourra être prise avant l'expiration des trente jours à compter dudit avis.
>
> Le défaut d'avis ne privera pas cependant les réclamants de leur droit d'action, s'ils prouvent qu'ils ont été empêchés de donner cet avis par force majeure, ou pour d'autres raisons jugées valables par le juge ou le tribunal, sujet à la loi 29 Victoria, chapitre 57, article 36, paragraphe 35.

L'appelante a attiré notre attention sur le fait que la version anglaise de cet article, au lieu des mots

> à compter du jour où s'est produit le fait dommageable,

dit:—

> counting from the day when the right of action arose.

Et au lieu des mots de la version française, concernant l'avis d'action:

> dans les trente jours à compter de celui où le fait dommageable est arrivé,

nous lisons dans la version anglaise:

within thirty days from the date on which the cause of the damage happened.

Avant la loi 6 Geo. V, ch. 43, l'article 561, ou plutôt l'article 8 de la loi 55-56 Vict., ch. 50 (qui est la source de l'article 561) tel qu'on le lit dans la loi 7 Edouard VII, ch. 62, sect. 45, disait, dans sa version française, en parlant de l'avis d'action,

dans les trente jours à compter de celui où l'accident est arrivé.

et dans la version anglaise,

within thirty days from the date on which the accident happened.

Le principal changement sur lequel on se base, c'est le remplacement du mot "accident" par l'expression "fait dommageable."

Cette dernière expression est sans doute plus générale et comprendrait probablement—mais pour les fins de cette cause il n'est pas nécessaire de le décider formellement — une cause de dommages que l'on pourrait distinguer d'un pur accident.

Mais sans m'attarder à des distinctions, d'un grand intérêt théorique peut-être, entre la cause d'une obligation généralement parlant et les conditions exigées pour qu'une responsabilité imposée par la loi prenne naissance, je dirai—et cela suffit pour les besoins de la cause—que la loi qui impose l'obligation dont il s'agit ici, c'est-à-dire la loi 16 Vict., ch. 233, n'a pas établi une prescription courte ayant pour effet d'éteindre l'obligation légale qu'elle a créée, et n'exige pas qu'un avis d'action soit donné.

Il serait absurde d'appliquer à une action comme celle de l'intimée une prescription de six mois à compter du jour où s'est produit le fait dommageable, car le

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droit d'action ne prend naissance que lorsque six mois se sont écoulés depuis le fait dommageable sans que la cité de Québec ait pourvu par une cotisation spéciale à défrayer les dépenses nécessaires pour indemniser le propriétaire. Si l'appelante a raison, la naissance du droit d'action coïnciderait avec l'expiration de la période de la prescription, et le droit d'action serait mort-né. Cela suffit pour disposer du plaidoyer de prescription.

Et quant à l'avis d'action, on peut dire—et ce serait un argument très fort—que si l'article 561 de la charte de Québec ne s'applique pas à une réclamation comme celle de l'intimée pour déterminer la période de la prescription, il ne doit pas s'y appliquer pour donner une fin de non-recevoir résultant du défaut d'avis d'action. Du reste, les termes mêmes de l'article 561 démontrent qu'il est sans application à l'obligation légale dérivant de la loi 16 Vict., ch. 233, car l'avis d'action doit être donné dans les trente jours à compter du fait dommageable, et alors l'action de l'intimée, basée sur l'omission de la cité de Québec d'imposer la cotisation dans les six mois du dommage, n'était pas encore née. Du reste, il n'y a pas, selon l'article 561, déchéance absolue, mais le tribunal peut, selon le deuxième alinéa de cet article, décider que l'avis n'était pas indispensable dans les circonstances.

Mais ce qui suffit surabondamment pour les besoins de cette cause, c'est que la loi 16 Vict., ch. 233, n'exige pas l'avis d'action. On suppose, bien entendu, que le propriétaire lésé a fait connaître à la cité le chiffre de ses dommages, car il s'agit pour le conseil de les prélever par cotisation spéciale, et cela a été fait dans l'espèce. Mais il n'y est pas question d'un avis d'action dans un délai quelconque.

Je conclus donc que la défense de prescription et de défaut d'avis d'action est mal fondée.

L'appelante n'a pas établi l'abrogation implicite de la loi 16 Vict., ch. 233, par suite de dispositions subséquentes incompatibles avec cette loi, et il n'y a pas eu d'abrogation expresse.

L'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Chapleau & Thériault.*

Solicitors for the respondent: *Fergus Murphy.*

1921

*June 16.
*June 27.

LOUIS LAFERRIÈRE AND OTHERS (DEFENDANTS) ..... APPELLANTS;

AND

A. J. H. ST. DENIS (DEFENDANT)

AND

HERMAS GARIÉPY (PLAINTIFF) . RESPONDENT.

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

Appeal—Jurisdiction—Amount in controversy—Title to land—Personal action—Rent—Option to buy.

In 1914, L. and St. D., co-owners of an hotel property, rented it to S. and gave him also an option to buy at the price offered by an intending buyer. The lease was expiring on the 1st of May, 1920. On the 20th of February, 1920, St. D., acting personally and as agent of L., rented the same property to G. for five years from the 1st of May with the option to buy it for $60,000. On the 22nd of March, 1920, S. notified L. and St. D. that he was exercising his option to buy the property for $60,000. On the 24th of April, 1920, two actions were brought to annul the lease by St. D. to G. one by S. against St. D. with L. and G. as mis-en-cause and one by L. against St. D. and G. On the 8th of May, 1920, G. tendering a sum representing the rent for one month, brought an action against St. D., L. and S. in order to be put into possession of the hotel. The two first actions were dismissed by the trial court and no appeal taken. The third one by G. was maintained by the Superior Court, which judgment was affirmed by the Court of King's Bench.

Held, Anglin and Mignault JJ. dissenting, that there was jurisdiction in the Supreme Court of Canada to entertain an appeal.

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

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LAFERRIERE v. GARIEPY

MOTION to quash an appeal from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), affirming the judgment of the Superior Court and maintaining the respondent's action.

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

Aimé Geoffrion K.C. for the motion.

T. Rinfret K.C. contra.

IDINGTON J.—I am of opinion that the motion to quash this appeal should be dismissed with costs on the grounds that, as sworn to, there is involved in the matter in controversy what amounts to the value of two thousand dollars, and that the matters in controversy relate to the title to lands or tenements, as interpreted according to the jurisprudence of this court, touching the right of appeal.

DUFF J.—I am of opinion that the motion should be dismissed.

ANGLIN J.—I am unable to find a subject matter of the value of $2,000 directly involved in this action.

The weight of authority seems to support the view that in the Province of Quebec an action to recover possession from an overholding tenant should be regarded as a personal action, and does not involve title to land in the sense necessary to maintain the jurisdiction of this Court under s. 46 (b) of the "Supreme Court Act."

I am therefore of opinion that the motion to quash should prevail.

(1) Q.R. 31 K.B. 256.

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LAFERRIERE v. GARIEPY

Brodeur J.

BRODEUR J.—L'intimé Gariépy fait motion pour casser l'appel faute de juridiction.

Les faits de la cause sont un peu compliqués et il devient nécessaire d'en faire une courte analyse pour rendre jugement sur cette motion.

Les appelants, les Laferrière, et St.-Denis, le défendeur, sont propriétaires indivis de l'Hôtel Riendeau à Montréal.

En 1914, les Laferrière et St.-Denis ont loué cette propriété pour cinq ans aux défendeurs-appelants Gervais et Samson et ont stipulé dans le bail que ces derniers auraient la préférence de se porter acquéreurs de la propriété si les locateurs trouvaient un acheteur.

Le bail expirait au 1er mai 1920.

Le 20 février 1920, St.-Denis, agissant tant personnellement que comme mandataire de ses co-propriétaires, les Laferrière, louait la propriété à l'intimé Gariépy pour cinq ans à compter du 1er mai 1920, et en même temps il donnait personnellement à ce dernier une promesse de lui vendre la propriété pour $60,000.00.

Les Laferrière prétendirent alors qu'ils n'avaient pas autorisé St.-Denis à faire bail de la propriété en faveur de Gariépy et ils instituèrent une action pour demander l'annulation de ce bail St.-Denis-Gariépy du 20 février 1920.

Le 12 mars 1920, Gervais et Samson notifièrent leurs locateurs qu'ils désiraient exercer le pacte de préférence stipulé dans leur bail et qu'ils étaient prêts à acheter la propriété aux conditions de la promesse de vente faite par St.-Denis à Gariépy le 20 février 1920 et à signer à cette fin tous les contrats nécessaires.

Les Laferrière se déclarèrent prêts à donner suite à cette promesse de vente et à permettre à Gervais et Samson d'exercer leur pacte de préférence.

Comme St.-Denis et Laferrière ne livraient pas la propriété à Gariépy le 1er mai 1920 et comme Gervais et Samson continuaient à l'habiter après le 1er mai 1920, Gariépy a, le 14 mai 1920, institué la présente action où il conclut à ce que les défendeurs St.-Denis, Laferrière, Gervais et Samson soient condamnés à lui livrer le dit immeuble.

Les défendeurs, les Laferrière et Gervais et Samson, ont plaidé séparément, mais leur défense est au même effet, c'est qu'ils ont déjà demandé par une première action l'annulation du bail consenti par St.-Denis à Gariépy, le 20 février 1920, qu'ils réitèrent les conclusions qu'ils ont prises dans cette première action et que Gervais et Samson ayant exercé leur pacte de préférence ils ont droit de rester en possession de cet immeuble et qu'ils en sont les propriétaires.

La cour supérieure et la cour d'appel (1) ont maintenu l'action de Gariépy et la question qui nous est soumise est de savoir si cette cour a juridiction pour entendre l'appel qui est porté devant nous.

Cette cour a été appelée a décider cette question de juridiction dans une cause de *Blachford* v. *McBain* (2), où les faits sont à peu près semblables à ceux de la présente cause. Dans cette cause de *Blachford* v. *McBain* (2), le locataire réclamait qu'il avait le droit de garder la propriété en vertu d'une promesse de vente contenue dans son bail; le locateur prétendait, au contraire, qu'il devait en être expulsé. La cour en est venue à la conclusion suivante:

> That as upon the face of the proceedings the right to the *possession and property* of an immovable property is involved, an appeal lies.

(1) Q.R. 31 K.B. 256. (2) [1890] 19 Can. S.C.R. 42.

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Brodeur J.

S'il n'y avait pas la promesse de vente et le pacte de préférence en question en la présente cause, s'il n'y avait, au contraire, que les relations de locateur et de locataire, il pourrait se faire que nous serions en présence non pas d'un droit immobilier mais d'un droit personnel et qu'en conséquence on devrait appliquer la décision de *Fréchette* v. *Simmoneau* (1). Cependant je dois reconnaître que la question de savoir si le droit du locateur de recouvrer la possession d'une propriété louée est un droit mobilier ou immobilier, n'a jamais été clairement résolue et qu'elle a fait dans la doctrine et la jurisprudence française la cause de vives controverses.

Vide: Troplong, vol. 1er, Louage, nos. 6 à 14; Art. 1743 Code Napoléon; Guillouard, vol. 1er, Louage, nos. 17 & suivants; Dalloz, Répertoire Pratique, vo. Action possessoire, no. 25; Dalloz, 1848-1-39.

Il serait intéressant de connaître la portée de nos articles 1663 et 2128 du Code Civil sur la solution de cette question de savoir si les droits du locateur ou du locataire sur l'immeuble loué sont des droits personnels ou réels.

Pour un autre motif que celui énoncé plus haut, je crois que nous avons juridiction parce qu'il s'agit d'une matière dont la valeur est de plus de deux mille dollars. La loi permet maintenant, depuis 1913, de faire la preuve par affidavit de cette matière en litige. C'est ce qui a été fait dans la présente cause.

Il me paraît incontestable que le droit de posséder et d'occuper cet immeuble vaut au moins cette somme.

Pour ces raisons la motion pour casser l'appel doit être renvoyée avec dépens. Il est fort possible que les défendeurs n'aient aucun droit d'invoquer cette pro-

(1) [1900] 31 Can. S.C.R. 12.

messe de vente, et que la possession des défendeurs Gervais et Samson, en possession de cet immeuble, soit sans justification. Mais c'est là une question qui touche au mérite de la cause et qui ne saurait affecter le point de savoir si nous avons le droit d'entendre une cause même dans le cas où le défendeur désire faire un appel pour délai.

MIGNAULT J.—J'accorderais les conclusions de la motion de l'intimé pour casser cet appel pour défaut de juridiction.

L'intimé Gariépy—qui avait loué pour cinq ans un immeuble à Montréal, connu sous le nom d'Hôtel Riendeau, du nommé St. Denis, propriétaire des sept-huitièmes indivis de cet immeuble, les appelants Laferrière étant propriétaires d'un huitième, et qui a trouvé, à l'époque de la prise de possession stipulée en son bail, que les locataires, les appelants Gervais et Samson, dont le bail était expiré, ne voulaient pas livrer possession de l'hôtel, et que St. Denis ne prenait pas les mesures de les en expulser—a intenté en cour supérieure une action contre les appelants par laquelle il offrait à St. Denis et aux Laferrière un mois de son loyer, et où il concluait, comme exerçant, sous l'article 1031 du Code Civil, les droits de son débiteur St. Denis, à l'expulsion de Gervais et Samson de l'hôtel. Cette action fut contestée par Laferrière et par Gervais et Samson. Tous les défendeurs allèguent dans leur défense avoir pris une action pour faire annuler le bail consenti par St. Denis à l'intimé. Ils concluent au renvoi de l'action de l'intimé, demandant acte de l'action qu'ils ont intentée contre lui pour faire annuler ce bail, et déclarant en réitérer les conclusions. Les appelants Gervais et Samson prétendent avoir loué

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Mignault J.

l'immeuble des Laferrière et disent aussi que dans leur bail à eux, alors expiré, St. Denis leur avait consenti un pacte de préférence pour la vente de l'hôtel au cas où il se déciderait à le vendre.

Il est très important de constater que les appellants Laferrière et Gervais et Samson, ayant intenté une autre action pour faire annuler le bail sur lequel l'intimé se base en l'action présente, la validité de ce bail et de la promesse de vente qu'il contient, en question dans l'autre action, ne l'est pas en l'action dont il s'agit ici. Tout ce que les appelants pouvaient faire, sans s'exposer à l'objection de litispendance, c'était de demander, dans leur défense à l'action actuelle, acte de l'action qu'ils avaient intentée pour faire annuler le bail, et c'est ce qu'ils ont fait. Ils auraient pu encore demander la réunion des deux causes, mais ils ne paraissent pas l'avoir fait. Réitérer dans cette action les conclusions qu'ils avaient prises dans l'autre action, ne donnait pas juridiction à la cour dans l'action actuelle d'annuler le bail. Cette question ne pouvait se décider que dans l'autre action et n'est pas et ne peut être soumise sur l'action présente. De fait, M. Geoffrion, avocat de l'intimé, a affirmé, sans contradiction, que l'autre action des appelants en annulation du bail avait été renvoyée et qu'il n'y avait pas eu appel.

Dans ces circonstances, nous sommes en présence d'une action personnelle, offrant $270.84 pour un mois de loyer et demandant, comme locataire, la possession de l'immeuble contre certains locataires dont le bail est expiré. Le droit du locataire est évidemment un droit personnel. Je ne puis voir dans cette cause rien qui ressemble à l'espèce de *Blachford* v. *McBain*. (1), citée par les appelants, où la défende-

(1) 19 Can. S.R.C. 42.

resse alléguait, en réponse à une saisie-gagerie en expulsion, être propriétaire de l'immeuble. Je le répète, la validité du bail et le droit d'avoir la préférence, au cas d'aliénation de l'immeuble ont été soulevés par les appelants dans une autre action qui n'est pas devant nous, et ils ne peuvent être mis en question sur cet appel. Il n'appert même pas, je l'ai dit, que les deux actions aient été réunies, et elles n'ont pas dû l'être, car autrement le jugement le mentionnerait.(1) Le fait que le loyer entier des cinq années du bail de l'intimé, dont il n'offre qu'un mois, dépasse $2,000.00, ne suffit pas. Et l'affidavit de M. Laporte ne fait qu'additionner ce loyer et évaluer l'immeuble dont le titre n'est pas en question. Je ne vois d'autre montant en contestation, s'il peut y avoir contestation à ce sujet, que le loyer d'un mois offert par l'action. Il n'y a non plus, au procès, aucune question concernant un titre à des biens-fonds.

Je maintiendrais la motion de l'intimé et je casserais l'appel.

Motion dismissed with costs.

(1) Depuis que le dossier a été imprimé, j'ai constaté que j'étais dans l'erreur en croyant que les causes n'avaient pas été réunies pour les fins de la preuve. Elles l'ont été, mais elles ont été jugées séparément.

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*Feb. 7.
*June 7.

THE SECRETARY OF STATE OF CANADA (DEFENDANT)..... } APPELLANT;

AND

LUCY HAMILTON NEITZKE (PLAINTIFF)..... } RESPONDENT.

THE SECRETARY OF STATE OF CANADA (DEFENDANT)..... } APPELLANT;

AND

MARY PENISTON WIEHMAYER (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Treaty of Peace with Germany—Enemy property—Clearing offices—"Debts payable"—Relinquishment.

The Treaty of Peace (Germany) Order, 1920, provided for the settlement through clearing offices of debts payable before the war and due by a national of one power to a national of the other and debts which became payable during the war to nationals of one power arising out of transactions or contracts with nationals of the other, execution of which was suspended, and by an annex to these provisions each power became responsible for payment of such debts due by its nationals. An order of the Governor General in Council passed in 1920, after reciting that under the Treaty Canada has the right to liquidate certain enemy property vested in the Custodian (appellant) but power is reserved to relinquish any of the same, which power should be exercised in respect to property of British born women who acquired German nationality by marriage only, provided that any such woman could apply to the Exchequer Court for a declaration as to what property

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

formerly owned by her could be relinquished without rendering Canada liable to Germany under the treaty. Pursuant to this order the respective respondents applied to the Exchequer Court which declared that all their property could be relinquished as not constituting "debts payable before the war" or "debts which became payable during the war" within the terms of the treaty. On appeal from such declaration.

Held that deposits of money with the National Trust Co. for investment in securities, repayment of which was guaranteed on dates which fell during the war, are debts payable during the war within the meaning of the above provision of the Treaty and could not be relinquished.

Held also, Brodeur J. contra, that deposits in a Savings Bank and moneys invested with a Loan Co. to be withdrawn on notice and from the bank on presentment of the bank book also, are not "debts" it not being established that the right to such notice and presentment was abandoned.

Held, per Davies C. J. and Anglin and Mignault JJ., Brodeur J. contra, that moneys deposited with a trust company with instructions that all sums of capital and interest so received should be held by the company to the credit of the owner until further advice by her which was never given were not "debts payable" as provided by the Treaty.

Held, per Davies C. J. and Duff and Brodeur JJ., Anglin and Mignault JJ. contra, that dividends and interest from investments or securities which became payable during the war were "debts."

Per Duff J. The word "debts" should receive a broad construction and includes moneys held under a legal or equitable obligation to pay at any time on demand.

Per Anglin and Mignault JJ. Interest on moneys placed with the National Trust Co. on guaranteed trust investment receipts is a "debt."

Idington J. did not deal with the specific claims presented but was of opinion that there was so much doubt in respect to them that the court should report to the Governor in Council that no relief could be granted at present to either claimant.

Declaration of the Exchequer Court (20 Ex.C.R. 219) approved in part.

APPEAL from the declaration of the Exchequer Court of Canada (1), that none of the property rights and interests of the respective respondents vested in the appellant as custodian are "debts payable" under the terms of section 296 of the Treaty of Peace with Germany and all may be relinquished.

(1) 20 Ex. C.R. 219.

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The terms of the Treaty and of the Order in Council respecting the respondent's property are sufficiently indicated in the above head-note.

Christopher C. Robinson for the appellant.

R. S. Robertson K.C. for the respondent.

THE CHIEF JUSTICE.—*In re Neitzke.*

After much consideration of the facts of this appeal from the Exchequer Court, I am of opinion that

1. The deposits with the National Trust Co. are debts within Article 296;

2. The deposit with the Central Canada Loan and Savings Co. is *not* a debt within the Article; and

3. That the dividends and interest are debts within Article 296.

I concur in the reasoning of Mr. Justice Anglin with respect to the first and second items, but I am unable to agree with him with respect to the item concerning dividends and interest.

In re Wiehmayer.

I concur in the opinion of Mr. Justice Anglin that neither the deposits with the Bank of Toronto nor the Mary Prue Mara trust moneys are debts within the article 296, but I am unable to agree with him as regards the dividends and interest which I hold are debts within Article 296.

IDINGTON J.—In each of these cases an appeal is presented from the judgment therein of Mr. Justice Cassels.

It seems to me that if the final determination of either is to be undertaken it must turn, in the last analysis, upon the interpretation to be given article 296 of the Treaty of Peace between the Allied and Associated Powers and Germany, signed at Versailles June 28th, 1919, and certain subsidiary provisions of said Treaty.

Said article 296, by the introductory clause and four following paragraphs, reads as follows:—

> There shall be settled through the intervention of clearing offices to be established by each of the high contracting parties within three months of the notification referred to in paragraph (*e*) hereafter the following classes of pecuniary obligations:
>
> (1) Debts payable before the war and due by a national of one of the contracting powers, residing within its territory, to a national of an opposing power, residing within its territory;
>
> (2) Debts which became payable during the war to nationals of one contracting power residing within its territory, and arose out of transactions or contracts with the nationals of an opposing power, resident within its territory, of which the total or partial execution was suspended on account of the declaration of war;
>
> (3) Interest which has accrued due before and during the war to a national of one of the contracting powers in respect of securities issued by an opposing power, provided that the payment of interest on such securities to the nationals of that power or to neutrals has not been suspended during the war;
>
> (4) Capital sums which have become payable before and during the war to nationals of one of the contracting powers in respect of securities issued by one of the opposing powers, provided that the payment of such capital sums to nationals of that power or to neutrals has not been suspended during the war.

It is to be observed that neither was the Exchequer Court, nor are we, deciding any cause between the parties to the said Treaty.

It seems to have occurred to the appellant or the Government of Canada that under this provision certain cases of hardship were likely to arise; and by virtue of an order in council the possibility of a relinquishment to members of such class of persons was directed subject, however, to a reference to the Exchequer Court of

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Idington J.

Canada to declare the rights of such persons to so claim, and appellant to assent to the said relinquishment.

The Exchequer Court declared accordingly that each of the respective respondents in question is entitled to claim from appellant the relinquishment of her share of funds held by him as custodian.

It seems to me clear that the Exchequer Court must be acting in an advisory capacity and its judgment cannot be of any higher value than that may give it.

I am in doubt how such a case can be brought by way of appeal here. It is not from a final judgment within the meaning of either the Supreme Court Act or the Exchequer Court Act. It is probably quite competent for the Crown to submit directly to us such a question as submitted to the Exchequer Court.

And if, passing the doubt I have as to the said right of appeal under such very peculiar circumstances, I applied my mind as I have to the arguments addressed to us, and much else bearing upon the case, I regret to say I still remain, with great respect, in grave doubt as to the correctness of the opinion of the learned trial judge.

I am quite unable to give the word "debt" in said article the narrow meaning in the sense contended for, as if restricted to what our common law courts might classify as such.

If I resort to dictionaries, such as Stroud, and Bouvier, I find it might reasonably be given in such a document as presented a much more extended meaning.

Curiously enough, though sometimes driven by mere doubt to maintain a judgment of the court below which I cannot satisfy myself is clearly wrong, I feel impelled, in a mere advisory judgment such as this, to hold that the appellant is entitled to rest upon such doubt and to claim he is entitled to act thereon if such be the conclusion of the majority of the court.

In truth, however, the more I consider the meaning of the word "debt" and the relevant words in the article 296 and the annex, the less reason I see for the restricted meaning applied below.

Since writing the foregoing I find much difference of opinion in this court and that coupled with my own doubts as to the correctness of the opinion of Mr. Justice Cassels, leads me to the conclusion that the so-called appeals should be answered by submitting that amid so much doubt and difficulty the appellant cannot on the case presented act in such a way as to give either respondent any relief at present.

In re Weihmayer.

DUFF J.—I am disposed to think that the opinion or judgment of Mr. Justice Cassels is not appealable to this court but as the questions submitted to him could be submitted directly to this court by an order in council, it seems to be proper that we should treat the appeal as in the nature of a submission and give such assistance as we can for the determination of the questions involved. I think the word "debts" in Art. 296 ought to receive a broad construction and I think it includes moneys held under a legal or equitable obligation to pay at any time on demand. On the other hand debts payable at a fixed date or at the expiration of notice are not, in the absence of such notice or prior to such date, within the terms of the article; and deposits in respect of which the depositee is entitled to require notice before payment are therefore not debts payable within those terms. In the result, dealing seriatim with the items in respect of which dispute arises:—

(a) The deposit in the Bank of Toronto does not fall within Art. 296.

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Duff J.

(b) As to the cash held by the National Trust Co. for the Mary Prue Mara trust and the proceeds of the mortgages I think that the memorandum of the 14th of October, 1914, although it does not in terms refer to these funds, indicates the terms upon which they were in fact held and that, applying the criterion above indicated, they fall within Art. 296.

(c) Speaking generally, dividends and interest being moneys which somebody was under a legal obligation to pay, were, in my opinion, debts within the meaning of Arts. 296. As regards interest which became payable during the war whether by contract or by statute the legal obligation to pay was one of the legal incidents of the "transaction" or "contract" the execution of which in respect of such incident was suspended on account of the war. The phrase "on account of the war" expresses in my judgment the meaning of the words "on account of the declaration of war." As respects dividends: The word "transaction" in my judgment is broad enough to embrace the acts or proceedings by which Mrs. Wiehmayer's right to the respective dividends in question became constituted and the obligation to pay dividends is under the criterion above indicated a debt within Art. 296.

Some difficulty arises in respect of dividends and interest paid by Mr. McMurray into the Bank of Toronto account. I am disposed to think, not without a great deal of doubt, that as these moneys appear to have been thus dealt with by him with the authority of Mrs. Weihmayer, they must be held to stand in the same category as the other moneys in that account; and in consequence of the term of the deposit which entitled the bank to require notice before payment, they ought not to be considered to have constituted a debt "payable" within the meaning of the article.

Applying the criterion mentioned in Mrs. Wiehmayer's case it follows: 1st, that the deposits with the National Trust Company are within Art. 296; 2nd, that the deposit with the Central Canada Company does not fall within Art. 296.

As to interest and dividends: Interest and dividends generally are to be considered within the article, but any sum representing such interest and dividends as may have been credited by the Central Canada Company to Mrs. Neitzke's deposit account under the terms mentioned in paragraph 13 of the case, is, I am disposed to think with a great deal of doubt, not to be considered as a debt payable within the article.

ANGLIN J.—The appeals in these two actions, which raise very similar questions, were argued together. By a special case stated in each the parties seek to have it determined whether certain property of the respondents, German subjects through marriage only, or any part of it is or is not of such a character that the Government of Canada may renounce claim to it without becoming accountable therefor to the Government of Germany. The answer depends primarily, if not entirely, on whether the several items of property in question were at the date of the Treaty of Peace with Germany (10th of January, 1920), "debts (which had been) payable before the war" or "debts which became payable during the war" within Art. 296 of that treaty, or were then not such debts but rather "property rights (or) interests * * * belonging to German nationals" within Art. 297. If they were the former they cannot be so relinquished; the treaty

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forbids it (Art. 296, pars. (a) and (b)); if the latter they may be abandoned to the respondents without accountability to Germany being incurred, the allied powers having merely "reserve (d) the right"—not undertaken responsibility—"to retain and liquidate" such property and give credit for its proceeds.

It seems abundantly clear that the liabilities to the respondents arose out of transactions of which the partial execution was suspended "on account of the declaration of war." These latter words of clause (2) of Art. 296, in my opinion, clearly mean on account of the situation (i.e., the state of war) created by the declaration of war. That situation and the disabilities it entailed existed up to the 10th of January, 1920, "on account of the declaration of war."

The heading of Art. 296 is "Debts," which, if not misleading, can scarcely be termed definite or precise, (37 L.Q.R., p. 59). The article deals not with all pecuniary obligations but only with certain classes of them. In considering what pecuniary obligation it was intended to comprise within the category of debts it must first be observed that there are certain restrictions on the broad meaning of that word, viz.,

> that which is owed or due; anything, as money, goods or service, which one person is under obligation to pay or render another; a sum of money or a material thing. Murray's Dict., vbo., Debt,

imposed by the qualifying statements of the article that the debts dealt with are "pecuniary obligations" and that they must either have been "payable before the war" or have "become payable during the war." In the French version the word "payable" is rendered as "*exigibles*" in par. No. 1 and as "*exigibles et dues*" in par. No. 2.

The special mention made in clauses (3) and (4) of capital sums and interest payable "in respect of securities issued by an opposing power" is also significant. Such obligations are classed with "debts" due by the nationals of such power. The legitimate inference would seem to be that capital and interest payable in respect of private securities issued by such nationals, whether persons or corporations, were not meant to be within the purview of the article.

The Treaty does not declare by what law its terms are to be construed. Having regard to its international character, however, it should perhaps not be too readily assumed that merely because English municipal law differentiates between a debt and the obligation of a trustee to account that distinction should obtain in construing the word "debts" used in Art. 296. Yet when the nature of the relations of the *cestui que trust* and the trustee to trust property are carefully considered the distinction would not seem to depend upon considerations peculiar to English law but rather to be of universal application. The *cestui que trust* is not a mere creditor of his trustee in respect of trust moneys, but has a beneficial proprietary interest in them while in the trustee's hands. They are his moneys, not the trustee's. They are not exigible to satisfy a judgment for the claim of any other person who is a creditor of the trustee as they would be if the latter was merely a debtor for them to his *cestui que trust*.

"Payable" is a word susceptible of more than one shade of meaning; *Massy* v. *Lloyd* (1), at pages 267-8, per Westbury L.C. Counsel for the Crown in

(1) 10 H.L.Cas. 248.

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his factum, and again at bar took the position that a debt is "payable" only when it may be sued for without any previous demand or other act of the creditor—but not otherwise.

North J. in *In re Tidd* (1), at page 156, quotes with approval the following passage from Evans' Commentary on Pothier, Vol. II, page 126:

> Where a man deposits money in the hands of another to be kept for his use, the possession of the custodee ought to be deemed the possession of the owner until an application and refusal, or other denial of the right; for, until then, there is nothing adverse, and I conceive that, upon principle, no action should be allowed in this case without a previous demand; consequently, that no limitation should be computed further back than such demand.

The Wiehmayer Case.

Assets of three descriptions are in question in this case:

(1) Moneys of Mrs. Wiehmayer deposited in a savings bank account with the Bank of Toronto.

(2) Mrs. Wiehmayer's share of cash held by a trustee company at the date of her mother's death and of moneys received by it as the proceeds of mortgage securities in its hands—both covered by a trust of which Mrs. Wiehmayer and her sister, a British subject, were beneficiaries subject to a life interest in their mother.

(3) Interest and dividends which became payable to Mrs. Wiehmayer while a state of war subsisted.

(1) As a "deposit * * * established before or after the declaration of war" the money on deposit in the Bank of Toronto seems to be a "cash asset" within clause (h) (1) of Art. 297, as defined by section 11 of the annex to that article, rather than a "debt" within Art. 296. It was payable by the terms of the contract of deposit only on production of the bank book,

(1) [1893] 3 Ch. 154.

and, if required by the bank, after fifteen days' notice. A demand for payment accompanied by production of the bank book and the fifteen days' notice, if exacted, were conditions precedent to a cause of action to recover it arising. Until these conditions were fulfilled, if a "debt" it was not "payable." I cannot distinguish the case as to these moneys from *Atkinson* v. *Bradford Third Equitable Society* (1), and *In re Tidd, supra* (2).

It is true that the special case states tha

it was not the practice of the bank in dealing with this account or with similar accounts to insist that requests for withdrawals were to be accompanied by the bank book.

There is no admission, however, that the bank had relinquished or abandoned its right to do so or to exact the notice and I am not prepared to draw that inference from the mere existence of the practice stated. There are no other circumstances before us pointing to an equitable right on the part of the respondent to rely on that practice as having established such an abandonment—nothing to indicate that in suing to recover the amount to the credit of her savings account it would be unnecessary for the plaintiff to aver performance of the condition precedent as to presentation of the bank book or inequitable on the part of the bank to set up against her the express stipulations of its contract with her.

Although counsel for the appellant expressly confined his appeal to such items as fall within Art. 296, it has been suggested in the course of the consideration of these cases that for all "cash assets" there is a like obligation to account through the clearing office, imposed by clause (h) of Art. 297 and sub-clause (1) thereof. The argument urged is that "all cash assets in general" are by clause (h) put in the same category

(1) 25 Q.B.D. 377. (2) [1893] 3 Ch. 154.

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with "net proceeds of sales of enemy property" which has been retained and liquidated, and that sub-clause (1), in the case of powers adopting section III (Art. 296) and the annex thereto, imperatively requires that such proceeds and "cash assets" shall alike be credited to the power of which the owner is a national, through the clearing office. But that construction would impose on the allied or associated powers the obligation to "retain" all cash assets within their territories belonging to German nationals, whereas such "cash assets" form part of the "property, rights and interests," which the allied or associated powers by clause (b) merely reserved the right—impliedly refused to assume any obligation—"to retain and liquidate." Clause (b) is, in my opinion, the dominant provision, and clause (h) and sub-clause (1) thereof must be read subject to it. The latter clauses therefore apply in the case of the Allied or associated powers only to "cash assets " in respect of which such powers shall have exercised their reserved right of retention.

As to item No. 1 the appeal in my opinion fails.

(2) and (3). Because of the relations to them of the trustee and the *cestui que trust* above stated the trust funds covered by item No. 2 I also think cannot be regarded as "debts" and neither these moneys nor interest or revenues accruing from them, comprised in item No. 3, as I view them, "became payable during the war" to the plaintiff. While there is nothing in the terms of the trust instrument that would have precluded her calling upon her trustee to account to her at her mother's death for her share of the moneys covered by the trust then in its hands and afterwards for the other moneys included in the second item and for interest and revenues arising therefrom when and as they were received by it, a memorandum of instruc-

tions of the 14th October, 1914, that all sums, either of capital or income, received on the plaintiff's account by her trustee were to be retained by it to her credit until further advice by her, at least serves to negative the existence from that date forward of any arrangement or standing instructions that such moneys were to be remitted or paid over by the trustee on receipt, which might be tantamount to a demand. There was a further act to be done by the creditor in regard to all these moneys before a right of action to recover them from the trustee would have arisen. In my opinion they were not "debts," which "became payable during the war" to the plaintiff.

Neither are dividends "debts" within Art. 296. They are the share or interest of the stockholder to whom they are payable in the distributable profits of the corporation and are his property quite as much as are the shares in the capital stock he holds. They are "cash assets" as defined by clause 11 of the Annex to Art. 297.

The appeal therefore also fails as to items (2) and (3).

The Neitzke Case.

There are also three distinct items involved in this appeal:

(1) An amount deposited on the 4th of August, 1914, to the credit of the plaintiff in the Central Canada Loan and Savings Company;

(2) Sums represented by two guaranteed trust investment receipts issued by the National Trust Company, Limited, to the plaintiff;

(3) Interest and dividends which became payable between the 4th of August, 1914, and the 11th of January, 1920, on property, rights and interests of the plaintiff.

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(1) Item No. 1 seems to be in the same position as the corresponding item in the Wiehmayer case. The money was placed in a special deposit account bearing interest and was withdrawable only on 30 days' notice if required by the loan and savings company. This would appear to be a "deposit established before or after the declaration of war" within the purview of clause 11 of the annex, and therefore a "cash asset" within Art. 297 (h) (1). No abandonment of the right to exact the 30 days' notice is alleged or shewn.

Interest which accrued due on these moneys as "assets coming from a deposit" (Annex, cl. No. 11), covered by item No. 3, would be subject to the same disposition as the principal.

(2) The substance of the transactions between the plaintiff and the National Trust Company must be considered rather than the name given them by the company—"Guaranteed Trust Investments." When the trust company received each of the two sums from the plaintiff it gave her an absolute undertaking to repay the principal at the end of five years and to pay her interest thereon in the meantime half-yearly at the rate of 4½ per cent per annum. The dates for payment of the principal and interest as well as the rate of the latter were fixed quite independently of the terms of any security in which the moneys might be invested by the company. The only liability to the plaintiff was that of the company. Her sole recourse was against it. No specific security was allotted to her investment or in any manner ear-marked as one on which she should have an exclusive claim. Her only right, apart from that of enforcing payment by the trust company according to the terms of the receipts given her, would be to require the company at all times before repayment of the principal to hold allocated to

such "trust investments" of the plaintiff and others in like plight an amount of securities of face value equal to the total amount of moneys received by it upon similar terms. Of the sufficiency of such securities, however, the company was the sole judge. In the event of its making default in payment and going into liquidation there would, no doubt, be a mass of its securities on which all customers from whom it had obtained money on terms similar to those arranged with the plaintiff would alike have liens entitling them to share *pari passu* in their proceeds up to the amount of the company's liability to each of them respectively. But at no time was there any part of that mass of securities held by the company which was hers. Her sole recourse, so long as the company remained solvent, was to look to it for payment of the amount advanced by her with interest thereon at the rate stipulated in the receipt given her, and in the event of insolvency or liquidation to rank for that amount as a secured creditor upon the fund represented by the securities that had been allocated by the company to its "trust investments" of the class to which hers belonged.

In substance these transactions, in my opinion, were not deposits of money by the plaintiff in trust for investment by the company on her account but loans to the company of the amounts handed over by her to it, of which payment was to be collaterally secured by liens, held in common with other lenders in like plight as above stated, on certain assets of the company set aside for that purpose. The plaintiff was a lender and as such a creditor; the company a borrower and as such a debtor—and the sole debtor—of the plaintiff. Both the principal and the interest are "debts" of the company to the plaintiff which "became payable during the war" and as such, I think, fall within Art. 296 of the Peace Treaty.

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(3) The position of any dividends to which the plaintiff became entitled is the same as that of the dividends in the Wiehmayer case. Interest on investments or securities, other than the money lent to the National Trust Company and that on deposit with the Central Canada Savings Co., which have already been dealt with, would seem to be "cash assets" within the definition of that term in the annex to Art. 297.

I have assumed that we have jurisdiction to entertain these appeals from the opinion expressed by the learned judge of the Exchequer Court under the jurisdiction conferred upon that court by section 1 (i) of c. 14, 10 Geo. V. In the result the opinion expressed by the learned judge in the Wiehmayer case should in my opinion be confirmed; that expressed in the Neitzke case should also be confirmed except as to the moneys received by the National Trust Company on "guaranteed investment receipts" and interest accrued thereon.

BRODEUR J.—As these two appeals have been argued together and as they raise practically the same issues, they might be both decided at the same time.

These actions have been instituted by two women who were of British nationality by birth and who married men of German nationality before the war and went to reside in Germany. They had money invested in Canada and their Canadian properties and rights were, by order of the court, vested in the Minister of Finance under the provisions of the consolidated orders respecting trading with the enemies, 1916.

By the Treaty of Peace order of 1920 all the properties and rights vested in the Minister of Finance were

transferred to the Secretary of State of Canada, the appellant, as custodian. Now the respondents claim by their action that their property, rights and interest, which they possess in some investments, be returned by the appellant to them and that it be declared that these investments should not be considered as falling under the provisions of Article 296 of the Treaty of Peace with Germany.

The Secretary of State is willing to relinquish these properties and hand them to their former owners provided such relinquishment shall not be contrary to certain provisions of the Treaty which require that the payment of certain debts should be made through a clearing office to Germany itself and not to the original owners thereof.

We have then in that respect to construe the provisions of Article 296 of the Treaty which determines how certain debts due by a national of one contracting power to a national of an opposite power shall be settled. The question submitted in this case is whether the word "debts" of this article 296 would include the investments which the respondents possessed in Canada.

These investments are of three classes:

First, the investments made in the Canadian trust companies and represented by "guaranteed trust investment receipts;" secondly, the deposits in loan and savings companies, or in banks in their savings account; thirdly, interest and dividends which became due or were paid during the war.

There is also in the case of Mrs. Wiehmayer a trust investment under special agreements which will have to be dealt with.

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I.

Guaranteed Trust Investments.

This is an agreement by which sums of money are received by a trust company for investment for the repayment of which this trust company becomes liable. The trust company then invests the money in its own name and no specific mortgage is allocated to the trust investment receipts but the mortgages representing the total amounts invested by the trust company are simply set apart and are held in a special account.

We are not much concerned as to the manner in which the trust company manages or invests the funds which its clients put in its hands for investment. We have in the agreement or receipt an obligation to pay or reimburse the amount which has been put in its hands. There is established then between the investor and the trust company the relation of debtor and creditor and the investor has a right to claim from the company the reimbursement of his money. It becomes an ordinary pecuniary obligation.

What is a pecuniary obligation? It is a personal engagement which gives to the person in whose favour it is contracted the right to claim a sum of money. It is a *vinculum juris* which obliges a person to give some money to another.

I am of opinion that under the Treaty these trust investments should be paid through the clearing house and that the custodian, the Secretary of State, should not pay these pecuniary obligations to the respondent.

Deposits in Savings Banks in Loan Companies.

These deposits are generally made with the condition that the money will be paid after certain days' notice or when the bank book is presented. As a matter of practice, however, the amounts so deposited are reimbursed without requiring that notice or the presentation of the book.

It seems to me that any deposit in a bank constitutes a pecuniary debt by the bank from the moment of the deposit; *Pott* v. *Clegg* (1). The respondent relies on the case of *Atkinson* v. *The Bradford Third Equitable Benefit Building Society*, (2), where it was decided by the Court of Appeal in England that the condition that the sum should be repayable after the lender had given notice of his intention to withdraw it and that no money would be payable except on presentation of a pass book; that the condition as to the production of the book was a condition precedent and that until it was produced, the Statute of Limitations did not begin to run against the lender. But the *Atkinson Case* (2), has reference only to the operation of the Statute of Limitations.

The Treaty is in more general words and of more general application than the Statute of Limitations referred to in the *Atkinson Case* (2). According to my view, those deposits constitute debts which under section 296 of the Treaty would have to pass through the clearing house.

I have stated before in discussing the guaranteed trust investments what is the essence of a pecuniary obligation. Nobody can say that there was not an obligation on the part of the banks, of the loan companies or of the others to pay a certain sum of money.

(1) 16 M. & W. 321. (2) 25 Q.B.D. 377.

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That money could, in some cases, be claimed before the war and if it was not demanded that is not a reason to say that there was no debt. As to the money which became due during the war, if it was not claimed, that was due to the declaration of war. In each case, these debts constitute the pecuniary obligations mentioned in Art. 296 of the Treaty.

Dividends and Interest.

As to the dividends and interest, they were certainly debts which became payable during the war and they arose out of agreements entered into before the war and the payment of the interest contracted for or the dividends which might have been declared was suspended on account of the declaration of the war.

There is besides in paragraph 22 of the annex to article 296 a formal reference as to interest which shews that capital and interest should be considered as one.

Trust Investment Wiehmayer Case.

By a certain agreement, the National Trust Company held certain mortgages in trust to pay the income to Mary Prou Mara during her life and after her death part to the respondent and part to her sister in equal shares. Upon the death of Mary Prou Mara in June, 1913, the National Trust Company became obliged to divide between the respondent and her sister the capital held by it under this agreement.

The question is whether that sum became a debt payable and should be considered as such under the Treaty.

The trust company was not forced during the war to pay to the respondent her share of the capital, but I fail to see how these sums could not be considered as a debt.

I am of opinion that the judgment *a quo* should be reversed.

In re Neitzke.

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MIGNAULT J.—The question under this appeal is whether certain rights or claims of the respondent, as being "debts" within the meaning of article 296 of the Treaty of Peace signed at Versailles, on the 28th June, 1919, between the allied and associated powers and Germany, are subject to the provisions of the said article. Article 296 is among the economic clauses of the Treaty and, as far as material to the present inquiry, provides as follows:—

There shall be settled through the intervention of clearing offices to be established by each of the high contracting parties within three months of the notification referred to in paragraph (e) hereafter the following classes of pecuniary obligations:

(1) Debts payable before the war and due by a national of one of the contracting powers, residing within its territory, to a national of an opposing power, residing within its territory;

(2) Debts which became payable during the war to nationals of one contracting power residing within its territory and arose out of transactions or contracts with the nationals of an opposing power, residing within its territory, of which the total or partial execution was suspended on account of the declaration of war.

Paragraphs (3) and (4) are immaterial on this appeal.

This question was submitted to the Exchequer Court by means of a special case under rule 160. The respondent succeeded as to all the items mentioned in the schedule annexed to the case, and the appellant now asks this court to reverse the judgment of the court below as to three of these items, viz.:—

(a) The sums represented by the two guaranteed trust investment receipts issued by National Trust Company, Limited, to the respondent;

(b) The amount on deposit on the 4th of August, 1914, to the credit of the respondent in the Central Canada Loan and Savings Company; and

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(c) The interest and dividends which became payable between the 4th of August, 1914, and the 11th of January, 1920, on the property, rights and interests of the respondent.

The appellant seeks also to have it held that, if these items fall under Article 296, Canada is or may be liable to Germany for or in respect of such of them as are relinquished to the respondent.

The answer to be given depends on the construction of Article 296 of the Peace Treaty, which must be read in connection with the two following articles.

In arriving at this construction, a broad distinction must be made between "debts" referred to in Article 296 of the Treaty of Peace and "property, rights and interests" which are the subject of Articles 297 and 298. The latter expressions are wide enough to comprise any kind of "debts," and the word "debts" *lato sensu* would include any species of claim whether for money or other property to which one person is entitled as against any other. It is noticeable, however, that the "debts" referred to in Article 296 are stated to be certain classes of "pecuniary obligations," so that nothing which cannot be described as a pecuniary obligation can come within the meaning of the word "debts" as used in Article 296.

"Cash assets" are included among the "property, rights and interests" of Article 297 and are expressly mentioned in paragraph (h) of that article. In the annex to Articles 297 and 298, they are defined, by paragraph 11, as including all deposits or funds established before or after the declaration of war, as well as all assets coming from deposits, revenues, or profits collected by administrators, sequestrators, or others from funds placed on deposit or otherwise, but not to include sums belonging to the allied or associated powers or their component states, provinces, or municipalities.

I must confess that the reference to "cash assets" in Article 297, and in the annex to Articles 297 and 298, is more confusing than helpful. This is especially so when the different provisions of Article 297 are carefully studied. As the parties presented their case, the question was whether the property in question fell within the provisions of Article 296, paragraphs 1 and 2. Still it is impossible to overlook Article 297, and, as I have said, its reference to cash assets is confusing. Thus paragraph (h), subparagraph (1), seems to require that in general all cash assets of enemies, as regards powers adopting article 296, shall be credited to the power of which the owner is a national, through the clearing office established under the latter article. But the collocation of the expression "cash assets" with the words "the net proceeds of sales of enemy property" sufficiently shows that what was intended was that where, under paragraph (*b*) of article 297, an allied or associated power has elected to retain and liquidate property, rights and interests (which would include "cash assets") belonging to German nationals, the proceeds of such liquidation and all cash assets, as regards powers adopting article 296, shall be credited to Germany through the clearing house, any credit balance being applicable to the payment of Germany's reparation obligations under article 243. If an allied and associated power has not elected to retain and liquidate the property, rights and interests of German nationals, and Canada has not done so with respect to British born wives of German nationals, the only question is whether the property to be dealt with is or is not a "debt" within the meaning of article 296.

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I can now deal with the amounts claimed by the respondent in order to determine whether they should be considered as being "debts," or, I may say in contradistinction thereto, "cash assets," which term has now been sufficiently explained. And it seems entirely proper to distinguish moneys in hand or moneys recovered and deposited for safe keeping from moneys due under a pecuniary obligation, whether such obligation be created for investment purposes or otherwise. It is in the latter sense that I construe the word "debts."

Article 296 refers to debts *payable* before the war or during the war. Does this mean debts for which an action would lie without any previous demand? This seems to be the construction which the appellant places on the word "payable," for in his factum he says:

> It is further submitted that a debt "became payable" before or during the war within the meaning of these paragraphs if at any time before or (but for the war) during the war it could have been sued for without any previous demand or other act by the creditor.

I cannot agree with this construction, for it seems inconceivable that the negotiators of the Treaty were concerned with the question whether a debt was suable without demand or only after a previous notice to the debtor. What seems entirely likely is that the debts with which they intended to deal were those of which the payment had been prevented by the war, and this payment was prevented in case of all debts between belligerents, irrespective of the question whether or not a previous demand was necessary. In my opinion, all moneys due under a pecuniary obligation of which the war prevented the payment, and which therefore had not, on that account, been recovered, are debts within the meaning of Article 296.

Applying therefore Article 296 to the items which are the subject of this appeal, my opinion is that:—

A. The sums represented by the two guaranteed trust receipts issued to the respondent by the National Trust Company, Limited, are "debts" within the meaning of Article 296. The moneys received from the respondent under these receipts, to wit, $11,000.00 and $2,000.00, were to be invested by the Trust Company in securities taken in its name, the surplus of interest over five per cent to be retained by the company for its own benefit, and the company guaranteed the payment of the principal money, in the case of the $11,000.00, on the 1st of January, 1917, and, in the case of the $2,000.00, on the 2nd of January, 1919. Both these days fell "during the war." See the construction of these words in the Treaty of Peace (Germany) Order, 1920, section 2, subsection (c). In my opinion, were it necessary to so hold, the capital sums for which these receipts were given were payable and suable without any previous demand, but it will suffice to say that they were debts of which the payment was prevented by the war and therefore they come within Article 296.

B. The amount on deposit on the 4th August, 1914, to the credit of the respondent in the Central Canada Loan and Savings Company was not a debt payable before the war within the meaning of Article 296. This amount was deposited in a savings bank account and the form of the question shews that at the time of the declaration of war no order for its payment had been given by the respondent. It would further come within the expression "cash assets" as used in Article 297. The want of a demand of payment here is import-

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ant only as shewing that at the date of the declaration of war there was merely an existing savings account in favour of the respondent on which, as to the sum then standing to her credit, no cheque had been issued by her.

C. In so far only as this item comprises interest or dividends on item A, I would think it would fall under Article 296 of the Treaty, being an accessory of the capital sums of $11,000.00 and $2,000.00 represented by the National Trust Company's guaranteed trust investment receipts.

The appeal also raises the question whether, if any of the said items do fall within Article 296, Canada is or may be liable to Germany for and in respect of such of them as are relinquished to the respondent.

I would answer in the affirmative. Article 296 renders it compulsory to settle through the intervention of clearing houses the classes of pecuniary obligations mentioned therein. Should Canada relinquish to the respondent any debts which come under the operation of Art. 296, it would undoubtedly incur liability towards Germany for the debts so relinquished.

I would therefore allow the appeal to the extent of declaring that the capital sums of $11,000.00 and $2,000.00 represented by the guaranteed trust investment receipts of the National Trust Company, Limited, as well as all interest or dividends thereon accrued, are "debts" within the meaning of Article 296 of the Treaty.

In re Wiehmayer.

Inasmuch as in the case of *The Secretary of State* v. *Neitzke* I have explained what construction should be placed on Articles 296 and 297 of the Treaty of Peace between the allied and associated powers and Germany,

it will suffice to say that, in my opinion, none of the items which the appellant claims are "debts" within the meaning of Article 296, or should be so considered.

As a consequence the appeal should be dismissed.

Adjudged accordingly.

Solicitor for the appellant: *Christopher C. Robinson.*

Solicitors for the respondents: *Fasken, Robertson, Chadwick & Sedgewick.*

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*May 17, 18.
*June 20.

GEORGE McKEAN AND COMPANY, LIMITED AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

EUNICE A. BLACK AND OTHERS (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Evidence—Admissibility—Corroboration—Conveyance—Security for advances—Continuing agreement.

A contract made in Jan. 1914 recited that McK. had agreed to guarantee repayment of advances made and to be made to B., that he had agreed to buy from B. lumber to be cut and manufactured during the year and as security for the guarantee he was to receive title to the property from which the lumber was to be cut. The contract then provided that B. would completely lumber the property and deliver all the lumber to McK. at a price to be settled or, in default of agreement, on consignment for sale on the customary commissions. B. eventually paid all the advances and demanded a reconveyance from appellant (McK. having died) which was refused on the ground that all the lumber had not been cut and delivered. In an action for an order directing the appellants to reconvey and for damages B. tendered evidence of a representation made by McK. when the agreement was presented and he objected to the requirement to cut all the lumber that the meaning of it was that McK. would hold the lumber until paid all the advances with interest; that B. could not sell any until enough was cut to pay him off. The evidence was admitted and the trial judge, accepting it as true, gave judgment for a reconveyance and damages to be assessed. On appeal from the Court *en banc* affirming his decision.

Held, per Davies C. J. and Idington J., that the evidence was admissible and sufficiently corroborated by the provisions of the document.

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

Per Idington J. The document was a mortgage with the usual right of redemption and respondents were entitled to succeed without this evidence.

Per Duff J. Parol evidence is always admissible when its object is to show that the transaction is one of loan and that the conveyance though absolute in form is intended to be security only.

Per Anglin J. The contract was not ambiguous and the evidence not admissible for the reason that it needed explanation. But it could be received to support a claim for reformation or a plea of estoppel based on misrepresentation innocent or fraudulent. The corroboration relied on below was too slight to satisfy the provision of the Nova Scotia Evidence Act but the admission by the appellants that for the purposes of the action they should be deemed to be in the same position as if McK. was alive and was the defendant obviated the necessity for any corroboration.

Per Mignault J. Two courts having received and believed the evidence of B. and held that there was sufficient corroboration of it, the decision appealed against should stand.

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

The material facts are set out in the above head-note.

F. R. Taylor K.C. and *Jenks K.C.* for the appellants. The plaintiffs cannot rely on fraudulent misrepresentation which must be specifically pleaded; *Lawrance* v. *Norreys* (2); and as recission is not asked for innocent misrepresentation cannot help him. *Newbigging* v. *Adam* (3), at page 590.

The evidence does not justify an order for rectification. *May* v. *Platt* (4), at page 623. And there is no sufficient corroboration. *McDonald* v. *McDonald* (5).

Henry K.C. for the respondents referred to *Burkinshaw* v. *Nicolls* (6); *Redgrave* v. *Hurd* (7).

(1) 54 N.S. Rep. 245.
(2) 15 App. Cas. 210.
(3) 34 Ch. D. 582.
(4) [1900] 1 Ch. D. 616.
(5) 33 Can. S.C.R. 145.
(6) 3 App. Cas. 1004 at p. 1026.
(7) 20 Ch. D. 1. at pages 12, 14 and 20.

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THE CHIEF JUSTICE.—I think this appeal fails and should be dismissed. The action was one brought by Black against the heirs and representatives of the late George McKean in which the plaintiff claimed a reconveyance to him of a certain lumber property which he had conveyed and assigned to McKean as security, as he contended, for certain advances then and afterwards to be made to him and certain guarantees to be given on his behalf to enable him to complete his purchase of the property and to enable him further to carry on his lumbering operations, and which advances had all been repaid. The defence was practically a denial that the plaintiff had carried out the obligations imposed upon him by the agreement in other respects than the repayment of the moneys advanced or guaranteed and which it was essential he should carry out before he was entitled to the reconveyance claimed. The repayment of all advances and interest which McKean had made to Black or guaranteed for him, was not challenged or denied, but it was claimed that it was a condition and a term of the agreement that before Black could claim a reconveyance of the property he was obliged completely to lumber the property and to cut, saw and manufacture and deliver to McKean all the lumber on said property at a price to be agreed upon, or that said lumber should be shipped on terms in paragraph one (1) of the agreement stated. It was agreed that this had not been done and Black's contention was that it was not obligatory on him to do this, once he had paid McKean all advances made by him with interest and discharged him from all guarantees and liabilities he had incurred in this respect by the agreement.

Apart from the legal construction of the agreement itself, a question arose as to the statement said to have been made by McKean to Black as to the meaning of the agreement, which statement Black swore was what induced him to sign the agreement. This evidence is as follows:—

(Charles O. Black, Direct Examination).

After we had bargained, Mr. McKean, the young man, went out and got that agreement drawn up by a lawyer; I had no lawyer, and I am not one myself, and have a limited education; there was a clause where it said we hold all the lumber on this property estimated at thirty million; I said there might not be thirty million on the property, in fact, I know there is not; it is only an estimate, and I might not be able to cut all that lumber, and it is a bad thing for me to sign things like that. He said, "the meaning and intention of this agreement is that we hold all the lumber on this property until we are paid off all our advances with interest; that means to say, you can't sell any lumber off this property until you cut enough to pay us all off, because if you did we would not have security, and that is what the agreement means." I said, "if that is what it means, all right." That is what I thought it was, but now it seems it is interpreted they hold it all after it is paid off; he said the meaning and intention of the agreement was that.

Q. You then signed the agreement? A. Yes, with young McKean.

Q. On the understanding you had with Mr. George McKean, as you have just told us about? A. Yes.

The learned trial judge accepted this statement of fact as proved, and also held that there was sufficient corroboration of it and the question for our consideration is whether the statement was admissible as evidence, and if so, whether McKean being then dead there was sufficient corroboration under the statute and what effect, if any, was to be given to it.

I am of the opinion that the learned trial judge was right in holding that the agreement in question was an ambiguous one the real meaning of which, considering the apparently conflicting clauses of it, was most difficult to determine. I must say I myself have

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found it so and agree fully with the learned trial judge as to its ambiguity. I think the evidence was properly admitted and that there was sufficient corroboration of it under the statute.

In my judgment the agreement in question was in reality a mortgage intended to secure to McKean all moneys advanced or guaranteed by him together with interest and charges and as these were conceded to have been fully repaid to McKean when the action was commenced and he was discharged from all liability in respect of them, the equity of redemption of Black in the property was complete and entitled Black to the reconveyance claimed.

Once the evidence of McKean's statement, as to the meaning and intent of the agreement before set out, is accepted, and that such meaning and intent were indeed the inducements which led Black to sign it, the controversy would be at an end and Black's claim to a reconveyance would, in my opinion, be complete.

I accept fully the findings of the trial judge confirmed by the majority of the court on appeal on this point, and think that it is a reasonable construction of the agreement that all its other provisions relating to the cutting of the lumber on the land were at an end when McKean's advances and guarantees were fully paid and discharged. In other words, I hold that the statement of McKean as to the intent and meaning of the agreement and which formed the inducement on which Black signed it, was a correct statement and was accepted by the parties as such. If and when Black paid off all advances and interest and discharged McKean from his guarantees, he became at once entitled to a reconveyance.

The other provisions of the contract as to the cutting of the lumber by Black and handing it over to McKean for sale on a commission were, in my judgment, intended to be in force only while McKean's advances to Black, or his guarantees to the bank for Black, or some part of them, were still outstanding, and were intended as securities to McKean as against such liability and guarantees.

Section six (6) of the agreement provides for a condition which never arose, namely: Black "desiring to sell the property free from the agreement," and need not now be considered.

For these reasons I would dismiss the appeal with costs.

IDINGTON J.—The late Charles O. Black, engaged in the lumber business and, as the learned trial judge finds, in course thereof bought from the Nova Scotia Lumber Company a large property for $40,000, of which all had been paid but $5,000. Having met with some business reverses he needed help in order to pay that and raise $18,000 to carry on his lumbering business on said property.

The late George McKean agreed to go his surety to the Bank of Montreal for such amount as thus needed.

The Nova Scotia Lumber Company had given Black a bond to convey the said land upon the payment of the price and that was indorsed over, as Black expresses it, to the late George McKean at the time of entering into the agreement presently to be referred to. By virtue thereof the said company, three months later, conveyed the land to said McKean. Under the circumstances an ordinary form of mortgage

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might have easily been framed to express all that the parties intended, but, instead thereof, an agreement was entered into between said Black and said McKean (whom I shall hereinafter call the mortgagor and mortgagee respectively) drawn up by the latter's solicitor, dated 29th January, 1914, which recited the facts that the mortgagee had agreed to guarantee

> a certain advance to be made by the Bank of Montreal to the said party of the first part, and has also agreed to arrange for further advances to the said party of the first part during the lumbering season of 1914,

and also had entered into an agreement to purchase certain lumber from the said mortgagor, and, as security, said mortgagor had agreed to assign the said agreement for purchase of the said land to said mortgagee.

Then the operative part of the agreement contained a half dozen covenants such as might have been inserted in an ordinary mortgage had the parties taken that method of carrying out their arrangement.

If we have regard to what the parties were about these several instruments must be read together, and so read, the transaction was nothing more nor less than a mortgage accompanied by these covenants to secure the mortgagee against loss and incidentally get the profits to be derived from handling the mortgagor's entire lumber from timber on said land, until the advances and six per cent per annum thereon had been repaid.

That product for a year would seem to have been likely to be about three million feet of lumber.

From the expressions in the agreement the term of the year 1914 would seem to be all that was in the minds of the parties.

The first paragraph provided for the said mortgagor completely lumbering the property and selling the lumber to the mortgagee at such prices as they might agree on, or commission named.

The second provided that no other lumber should be cut on the premises nor should any cut there be sold to any one else than the mortgagee, his assigns or representatives.

These provisions the appellants contend entitle them as the successors in title of the mortgagee (who died in 1915) to hold the property free from the redemption by the said mortgagor who instituted this suit for the redemption of said mortgage.

This contention I will presently consider, after stating the substance of the other paragraphs.

The third paragraph was for quiet enjoyment and will be set forth later in full.

The fourth paragraph provided for the payment by the said mortgagor to the mortgagee of

> all loss or damage which may be caused to the said timber lands, lumber or property by fire or other casualty, and will hold the said party of the second part, his executors, administrators and assigns, harmless and indemnified therefrom.

The fifth bound the mortgagor to pay all rates and assessments on the property.

The sixth provided for the case of the mortgagor wishing to sell the property doing so on the terms of paying fifty cents a thousand on a basis of there being thiry million feet thereon.

These were followed by the following power of sale given McKean:—

> Provided always and it is hereby agreed, that on default in the repayment of the sums so guaranteed by the said party of the second part and all other sums that hereafter may be guaranteed by the said

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party of the second part, his executors, administrators or assigns, and all expenses, charges, costs, rates, taxes and assessments with interest at six per cent as aforesaid on the said property or any portion thereof, or the said lumber thereon, or any portion thereof, or in case of the loss or destruction of said property or any portion thereof or the lumber thereon or any portion thereof, by fire or other casualty, or in case of the breach by the party of the first part, his heirs, executors or administrators of any of the covenants or agreements herein contained it shall be lawful for the said party of the second part, his heirs, executors, administrators or assigns, either by public auction or private sale to sell and convey the said property hereinbefore referred to or any portion thereof and either in one block or in separate parcels as he or they may deem fit, and upon such terms as he or they in their discretion may deem advisable after giving notice to the said party of the first part of such sale by mailing at least seven days prior thereto at some post office in the province of New Brunswick by registered mail addressed "C. O. Black, Oxford, N.S." written notice of the time and place of such sale and no other or further notice or demand shall be necessary, and such notice shall be effectual whether the said Charles O. Black be living or dead; and the proceeds of such sale or sales the said party of the second part, his heirs, executors, administrators or assigns, shall apply in the first place to the expenses of such sale or sales and necessary conveyances, and, secondly, so far as they will go to or towards the repayment to the said party of the second part, his heirs, executors, administrators or assigns, of any sums that he may have paid or be liable for under said guarantee or may have advanced hereunder, together with interest, expenses, costs, charges, rates, assessments, moneys paid on account of rates, taxes and impositions or such portion thereof as may remain unpaid; and thirdly, to or towards any sums otherwise accruing due by the said party of the first part or his aforesaid to the said party of the second part, and shall pay the balance, if any, to the party of the first part, his heirs, executors, administrators or assigns, and that all contracts which shall be entered into, and all conveyances which shall be executed by the said party of the second part, his heirs, executors, administrators or assigns, for the purpose of effecting any such sale or sales shall be valid and effectual notwithstanding that the party of the first part, his heirs, executors, administrators or assigns, shall not join therein or assent thereto, and that it shall not be incumbent on the respective purchasers of said lands, property or premises or any part thereof, to ascertain or inquire whether such notice of sale shall have been given or to see to the application of the proceeds thereof.

This certainly (in the third part regarding the application of such proceeds of sale) does not countenance anything like the contentions of the present appellants.

It should have provided expressly for that fifty cents a thousand or for the commissions provided for in foregoing or something like thereunto, if the contentions set up are sound.

In the argument much was said by counsel for appellants about this agreement being unambiguous and not ambiguous as suggested by some of those dealing with it in the courts below.

It is contended that the language is plain and express.

So I answer is the third paragraph of the agreement, which reads as follows:—

> 3. That the said party of the second part, his heirs, executors, administrators and assigns, shall quietly and peaceably enjoy the said property and the said timber and lumber, and that the same are free from incumbrances.

If the sort of argument applied to paragraphs 1 and 2 is valid, why not rely on this one and simplify the whole business by setting up that least ambiguous of all.

Thereby the appellants are entitled to enjoy forever, as there is no limit of time named, the land in question.

Of course the answer thereto is that such was not within the contemplation of the parties.

The question thus raised as to the first and second paragraphs is whether the remarkable contentions set up by the appellants can be imagined as within the like contemplation of the parties when due regard is had to the surrounding circumstances and the conduct of the mortgagor and much more so of the appellants in later years.

I think the intention was made quite clear by the first part of the recital as quoted above that the mortgage was simply to indemnify the mortgagee for his suretyship for the contemplated advances by the bank.

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No doubt the parties intended that the mortgagee, as part of the inducement to him to become surety, was to get the benefit to be derived from handling the lumber produced so long as the advances made within the scope of said recital or interest thereon remained unpaid.

But I cannot imagine such a proposition as appellants contended for, that the advantages so implied during that period were to extend for ten years or more, being the length of time probably required to complete the lumbering.

It is not only inconsistent with the recital but also with the terms of the power of sale, and with the correlative right of redemption which the mortgagor would have the moment the condition came into existence, which would render the power of sale capable of operation.

The curiosities presented in the document shewing others like to the first two giving rise to these contentions of the appellants, do not end there or in the covenant number three, above quoted, for the pith of the fourth covenant, above quoted in part, provides, not for the protection of the mortgagee against his loss by reason of any fire, but for the payment to him

of the damage which may be caused to the said timber lands.

In as plain, unambiguous language as appellants claim for these other covenants in question the mortgagee would hereunder be entitled to claim the whole value of the timber destroyed by fire.

Of course no one ever imagined that such was the intention of the parties, but such is its literal meaning and we are left to guess what could be claimed under this covenant.

There is much to be said in favour of all these covenants presenting curiosities demonstrating such an inconsistency with the right of redemption as to render them null and void within many cases to be found when mortgagees had attempted to bar or render impossible the right of redemption.

I mean, of course, on the assumption that the results appellants claim are the true meaning thereof, interpreting and construing, in light of all the surrounding circumstances, as I do, that these first two covenants were only to be operative during the existence of the indebtedness for or in respect of the advances contemplated and then to cease. Though they are no models of accurate draftmanship, they are consistent with the creation of a mortgage and only a mortgage as being all that was intended by those concerned.

In the sense contended for by appellants they might be such as might be found in a partnership agreement but are hardly consistent with being part of a mortgage.

Evidently the explanation given the mortgagor, (who never met the solicitor who drew this document) who asked the mortgagee its meaning before its execution, and was told by him what he swore to and the learned trial judge believed, did not need much corroboration, if any needed in such a case.

Moreover the maxim relied upon in respondents' factum—*Verba chartarum fortius accipiuntur contra proferentem*—may, under such circumstances, be borne in mind.

The chances are, I suspect, that if the mortgagee had survived no one would have heard him set up such contention as appellants make.

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The unfortunate slips so evidently the result of haste in preparation of the document are cogent warnings against taking those now in question as literally correct.

Parts of any document, and especially one so prepared, may have in it sentences and covenants clear and unambiguous if taken alone, yet be most ambiguous when read in light of surrounding circumstances clearly demonstrating its real purpose.

Then as to the appellants, and relative thereto, it is to be borne in mind that their own conduct, as set forth in correspondence and accounts against them, is quite inconsistent with such claims as they set up.

In regard thereto I think the following passage in Fisher on Mortgages (Can. Ed.) relative to the analogous subject of mortgage or no mortgage, to be found in the 14th paragraph of that work, is worth quoting as a guide herein as against appellants' contention for what, I submit, is a claim for partnership.

> 14. And while the courts protect a *bona fide* purchaser, and will not lightly infer an intention to make a mere security, if none be expressed they will give effect to an intention, if proved, to create a security, and will also take care that a borrower shall not suffer from the omission by fraud, mistake, or accident, of the usual requisites of a mortgage.
>
> An instrument which purports to be an absolute conveyance, may therefore be construed as a mortgage, where, according to the true intention of the parties, it was intended to be regarded as a mortgage.

In conclusion I take the conduct of the mortgagor and mortgagee, the nature of the business they had in hand and the fact that by the hypothecation of the product of the lumber to the bank by the mortgagor with the knowledge and assent of the mortgagee to secure payment of the advances by the bank, to be cogent evidence of the transaction being a redeemable mortgage and not a partnership, or something akin thereto.

And the conduct of appellants in relation thereto after the death of the mortgagor, renders it clear that respondents are entitled to succeed quite independently of the evidence of the mortgagor of what the mortgagee told him.

But I do not doubt that such evidence may well be received on the basis of what transpired being used in regard to the right of redemption denied by the appellants on the strength of a most ambiguous provision, if room for the contentions set up, and that there is abundant corroboration in the other provisions of the document.

Suppose the case of a mortgagor bound by the terms of his mortgage to insure, having assigned his policy to the mortgagee by an instrument that was absolute in orm and expressed as made for due consideration, but nothing else disclosing the actual consideration, and the insurers saw fit to pay what became due thereon, as result of fire, to such assignee next day after all the money due on the mortgage had been paid, and he died immediately after the receipt of such insurance money, how much and what kind of corroboration would be needed for the mortgagor to establish his rights to recover same from the representatives if the innocent mortgagee's representatives chose to insist as appellants do that the mortgagor's version of his rights must be corroborated?

I submit the surrounding facts and circumstances might suffice as they ought to do herein.

I think the appeal should be dismissed with costs.

DUFF J.—This appeal, in my opinion, should be dismissed. Parol evidence is, I think, admissible in all cases where the question arises whether a covenant

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absolute in form is intended as security and whether the real transaction is or is not a transaction of loan, that is to say, whether the property was to stand as security for the repayment of money advanced. The trial judge had held that such was the nature of this transaction and that according to the true intent of the parties the provisions of the agreement notwithstanding their form were intended to stand as security for the repayment of money advanced or to be advanced. I have discovered no satisfactory ground upon which that finding could be reversed.

ANGLIN J.—Not, I confess, without some lingering doubt, I concur in the conclusion of the learned trial judge affirmed by the majority of the learned judges of the Nova Scotia Appellate Court as to the nature and scope of the agreement between the late Charles Black and the late George McKean; but the award of damages to the plaintiff for the defendants' refusal to reconvey the land in question I think cannot be upheld.

This is not the comparatively familiar case of a defendant maintaining that a deed of conveyance in form absolute truly represents the transaction it purports to evidence against the plaintiff's assertion that it was intended to be held merely as security and is therefore in reality a mortgage. That the transfer to the late George McKean of the property in question was merely as security is common ground. The controversy between the parties is rather as to what it was given to secure—whether merely repayment of advances made by McKean with interest, as the plaintiffs assert, or also performance of an agreement, which the defendants maintain that the plaintiffs' testator, the late Charles Black, made, to lumber the property completely and either to sell and deliver the

entire product to McKean at prices to be agreed upon, or, if such agreement should not be reached, to ship such product to him on consignment and commission at stated rates. The parties also differ as to the extent and duration of the right conferred on McKean to handle the lumber produced by Black from the property. The plaintiffs maintain that that right was given merely as security for the repayment of McKean's advances and interest and was to terminate upon such repayment being completed. The defendants insist that it was absolute, that it formed the inducement for making the advances, and that it was to subsist after they were repaid and until all the lumber on the land had been cut by Black and delivered to McKean either as its purchaser or as commission agent, even though Black should sooner become entitled to a reconveyance of the land.

While the omissions from the recital in the contract under consideration of any reference to the cutting of lumber subsequent to the year 1914, and from its concluding clause of all provision for compensation to McKean for loss of profit on the sale of lumber still uncut should his power of sale for default be exercised, may be open to observation, as is pointed out by the learned Chief Justice of Nova Scotia, I am disposed to agree with Mr. Justice Russell that they scarcely created an ambiguity sufficient to justify a refusal to give effect to the plain and unambiguous covenant of Black to cut, manufacture and deliver to McKean all the lumber on the land, etc. The evidence of W. K. McKean, if accepted, would make it reasonably clear that the obtaining of this business advantage was the chief, if not the sole, consideration which moved his father to enter into the agreement and at least one passage in the cross-examination of Black would

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support that view. The provision of the agreement for the payment by Black to McKean, in the event of the former selling the property, of 50 cents per M for 30,000,000 feet of lumber, estimated to be standing on the property, less what might have been already shipped to or handled by McKean, also tends to indicate that the defendants' contention as to the real intent of the parties in making the arrangement is sound.

While the recital declares that the property is to stand as security for advances, it also states that it is to serve as security "for the performance of this * * agreement," the first operative provision of which, immediately following the recital, is the covenant of Black "to completely lumber the said property" and to "saw, manufacture and deliver all the lumber on the said property" to McKean, at prices to be agreed upon, or, in default, of such agreement, "on consignment and commission" at stated rates. But for the findings of the learned trial judge based on the oral evidence of Black, and accepted by the appellate court, that it had been represented to him by the late George McKean immediately before the execution of the agreement that this was not its purport or intent, but, on the contrary, that the meaning and scope of the agreement was that McKean should hold the lumber on the property only until he should be repaid all advances with interest and that Black executed the document under the belief, so induced, that this was its effect, I should probably have felt constrained to uphold the contention, ably and forcefully presented by Mr. Taylor and Mr. Jenks on behalf of the appellants, that the covenant for cutting and delivering all the lumber on the premises must be given effect according to its tenor and that Black's

property had been pledged as security for its performance. But I am inclined to think we should not interfere with the findings made by the learned trial judge and affirmed on appeal unless the evidence on which they are based was inadmissible, or s. 35 of the Nova Scotia Evidence Act (R.S.N.S., 1900, c. 165) prevents effect being given to it.

The admissibility of the evidence cannot, I think, be rested on ambiguity in the agreement. In the first place, as already stated, I do not find any such ambiguity. But if, as held by the learned trial judge and the learned Chief Justice of Nova Scotia, there is inconsistency between the recital and the final proviso on the one hand and the covenant invoked by the defendants on the other which renders the whole instrument equivocal, that, with respect, would seem to be a patent ambiguity and as such, in the quaint language of Lord Bacon, not to be "holpen by averment." *Saunderson* v. *Piper* (1).

But in support of a claim for reformation or of a plea of estoppel grounded on misrepresentation, whether fraudulent or innocent, the evidence under consideration was, I think, admissible. Its sufficiency is of course another question.

Fraud, it is true, is not alleged, and there may therefore be a difficulty in the way of the plaintiffs recovering on that ground without amendment. But the defendants seem to me to be in this dilemma. Accepting the finding that the representation deposed to by Black was made to and acted upon by him, it was either honestly and innocently, or dishonestly and fraudulently made. If the latter, the defendants would scarcely be heard to allege the turpitude of the party through whom they claim. If the former,

(1) 5 Bing. N.C. 425.

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there was mutual mistake such as would afford a ground for reformation. Moreover, for a party who had made such a misrepresentation or for those claiming under him to insist upon holding the other party to the terms of a contract his execution of which was so induced, however innocently, would be the *ex post facto* fraud dealt with by Jessel M. R., in *Redgrave* v. *Hurd* (1), at page 12. We had to consider the admissibility of somewhat similar evidence and the effect of such a misrepresentation as raising an equitable estoppel in the recent case of *Bathurst Lumber Co.* v. *Harris* (23rd of Nov. 1920).

The learned trial judge found in the circumstances and in the terms of the agreement itself corroboration sufficient to satisfy s. 35 of the Nova Scotia Evidence Act. The learned Chief Justice of Nova Scotia, and Longley and Ritchie JJ. and also (with some doubt) Chisholm J. concurred in that view, and I do not understand Russell J. to express any dissent from it. I am not convinced that the conclusion reached on this point was wrong. Yet the corroboration relied on, if any, is very slight and while, as was held in *Radford* v. *Macdonald* (2), all that the statute requires is that the evidence to be corrorobated shall be

> strengthened by some evidence which appreciably helps the judicial mind to believe one or more of the material statements or facts deposed to,

and, as was said in *Green* v. *McLeod* (3),

> the "material evidence" in corroboration may consist of inferences or probabilities arising from other facts and circumstances,

I share Mr. Justice Chisholm's doubt as to the value as corroboration of an agreement alleged by the plaintiffs to be ambiguous and were it not for the aid on

(1) 20 Ch. D. 1. (2) 18 Ont. App. R. 167.
(3) 23 Ont. App. R. 676.

this branch of the case afforded to them by the letter of the defendants' agent, C. H. Read, of the 28th of December, 1918, I should doubt whether the statute had been satisfied. But I find in the record that at the close of the trial

> it was agreed between the parties that for the purpose of this action the defendants are to be taken to be in the same position as if the defendant were George McKean and he was still alive.

If that were the situation no question of corroboration would arise and I am disposed to think that this agreement, although that may possibly be a result which the parties did not contemplate, wholly excludes the application of s. 35 of the Nova Scotia Evidence Act.

During the course of the argument the suggestion was made from the Bench that if the contract should be held to give to the defendants the right for which they contend it would be unenforceable as obnoxious to the rule of equity prohibiting the clogging or fettering of the mortgagor's equity of redemption. Counsel, however, did not discuss this aspect of the case, and, in the absence of argument, I should not be disposed to express a concluded opinion upon it. It might be a very nice question whether the right asserted by the defendants that after repayment of all advances and interest they should still control the output of the mortgaged property either as purchasers at a price to be agreed upon, or as commission agents at fixed rates, was inconsistent with Black's contractual and equitable rights to have his property restored unfettered upon such repayment, as was held to be the case in *Bradley* v. *Carritt* (1), or was merely a stipulation for

(1) [1903] A.C. 253.

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an independent collateral advantage not in itself unfair or unconscionable, not in the nature of a penalty clogging the equity of redemption, and not inconsistent with or repugnant to the contractual and equitable right to redeem as, in *Kreglinger* v. *New Patagonia Meat & Cold Storage Co.* (1), at page 61, a provision for an option of pre-emption was deemed to be under the circumstances of that case.

As at present advised I should be disposed to regard the transaction as evidenced by the written instrument as fair and businesslike and not within the mischief aimed at by any equitable rule or maxim relating to the clogging or fettering of the equity to redeem a mortgage. If the evidence of Black, on the strength of which the contrary view has prevailed, were not in the record I should have said the intention of the parties as shewn by their contract was that Black should not by repaying the McKean advances and interest be entitled to put an end to McKean's stipulated right to handle the entire output of the mortgaged property either as purchaser or as commission agent. As put by Lord Parker in the *Kreglinger Case* (1), at p. 61:

> I doubt whether even before the repeal of the usury laws, this perfectly fair and businesslike transaction would have been considered a mortgage within any equitable rule or maxim relating to mortgages. The only possible way of deciding whether a transaction is a mortgage within any such rule or maxim is by reference to the intention of the parties. It never was intended by the parties that if the defendant company exercised their right to pay off the loan they should get rid of the option. The option was not in the nature of a penalty nor was it nor could it ever become inconsistent with or repugnant to any part of the real bargain within any such rule or maxim. The same is true of the commission payable on the sale of skins as to which the option was not exercised.

(1) [1914] A.C. 25.

Mutatis mutandis this language seems to fit the case at bar. But it is unnecessary to pass upon this aspect of the case and, as I have said, I prefer not to do so without the assistance of argument upon it.

Subject to modifying it by striking out the clauses awarding damages and providing for a reference to assess them the judgment in appeal should be affirmed.

MIGNAULT J.—In my opinion, clause one of the agreement signed by the parties, obliging the plaintiff, Charles O. Black, to completely lumber the property and sell the timber to the appellants, is not ambiguous nor should it be construed as being merely a guarantee to secure the repayment of the advances made to Black, and as ceasing to produce effect when these advances are repaid. It is, in my opinion, an independent covenant. See *Kreglinger* v. *New Patagonia Meat & Cold Storage Co., Ltd.* (1), where a somewhat similar covenant was made.

The case of the plaintiff, now represented by the respondents, is however that he was induced to sign this agreement by the representations of the late George McKean that

> the meaning and intention of this agreement is that we hold all the lumber on this property until we are paid off all our advances with interest, that means to say, you can't sell any lumber off this property until you cut enough to pay us all off, because if you did we would not have enough security, and that is what the agreement means.

The learned trial judge believed Black's evidence that this representation was made to him. It is contended that the matter could not be proved by parol evidence. The learned trial judge decided otherwise and under all the circumstances of the case I do not think he was in error in allowing this evidence.

(1) [1914] A.C. 25.

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McKEAN AND COMPANY v. BLACK

Mignault J.

He also considered that there was sufficient corroboration under the statute requiring corroboration as to statements alleged to have been made by deceased persons. This is the only point on which I entertain any doubt, but this doubt is not sufficient in my judgment to justify me in reversing the finding of the trial judge. The question of corroboration has already been passed upon by two courts and I am satisfied to abide by their decision.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *L. A. Lovett.*

Solicitor for the respondents: *W. A. Henry.*

THE ROYAL BANK OF CANADA, TRUSTEE FOR SIR HERBERT HOLT, GEORGE UNDERWOOD AND ESTATE OF THE LATE SIR WILLIAM C. VAN HORNE (DEFENDANT)..... APPELLANT;

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*May 23.
*June 7.

AND

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

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK.

Timber—Crown lands——Licence to cut—Option to cut or not cut—Payment of stumpage dues without cutting—Operating in subsequent years—Claim of anticipated payments.

Licences for lumbering on Crown lands in New Brunswick contain a regulation passed by the Lieutenant Governor in Council which provides that the licensee may be required to cut, annually, at least 10,000 superficial feet of lumber for each square mile of his holding with the option in any case of paying the stumpage that would be due on the required quantity and not cutting.

Held, that a licensee who, for one or more years, had elected to pay and not cut is not entitled to have the amount so paid deducted from the stumpage fees due to the Crown when he eventually operates over the limits.

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick reversing the judgment at the trial in favour of the defendant.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Brodeur and Mignault JJ.

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The defendant was holder of a licence to cut lumber on Crown lands with a right of annual renewal for a number of years on complying with all stipulated conditions. The licence was subject to, and contained, the following regulation passed by the Governor in Council:—

"As a protection to the Government against lands being held under licence for speculative purposes, and not operated on, all licensees shall make such operations annually on the lands held by them under licence as may be deemed reasonable to the Minister of Lands and Mines, and the Minister of Lands and Mines shall have the power to call upon any licensee to cut an amount equal to at least ten thousand superficial feet of lumber for each square mile of licensed land held by the licensee as the Minister of Lands and Mines may determine or direct. Should the licensee prefer to pay the stumpage that would be due on such quantity of lumber at ten thousand superficial feet per mile, instead of making the required operation or cut, he shall have the right to do so in any year, on his notifying the Minister of Lands and Mines to that effect, and obtaining his consent thereto, and such charge in lieu of stumpage shall be payable on or before the first day of August. On failure of the licensee to comply with any of the foregoing conditions, the licences shall be forfeited and the berths held under them shall become vacant, and be open for application by any other person."

For three years the defendant paid the stumpage dues without cutting. In the fourth year the lumber was cut and the stumpage paid without question, but the next year when operations were continued the claim was set up that the amounts paid in the first three years should be credited to defendant and

deducted from the stumpage for that season's cut. This claim was allowed by the trial judge but his judgment was reversed on appeal to the Appeal Division.

H. A. Powell K.C., for the appellant: Regulation 17 is *ultra vires* of the Governor in Council. Power is given to make regulations in regard to the cutting and removing of lumber which only covers the mode of operating and does not authorize compulsion or restriction as to quantities to be cut.

Assuming it to be *intra vires*, it is not reasonable. If the 10,000 feet per mile is cut the Crown has the stumpage fees and the licensee the lumber. If not cut the Crown has both the money and the timber since it is possible that the licensee may never cut it. If he does the Crown gets the same amount again as the regulation has been construed.

The principle that should govern in this case, if necessary to invoke it, has been laid down in several judicial decisions. It is that where the construction of an Act according to its ordinary meaning would work a manifest injustice an interpretation that would not have that effect should be adopted if a grammatical and reasonable construction of the language so permits. See *In re Brocklebank* (1); *Plumpstead Board of Works* v. *Spackman* (2); *Moon* v. *Durden* (3).

J. J. F. Winslow for the respondent: The right of the defendant to pay without cutting is one to be exercised "in any year." He holds only an annual licence and the right to renewal does not make it anything else. *Lakefield Lumber Co.* v. *Shairpe* (4). Hence the right exercised in any year is exhausted when that year ends.

(1) 23 Q.B.D. 462.
(2) 13 Q.B.D. 878 at p. 887.
(3) 2 Ex. 22, at page 68.
(4) 19 Can. S.C.R. 657.

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The intention of this regulation is to have the licensee pay for the privilege of leaving the timber standing. The defendant recognized this when in the fourth year the lumber was cut and the stumpage dues paid without any claim for deduction.

The rule of the maxim *verba fortius accipiuntor contra proferentem* does not apply to Crown grants which are construed more strongly against the grantee. *Bulmer* v. *The Queen* (1).

THE CHIEF JUSTICE.—This was an action brought by the Attorney General of New Brunswick to recover the sum of $5,616.68, being the alleged balance due for "stumpage" on Crown lands during the year ending August 1st, 1919, with interest.

The defence was that this sum had already been paid by the defendant appellant to the Crown in the years 1913, 1914 and 1915, excepting $619.20 which was admitted to be due, and paid before action.

In the year 1913, pursuant to c. XI of the Acts of Assembly of New Brunswick of that year, the then holders of licences were permitted to take out new licences very similar to the old ones, but providing for annual renewals for 20 years from August 1st, 1913.

In addition to "stumpage" on lumber cut, the province charges annual mileage at $8.00 per mile and other fees, and it was stated and was not denied that from these stumpage, mileage and other fees, the province derives about one-half of its total annual revenue.

The whole contest in this appeal turns upon the construction of Regulation 17 issued under and pursuant to the statute before referred to. Shortly put it is this:

(1) 23 Can. S.C.R. 488, at page 496.

Is the licensee of any area having elected not to cut timber under his licence in any year, and having paid to the Crown the "charge in lieu of stumpage," provided for in the regulation for that year, entitled, in a subsequent year when he has elected to cut lumber on his lot, to set off or deduct from the amount payable under the regulation for such cutting the amounts he had paid in previous years when he had elected not to cut as and for stumpage, or "in lieu of stumpage."

Mr. Powell contended very strongly for the appellant that to hold he was not so entitled was tantamount to asking him to pay stumpage twice over.

Section 17, on the construction of which the controversy between the parties depends, reads as follows:—

As a protection to the Government against lands being held under licence for speculative purposes, and not operated on, all licensees shall make such operations annually on the lands held by them under licence as may be deemed reasonable to the Minister of Lands and Mines, and the Minister of Lands and Mines shall have the power to call upon any licensee to cut an amount equal to at least ten (10) M superficial feet of lumber for each square mile of licensed land held by him, and may require that such operation or cut shall be made on such blocks of timber lands held by the licensee as the Minister of Lands and Mines may determine or direct. Should the licensee prefer to pay the stumpage that would be due on such quantity of lumber at 10 M superficial feet per mile, instead of making the required operation or cut, he shall have the right to do so in any year, on his notifying the Minister of Lands and Mines to that effect, and obtaining his consent thereto; and such charge in lieu of stumpage shall be payable on or before the first day of August. On failure of the licensee to comply with any of the foregoing conditions, the licences shall be forfeited and the berths held under them shall become vacant, and be open for application by any other person.

The learned trial judge held that under the true construction of this section the licensee having once paid the charge for stumpage, or, as the regulation

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The Chief Justice.

states, "in lieu of stumpage" for a specific year, he could, in a subsequent year when he elected to cut, claim to have the sum so previously paid by him credited to the charge he was liable to pay in the year he elected to cut.

On appeal to the Appeal Division of the Supreme Court of New Brunswick, that court unanimously reversed the finding of the trial judge. Mr. Justice Grimmer, in delivering the judgment of the court, puts the question very clearly and I fully agree with his construction of the section.

He says:—

> In my opinion the intention of this section is clear. It enabled the Crown to secure a certain amount of protection as far as revenue was concerned, from the lands held by the licensee thus preventing the tendency to speculation and it conferred upon the licensee an option either to cut or to pay for the privilege of not cutting, which option if elected by the licensee, in my opinion simply entitled him to retain his licence and prevent the forfeiture, which otherwise would take place under the provisions of the regulation. The words "such charge in lieu of stumpage" are to my mind clear and unmistakable, and the choice once made by the licensee and consented to by the Minister became final, the licensee thereby paying for the option which he enjoyed as hereinbefore stated * * *. I cannot and do not consider that Section 17 requires a payment from the licensee in any sense as a penalty for not making the operation or cut required by the Minister, but it does confer upon him, as stated, the privilege of holding his lands without making a cut or operation, upon payment of a sum fixed by the Minister. In such a case an election to pay would not be in the nature of an anticipated payment for stumpage, but would be simply for the enjoyment of the privilege which was conferred. Should there be any uncertainty in the words "the stumpage that would be due" in my opinion it is fully explained and the purpose and intention made plain by the other words "such charge in lieu of stumpage" which to my mind place upon the object of the section a construction clear, plain and unequivocal.

I do not consider it necessary to elaborate upon the learned judge's remarks. I would, therefore, dismiss the appeal with costs.

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Idington J.

IDINGTON J.—The respondent sued appellant for stumpage dues it had become responsible for, as holder of a licence to cut timber in the Province of New Brunswick in the year from 1st August, 1918, to 1st August, 1919, which amounted to $6,070.25, but was reduced before action by the payment of $602.75.

The appellant's licence was one of the kind that was renewable from year to year and the annual stumpage dues might be increased from year to year without the consent of the licensee by the Minister of Lands and Mines as he saw fit.

Section 4 of the Act of 1913 relative to such Crown timber lands and licences to cut thereon, reads as follows:—

> The Lieutenant Governor in Council shall from time to time fix and determine the rates of stumpage to be paid upon the various kinds of lumber cut from the Crown lands by the licensees, and shall determine the mileage to be paid annually by the licensee, and shall make such other rules and regulations in regard to the cutting and removing of lumber from the Crown land areas as may seem to him just, wise and prudent.

Thereunder the Lieutenant Governor in Council made the following amongst other regulations:—

> (c) As a protection to the Government against lands being held under license for speculative purposes, and not operated on, all licensees shall make such operations annually on the lands held by them under licence as may be deemed reasonable to the Minister of Lands and Mines, and the Minister of Lands and Mines shall have the power to call upon any licensee to cut an amount equal to at least ten thousand superficial feet of lumber for each square mile of licensed land held by the licensee as the Minister of lands and Mines may determine or direct. Should the licensee prefer to pay the stumpage that would be due on such quantity of lumber at ten thousand superficial feet per mile, instead of making the required operation or cut, he shall have the right to do so in any year, on his notifying the Minister of Lands and Mines to that effect, and obtaining his consent thereto, and such charge in lieu of stumpage shall be payable on or before the first day of August. On failure of the licensee to comply with any of the foregoing conditions, the licences shall be forfeited and the berths held under them shall become vacant, and be open for application by any other person.

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Idington J.

That was set forth in full in the licence issued to the appellant in 1913 as part of the terms upon which the licence was continued in force; and also in each succeeding renewal thereof.

The parties hereto at the trial agreed upon the facts to be had in view in determining the issue raised.

That remarkable issue is that the appellant, after having acted upon the said regulation not only for the year 1913-1914, but also for each of the two succeeding years, and paid each year the sum of $1,822.50 as the yearly price for the privilege of refraining from cutting, without any resistance, now sets up the contention that such payments were mere payments on account of future cutting under later licences.

The amusing feature of appellant's claim is that it did cut in the fourth year and paid the full amount of the dues for and in respect of said year's actual cut, and never suggested what now is claimed until settlement demanded for the actual cutting of the fifth year.

Not only did it forget to raise the question when paying for the dues it owed for its actual cut of the year August 1917 to August, 1918, but in the admissions made at the trial it described what had transpired in respect to the first year's exercise of a privilege of refraining from cutting, as follows:—

> And the Minister, after the issuing of such renewal licences called upon the defendant, as licensee, to cut during the said term upon the said lands 1,225,000 superficial feet of timber, an amount equal to 10,000 superficial feet of timber, for each square mile of the same, and the defendant preferring to pay the stumpage that would be due on such quantity of timber, namely, 1,225,000 superficial feet, instead of making the said required operation or cut during the said term thereupon notified the Minister of its said preference and the Minister consented that the defendant should exercise such preference and fixed at $1,822.50 the amount of stumpage the defendant should pay

on such quantity of timber in accordance with the rates of stumpage then payable by licensees of Crown timber lands for timber cut thereon by the licensees thereof, and the defendant accordingly did not cut during the said term any timber on the said lands but paid to the provincial treasurer the sum of $1,822.50, being the amount of stumpage so fixed to be paid * * *

There does not seem to have been a shadow of doubt in the minds of those concerned at the times of the several renewals and payments made by appellant of the nature of the transaction being what respondent contends. Nor was any pretension to the contrary set up till two years of cutting had taken place.

Had such a pretension been set up at an earlier date doubtless it would have been ended by the Minister advising an increase of the stumpage dues under the licence to what was necessary to cure the complaint.

The appellant, I submit, cannot now, properly, steer in silence past such a danger for two years and then set up what rests on nothing but a war of words, regardless of the conduct of appellant in paying on the actual basis of what was clearly a common mutual understanding quite inconsistent with what is now contended for.

I always prefer the interpretation so given, to results to be got by doubtful argument as to words, suggested by afterthought, of what either might have claimed long ago.

However, I doubt if the interest to be saved the province would ever have occurred to its Minister as worth taking such pains for or as an effectual check upon speculation.

For these reasons, and adopting in the main the reasoning of the Court of Appeal, I think the appeal should be dismissed with costs.

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Duff J.

DUFF J.—My opinion touching the questions in controversy accords with that of Mr. Justice Grimmer whose reasoning is, I think, conclusive. The appeal should be dismissed with costs.

BRODEUR J.—This appeal turns upon the construction of Regulation 17 made by the Lieutenant Governor in Council of New Brunswick concerning the persons having saw mill licences on Crown lands.

A licence was issued in 1913 in favour of the Royal Bank *in trust* for different persons and it contained a provision that the licensee would carry out the rules and regulations made in connection with the Crown land areas.

Regulation 17 in dispute reads as follows:—

> 17. As a protection to the Government against lands being held under licence for speculative purposes, and not operated on, all licensees shall make such operations annually on the lands held by them under licence as may be deemed reasonable to the Minister of Lands and Mines, and the Minister of Lands and Mines shall have the power to call upon any licensee to cut an amount equal to at least ten (10) M superficial feet of lumber for each square mile of licensed land held by him, and may require that such operation or cut shall be made on such blocks of timber lands held by the licensee as the Minister of Lands and Mines may determine or direct. Should the licensee prefer to pay the stumpage that would be due on such quantity of lumber at 10 M superficial feet per mile, instead of making the required operation or cut, he shall have the right to do so in any year, on his notifying the Minister of Lands and Mines to that effect, and obtaining his consent thereto, and such charge in lieu of stumpage shall be payable on or before the first day of August.

It appears that before the legislation of 1913 there was no disposition by which the Government could get the timber limits under licence exploited, and the licensees could for years and years keep the limits without making any cutting. This regulation 17 remedied this undesirable state of affairs and gave the Minister of Lands the power of forcing the licensees to make a certain quantity of cutting.

However, the right of the Minister was not absolute, for the regulation provided that if the licensee preferred not to do the cutting required by the Minister then he would have to pay

> the stumpage that would be due on the quantity of timber which he had been ordered to cut

and such *charge in lieu of stumpage* should be payable on the first day of August.

For three years the appellant did not make the operations ordered by the Minister and paid to the Government the charge stipulated in the regulation. In the fourth, the appellant cut a larger quantity than the one required by the Minister for that year and paid the stumpage dues on the whole quantity he cut. In the fifth year, he still cut a much larger quantity than the one required; but this time, instead of paying the dues, he claimed that he should be given credit for the sums which he had paid in the first three years. It is contended on the contrary by the Government that the amount which was paid did not form part of the stumpage dues but that it was an additional charge.

If the first part of the regulation in which is mentioned the payment of stumpage were alone, there would be no doubt, according to my opinion, that the licensee would be entitled to claim that the money which he paid was an advance payment of stumpage on lumber to be cut, but the last part of the regulation makes it very clear that the payment which he makes is a *charge in lieu of stumpage*. This charge or payment is for the privilege which he acquires to have his licence renewed in paying a sum of money representing the dues which he would have paid if he had cut the quantity of timber required by the Minister.

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Brodeur J.

This payment is not an advance payment, but it is a charge which he is called upon to pay if he does not fulfil the obligation imposed upon him by the Minister. The appellant itself appears to have so construed the agreement, since, in the fourth year, it did not claim, when it paid its dues, that the previous payments were to be considered as advance payments.

I, therefore, agree with the construction made by the court below of this regulation 17 and the appeal should be dismissed with costs.

MIGNAULT J.—The learned counsel for the appellant left nothing unsaid that could serve as an argument against the judgment appealed from. At first sight, there appeared to be a certain plausibility in his contentions which prevailed before the trial court, but when carefully scrutinized, I cannot accept these contentions as being sound. The whole question turns upon the construction to be placed upon the licence under which the appellant held from the Crown the right to cut timber on 122½ square miles of land belonging to His Majesty in right of the province of New Brunswick.

The clause which gave rise to the difficulty is section 17, which reads as follows:—

As a protection to the Government against lands being held under licence for speculative purposes, and not operated on, all licensees shall make such operations annually on the lands held by them under licence as may be deemed reasonable to the Minister of Lands and Mines, and the Minister of Lands and Mines shall have the power to call upon any licensee to cut an amount equal to at least ten (10) M superficial feet of lumber for each square mile of licensed land held by him, and may require that such operation or cut shall be made on such blocks of timber lands held by the licensee as the Minister of Lands and Mines may determine or direct. Should the licensee prefer to pay the stumpage that would be due on such quantity of lumber at 10 M superficial feet per mile, instead of making the required operation or cut, he shall have the right to do so in any year, on his notifying the

Minister of Lands and Mines to that effect, and obtaining his consent thereto; and such charge in lieu of stumpage shall be payable on or before the first day of August. On failure of the licensee to comply with any of the foregoing conditions, the licenses shall be forfeited and the berths held under them shall become vacant, and be open for application by any other person.

I may add that the licence was also subject, as a condition of its renewal, to the payment of $8.00 per square mile over and above all stumpage dues, and this mileage has been regularly paid.

In February, 1912, Hilyard Brothers assigned to the appellant a saw mill licence for the territory in question. In the two years ending August 1st, 1912, and 1913, no lumber was cut on these lands and a new licence was issued to the appellant on August 1st, 1913, for another year ending August 1st, 1914. In the latter and subsequent licences was inserted section 17 above quoted.

During the years beginning on August 1st, 1914, 1915, and 1916, the licensee was called upon by the Minister of Lands and Mines to cut an amount of at least ten thousand superficial feet of lumber for each square mile. The appellant did not cut this lumber but under section 17 paid to the Government $1,822.50 in each year, which would correspond to the stumpage on the quantity which it had been required to cut. In the year beginning on August 1st, 1917, the appellant being again called upon to cut this quantity of lumber, cut an excess amount and paid the stumpage thereon without asserting any right to set off previous payments.

The claim to offset these previous payments was first made in answer to the demand of stumpage dues on lumber cut during the year beginning on August 1st, 1918. Whether the appellant is entitled to have these payments applied so as to reduce the stumpage due for the latter year is the question to be decided.

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Mignault J.

Briefly the appellant's contention is that although it cut no lumber during the three years beginning on August 1st, 1914, 1915, and 1916, it paid the stumpage dues that would have been payable on the required cut of ten thousand superficial feet per square mile, and that when it subsequently did cut lumber, these stumpage dues should be credited on the lumber then cut. It lays stress on the words in section 17:—

> Should the licensee prefer to pay the stumpage that would be due on such quantity of lumber * * *

The respondent answers that the amounts paid for the years wherein lumber was not cut were paid for the privilege of holding the lands without cutting lumber thereon, and relies on the words

> such charge in lieu of stumpage shall be payable, etc.,

as shewing that the appellant paid a charge, *not* for stumpage but in lieu thereof, for this privilege.

Section 17 expressly states that its purpose is to protect the Government against lands being held under licence for speculative purposes and not operated on. Reading the whole clause, it appears clear that the intention was to require the payment each year of a minimum amount whether or not the licensee cut any lumber. Had the required quantity been cut, this payment would undoubtedly be for stumpage, but where no lumber was cut, I cannot, on my construction of this clause, come to the conclusion that the payment was on account of stumpage, for stumpage being by definition "a tax charged for the privilege of cutting timber on State lands" (New English Dictionary), there could be no stumpage in the absence of the cutting of any lumber. And although the licensee, to use the language of this clause, was allowed to pay the stumpage that would be due on the minimum

quantity required to be cut instead of making the required operation or cut, he really paid a charge in lieu of stumpage, for it would be an abuse of language to term such a payment as one made for stumpage when no lumber was cut and no stumpage had accrued, and the only meaning it can have is that it was made for the privilege of not cutting the quantity specified by the Minister.

Another consideration is that stumpage dues might increase and did in fact increase in the subsequent years, and it would be unreasonable to allow the licensee, when he actually did cut lumber, to escape from paying the increased stumpage, by reason of previous payments at a lower rate for the privilege of making no cut of lumber.

For these reasons my conclusion is that the appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *H. A Powell.*

Solicitors for the respondent: *Winslow & McNair.*

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June 9.
June 20.

ADA SHERLOCK (PLAINTIFF).....APPELLANT;

AND

THE GRAND TRUNK RAILWAY COMPANY (DEFENDANT).....RESPONDENT.

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

Statute—Application—Railway Company—Carriage of traffic—Personal baggage—Limitation of liability—Powers of Board of Railway Commissioners—Railway Act R.S.C. [1906] *c.* 37, *s.* 340.

By sec. 340 of the Railway Act a railway company cannot, by contract or otherwise, limit its liability in respect to the carriage of traffic unless authorized by the Board of Railway Commissioners; the Board may, by regulation, determine the extent to which the liability may be limited (s.s. 2), and it may prescribe the terms and conditions under which any traffic may be carried.

Held, affirming the judgment of the Appellate Division (48 Ont. L.R. 237) that a regulation, providing that a carrier shall not be liable for loss of or damage to personal baggage caused by negligence or otherwise to an amount greater than one hundred dollars unless greater values are declared and extra charges paid at time of checking, is *intra vires* of the powers of the Board.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment at the trial (2), in favour of the respondent.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 48 Ont. L.R. 237. (2) 47 Ont. L.R. 473.

The appellant is a commercial traveller residing in the City of Hamilton, and on the 7th day of May, 1919, she purchased a ticket from Hamilton to Toronto, which ticket was the ordinary ticket issued by the respondent, and contained no conditions or restrictions whatever either on its face or back. After she had purchased her ticket, the appellant went to the baggage office and checked her trunk containing her wearing apparel and personal belongings and received in return a check. There was nothing said to her by the clerk who handed her the check to draw her attention to the fact that this check was anything more than a mere receipt for the trunk and the plaintiff herself did not notice that the check contained thereon any terms or conditions whatever.

The trunk was lost on the journey and has not yet been recovered, and the appellant brought this action for the value of same. The respondent paid the sum of one hundred dollars into court but denied further liability, relying on the terms and conditions which were printed on the back of the check and pleaded that the said conditions were authorized by and contained in General Order 151 of the Railway Board of Canada, dated the 8th day of November, 1915, and that said order was duly published in the Canada Gazette and had therefore the same effect as if contained in the Railway Act. The substance of this order is given in the above head-note.

The case was tried before the Honourable Mr. Justice Rose and judgment was delivered on the 4th day of May, 1920, giving effect to the respondent's contention and dismissing the appellant's action with costs. This judgment was affirmed by the Appellate Division.

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SHERLOCK v. THE GRAND TRUNK RAILWAY CO.

Hellmuth K.C. and *J. Y. Murdock* for the appellant. The relation of passenger and agent entitles the passenger to have his luggage transported without additional charge. *Spencer* v. *Canadian Pacific Ry. Co.* (1); *Carlisle* v. *Grand Trunk Ry. Co.* (2).

No limitation of the carrier's liability would have effect unless it is shown that it was read by the appellant or her attention was called to it when the check was delivered. *Lamont* v. *Canadian Transfer Co.* (3); *Spencer* v. *Canadian Pacific Ry. Co.* (1).

D. L. McCarthy K.C. for the respondent. The appellant must be deemed to have had knowledge of the limitation of liability. See *Grand Trunk Ry. Co.* v. *Robinson* (4).

THE CHIEF JUSTICE.—I think this appeal fails and should be dismissed with costs.

The action was brought by a passenger claiming the value of the contents of a trunk checked as personal luggage and lost by the company. The question to be determined was whether the liability of the company is limited in the matter of a passenger's personal baggage by General Order No. 151 of the Board of Railway Commissioners dated November 8th, 1915. The order was duly published in the Canada Gazette and by sec. 31 of the Railway Act, R.S.C. 1906, c. 37, if there was power to make it, it has, while it remains in force, the like effect as if enacted in the Act itself.

I concur in the reasons for his judgment of Mr. Justice Rose, the trial judge, which judgment was unanimously confirmed by the Second Divisional Court of the Appellate Division of the Supreme Court of Ontario and to which I have nothing to add.

(1) [1913] 29 Ont. L.R. 122.
(2) [1912] 25 Ont. L.R. 372.
(3) [1908] 19 Ont. L.R. 291.
(4) [1915] A.C. 740.

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Idington J.

IDINGTON J. The appellant sued the respondent for damages arising from its having lost her baggage for which it has given her a check on presentation of an ordinary ticket as a passenger entitled to travel on its train.

It was assumed on argument that there was no condition expressed on the ticket as to the terms upon which her baggage was to be carried.

On the check for baggage there was expressed something which it is said by respondent should have informed her that she was only entitled to claim, in case of loss, one hundred dollars, unless she had declared on getting the check the value of the baggage beyond that sum and paid an increased charge for such excess in value.

The counsel for appellant argues that the basis of the liability is contract and that, he submitted, was contained in the ticket.

I am afraid the reasoning is rather technical and omits reading into the contract what the law nowadays imputes as knowledge of all implied in a mere ticket, by virtue of the regulation No. 151 of the Board of Railway Commissioners, and imputes to her knowledge thereof and all else that ensued, or was to ensue, before she had got a check for her baggage, and all inscribed on such check hence part of the contract. These several imputations of knowledge of what her ticket implied, and especially the rights thereby acquired to get her baggage carried, cannot be overlooked, and she got a check for same so inscribed which she must be held in law to have known and assented to.

If any one doubts these several imputations of knowledge let him read the facts set out in my judgment in the case of *Robinson* v. *The Grand Trunk Railway* Co. (1), as well as what is said therein by my brother judges.

(1) 47 Can. S.C.R. 622.

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Idington J.

I refer to my own because it appears therein that the form never was filled up, yet the court above reversed us and the decision of that case as reported in (1), binds us.

Surely it goes much further in imputing knowledge than anything required herein to bind the appellant thus presumed in law to have had knowledge of the condition and to have given her assent thereto by accepting the check inscribed as above stated.

In regard to the validity of the regulation as part of a contract so interpreted, there is no question but the appellant must fail herein.

Apart from all that, can it be said that the power of the Board to fix tolls for any and every service by a railway does not cover the case of baggage?

And does not section 340 give the Board almost unlimited powers in the way of impairing, restricting or limiting the liability of a railway company within its jurisdiction?

It reads as follows:—

340. No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have been first authorized or approved by order or regulation of the Board.

2. The Board, may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited.

3. The Board may by regulation prescribe the terms and conditions under which any traffic may be carried by the company.

The exact thing in question herein seems within these powers, or some one of them, and I need say no more in regard thereto.

(1) [1915] A.C. 740.

The framing of Rule No. 151 which I think was intended to be an exercise of the power it was asked by the railway company to exercise, may be open for the criticism that it might have been better expressed if intended to reach the understanding of ordinary people, but its legal import, assuming what was done in way of its publication was all that the Act requires to give it vitality, seems clear.

I am almost tempted to suggest that contract as a basis for such dealings as in question is fast becoming a fiction of law.

I think this appeal should be dismissed with costs.

DUFF J.—It was competent, in my opinion, to the Board, acting under section 340, subsection 3, to limit the value of the personal baggage or other property to be carried on a passenger train for a passenger and to require a declaration by the passenger as to the value of his baggage in excess of $100.00 and further that the charges for such declared excess should bepre paid. Where the value of the passenger's baggage exceeds the sum mentioned and no declaration is made in respect of it then, as the company is under no obligation to receive such baggage for carriage and does not knowingly consent to carry that which it is not bound to carry, I am unable myself to understand upon what foundation the responsibility of the company for such baggage can be based. I do not think section 284, subsection 1 applies to such case nor do I think subsection 7 applies.

If such excess baggage were accepted knowingly by the company's servants without declaration and without payment of tolls a very different situation

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Duff J.

would arise; but where there is no declaration and the company is ignorant of the facts the company's responsibility is, in my judgment, neither more nor less than its responsibility in respect of property wrongfully placed in one of the company's cars.

If this be the correct view the basis of Mr. Hellmuth's argument fails because the order does no more than declare the legal consequences of the conditions laid down and validly laid down in respect of the reception of such "traffic."

ANGLIN J.—The question for determination on this appeal is whether the Board of Railway Commissioners has the power by general regulation to relieve a railway company from liability consequent upon loss of, or damage or delay to, personal baggage ascribable to negligence of its servants for any amount exceeding a stated sum, unless such baggage has been declared to be of greater value and extra charges therefor, according to a tariff approved by the Board, paid at the time of delivery to the company for checking. The Board passed such a regulation (No. 151) on the 8th of November, 1915, restricting the value of baggage entitled to free carriage to the sum of $100. The governing statute is the Railway Act of 1906 (R.S.C., c. 37) and amendments thereto made prior to the year 1919.

The plaintiff sues to recover damages for loss of personal baggage valued by her at $2,000. The existence of the conditions limiting the company's liability to $100, if the impugned regulation be valid, is admitted; if it is invalid the company's liability for damages beyond that sum, to be assessed on a reference, is conceded.

Sec. 283 of the Railway Act requires every railway company to check each parcel of baggage equipped with suitable means for attaching a check to it which is delivered by a passenger for transport and provides for the collection by the company of such tolls for excess baggage as may be authorized. By sec. 284 the company is required to receive, carry and deliver all traffic offered without delay and with due care and diligence (s.s. 1) and any person aggrieved by any breach of that duty is given a right of action from which the company cannot relieve itself by any notice, condition or declaration where the damage arises from its negligence or omission or that of its servants (s.s. 7). This right, however, as is pointed out in *Robinson* v. *Grand Trunk Railway Co.* (1), at page 744, is explicitly made "subject to this Act."

By sec. 340 any contract, condition, by-law, regulation, declaration or notice purporting to impair, restrict or limit the company's liability in respect of the carriage of any traffic is declared ineffectual unless of a class authorized or approved by order or regulation of the Board of Railway Commissioners (s.s. 1); the Board is empowered to determine the extent to which the company's liability may be so impaired, restricted or limited (s.s. 2); and, by regulation, to

prescribe the terms and conditions under which any traffic may be carried by the company (s.s. 3).

By sec. 30 the Board is empowered to make orders and regulations governing a number of enumerated matters and, *inter alia*,

(h) with respect to any matter, or thing which by this or the special Act is sanctioned, required to be done, or prohibited; and (i) generally for carrying this Act into effect.

(1) [1915] A. C. 740.

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Anglin J.

It is apparent, therefore, that the Board's powers are very comprehensive. By sec. 31 it is provided that any regulation, etc., of the Board shall when published for three weeks in the Canada Gazette have the like effect as if enacted in the Railway Act. Due publication of regulation No. 151 is admitted.

I think it is unnecessary to determine whether personal baggage of such weight and dimensions as would, under the regulation of the Board, entitle the passenger owning it to have it carried free may properly be classified as "excess baggage" within section 283 because its value exceeds a sum fixed by regulation of the Railway Commissioners as that of baggage which a passenger is entitled to have carried free. Whether that section does or does not apply, it is in my opinion within the competence of the Board under section 340 (3) to prescribe the terms and conditions under which baggage may be carried by railway companies—that if under a certain weight, of less than fixed dimensions and of value not exceeding a stated sum (all to be prescribed by the Board) it shall be carried free, and that if not within the limits set in any one or more of these particulars, tolls according to approved tariffs shall be paid for its carriage. I find nothing to preclude the Board ordering that in the event of the passenger failing to declare the value of his baggage, if it exceeds the amount within which he is entitled to have it carried free, and to pay or tender the approved toll in respect of such excess when presenting it to be checked, his right of recovery under section 284 (7) in respect of it shall be limited to the amount prescribed by the Board as the value up to which he was entitled to have it carried free. That seems to me to be nothing more than fixing

terms and conditions under which (this) traffic may be carried by the company

as authorized by sec. 340 (3). Notwithstanding the presence in s.s. 2 of the word "so," which I read as intended merely to carry into it the words "in respect of the carriage of any traffic" found in s.s. 1, rather than to restrict the application of s.s. 2 to cases in which the company, proceeding under s.s. 1, should attempt to impair, restrict or limit its liability by contract, condition, by-law, regulation, declaration or notice, I incline to think that regulation No. 151 may also be sustained as an exercise of the power which that subsection confers. Sec. 340 is one of the provisions of the Act to which s.s. 7 of s. 284 is made subject. The impeached regulation was therefore in my opinion *intra vires* of the Board and effectual to limit the respondent company's liability to the appellant.

The appeal fails and should be dismissed with costs.

BRODEUR J.—I concur with my brother Anglin.

MIGNAULT J.—I think the regulation relied on by the respondents was within the power of the Board of Railway Commissioners under subsection 3 of section 340 of the Railway Act (R.S.C. [1906] ch. 37). That the liability of the railway company can be restricted by order of the Board, even where the damage arises from the negligence or omission of the company or of its servants, notwithstanding subsection 7 of section 284, which, however, is stated to be "subject to this Act," is shewn by the decision of the Judicial Committee in *Grand Trunk Railway Co.* v. *Robinson* (1). This removes the doubt which I otherwise would have felt, and I therefore concur in the judgment dismissing the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Holden & Murdock.*
Solicitor for the respondent: *W. H. Biggar.*

(1) [1915] A. C. 740.

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May 16.
June 27.

THE HALIFAX GRAVING DOCK. COMPANY (SUPPLIANT)..... } APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Contract—Offer—Acceptance—Consensus ad idem.

The Halifax Graving Dock and plant were wrecked by the explosion in the harbour in 1917 and in Jan. 1918 the Government of Canada passed an order in council providing that the work of repair and reconstruction should be entrusted to the appellant company on the condition, *inter alia*, that the latter should contribute $111,000 (the amount of the insurance it carried) and the Government pay the balance. A letter was sent to the company enclosing a copy of the order and stating that "an agreement is being prepared and will be submitted to you shortly for your signature," but no agreement was ever executed. Two days later the company wrote the Minister of Public Works saying that the terms of the order were satisfactory and adding "but in order that all will be quite clear our understanding is that we are to assign our insurance policies to the Government and that the temporary buildings now being constructed are to be replaced by permanent buildings of the same kind as the original." The company did some of the work on the dock but the Minister was not satisfied with its progress and the Government took it over, practically completed it and eventually expropriated the property. In proceedings by the company to recover the amount expended on the work.—

Held, affirming the judgment of the Exchequer Court (20 Ex.C.R. 67), Duff J. dissenting, that the letter of the company to the Minister did not contain an unqualified acceptance of the terms set out in the order in council; that there never was a *consensus ad idem* between the parties; and the company could not recover.

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

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THE HALIFAX GRAVING DOCK COMPANY v. THE KING.

APPEAL from the judgment of the Exchequer Court of Canada, dismissing the suppliant's petition of right.

The facts, so far as material, are set out sufficiently in the above head-note.

Jenks K.C. and *Roper* for the appellant.

Tilley K.C. and *W. L. Hall K.C.*, for the respondent.

THE CHIEF JUSTICE.—This was an appeal from the Court of Exchequer in an action brought by the suppliants, appellants, to recover the sum of $195,638 under the provisions of an order in council dated 15th January, 1918, for the expenditure upon the work of repair and reconstruction of the dock and shops, etc., at Halifax, damaged by the explosion of December, 1917.

The learned trial judge, Mr. Justice Audette, dismissed the suppliant's petition having come to the conclusion that there existed no legal contract between the parties on which a recovery could be maintained.

In his reasons for judgment the learned judge has set out the order in council above referred to and all the correspondence and documents which followed which renders it unnecessary for me to repeat them now.

After hearing the lengthy argument at Bar I have given this order in council and all the correspondence and documents my most careful attention and consideration and have had no difficulty in reaching the conclusion that there never was any unqualified acceptance by the appellant of the only terms upon which the Government agreed to reconstruct the graving dock. The parties never were *ad idem* as to the amount the appellant was to contribute to the cost of reconstruction. In order that the suppliant's action should be sustained, it was essential that such a contract should exist.

[20 Ex. C. R. 67].

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The Chief Justice.

Some reference was made by the trial judge as to the suppliant having been paid already, in the expropriation proceedings of the dock already taken by the Government, for whatever outlay they incurred. Mr. Tilley, however, at the argument did not press this point, the two proceedings, as he said, being quite distinct.

I would dismiss the appeal with costs.

IDINGTON J.—The appellant was the owner of a dock in Halifax Harbour which was materially injured by the explosion which took place there during the war.

The respondent was deeply interested by reason of the war in having the said dock restored.

In consequence thereof there ensued some negotiations between the Dominion Government's Department of Public Works and the appellant.

These resulted in the passing of an order in council resting solely upon the powers conferred upon the said government relative to war emergencies, whereby, after writing that and other facts, the appellant was offered as follows:—

1. The Halifax Graving Dock Company, Limited, the owners of the dock damaged, to contribute towards the cost thereof the sum of $111,000.

2. The balance of the outlay required to be defrayed by the Government from the War Appropriation.

3. The final decision as to the exact nature and extent of the repair, reconstruction and re-equipment of the dock and plant as well as the actual work of reconstruction and purchase of material therefor, to be under the inspection, supervision and control of the representative of the Minister of Public Works.

The only acceptance, so called, of this offer, which was presented in reply thereto, was the following letter:—

Jan. 19th, 1918.

Hon. F. B. Carvell,
Minister of Public Works,
Ottawa.

Dear Sir:

We beg to acknowledge receipt of yours of the 17th enclosing a copy of the order in council with reference to the reconstruction of the Halifax Dry Dock, which is satisfactory; but in order that all will be quite clear our understanding is that we are to assign our insurance policies to the Government and that the temporary buildings now being constructed are to be replaced by permanent buildings of the same kind as the original.

Yours very truly,

Halifax Graving Dock Co., Ltd.,
(Sgd.) Saml. M. Brookfield, Chairman.

I am unable to hold that the said letter was a clear and unconditional acceptance of the offer made by said order in council. It was clearly a substitution of the assignment of some policies of insurance for an absolute contribution of $111,000 in cash. And that cannot be amended by anything passing afterwards going beyond the limitations set forth in said order in council.

The writer of the said letter, persistently, throughout the later correspondence and the litigation which has ensued, seemed determined to have his own way and to be taken as absolute interpreter of the language used and the law bearing thereon.

I cannot agree with him and hence conclude that there never was, as appellant claims, any binding contract.

Another incident is significant that there was to have been drawn up a formal contract which, if drawn, never was executed.

I cannot see any useful purpose to be served by following the history of what ensued.

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Idington J.

I may be permitted, however, to express the hope that the work done by the appellant, though not recoverable on the basis of a *quantum meruit* as it might have been in a case of a like history transpiring between private individuals, was amply covered by the amount awarded appellant in the expropriation proceedings.

The appeal should be dismissed with costs.

DUFF J. (dissenting).—I am unable to agree in the view of the trial judge that there was no acceptance. I think there was an acceptance.

ANGLIN J.—I would dismiss this appeal. I am satisfied that there never was an acceptance by the appellant of the only terms on which the Government agreed to reconstruct the graving dock. The parties appear never to have been *ad idem* as to the amount to be contributed by the appellant to the cost of reconstruction. The existence of such a contract is admittedly a *sine qua non* of the suppliant's right to recover.

MIGNAULT J.—In so far as it could be contended that the order in council of the 15th of January, 1918, constituted a contract between the Crown and the appellant, the latter admittedly did not contribute in money the sum of $111,000, said to be the amount of the insurance on the dry dock, which contribution, according to the order in council, was the condition on which the Government decided to furnish the balance required for the reconstruction. It is indeed as to this contribution that the chief difficulty arose from the very beginning, and this difficulty shews that between the appellant and the Crown there was never that *consensus ad idem* which is essential for the existence of a valid contract.

The order in council referred to two proposals, a main one and an alternative one, which the appellant had made to the Government. The alternative proposal, which was the one given effect to, is stated in the following terms:

That an alternative proposal has, however, been made by the owners in which they offer to proceed with the reconstruction of the dock and to furnish the sum of $111,000, which is the amount of the insurance, towards the cost, provided the Government supply the balance of the cost of reconstruction by way of a subsidy, relieving the Government of any further liability, as well as responsibility for the operation and maintenance of the dock. It is understood that the work of repair and reconstruction shall not consist of anything beyond the replacement of the dock and shops, etc., in the same condition in which they existed at the time of the disaster. The final decision as to the exact nature and extent of such repair, reconstruction and re-equipment, of the dock and plant to rest entirely with the Minister of Public Works or his delegated representative on the work; the actual work of reconstruction and purchase of material therefor to be under the inspection, supervision and control of the representative of the Department of Public Works.

The order in council concluded as follows:—

The Minister, in view of the foregoing and of the imperative necessity that docking and repairing facilities at Halifax be forthwith re-established and made available at once for ships awaiting repairs in that port, recommends that authority be given, under the War Measures Act, to proceed with the repairing, reconstruction and re-equipment of the dock and plant at that place under the following conditions:—

1. The Halifax Graving Dock Company, Limited, the owners of the dock damaged, to contribute towards the cost thereof the sum of $111,000.

2. The balance of the outlay required to be defrayed by the Government from the war appropriation.

3. The final decision as to the exact nature and extent of the repair, reconstruction and re-equipment of the dock and plant as well as the actual work of reconstruction and purchase of material therefor to be under the inspection, supervision and control of the representative of the Minister of Public Works.

The Committee submit the same for approval.

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Mignault J.

A copy of this order in council was in due course sent to the appellant, but the latter took exception to the clause concerning the contribution of $111,000, and in a letter of January 19th, 1918, to the Honourable Mr. F. B. Carvel, Minister of Public Works, stated that

> our understanding is that we are to assign out insurance policies to the Government.

Mr. Hunter, Deputy Minister of Public Works, on January 30th, answered that this was not the arrangement at all, adding:—

> You are to collect your own insurance policies and hand over the cash results to the Government.

On February 2nd, the appellant's chairman answered Mr. Hunter:

> I have just received your letter of the 30th of January with reference to the insurance policies and temporary and permanent buildings. Both clauses in your letter are quite satisfactory.

The appellant relies on this correspondence as constituting the contract whereby it was merely to collect what insurance it could and hand over the cash results to the Government. But obviously the deputy minister could not change the order in council which imposed on the appellant a contribution of $111,000 in money and not of the cash results of its collection of the insurance policies. On the other hand, the appellant did not accept purely and simply the order in council, but qualified its acceptance by insisting on a modification which could only be made by another order in council, and not by the mere acquiescence of the Minister of Public Works.

I think this shews that the parties were never *ad idem*, and therefore that no contract existed between them for the reconstruction of the dry dock. What the Government did was not for the purpose of carrying out any binding contract, but solely to further public interests. And if there was no contract, the appellant's action fails.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. S. Roper.*

Solicitor for the respondent: *W. L. Hall.*

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May 19, 20.
June 27.

THE SAINT JOHN AND QUEBEC RAILWAY COMPANY (DEFENDANT)..... APPELLANT;

AND

THE BANK OF BRITISH NORTH AMERICA (PLAINTIFF) AND THE HIBBARD COMPANY (DEFENDANT)..... RESPONDENTS

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Debtor and creditor—Assignment of claim—Notice to debtor—Constructive notice.

Notice to the solicitor of a debtor that the claim against the latter was to be paid to a third party is notice to the debtor himself that such claim had been assigned.

Per Duff J. The information given to the solicitor placed before the debtor constituted notice.

APPEAL from a decision of the Appellate Division of the Supreme Court of New Brunswick affirming the judgment on the trial in favour of the plaintiff bank.

The only question dealt with on the decision of this appeal was whether or not the appellant had notice of the assignment to the bank of the claim of the respondent The Hibbard Company. The notice to appellant's solicitor was given in the manner set out in the judgments reported.

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

W. P Jones K.C. and *T. M. Jones* for the appellant. Express notice in writing of the assignment had to be given to the appellant. *Dell* v. *Saunders* (1) 4 Hals. Laws of England, page 372, par. 790.

F. R. Taylor K.C. for the respondents. Notice to the solicitor is notice to the client. *Le Neve* v. *Le Neve* (2); *Bradley* v. *Richer* (3).

THE CHIEF JUSTICE.—After much consideration of the facts of this appeal and of the argument of counsel at bar I have reached the conclusion that the appeal fails and should be dismissed with costs.

I concur substantially in the reasons for the judgment of the Appeal Division of New Brunswick, delivered by Sir Douglas Hazen, Chief Justice, where all the material facts are stated, confirming that of Mr. Justice Chandler, the trial judge.

IDINGTON J.—The respondent sued as assignee of several choses in action owing by the appellant, and which had been assigned to the respondent by the Hibbard Company, Limited, as security for advances made to said company.

The respondent bank, by notice in writing accompanied by a copy of the said assignment, duly served by mail the Provincial Treasurer of New Brunswick and beyond doubt intended that the like notice should be mailed the appellant's secretary.

The proof of the latter mailing of notice is claimed to be rather weak inasmuch as it depends only on the evidence of the stenographer in the office of the said Hibbard Company, in which she testifies as follows:—

(1) [1914] 17 D.L.R. 279 and cases cited. (2) 3 Atk. 646.
(3) [1878] 9 Ch. D. 189.

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THE SAINT JOHN AND QUEBEC RAILWAY CO. v. THE BANK OF BRITISH NORTH AMERICA AND THE HIBBARD CO.

Idington J.

Q. Whose work did you mostly do while you were in their office?

A. Mr. Hibbard's work.

Q. Will you take communication of the document now shewn you marked No. 33, September 11th, 1914, initialed W.B.C., and state if you recognize that in any way?

A. Yes, I recognize that as a letter I wrote.

Q. What would be the date of the writing of that letter?

A. The date would be exactly the date that is on the letter.

Q. Do you know whether the letter was mailed or not?

A. Well I could not say as to the mailing of the letter.

Q. What would be the ordinary procedure in the office regarding the typing and other details concerning a letter like that?

A. The ordinary routine generally was that I would take the letter in, you would sign the letter, I would write the envelope and if there was any enclosures put the enclosures in the envelope, get the letter from you signed, and leave the envelope and the letter on the boy's desk. That was the usual procedure.

Q. Do you recall whether you followed that procedure in regard to this particular letter or not?

A. I could not positively say in regard to that particular letter, but as a general rule that was the procedure I always followed.

Q. In what way were copies of letters kept at that time?

A. Well a carbon copy such as that one would be put into the folder or claim.

Q. By whom?

A. By myself.

The boy, whoever he was, whose duty it was to do the mailing, is not called. Why is not explained.

It is however urged, and with much force, that the Provincial Treasurer was served in same way and received his copy, but I cannot see this fact attested to in such a manner as to shew that the actual writing of that letter and its mailing was concurrent with the other.

I am, therefore, unable to find that reliance on the routine of business as proof of the mailing is quite as satisfactory as I should wish, but if the courts below had clearly accepted it as such I should not feel inclined to disturb such finding.

The courts below do not seem to have relied so much thereon as upon the notice to the appellant by the knowledge of the attorney under the following peculiar circumstances.

There had been suggestions made of a meeting for a settlement between the said company and appellant. In bringing that about there certainly was on the part of appellant's officers, or some of them, a want of courtesy in failing to notify the solicitor for the respondent bank, though he had specially so requested. That has justly given rise to much suspicion and charges needless to consider herein.

The solicitor for appellant drew up a form of resolution to be passed by the directors of the Hibbard Company authorizing one Gall, who was treasurer of said company, to negotiate such settlement.

The directors, instead of adopting that form of resolution, passed one which in substance covered all that was therein essential, but varied in the essential as to signing any regular and lawful agreement respecting such claims by adding to the words

giving full and final discharge for all payments made

the following:

provided the same be paid into the Bank of British America according to its rights of transfer and subrogation.

This clearly to my mind was notice to the solicitor of the fact that respondent had a claim upon the results. The excuse of the solicitor is that he had no concern with that but to produce a resolution such as would be agreeable to his client's instructions.

I cannot attribute any meaning to this provision except that the respondent contends for in the first place, that it disclosed the rights of the respondent, or, secondly, which is much more destructive of the appellant's contentions, that it knew of the said claims having been definitely assigned to the respondent.

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Idington J.

The information to the mind of a solicitor directing his attention to it inevitably must have been that the respondent bank was entitled to receive the proceeds by virtue of a transfer. And that would in law be attributable to the appellant. If it chose, as he says, to take the matter into its own hand, sand he was impliedly directed to exclude that provision, so much the worse for the appellant. It either was submitted to his clients or it was not. If not, then the client is bound by his knowledge which to my mind is conclusive. If it was, as I suspect, anticipated by the client, so much the worse for its contentions.

In conclusion, I am of the opinion that the judgment appealed from is right.

Having considered the authorities cited on the question of notice to the solicitor, and searched further, I find *Gale* v. *Lewis* (1), and *Tibbets* v. *George* (2), worthy of consideration as of a time antecedent to our present state of the law when the equity rule has precedence, as it were.

It was urged that the men at the back of this appeal and litigation are those responsible as sureties to the bank. I am unable to find how such an issue is presented to us on the pleadings, or necessarily arises from anything therein.

We might as well speculate on what might have arisen if the Government of New Brunswick, or His Majesty, on behalf of New Brunswick, or the Attorney General therof, could have been in any form brought into the case.

We are only dealing with what is in due form brought before us.

I think the appeal should be dismissed with costs.

(1) 9 Q.B. 730. (2) 5 A. & E. 107.

DUFF J.—I am not satisfied that express notice in writing within the statute was proved. By applying the test which is now the settled test in all cases of constructive notice I think the proper conclusion is that the officers of the railway company had before them knowledge of facts which ought to have put them on inquiry and that if they had acted with reasonable business prudence they would have learned that the bank had an interest in the Hibbard Company's claim which made the assent of the bank an essential condition of any valid settlement of that claim. I may add, I think it is only fair to add, that I accept Hanson's testimony and have no doubt that he Mr. did not in fact realize what the nature of the bank's claim was.

ANGLIN J.—Mr. Jones' able argument failed to convince me that there was error in the conclusions of the Supreme Court of New Brunswick against which his client appeals either as to the sufficiency of the assignment to the respondent bank or as to the existence of constructive notice thereof to the appellant and its effect. Subsequent consideration of the evidence has not disturbed the tentative views which I had formed upon these points at the conclusion of the argument. Substantially for the reasons assigned by the learned Chief Justice of New Brunswick I would affirm the judgment *a quo*.

MIGNAULT J.—This case comes to us without a dissenting opinion in the courts below, and the finding that sufficient notice was given to the appellant of the transfer to the respondent of the claims of the

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THE SAINT JOHN AND QUEBEC RAILWAY CO. v. THE BANK OF BRITISH NORTH AMERICA AND THE HIBBARD CO.

Mignault J.

Hibbard Company, Limited, against the appellant, is a unanimous one and is supported by the very carefully prepared judgments of Mr. Justice Chandler, in the trial court, and of Chief Justice Hazen, in the Appellate Court.

The whole circumstances of the case support this holding. Mr. Hanson, the solicitor of the appellant, had prepared a form of resolution to be adopted by the Hibbard Company for the settlement of the claim it had against the appellant. This resolution was returned to him with the added words,

> provided the same be paid into the Bank of British North America according to its rights of transfer and subrogation.

In other words, Mr. Hanson was informed that the amount due by the appellant to the Hibbard Company was to be paid into the bank because the latter had rights of transfer and subrogation. This could only mean that the claim of the company had been assigned to the bank and that the latter was subrogated to the company for its collection.

Mr. Hanson objected to this and another resolution (the one originally prepared by Mr. Hanson) was adopted omitting these words, the result being that Mr. Gall, under this resolution, was able to get payment, out of moneys due to the company and assigned to the bank, of his personal claim against the appellant.

I have no doubt that Mr. Hanson acted in absolute good faith, for solicitors as a rule object to any change in resolutions drafted by them for the payment of moneys by their clients, the more so if the disposal of the moneys is, by such changes, made subject to conditions or restrictions. But the fact still remains that the addition made to the first draft of the resolution should have put Mr. Hanson on inquiry as to

what were the rights of transfer and subrogation of the bank. In plain English it stated that the bank was a transferee of the claim and was subrogated in any right of recovery of the Hibbard Company. Mr. Hanson could not close his eyes to this plain intimation and make an unconditional settlement with Mr. Gall without running the risk of the trouble that has arisen from the action of Mr. Gall in illegally paying himself out of moneys of which, even under Mr. Hanson's draft resolution, he was a trustee. The bank, at the time of the trial, was still a creditor of the Hibbard Company for more than $5,000.00, and, although it had possibly ample security, it had the right to receive any moneys due to the Hibbard Company under the transfer the latter had made to it.

I feel that I can really add nothing to the judgments in the courts below and my opinion is to dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. P. Jones.*

Solicitor for the respondents: *F. R. Taylor.*

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*Nov. 9.
*Nov. 11.

MERCHANTS BANK OF CANADA APPELLANT;

AND

CHARLES ANGERS.....RESPONDENT.

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

Appeal—Special leave to appeal—Petition to sue in name of trustee—"Bankruptcy Act," 9 & 10 Geo. V., c. 36, sections 35, 3 and 74 ss. 3.

A judge sitting in bankruptcy having granted a petition by the respondent, under section 35 of the "Bankruptcy Act," to be authorized to take certain proceedings in the name of the trustee but at the respondent's own expense and risk, the Court of King's Bench held that it was a mere preparatory judgment and one not subject to the control of that court.

Held, that special leave to appeal to the Supreme Court of Canada should not be granted.

MOTION for special leave to appeal, under section 74, s.s. 3 of the "Bankruptcy Act," from a decision of the Court of King's Bench, appeal side, Province of Quebec, dismissing an appeal from the judgment of Loranger J. which granted respondent's petition to take certain proceedings in the name of the trustee.

The facts are fully stated in the judgment of Mr. Justice Mignault on the application for special leave.

Aimé Geoffrion K.C. and *A. R. Holden K.C.* for the motion.

E. R. Angers contra.

*PRESENT:—Mr. Justice Mignault in Chambers.

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Mignault J.

MIGNAULT J.—The petitioner-appellant, the Merchants Bank of Canada, has applied to me under section 74, subsection 3, of "The Bankruptcy Act" for special leave to appeal from a judgment of the Court of King's Bench, Appeal Side (Quebec), of the 25th day of October, 1921, whereby its appeal was rejected, on the respondent's motion for the following reasons:

Considérant que la permission préliminaire de poursuivre donnée par la Cour de Faillite ne préjuge rien du futur litige et n'empêche aucunement l'appelante de faire valoir tous les moyens de droit et de fait qu'elle peut opposer à l'intimé;

Considérant qu'un jugement accordant telle permission n'est pas sujet au contrôle de la cour d'appel;

To explain the circumstances under which this judgment was rendered, I may say that the respondent, in July last, presented to a judge sitting in bankruptcy a petition under section 35 of "The Bankruptcy Act," praying that he be authorized to take proceedings in the name of the trustee, but at his own expense and risk, to revendicate certain securities which he had furnished to the bankrupt as a margin on certain stock transactions made by him, but which he alleged the bankrupt had fraudulently transferred to the appellant.

It appears that in April last an arrangement of the nature of a transaction (art. 1918 C.C.) had been entered into between the trustee, duly authorized by the inspectors and the appellant, whereby the latter was allowed to keep the securities it held for a large claim against the bankrupt, on condition that it would not assert its claim against the estate, this arrangement, between the parties thereto, to have the authority of a final judgment.

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The respondent's petition coming before Mr. Justice Panneton, judge in bankruptcy, was referred to Mr. Justice Loranger. The present appellant, although it does not appear to have been served with a copy of the petition, appeared by counsel before the learned judge, and producing the above-mentioned arrangement opposed the granting of the petition.

The learned judge, however, on the ground that section 35 of "The Bankruptcy Act" does not distinguish between a justifiable or an arbitrary refusal of the trustee to institute proceedings, and that however serious the reasons for refusing the authorization might be, these reasons would have their full effect in a plea to the merits, granted the authorization subject to the present respondent furnishing security to the amount of $300.00

The petitioner-appellant appealed from this judgment to the Court of King's Bench, but its appeal was dismissed for the reasons above stated, and it now applies for special leave to appeal from the judgment of the Court of King's Bench to the Supreme Court of Canada.

The parties came before me by their counsel on November 9th and the matter was fully argued.

The petitioner-appellant alleged that this appeal involves matters of public interest and important questions of law with reference to the proper construction of the Bankruptcy Act, and that the said questions of law are applicable to the whole Dominion.

Mr. Geoffrion, K.C., for the appellant, argued that it was very important that section 35 of "The Bankruptcy Act" be construed by this court. This section reads as follows:

If at any time a creditor desires to cause any proceeding to be taken which, in his opinion, would be for the benefit of the bankrupt's or authorized assignor's estate, and the trustee, under the direction of the creditors or inspectors, refuses or neglects to take such proceedings after being duly required to do so, the creditor may, as of right, obtain from the court an order authorizing him to take proceedings in the name of the trustee, but at his own expense and risk upon such terms and conditions as to indemnity to the trustee as the court may prescribe, and thereupon any benefit derived from the proceedings shall, to the extent of his claim and full costs, belong exclusively to the creditor instituting the same; but if, before such order is granted, the trustee shall, with the approval of the inspectors, signify to the court his readiness to institute the proceedings for the benefit of the creditors, the order shall prescribe the time within which he shall do so, and in that case the advantage derived from the proceedings, if instituted within such time, shall belong to the estate.

Mr. Geoffrion however admitted that the only right of which he was deprived by the judgment rendered under section 35—the effect of which was to subrogate the respondent in the rights of the bankrupt's estate with respect to the proceedings which he was authorized to institute in the name of the trustee—was what he termed the right not to be sued in view of the arrangement or transaction above mentioned. I am not convinced that this is any substantial right, for it is obvious that if the transaction has the effect of a final judgment against the bankrupt's estate, the present appellant can set it up by plea and get its full benefit.

Moreover this court would not be called upon to construe section 35 if special leave to appeal were granted. The judgment of the Court of King's Bench did not construe it, but dismissed the appeal on the ground that Mr. Justice's Loranger's judgment was a mere preparatory judgment and one not subject to the control of the court of King's Bench, and that the preliminary leave to institute proceedings in the name of the trustee did not decide in any way as to

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the merits of these proceedings, and did not prevent the appellant from availing itself of any defence in law and fact which it might have against the demand of the respondent.

But Mr. Geoffrion argued that it would be very important to determine whether the Court of King's Bench should not have entered into the merits of the appeal, and whether it had not jurisdiction to review the judgment granting authorization to institute proceedings in the name of the trustee.

The point however really involves the question whether such a preparatory judgment is appealable and, if appealable, whether under the Quebec Code of Civil Procedure the appeal should have been brought as appeals must be from interlocutory judgments, that is to say upon leave obtained. Under "The Bankruptcy Act" courts exercise their jurisdiction according to their ordinary procedure (section 63), and the whole question, were special leave granted, would probably be whether the appeal to the Court of King's Bench was properly brought. There would therefore be to my mind no question of public interest justifying the grant of special leave to appeal to this court merely in order to determine whether the Court of King's Bench had jurisdiction to hear the appellant's appeal, or whether the appeal was properly before that court, in view of the provisions of the Quebec law as to interlocutory appeals (arts. 46, 1211 et seq. C.C.P.).

What is certain is that the construction of section 35 of "The Bankruptcy Act" could not be passed on by this court if special leave to appeal were granted, nor can I see that any question as to the proper construction of section 74 would be involved in an appeal to this court. The issue would be, as I have said,

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whether such a judgment is appealable and whether or not the appellant should have followed the rules governing appeals from interlocutory judgments, and this being a question of practice and procedure, I cannot think that this court would interfere with the decision of the court below.

On the whole my opinion is that I would not be justified in granting special leave to appeal (for a reference to decisions governing the grant of special leave see my judgment in *Riley* v. *Curtis's & Harvey, Limited* (1)), and the appellant's petition is dismissed with costs.

Motion dismissed with costs.

(1) [1919] 59 Can. S.C.R. 206.

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*June 8,
*Oct. 11.

THE TOWNSHIP OF ZONE (DEFENDANT)..... } APPELLANT;

AND

JOHN B. McDOWELL (PLAINTIFF). RESPONDENT.

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

Municipal corporation—Road allowance—Highway—Private land fenced back of boundary—Municipal Act, R.S.O. [1914] *c.* 192, *s.* 478—*Surveys Act, R.S.O.* [1914] *c.* 166, *s.* 13.

Owing to a dispute between a municipality and M. as to whether or not some of the land claimed by the latter was part of the highway the Municipality applied to the Department of Lands, Forests and Mines for a survey which was made and confirmed by an order of the Minister. M. then moved his fence to the boundary thereby established.

Sec. 13 (4) of the Surveys Act provides that "the order of the Minister confirming the survey shall be final and conclusive upon all persons and shall not be questioned in any court." In an action by M. to restrain the municipality from tearing down his fence the latter invoked the provisions of sec. 478 of the Municipal Act that where a municipality desiring to open an original road allowance by mistake opens a road not wholly upon such allowance the private land included shall be deemed to be expropriated.

Held, per Davies C.J. and Anglin and Mignault JJ., that the road allowance this case was opened long before any such provision was placed in the Municipal Act and sec. 478 could not be invoked. The order of the Minister confirming the survey was conclusive and the boundaries established thereunder must be accepted.

Per Idington and Brodeur JJ., that the order of the Minister is final and the municipality cannot claim any boundary other than that established by the survey.

Per Duff J. The appeal should be dismissed for the reasons given by Mulock C.J. in the appellate division.

Judgment of the Appellate Division (48 Ont. L.R. 459) affirmed.

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

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APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment at the trial (2) in favour of the respondent.

The respondent was, and is, the owner of lots numbers 4, 5 and 6 in the Gore Concession of the township of Zone, in the county of Kent, and brought his action against the appellants for an injunction and damages for the tearing down of the fences erected by the respondent upon his said lots, for a mandatory order compelling the appellants to re-erect the fences torn down by them, and for such other relief as the respondent might be declared to be entitled to.

The council of the appellants, in May, 1915, under the provisions of "The Surveys Act," R.S.O. 1914, chapter 166, applied to the Lieutenant-Governor in Council to cause the base line from the road allowance between concessions three and four, in the said township of Zone, to be surveyed and to be marked by monuments of stone or other durable material, under the direction and order of the Minister of Lands, Forests and Mines, in the manner described by the said Act.

The survey was duly made by G. A. McCubbin, O.L.S., an engineer appointed by the said Minister of Lands, Forests and Mines, and the survey so made was confirmed by the said Minister of Lands, Forests and Mines, in accordance with the provisions of the said Act, and an order confirming the same was duly made by the said Minister.

Notwithstanding the said order confirming the survey, the appellants, in September, 1919, by their servants, agents and workmen, entered upon the said lands of the respondent and tore down and damaged

(1) 48 Ont. L.R. 459. (2) 48 Ont. L.R. 268.

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or destroyed his fences thereon, and after the respondent had re-erected his said fences the appellants, in November, 1919, by their servants, agents and workmen, entered upon the said lands of the respondent and again tore down and destroyed them, and threatened to enter and tear down any fences which he might erect upon his said lands.

The action was tried before the Honourable Mr. Justice Orde, who reserved his decision, and subsequently, by his judgment, declared that the survey made by the said George A. McCubbin, O.L.S., is final and conclusive as establishing the boundary line of that part of the road allowance, commonly called the Base Line, which it covers, ordered and restrained the appellants, their servants, workmen and agents from trespassing upon the respondent's lands, and from tearing down and removing his fences, directed a reference to the local master to assess the respondent's damages, ordered the appellants to pay the damages so found by the master, and ordered the appellants to pay the costs of the action.

The appellants appealed and the Appellate Division affirmed this judgment.

Sec. 13, sub-sec. 4 of the Surveys Act provides that "(4) On the return of such survey to the Minister he shall cause a notice thereof to be published once in each week for four consecutive weeks in a newspaper published in the county or district town of the county or district in which the lands lie, and shall specify in the notice a day, not less than ten days after the last publication, on which the report of the survey will be considered, and the parties affected thereby heard, and on the hearing the Minister may either confirm the survey or direct such amendments or corrections to be made as he shall deem just, and shall

confirm the survey so amended or corrected, and the lines or parts of the lines so surveyed and marked shall thereafter be the permanent boundary lines of such concession or side roads or parts of concessions or side roads to all intents and purposes, and the order of the Minister confirming the survey shall be final and conclusive upon all persons and shall not be questioned in any court."

Sec. 478 of the Municipal Act relied on by the appellant reads as follows:—

(1) Where the Council of a municipality desiring to open an original allowance for road has by mistake opened a road which was intended to be, but is not wholly or partly upon such allowance, the land occupied by the road as so opened shall be deemed to have been expropriated under a by-law of the corporation and no person on whose land such road or any part of it was opened shall be entitled to bring or maintain an action for or in respect of what was done or to recover possession of this land, but he shall be entitled to compensation under and in accordance with the provisions of this Act as for land expropriated under the powers conferred by this Act.

(2) The right to compensation shall be forever barred if the compensation is not claimed within one year after the land was first taken possession of by the corporation. 3-4 Geo. 5, c. 43, s. 478.

Pike K.C. for the appellant. The highway is the whole land between the fences and it is not necessary that all the space should be fit for travel. See *Walton* v. *Corporation of York* (1), at page 188; *Sibbald* v. *Grand Trunk Ry. Co.* (2), at page 190.

(1) 6 Ont. App. R. 181. (2) 18 Ont. App. R. 184.

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The evidence shows that this road was used as a public highway for over fifty years which shifts the burden of proof to the plaintiff. *Chicago* v. *Chicago &c., Ry. Co.* (1).

Hellmuth K.C. for the respondent.

THE CHIEF JUSTICE.—I would dismiss this appeal with costs and concur in the reasons for judgment as stated by my brother Anglin.

IDINGTON J.—This case might have been so presented as to raise some important questions of law governing the rights of litigants similarly situated, but I doubt if on the evidence any satisfactory decision of such a character can be reached.

The base line road, so called, within appellant's jurisdiction, for some reason or other, or none at all so far as appears in evidence, was constructed in such irregular fashion that a contest arose between the landowners on either side claiming that those opposite them had got an advantage by reason of the actual road not being placed where it should have been. This resulted in an application being made under section 13 of the Surveyors' Act by the appellant's council to the Lieutenant Governor in Council to cause the concession lines to be surveyed on either side of that part of said base line now in question and to be marked by monuments as provided by said statutory provision.

The authority so applied to duly directed such survey and it was proceeded with at some considerable expense and trouble.

(1) 152 Ill. 561.

The necessary steps to enforce the results reported by Mr. McCubbin, the surveyor chosen, were duly taken and the line so surveyed was duly established.

When it became evident what such results would be the appellant's council sought to revoke its application, but the Minister in charge of such subject matters after due consideration declined to accede to such request.

When the process directed for establishing such concession lines had been duly completed the respondent, as owner of several lots fronting upon said base line, moved out his fence to the McCubbin line so established.

The appellant directed his fences to be torn down more than once.

The respondent then brought this action to restrain such conduct on appellant's part, and the trial resulted in a judgment of Mr. Justice Orde holding that appellant, having appealed to the tribunal duly constituted to hear and determine such like issues, must abide by the result and that in accord with such result the respondent was right and appellant wrong, and granted the injunction asked by respondent against appellant's council repeating its lawless proceeding of tearing down respondent's fences placed on the McCubbin line, and to pay such damages as already done and, if the parties could not agree on that, same to be settled by a reference, and to pay respondent's costs.

The appellant sought relief in the second Appellate Division of the Supreme Court of Ontario. That court held that, on the facts adduced in evidence, it was unnecessary to determine the question which may be properly raised some day, of how far the line laid down by a survey pursuant to section 13 of the Survey Act can invade the actual travelled highway upon which public money has been expended in construction thereof, and dismissed the appeal.

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Idington J.

In answering that, which I think a quite correct view if the evidence supports it, I am surprised to find that appellant does not seem to have come prepared with a case presenting evidence to meet such an obvious view of the law.

Its conception of a highway, under such circumstances, is not that travelled on and upon which public money has been actually expended to make it travellable, but that all that happened to exist, rightfully or wrongfully, between the fences on either side must be held to be the highway within the meaning of what we have to deal with.

Accordingly, turning to the evidence upon which it relies herein, one of the first assertions in the factum for appellant in this connection is that where plaintiff moved his fences "was on the graded portion of the road."

Turning to the evidence I am surprised to find the following:—

Q.—And your fence was moved out where it would obstruct travel to some extent on the road? A.—I don't think so.

Q.—It was on the travelled portion of the road, on the graded portion? A.—Well, you could use it for a car if you wished.

Q.—Yes, that was over in a ditch there was on the south side? A.—There was no watercourse on the south side

Q.—So that it was really all the way that could be travelled? A.—It could be travelled, but it was on grass I put the posts, not on the travelled part.

This illustrates appellant's point of view in regard to the whole case and its contention to be that despite the old definition in the Municipal Act of 1866, and long before and after, being as follows

315. All allowances made for roads by the Crown surveyors in any town, township or place already laid out, or hereafter laid out, and also all roads laid out by virtue of any Act of the Parliament of Upper Canada, or any roads whereon the public money has been expended for

opening the same, or whereon the statute labour hath been usually performed, or any roads passing through the Indian Lands, shall be deemed common and public highways, unless where such roads have been already altered, or may hereafter be altered according to law,

the highway is what lands happen to be found between the two fences on either side.

I submit you cannot extend the statutory definition beyond the actual roadway unless coupled with other circumstances such as the original survey, or the dedication by someone, or some such right to claim expansion beyond that part travelled upon or improved so as to be travelled upon.

Counsel for appellant in argument expressly renounced any claim resting upon dedication.

As demonstrating appellant's contention to be such as I ascribe to it, I find a mass of evidence that does not pretend to adhere to the travelled way as the highway, but takes as the sole guide, to ascertain and determine that, the farm fences on either side, sometimes very feeble and irregular at that if one applies common knowledge as to conditions in this country.

The very interesting question of law of whether or not the actual travelled and graded highway in use having had public money expended upon it and been found beyond the bounds presented by a report such as that of Mr. McCubbin in question herein, can yet be declared, by virtue thereof, to be receded as it were to the rightful owner, does not seem to me to arise on the evidence presented in this case.

Apart from such a question of fact giving rise to a necessary solution of that problem, there is nothing in this appeal.

I am not prepared to declare that the view of the evidence taken by the court below is erroneous and upon the facts as in the judgment declared I am not prepared

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to say that court is wrong, and in regard to the relevant law applied thereto I think that court clearly right.

I would therefore dismiss this appeal with costs.

DUFF J.—This appeal should be dismissed with costs. I concur in the reasons given by Mulock C.J. in the Appellate Division.

ANGLIN J.—That under the original survey the strip of land in dispute formed part of lot 4 now owned by the respondent is, I think, conclusively established by the confirmation of the McCubbin survey by the Minister of Lands, Forests and Mines under s. 13 of the Surveys Act, R.S.O. [1914], c. 166. The appellant, defendant, nevertheless asserts that it is part of the highway known as the Base Line. It rests this claim neither on prescription nor dedication, but solely on the effect of s. 478 of the Municipal Act (R.S.O., [1914], c. 192), which reads as follows:—

478. (1) Where the council of a municipality desiring to open an original allowance for road has by mistake opened a road which was intended to be, but is not wholly or partly, upon such allowance, the land occupied by the road as so opened shall be deemed to have been expropriated under a by-law of the corporation, and no person on whose land such road or any part of it was opened shall be entitled to bring or maintain an action for or in respect of what was done or to recover possession of his land, but he shall be entitled to compensation under and in accordance with the provisions of this Act as for land expropriated under the powers conferred by this Act.

(2) The right to compensation shall be forever barred if the compensation is not claimed within one year after the land was first taken possession of by the corporation.

The learned trial judge held that the operation of that section was superseded by the confirmation of the McCubbin survey by the Minister under s. 13 of the Surveys Act. The Appellate Divisional Court, expressing no opinion on that point, based its judgment dismissing the defendant's appeal, on the ground that because

there is no evidence shewing the performance of any statute labour or expenditure of any public money on any portion of the strip in question, nor so far as appears has it ever been used as a highway, that strip of land had not been shewn to be part of "the land occupied by a road" opened by the municipal council by mistake within s. 478 of the Municiapl Act.

While there is, no doubt, cogent evidence given by the engineer Flater, called by the plaintiff, that the strip of land in question at no point encroached on the travelled way, with great respect there is some testimony adduced by the defendants that some of the permanent boundary posts planted by McCubbin were on the graded roadway and there is also evidence that the ditch on the south side of the *via trita* and some small part of the latter itself were within the disputed strip.

But in the view I take of the purview of s. 478 of the Municipal Act, it is unnecessary to rest a judgment on the determination of that issue of fact which, if found in the appellant's favour, would probably cover only a comparatively small part of the land in dispute and would render another survey necessary, unless, as held by the learned trial judge, the McCubbin survey should be deemed to have fixed finally the boundaries of the highway by virtue of the provisions of the Surveys Act.

What is now s. 478 of the Municipal Act was first enacted in 1881 by 44 V., c. 34, secs. 15 and 16:—

15. In case it appears that any municipality in whose jurisdiction an original road, or allowance for road is situate, shall open that which they take and believe to be the true site of the same, and in case the municipality their officers and servants shall act in good faith, and shall take all reasonable means to inform themselves of the correctness of their line and work, and in case it appears that the road being opened, although not or not altogehter upon the true line of the original road,

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or allowance for road, is nevertheless, from any difficulty in discovering correctly the true line, as near to or as nearly upon the true line as under the circumstances could then be ascertained, no action shall be brought by any person against the municipality, their officers or servants, for or in respect of the opening of such road or allowance for road, or for any other act or matter whatsoever connected with or arising from the same.

16. The municipality shall, however, in any case respecting the opening of an original road, or road allowance, make to any person having title to or interest in the same, reasonable compensation in full of all claims, and as a final settlement of the same: Provided the claims for such compensation shall be made within one year from the time of the laying out or taking possession of such road by the municipality or its officers, or the part thereof in respect of which compensation is claimed, and in the event of the parties not agreeing as to the amount or terms of such compensation, the same shall be ascertained and the payment thereof enforced, under the provisions of the Municipal Act relating to arbitrations.

The character of these provisions makes it reasonably certain that they were meant to apply only to roads thereafter opened or laid out. The verbs "shall open," "shall act," and "shall take" in the future tense, so indicate, and the restriction of the provision for compensation to claims "which shall be made within one year, etc.," seems to put that beyond doubt. There is nothing to shew that the municipality "opened" or "laid out" the road known as the Base Line. On the contrary it would rather seem that the owners of the adjoining lands on either side had erected fences on what they conceived to be the boundaries of their lots as best they could leaving what they regarded as the road allowance between them. There is no evidence in the record that the officers and servants of the municipality "acted in good faith" or that they took "all reasonable means to inform themselves of the correctness of their line and work," or that the road opened was

from any difficulty in discovering correctly the true line as near to or as nearly upon the true line as under the circumstances could then be ascertained.

The evidence puts it beyond doubt that the Base Line road had been in use as a travelled highway for about 60 years, that is for some twenty years before the statute of 1881 was enacted.

Sections 15 and 16 of the statute of 1881 were carried into the Consolidated Municipal Act of 1892 (55 Vict., ch. 42) as section 549 in substantially the same form as in the original enactment of 1881. In the Revision of 1897 (1) the future subjunctive "shall open" was replaced by the present "opens." The section was carried in the same form into the consolidation of 1903, 3 Edw. VII., ch. 19, sec. 635. "Open" was in the revision of 1913 substituted for "opens," and the conditions as to good faith, care and unavoidable error are now covered by the comprehensive phrase

where the municipality desiring to open an original allowance for road has by mistake opened a road which was intended to be, but is not, wholly or partly upon such allowance.

At the same time an idea which had theretofore been left to implication was expressed in the words "the land occupied by the road * * shall be deemed to have been expropriated," and the provision restricting the right to recover compensation to claims made within one year "after the land was first taken possession of by the corporation" was retained.

I have no doubt whatever that section 478 does not apply to the road here in question. Apart from the other reasons for that conclusion above indicated, the fact that it was opened long before there was any such statutory provision seems to me to be conclusive against the claim of the appellant.

(1) R.S.O., c. 23, s. 635.

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Anglin J.

Any difficulty presented by section 478 being thus removed, there appears to be no valid reason for not giving effect to the provision of subsection 4 of section 13 of the Surveys Act, that the lines surveyed and marked on a survey approved by the Minister under that section

> shall thereafter be the permanent boundary lines of such concession or side roads * * * to all intents and purposes and the order of the Minister confirming the survey shall be final and conclusive upon all persons, and shall not be questioned in any court.

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

BRODEUR J.—There had been for years a dispute as to the true location of the original road allowance of the Base Line in the township of Zone. This township had been surveyed about a century ago and the adjoining proprietors of the Base Line had erected fences to divide their farms from the highway.

In 1915, the council of the appellant township resolved, at McDowell's request, to bring a government engineer to establish the true line of the road allowance. The Government under the provisions of the Survey Act (ch. 166 R.S.C. ss. 13 and 14) sent an engineer, Mr. McCubbin, to make the survey. The survey as reported was evidently adverse to the township's claims and the township then rescinded its resolution asking for this official survey; but the Minister of Lands and Forests would not accept such a rescission and confirmed the survey which, according to the provisions of the law, became "final and conclusive upon all parties" and could not be questioned thereafter in any court whatsoever.

The municipality now urges that section 478 of the Municipal Act should apply. This section provides that where a municipality desiring to open an original allowance for road has by mistake opened a road which was intended to be but which is not wholly or partly upon such allowance, then the land occupied by the road as so opened shall be considered as having been duly expropriated.

It seems to me that the municipality, having requested the provincial authorities to determine the boundary line between its highway and the adjoining land owners, is debarred from asking for any other boundary than the one declared by such provincial authorities. There never was on the additional piece of land which the township now claims any statute labour nor the expenditure of any public money. It is not in evidence either that this piece of land was used as a public highway.

For those reasons the appeal should be dismissed with costs.

MIGNAULT J.—I concur with my brother Anglin.

Appeal dismissed with costs.

Solicitors for the appellant: *Wilson, Pike & Stewart.*

Solicitors for the respondent: *Meredith & Fisher.*

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*June 14,
*Oct. 11.

EDYTHE KERRIGAN (PLAINTIFF) . APPELLANT;

AND

EMMA M. HARRISON (DEFENDANT) . . . . . RESPONDENT.

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

Covenant—Conveyance of right of way—Defined road—Maintenance—Subsequent destruction of road—Impossibility of performance

Where, in a deed of land bordering on Lake Erie, the vendor grants to the vendee a right of way over a defined road with a covenant to maintain said road and keep it in repair the destruction of the road by encroachment of the waters of the lake excuses him from restoring it or providing a substituted right of way when there is nothing to show that the parties intended to agree therefor.

APPEAL from the decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment at the trial (2), in favour of the plaintiff (appellant).

A deed from the respondent to one Graham, of land bordering on Lake Erie contained the following clause:—

"PROVIDED and it is further agreed by and between the party of the first part, her heirs and assigns, and the party of the second part, his heirs and assigns that the party of the second part shall have a right of way to his said lands over a certain road shown upon the said plan as Harrison Place, running north-easterly

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

(1) 47 Ont. L. R. 548. (2) 46 Ont. L. R. 227.

and south-westerly as shown upon the said plan and the party of the first part agrees to maintain the said road and bridges thereon in as good condition as the same are now, and the party of the second part, his heirs and assigns, agree with the party of the first part, her heirs and assigns, to close the gates across the said roadway whenever he or they may have occasion to use said gates."

Said Graham conveyed to appellant the property, consisting of two lots, described in said deed except half of one lot.

The lake took by erosion all the road called Harrison Place and respondent laid out a new road in its place. Appellant, however, claimed that she was obliged to maintain the former road as it existed when the deed was given to Graham and brought an action to compel her to do so. The trial judge gave judgment in her favour directing the respondent to restore the road to its original condition or to furnish a road and bridges in all respects as suitable. The Appellate Division reversed his judgment holding that by the erosion the title to the road had reverted to the Crown and performance of the covenant would be illegal.

Lafleur K.C. and *Braden* for the appellant. If the vendor wished to guard himself against the contingency which happened he should have made provision therefor in the deed. See *Brecknock and Abergavenny Canal Navigation* v. *Pritchard* (1); *Jacobs* v. *Crédit Lyonnais* (2).

Impossibility of performance is no excuse in this case. The loss of the road was not caused by the act of God but by failure of respondent to protect it. See *Pandorf* v. *Hamilton* (3), at page 675; *Nugent* v. *Smith* (4).

(1) 6 T. R. 750.
(2) [1884] 12 Q.B.D. 589.
(3) [1886] 17 Q.B.D. 670.
(4) [1876] 1 C.P.D. 423.

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Idington J.

H. J. Scott K.C. and *McEvoy* for the respondent, cited *Haywood* v. *Brunswick Permanent Building Soc.* (1); *Andrew* v. *Aitken* (2); *Austerberry* v. *Oldham* (3).

IDINGTON J.—The covenant upon which the appellant sued herein, given by respondent in a deed by which she granted to one Graham two town lots of land of which he afterwards assigned the smaller one to appellant, does not seem to me to be clearly one that runs with the land.

It was a covenant to maintain a road and bridges thereon (by which access could be had to the land so granted) in as good condition as same were at the time of the grant.

The proviso containing said covenant began by stating that it was agreed by and between the grantor, her heirs and assigns, and the grantee, his heirs and assigns, that the grantee should have a right of way over a certain road shewn on a plan, and ended by a covenant of the grantee binding him, his heirs and assigns to close the gates across said roadway.

From this it clearly was a private right of way and was of some considerable length and seems to have served a number of places before reaching the point of approach to the land conveyed.

Even if the covenant would run with the land so conveyed, I doubt if, having regard to the surrounding circumstances as well as the language used, it could be held to do so in a sense that any assignee, as appellant is, of a small part only of the land granted should enjoy the benefit of same.

(1) [1881] 8 Q.B.D. 403. (2) [1882] 22 Ch. D. 218.
(3) [1885] 29 Ch. D. 750.

The law is to be found in *Spencer's Case* (1) and the notes thereto in Vol. I of Smith's Leading Cases (12 ed.) page 62.

The grantor can hardly have contemplated keeping up such a road for a colony and forever.

Then the road at the point in question seems rather remote from the land in question and it may only be one of the many collateral things that have been held not to be of the nature of that which must be the foundation for a covenant running with the land.

The points of objection resting upon the right of appellant to sue were taken here for the first time. And in deference to the argument so presented as well as curiosity I have considered the cases cited and much in *Spencer's Case* (1) and notes thereto cited above, without coming to any other definite conclusion than that, if there had been any doubt in my mind as to part of the ground upon which the judgment appealed from is rested in the court below, I should have desired a reargument on this phase of the case. The suggestion I make, as to the appellant not being the assignee of the whole, is my own and if resorted to needs an argument devoted thereto.

I have considered very fully the grounds taken in the argument in the court below, and have come to the conclusion that the reasons assigned by the learned Chief Justice of the Exchequer Division presiding in the second Appellate Division of the Supreme Court of Ontario are, in the main, correct but that it is not necessary to go quite so far as to hold that the mere periodical covering of an eroded part by a few inches of lake water, inevitably leads to a reversion of that part of the land in question to the Crown.

(1) 5 Co. 16.

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But assuredly herein, if the pretensions set up by the appellant are correct, much more than operating on a small part to counteract that which seems inevitable would have to be done by the respondent, or should have been done by her, to protect, by works such as witnesses speak of, the base of the road in question. That would involve what is contemplated by the reasons of the Chief Justice which would be applicable in the sense of interfering with navigation or the right of the Dominion to assert dominion over the space involved.

I do not think we need go further than the observance of the rule as to what could be held to have been possibly within the contemplation of the parties as I suggested during the argument herein.

I find justification therefor in the judgment of Lord Kenyon C. J., in the case, cited by counsel for respondent, of *The Company of Proprietors of The Brecknock and Abergavenny Canal Navigation* v. *Pritchard & Others* (1), wherein a somewhat similar covenant to that in question herein was involved.

In disposing of it he said:—

> This sort of loss must have been in the contemplation of all the parties in this case; the bridge was to be built in such a manner as to resist any body of water.

Such was the nature of the contract there in question. Such is not the nature of the contract here in question.

The pretension that such a contract as involved herein (merely in respect of and for the sale of two village lots worth together twelve hundred dollars), necessarily involves the possibilities of expending a fortune for discharging the obligation, is, to my mind, quite unthinkable.

(1) 6 T. R. 750.

If any one has pretended to say that such was involved in fact I beg leave to doubt his recollection and would feel inclined to doubt that the statement had ever reached the mind of respondent.

Let us apply our common sense to such pretensions and there is an end of such stories.

In my view it never was within the contemplation of either of the parties that in the event of that happening, which has happened, the respondent was bound by such a covenant as this to restore the road in question. If such a case had been presented to either as within the possibilities contemplated we never would have been troubled with this covenant or this case.

I rely, of course, on the cases cited and other reasons based thereon in said judgment of the Chief Justice, to which I have not specifically referred.

The appeal should be dismissed with costs.

DUFF J.—The proviso in the grant from the defendant to Graham upon which the decision of this appeal turns is in these words:—

> Provided and it is further agreed by and between the party of the first part, her heirs and assigns, and the party of the second part, his heirs and assigns, that the party of the second part shall have a right of way to his said lands over a certain road shewn upon the said plan as Harrison Place, running north-easterly and south-westerly as shewn upon the said plan, and the party of the first part agrees to maintain the said road and bridges thereon in as good condition as the same are now, and the party of the second part, his heirs and assigns, agrees with the party of the first part, her heirs and assigns, to close the gates across the said roadway whenever he or they may have occasion to use said gates.

The right of way reserved is therefore a right of way on a defined road and it is that defined road which the defendant covenanted to maintain. The Appellate Division was, I think, entirely right in holding that the covenant did not contemplate the case of the

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destruction of the substratum of the road by the inroads of the lake. The case is within the broad principle upon which the rule in *Taylor* v. *Caldwell* (1) rests, if not embraced within the terms of the rule itself. The parties clearly contracted on the footing that the site of the road should continue to exist. I say they clearly did so because, having regard to all the circumstances, one cannot suppose that reasonable persons, having clearly in view the contingency which happened, would on the one hand have exacted or on the other hand agreed to enter into an unqualified covenant to protect the site of the road from the invasion of the lake.

The appeal should be dismissed with costs.

ANGLIN J.—Two questions arise in this case—one as to the construction of the grant by the defendant to the plaintiff's assignor of a right of way

over a certain road shewn * * * as Harrison Place

and her covenant

to maintain the said road and bridges thereon in as good a condition as the same are now,

and the other as to the plaintiff's right to claim the benefit of this covenant. In the view I take of the first question it will be unnecessary to deal with the second.

The learned trial judge (Falconbridge C. J.) held the plaintiff entitled to recover and ordered the defendant to furnish, construct and maintain over her lands a road and bridges as suitable, sufficient and convenient for the plaintiff as the road known as Harrison Place was at the date of the defendant's conveyance to the plaintiff's assignor. Damages were also awarded for breach of the covenant. (2).

(1) 3 B. & S. 826. (2) 46 Ont. L.R. 227.

The Appellate Divisional Court reversed this judgment, holding that the erosion of the site of Harrison Place by encroachment of the waters of Lake Erie had relieved the defendant from all liability under her covenant. (1). The fact of the erosion is common ground.

With very great respect, I fail to find anything in the agreement for the right of way or in the covenant to maintain it which would entitle the plaintiff or her assignor, were he suing, to such a substituted right of way as the judgment of the lamented Chief Justice of the King's Bench awarded. The grant is of a right of way over Harrison Place; the covenant is to maintain said road and bridges thereon.

Harrison Place having ceased to exist without any default of the defendant, I agree in the view of the learned judges of the Appellate Divisional Court that her obligation under the covenant sued upon thereupon lapsed. I cannot usefully add anything to the reasons for this conclusion stated by the learned Chief Justice of the Exchequer Division.

The question is purely one of construction of the terms of the covenant, which must, of course, be read in the light of the circumstances under which it was made. But I do not find either in the language of the agreement and covenant *per se* or in the circumstances under which they were entered into, as disclosed by the evidence, anything that would warrant imposing upon the defendant an obligation—almost certainly impossible of performance—to protect the road in question against invasion by the waters of Lake Erie. That cannot reasonably be supposed to have been within the contemplation of the parties.

(1) 47 Ont. L.R. 548

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Anglin J.

The case in my opinion falls within the principle of the line of authorities of which *Taylor* v. *Caldwell* (1), is the best known and *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2), is a modern instance, rather than within that of *Paradine* v. *Jane* (3), and *Atkinson* v. *Ritchie* (4), relied on by the late learned Chief Justice of the King's Bench. The law seems to be well stated in paragraphs 717 and 718 of Vol. 13 of Corpus Juris, which the learned Chief Justice cited but thought not applicable. The case at bar I think falls within the exception noted in par. 713 rather than under the general rule stated in the passage from par. 711 quoted by the learned Chief Justice. The language of Hannen J. in *Baily* v. *De Crespigny* (5), at page 185, appears to be in point.

BRODEUR J.—The obligation incurred by the respondent under her contract with the appellant's auteurs was to *maintain* a certain road therein described. This road having been destroyed by the act of God, her obligation is at an end.

The parties contracted on the basis of the continued existence of the road its subsequent perishing excuses the performance (Corpus Juris, vol. 13, p. 642, sect. 717). There is an implied condition that the impossibility of performing the obligation puts an end to the obligation of keeping the road in repair. The word "maintain" could not cover the obligation of re-establishing the road if it were washed away by the action of the waves. It means to keep in repair the

(1) 3 B. & S. 826.
(2) [1916] 2 A. C. 397.
(3) Aleyn 27.
(4) 10 East 530.
(5) L. R. 4 Q. B. 180.

road in question. It could not be construed in the circumstances as an obligation of reconstructing works which by their high cost could never have been contemplated by the parties.

This contract should be read as containing an implied condition that the respondent should be excused if the breach became impossible from the perishing of the thing without default of the contractor. *Taylor* v. *Caldwell* (1); *Appleby* v. *Myers* (2).

No reasonable suggestion can be offered that the destruction of the road was due to the negligence or the fault of Harrison.

The appeal fails and should be dismissed with costs.

MIGNAULT J.—I concur with my brother Anglin.

Appeal dismissed with costs.

Solicitors for the appellant: *Gibbons, Harper & Brodeur.*

Solicitor for the respondent: *J. M. McEvoy.*

(1) 3 B. & S. 826. (2) [1867] L.R. 2 C.P. 651.

1921

*June 15.
*Oct. 11.

CLAYTON PETERSON (PLAINTIFF) APPELLANT.

AND

ADELINE BITZER (DEFENDANT) . . RESPONDENT.

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

Contract—Statute of Frauds—Memo. in writing—Implied terms.

An action was brought for specific performance of an agreement contained in the following document: "Received from Clayton Peterson the sum of one hundred dollars on deposit for house at 62 George St., $1,400 payable May 1st, 1920, and balance of $2,300 on 5 year mortgage." A cheque bearing the same date as the above was given to Mrs. B. It read "Pay to the order of Mrs. Adeline Bitzer one hundred dollars deposit on 62 St. George St., at purchase price of $3,800, $1,400 payable on May 1st, 1920, and assume a 5-year mortgage of $2,300.

Held, reversing the judgment of the Appellate Division (48 Ont. L.R. 386) Idington and Duff JJ. dissenting, that the documents could be read together and constituted a sufficient memorandum in writing of a contract of purchase to satisfy the Statute of Frauds; that the date, May 1st, 1920, on which the cash payment was to be made and security given for the balance of the purchase money indicated the time for taking possession; and that a stipulation that the mortgage would bear interest could be implied, the rate to be five per centum as provided by statute.

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

The material facts are stated in the above headnote.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Brodeur and Mignault JJ.

(1) 48 Ont. L.R. 386.

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G. F. Henderson K.C. and *Hattin* for the appellant. The finding of the trial judge that the parties had reached an agreement should not have been disturbed by the Appellate Division. *Morrow* v. *Ogilvie Flour Mills Co.* (1); *Ruddy* v. *Toronto Eastern Ry. Co.* (2). And see *McKenzie* v. *Walsh* (3).

The receipt and the cheque can be read together. *Doran* v. *McKinnon* (4); *Stokes* v. *Whicher* (5).

The mortgage would bear interest if the contrary is not expressed. *Martin* v. *Jarvis* (6), at page 374; Fry on Specific Performance (5 ed.) paras. 368 and 372.

McKay K.C. for the respondent. The complete agreement must appear in writing. *Douglas* v. *Baynes* (7).

The cheque is not referred to in the memorandum and they cannot be read together. *Stokes* v. *Whicher*(5).

THE CHIEF JUSTICE.—For the reasons stated by Sir William Meredith, Chief Justice of Ontario, in his dissenting opinion in the Appeal Court of Ontario (First Division), in which I fully concur, and to which I have nothing useful to add, I would allow this appeal with costs here and in the Appellate Division and restore the judgment of the trial judge.

IDINGTON J. (dissenting).—The appellant sues for specific performance of an agreement contained in the following:—

(1) [1918] 57 Can. S.C.R. 403.
(2) [1917] 33 D.L.R. 193.
(3) [1920] 61 Can. S.C.R. 312.
(4) 53 Can. S.C.R. 609.
(5) [1920] 1 Ch. 411.
(6) 37 Ont. L. R. 269.
(7) [1908] A.C. 477.

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PETERSON v. BITZER.

Idington J.

Kitchener, Ont., Dec. 29, 1919.

Received from Clayton Peterson the sum of one hundred dollars, on deposit for house at 62 St. George St., $1,400 payable May 1st, 1920, and balance of $2,300 on 5 year mortgage.

Adeline Bitzer.

The respondent, besides denying such an agreement as appellant sets up, pleads the Statute of Frauds.

The learned trial judge finds as a matter of fact that the rate of interest was not mentioned or discussed. And I may add from a perusal of the evidence that the question of interest was never spoken of by any one until some time after above foundation for this suit.

That fact seems conclusively established by the evidence of appellant wherein he spoke as follows:—

Q.—Was there any discussion then as to interest on the mortgage? A.—No, there was not.

Q.—The memorandum which is Exhibit No. 1 here, does that contain all that was discussed at that day? A.—Everything.

And more than that it was some days later when having realized that they had not discussed about the driveway to the lot, the size of the lot and the rate of interest, he sought out respondent's son, who had been present at the signing of said receipt (and in fact wrote it as appellant dictated it), and pretends that the son assented to the change he desired made in the receipt.

The said son admits appellant's visit to him where he was working but denies that he assented to any of such changes and further says that appellant wished him to insert words in the receipt to cover said points. This he properly refused to do and said he would tell his mother what appellant said.

It seems to me highly probable that this is the correct version of what transpired on that occasion especially as no more passed between them till a

month later when the said son, on behalf of respondent, tendered back to the appellant the cheque which had never been used or indorsed by respondent.

That cheque reads as follows:—

Kitchener, Ont., Dec. 29, 1919.

To Canadian Bank of Commerce, (Name of Bank)
Waterloo, Ont. (Branch))

Pay to the order of Mrs. Adeline Bitzer, $100.00 (one hundred dollars), deposit on 62 St. George St., at purchase price of $3,800.00, $1,400.00 payable on May 1st, 1920, and assume a 5-year mortgage of $2,300.00.

C. Peterson.

It is attempted to strengthen appellant's case under the above receipt as a compliance with the requirements of the Statute of Frauds by insisting that both must be read together.

If she had used or indorsed this cheque of course that would be a fair argument. Inasmuch as she did neither the cheque, in my opinion, cannot be read as part of what she is presumed to have bound herself by in writing.

In all the cases relied upon herein by appellant in that regard, none as I read them has gone so far.

And in any event it does not help the case made by the receipt in any regard except to indicate that it was a purchase of the property that was involved.

Both read together in any way one may desire do not cover the terms of interest.

I most respectfully submit that without a word said in the bargaining as to interest, a vital part of every bargain of the kind, the court cannot read into this receipt or into both documents taken together, a provision as to interest—either to provide for interest or the rate of interest.

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Idington J.

No case is cited that ever went so far and I venture to think that until this none is to be found so naked as this now presented.

Interest at the statutory rate is implied in many cases determining the sum payable as damages.

But this is of an entirely different character and under a statute that requires the essential features of the bargain to be set forth in a writing binding the party sought to be held liable.

To say that a mortgage necessarily implies the legal rate of interest would surprise many people in some parts of our Dominion where the vendor generally looks for a good deal more than five per cent per annum upon balances of unpaid purchase money.

Nay more, I venture to think if we so decided we would enable dishonest men desiring to take advantage of vendors to act upon this receipt as a model, and try to cheat the unwary vendor out of the difference between five and six, seven or eight per cent per annum.

It is to be observed as said elsewhere that the receipt (by omitting the word "purchase") does not shew that it is for any purchase and hence cases cited such as *Hughes* v. *Parker* (1), shewing the purchase is *prima facie* that of the fee simple, relied upon by the learned trial judge, are not applicable.

And again, the help got from the cheque if it had been so incorporated therewith as it might have been either by indorsement thereof, or an express reference thereto in the receipt, must have regard to the assuming of a mortgage. The only existent mortgage possibly referred to, was that to Magdalena Clemens which bore interest at five and a half per cent, payable semi-annually. And that mortgage happens to be for only two thousand dollars.

(1) 8 M. & W. 244.

One argument might have been raised that as no interest was named the mortgage was to be one without interest, which is by no means an unheard of thing.

Unfortunately for appellant he recognized the omission and says he agreed with young Bitzer for a six per cent rate. And in light of that and other features of the case the courts should not enforce such a claim by directing specific performance.

Yet it is worth while turning the light that way as a means of shewing what change is involved in reading into a contract which is required by law to be in writing something not there but clearly omitted by mistake which would be another ground for refusing specific performance.

There are other features of the case which present difficulties of a kind like unto the interest question, but one such (fatal as I hold) seems to me enough to deal with at such length.

I may in parting from this case point out how the common sense of the appellant led him to realize the mistakes he had made, and need for amending the contract, so called.

And when the alleged contract was repudiated how far beyond what is usual took place in making a tender of deeds and mortgages.

If indeed the case is so clear on the alleged legal authorities and principles of law involved, why did it require so many alternative tenders and such length of exposition in making clear what the tender as made really meant?

I think the appeal should be dismissed with costs.

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Duff J.

DUFF J. (dissenting).—I think this appeal should be dismissed. I agree for the reasons given by Mr. Justice Ferguson that the cheque cannot be looked at and that being so there are essential terms of the contract which are not mentioned in the document relied upon as a memorandum.

BRODEUR J.—The receipt of one hundred dollars signed by Mrs. Bitzer on the 29th of December, 1919, and handed over to the plaintiff Peterson, is a document which contains all the essential terms of a contract for the sale of the property therein mentioned. The parties, property and price are all included. If it was simply an option, as contended by the respondent, it would have been written in a different way. This court which had to construe lately an almost similar document in the case of *McKenzie* v. *Walsh* (1), came to the conclusion that such a receipt complied with the requirements of the statute of frauds.

The receipt in the present case did not specifically mention that the money was paid for the purchase of a property as in *McKenzie* v. *Walsh* (1). But the price stipulated could not apply to a lease of the property. Besides, the cheque which was given by the appellant to the respondent for one hundred dollars ($100), which was accepted and kept for some time by Mrs. Bitzer, was more explicit in that respect than the receipt itself since it specified that it was given for a purchase price.

The two documents, namely, the cheque and the receipt, could be read together. *Doran* v. *McKinnon* (2); *Stokes* v. *Whicher* (3).

(1) 61 Can. S.C.R. 312. (2) 53 Can. S.C.R. 609.
(3) [1920] 1 Ch. 411.

In the last case of *Stokes* v. *Whicher* (1), the document signed by the vendor did not contain the purchaser's name. But as a cheque had been given by the purchaser for the deposit stipulated in the document, it was held that the documents and the cheque could be read together to ascertain the purchaser's name and form a sufficient memorandum to satisfy the Statute of Frauds.

It is contended by Mrs. Bitzer that the document did not contain any date at which possession was to take place.

The 1st of May, 1920, was stipulated as the date at which the cash payment was to be made and at the same time a mortgage was to be given for the balance of the purchase price. In the absence of a contrary intention appearing possession should take place at that date. The date of payment of the purchase money may be regarded as the date of completion (Halsbury, Vol. 25, No. 625).

It is contended also by the respondent, Mrs. Bitzer, that there is no stipulation as to the interest on the mortgage.

A mortgage agreement generally provides for interest. But this is not necessary, for a mortgage whether legal or equitable carries interest although not expressly reserved. *Thompson* v. *Drew* (2).

As to the rate to be paid, our Dominion statute, ch. 120 R.S.C., sec. 2, provides that if no rate is fixed by the agreement the rate shall be five per cent.

For these reasons, I would allow the appeal and restore the judgment of the trial judge with costs of this court and of the court below.

(1) [1920] 1 Ch. 411.

(2) 20 Beav. 49.

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PETERSON v. BITZER.

Mignault J.

MIGNAULT J.—For the reasons given by the learned Chief Justice of Ontario, which are perfectly satisfactory to me and in which I express my respectful concurrence, I would allow this appeal with costs here and in the Appellate Division, and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitors for the appellant: *Clement, Clement & Hattin.*

Solicitors for the respondent: *A. L. Bitzer.*

SIR CHARLES ROSS (DEFENDANT).....APPELLANT;

AND

CHARLES O. DUNSTALL (PLAINTIFF) RESPONDENT

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*Feb. 17, 18.
*May 26.
*Oct. 11.

SIR CHARLES ROSS (DEFENDANT).....APPELLANT;

AND

SLOAN M. EMERY (PLAINTIFF).....RESPONDENT.

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

Negligence—Contract of sale—Fire-arm—Latent defect—Injuries—Liability—Delictual fault—Articles 1053, 1070, 1491, 1522, 1527 *C.C.*

The appellant was a manufacturer of sportsmen's rifles which, when placed by him on the market, were properly assembled and of good material and workmanship. His is the only make of bolt-action rifle which can be fired with the bolt unlocked though appearing to be locked. To prevent rust, the guns were heavily oiled by the manufacturer and purchasers were warned to wipe them out before using. In order to do this the bolt had to be taken apart but no instructions were given by the manufacturer as to the manner of reassembling the parts. Each of the respondents was injured by the bolt of one of these rifles being driven back through the breach when it was used by him for the first time after its purchase.

Held, Brodeur J. dissenting, that, even assuming that each of the respondents had improperly assembled the parts of the bolt after cleaning it as instructed, the fact that the rifle would fire when the bolt was unlocked while apparently locked, constituted a latent defect and source of danger in the rifle and the failure of the appellant to take any reasonable steps to warn purchasers against that latent danger was equivalent to "fault", "neglect" and "imprudence" within the purview of Art. 1053 C.C.

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

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Per Brodeur J. (dissenting):—Fault is either contractual or delictual, and delictual fault cannot be found in an action based on a contract. The appellant was not guilty of any contractual fault, the alleged defect of the rifle not being a latent defect within the purview of article 1522 C.C. The appellant was not liable for an apparent defect (art. 1523 C.C.) and he was not legally bound to warn purchasers as to the way of assembling the parts of the rifle (Art. 1491 C.C.)

Judgment of the Court of King's Bench (Q.R. 29 K.B. 476) affirmed, Brodeur J. dissenting.

APPEAL from the judgments of the Court of King's Bench, appeal side, Province of Quebec (1), affirming the judgments of the trial court (2) which maintained the respondents' actions but reducing the amount of damages granted to them. The material facts of the case are fully stated in the above head-note and in the judgments now reported.

F. Roy K.C. for the appellant. The rifle, if properly assembled, is absolutely safe and offers no danger whatsoever; and the appellant cannot be held responsible for the act of a purchaser who, by his neglect and imprudence, deranges the mechanism and assembles it in a defective manner and other than when it left the factory.

A. C. Dobell K.C. and *J. P. A. Gravel K.C.* for the respondents. The appellant is liable either of a contractual fault within arts. 1522 *et seq.* C.C., or of a delictual fault within art. 1053 C.C.

THE CHIEF JUSTICE.—For the reasons stated by my brother Mignault J., in which I fully concur, I am of opinion that both the appeals and the cross-appeals in these two cases should be dismissed with costs.

(1) Q.R. 29 K.B. 476. (2) Q.R. 58 S.C. 123.

IDINGTON J.—*Ross v. Dunstall.* I am of the opinion that this appeal should be dismissed with costs. And the cross-appeal, which raises no question but the measure of damages which for many long years has in numerous cases uniformly been held to be a matter we should not meddle with, must be dismissed with costs.

Ross v. *Emery.* For the reasons assigned by the learned trial judge and the judges constituting the majority in the Court of Appeal I am of the opinion that this appeal should be dismissed with costs.

Having regard to the jurisprudence of this court, for many years past, in refusing to interfere with the assessment of damages when no principle of law is violated in the actual determination of the amount, I would dismiss the cross-appeal herein.

DUFF J.—Negligence is clearly, I think, established in fact. The rifle, when the parts were assembled in a certain way—which to any eye but the expert eye might readily appear to be the right way—was a highly dangerous instrument. So much so indeed that when discharged in such circumstances injury to the holder of the rifle was almost certain to follow.

These rifles were sold without warning—that is to say were put into commercial circulation with the reasonable probability that some of them would come into non expert hands, where they would be received without suspicion and under the risks arising from the circumstances mentioned. There is sufficient evidence to support a finding that competent and careful inspection and testing must have revealed the existence of these risks to the appellant and I agree with the courts below that such is the proper conclusion.

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Duff J.

Is the appellant responsible? I can see no reason for holding that such responsibility does not arise from the very terms of Art. 1053 C. C. unless it can be successfully contended that responsibility in such circumstances is limited to that arising from the contract of sale. I see no reason for such a limitation of the effect of the article mentioned. I cannot understand why a delictual responsibility towards those with whom the negligent manufacturer has no contractual relation may not co-exist with contractual responsibility towards those with whom he has.

This is said to be inconsistent with the decisions of the English courts. But it is not, I think, inconsistent with *George* v. *Skivington* (1), which appears to be sufficient to support the proposition that a manufacturer is responsible if he negligently manufactures and puts into circulation a mischievous thing which is or may be a trap to people using it. *George* v. *Skivington* (1) has no doubt been adversely commented upon but it has not been considered by any court competent to overrule it and it has been applied widely in the American courts. See *MacPherson* v. *Buick Motor Co.* (2).

Whatever be the state of the English law the principle of *George* v. *Skivington* (1) is, in my opinion, a principle of responsibility which by force of Art. 1053 C.C. is part of the law of Quebec.

ANGLIN J.—The facts of these two cases sufficiently appear in the reports of the *Dunstall Case* in the Superior Court (3), and of both cases in the Court of King's Bench (4), and in the judgments of my learned brothers. They raise the very important

(1) [1869] L.R. 5 Ex. 1.
(2) 111 N. E. 1050.
(3) Q.R. 58 S.C. 123.
(4) Q.R. 29 K.B. 476.

question of the liability under the law of Quebec of the manufacturer of a firearm, placed by him on the market for general sale, which, though faultless in material and workmanship, causes injury to a purchaser (either from the manufacturer himself or his agent or from a merchant dealing in such goods) owing to a latent and unusual source of danger inherent in its design, to give warning of which no steps have been taken by the manufacturer. The existence of the source of danger in the Ross rifle—that it will fire when its bolt is unlocked—is indisputable. Its latent character is fully established—so much so that the manufacturer claims to have been himself unaware of it. While probably discernible by an expert and unlikely to be the cause of injury to a person who knows of it, it is apt to escape the notice of an ordinary user of a sportsman's rifle—even if somewhat experienced—as happened in each of these cases, without his being chargeable with any fault in the nature of temerity, carelessness or inattention.

No such hidden source of danger is to be found in such well known makes of bolt-action rifles as the Mauser, Lee-Enfield, Lebel, Mannlicher, Nagant and U.S. Springfield, none of which can be fired unless the bolt is securely locked. It was not shown to be present in any other make of rifle than the Ross.

There is evidence given by Mr. Power, formerly a foreman in the appellant's factory, that this source of danger was in fact brought to the appellant's attention in 1914. But as the manufacturer he should, in my opinion, not be heard to say that he was not or should not have been aware of it. 3 Pothier, Vente, No. 213; S. 1873.2.179; 2 Troplong, Vente, No. 574.

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There is also uncontradicted evidence given by Mr. Blair, a Government expert, that the danger might have been eliminated by a very simple change in design. That being the case, if such change would neither materially affect the user of the rifle nor interfere with the "straight pull," its characteristic feature—and, while there is no direct evidence to that effect, in the absence of any suggestion in the record that it would deem it a fair inference—I have little difficulty in accepting the conclusion that the fact that the Ross Sports Rifle could be fired while the bolt was in a wrong position and unlocked and nothing to indicate that fact was apparent to the ordinary user constituted a latent defect in its design.

I assume that the rifles were properly assembled when they left the appellant's factory and that the bolts became subsequently disarranged—not improbably while in the hands of the respective plaintiffs.

The learned trial judge found that the existence of this source of danger constituted a defect in the rifle which entailed responsibility on the manufacturer for resultant injuries. Three "Considérants" of his judgment read as follows:

> Considérant que le dit accident a été causé non par quelque défaut dans les matériaux employés ou dans la main-d'œuvre, mais par un défaut dans le modèle du fusil lui-même et du mécanisme de la culasse;
>
> Considérant que ce défaut consiste en ce que les pièces qui composent la culasse mobile dudit fusil sont susceptibles d'être déplacées par la manipulation sans que le changement soit suffisamment apparent pour autre qu'un expert, et en ce que la culasse ainsi dérangée est susceptible d'être mise en place et fermée, et le fusil armé, sans que la dite culasse soit fixée au canon du fusil—état de choses qui n'est pas visible à l'extérieur,—et surtout en ce que le fusil, ainsi apparemment bien armé, peut être tiré avec le résultat que la culasse en est repoussée par la détonation, s'en détache et frappe le tireur à la figure avec une grande force;

Considérant que, indépendamment de toute responsabilité contractuelle, la vente publique et la mise en circulation d'une arme affectée de ce vice constitue un quasi-délit dont l'auteur est responsable du dommage qui peut en résulter.

In the Court of King's Bench, while the judgments holding the defendant liable were sustained, the damages awarded to the plaintiff Dunstall were reduced from $11,060 to $8,560 and those awarded to the plaintiff Emery from $10,000 to $5,482. The respondents have both cross-appealed against these reductions in the amounts of their respective recoveries. These cross-appeals may be disposed of on the short ground that neither case is of the very exceptional class in which this court feels justified in interfering on the ground of gross and palpable excess or inadequacy with the quantum of damages fixed by the provincial appellate court.

The failure of the appellant to take any reasonable steps to insure that warning of the latent danger of the misplaced bolt—whether it did or did not amount to a defect in design—should be given to purchasers in the ordinary course of the sporting rifles which he put on the market in my opinion renders him liable to the plaintiffs in these actions. His omission to do so was a failure to take a precaution which human prudence should have dictated and which it was his duty to have taken and as such constituted a fault which, when injury resulted from it to a person of a class who the manufacturer must have contemplated should become users of the rifle, gave rise to a cause of action against him.

The cases fall within the purview of Art. 1053 C.C. Taking no steps to warn purchasers of the rifle of its peculiar hidden danger was "neglect" and "imprudence" on the part of the defendant (whether his

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knowledge of it was actual or should be presumed) which caused injury to the plaintiff in each instance. If his failure to make an effort to give such warning was due to ignorance of the danger, such ignorance may well be deemed "want of skill" (*imperitia*) under the circumstances.

The principle of the case in D. 1869.2.195, cited for the respondents, where a doctor attending a child who failed to notify its nurse of the contagious character of the disease with which it was afflicted and which she contracted was held liable to her, may be invoked. Purchasers of the Ross rifle were entitled to rely on the skill and prudence of its manufacturer as the nurse was on that of the doctor. Another case, reported in the Court of Cassation in S. 1899.1.371 and in the Court of Appeal in D. 1894.2.573, may also be referred to where failure to warn the purchaser of a bicycle of the danger, owing to weakness in the tubing forming the post, of raising the handle bar of the bicycle too high was indicated as a ground of liability on the part of the manufacturer-vendor, the purchaser having been injured because the tubing in the post broke.

The responsibility of the manufacturer where he has himself sold to the plaintiff, either directly or through an agent, for injuries occasioned to the purchaser by hidden defects in the thing sold is clearly covered by Arts. 1522 and 1527 C.C. All the authorities have followed Pothier in regarding him as a person who is legally presumed to know of such defects (Pandectes Françaises, Rep. vbo. Vices Redhib. Nos. 337-40: Guillouard, Vente, No. 462) and this presumption applies in favour of sub-purchasers as well as the original vendees. It puts the manufacturer who is ignorant of latent defects in the same plight as if he knew of them.

There is good authority for the proposition that this contractual or quasi-contractual responsibility extends to sub-purchasers of his products from merchants to whom the manufacturer has supplied them whether directly or through the intervention of wholesale dealers. Baudry-Lacantinerie (Saignat) Vente, No. 432: Guillouard, Vente, No. 452: S. 1891.2.5. But it is perhaps not so clear that it also covers unusual latent sources of danger not amounting to defects.

I therefore prefer to rest my opinion in favour of the plaintiffs on Art. 1053 C.C. (S. 1879.1.374). The defendant's failure to take steps to warn purchasers of his rifles of the hidden danger peculiar to them, that they would fire when the bolt appeared to be locked but was in fact unlocked, I regard as an imprudence or neglect within the purview of that article and therefore actionable. Sourdat, Resp. Vol. 1, Nos. 668, 670, 675, 680.

While English law is not applicable to these cases I incline to think that under it the defendant would likewise be liable—at all events if he knew of the latent danger of his rifle—and probably if he did not. Reference may be made to the very recent edition (1921) of Clark and Lindsell on Torts, pp. 455, 469, 471-5: 25 Hals. L. of E., No. 293: 21 Hals. L. of E., No. 638 and 686: *White* v. *Steadman* (1); *Bates* v. *Batey* (2); *Cavalier* v. *Pope* (3); and *Parry* v. *Smith* (4). In *Blacker* v. *Lake & Elliot* (5), Hamilton and Lush JJ., held knowledge by the manufacturer of the defect or condition creating the danger essential to

(1) [1913] 3 K.B. 340.
(2) [1913] 3 K.B. 351.
(3) [1906] A.C. 428.
(4) [1879] 4 C.P.D. 325, at p. 327.
(5) [1912] 106 L. T. 533.

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render him liable to a sub-purchaser from his vendee of an article not ordinarily of a dangerous character even though it must have been in contemplation that such a resale should take place. *George* v. *Skivington* (1), the well-known case of the deleterious hair wash, where the contrary was held, is treated as virtually overruled. Lush J. in *White* v. *Steadman* (2), however, indicates that in his view the decision in *George* v. *Skivington* (1) might have been supported if it had been put upon the ground that the defendant had failed to take ordinary care to avail himself of his opportunity of knowledge of the danger of the ingredients composing his hair wash. With respect, it seems to me that ground of liability, though not expressed, is fairly implied in the judgments delivered in the Court of Exchequer. *Thomas* v. *Winchester* (3), cited with approval in *Dominion Natural Gas Co.* v. *Collins* (4), and the opinion of Matthew L.J., in *Clarke* v. *Army & Navy Society* (5), may also be looked at in this connection. *George* v. *Skivington* (1) is still cited as an authority in Clark and Lindsell's recent book at p. 472. I find it difficult to reconcile the decision in *Blacker* v. *Lake & Elliott* (6), with the classical passage in the judgment of Brett M. R., in *Heaven* v. *Pender* (7).

> Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

(1) L. R. 5 Ex. 1.
(2) [1913] 3 K.B. 340.
(3) [1852] 6 N.Y. 397.
(4) [1909] A.C. 640, at p. 646.
(5) [1903] 1 K.B. 155, at p. 168.
(6) [1912] 106 L.T. 533.
(7) [1883] 11 Q.B.D. 503, at p. 509.

The duty of a manufacturer of articles (such as rifles), which are highly dangerous unless designed and made with great skill and care, to possess and exercise skill and to take care exists towards all persons to whom an original vendee from him, reasonably relying on such skill having been exercised and due care having been taken, may innocently deliver the thing as fit and proper to be dealt with in the way in which the manufacturer intended it should be dealt with. The manufacturer of such articles is a person rightly assumed to possess and to have exercised superior knowledge and skill in regard to them on which purchasers from retail dealers in the ordinary course of trade may be expected to rely. From his position he ought to know of any hidden sources of danger connected with their use. The law cannot be so impotent as to allow such a manufacturer to escape liability for injuries—possibly fatal—to a person of a class who he contemplated would use his product in the way in which it was used caused by a latent source of danger which reasonable care on his part should have discovered and to give warning of which no steps have been taken.

I agree with the learned judges of the Court of King's Bench and the Superior Court that the respondents' actions are not prescribed.

I would dismiss both the appeal and the cross-appeal with costs.

BRODEUR J. (dissenting).—Ces deux causes, qui avaient été réunies pour les fins de la preuve, ont été plaidées séparément devant nous; mais comme les faits y sont à peu près identiques et que les mêmes questions de droit s'y présentent, nous pouvons les décider en même temps.

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Les faits sont les suivants:

L'appelant, Sir Charles Ross, est fabricant d'une carabine communément appelée "Ross Rifle." Les intimés, qui sont amateurs de chasse, ont acheté chacun une de ces carabines. Avant de s'en servir cependant ces derniers ont été obligés de les nettoyer, et à cette fin il leur a fallu défaire quelques pièces de la culasse. Quand ils sont venus pour assembler ces pièces, ils n'ont pas suffisamment poussé et fixé la culasse, de sorte que plus tard, quand ils se sont servis de la carabine pour tirer sur le gibier, la culasse, par l'action de la cartouche, a laissé sa gaine, est venue les frapper à la figure et les a blessés grièvement. De là action en dommages contre le fabricant en alléguant que les accidents étaient dus à sa négligence et que ces carabines étaient entachées d'un vice caché.

Le fabricant a plaidé que ces accidents étaient dus à l'impéritie des deux demandeurs Dunstall et Emery et que ces carabines n'avaient pas de défauts cachés.

La Cour Supérieure, présidée par l'honorable Juge Dorion, a décidé que l'accident

> a été causé non pas par quelque défaut dans les matériaux employés ou dans la main-d'oeuvre, mais par un défaut dans le modèle du fusil lui-même et du mécanisme de la culasse * * et que indépendamment de toute responsabilité contractuelle, la vente publique . . d'une arme affectée de ce vice constitue un quasi-délit dont l'auteur est responsable du dommage qui peut en résulter.

Elle a condamné Ross, dans le cas de Dunstall, à lui payer $11,060.00, et, dans le cas d'Emery, à lui payer $10,000.00.

La Cour du Banc du Roi a déclaré qu'il y avait responsabilité de la part de Ross, mais elle a réduit les dommages en déclarant que le montant accordé était excessif.

Le défendeur Ross appelle de ces jugements et demande que les actions soient renvoyées.

Les demandeurs Dunstall et Emery font contre-appels et demandent le rétablissement des jugements de la Cour Supérieure.

Sur ces contre-appels nous n'avons pas jugé à propos d'entendre le défendeur. Il est de jurisprudence que nous n'intervenons presque jamais dans les décisions qui fixent ces dommages, à moins qu'il n'y ait application d'un principe erroné. Dans le cas actuel, la Cour du Banc du Roi a jugé à propos de réduire les dommages; et, de fait, je crois que les montants accordés par la Cour Supérieure étaient trop élevés. La Cour du Banc du Roi a exercé sagement la discrétion qui lui incombait.

Au mérite, sur la question de responsabilité, se présentent des points de droit des plus intéressants.

Les actions sont apparemment basées sur une faute contractuelle, c'est-à-dire sur le fait que la chose vendue serait entachée d'un défaut caché.

Les cours inférieures ont trouvé dans les faits de la cause non-seulement une faute contractuelle, mais un quasi-délit ou une faute délictuelle.

Il est assez important de préciser le débat sur ce point, car les deux fautes n'entraînent pas les mêmes conséquences et ne sont pas soumises au même mode d'enquête.

La première question est donc de savoir si les faits de la cause constituent une faute délictuelle.

En d'autres termes, l'inexécution d'une obligation contractuelle engage-t-elle la responsabilité du débiteur au point de vue délictuel?

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Tous les commentateurs du Code Napoléon qui avaient écrit sur la matière jusqu'à la codification, à quatre exceptions près, sont d'opinion que là où il y a faute contractuelle il n'y a pas lieu d'appliquer la responsabilité résultant des délits et des quasi-délits.

Aubry & Rau, vol. 4, par. 446, p. 755, 4e éd.;

Larombière, art. 1382, nos. 8 & 9;

Laurent, vol. 16, nos. 213–230, vol. 20, no. 463;

Demolombe, vol. 8, nos. 472, 477;

Sourdat, Traité de la responsabilité, vol. 1er, no. 6;

Saleilles, Traité de l'obligation d'après le code allemand, nos. 330 et suivants;

Huc, vol. 7, no. 95, et vol. 8, nos. 424 et suivants;

Saincteclette, Responsabilité et garantie;

Fromageot, De la faute comme source de la responsabilité, Paris, 1891;

Baudry-Lacantinerie, vol. 4, no. 2865;

Sauzet, Revue Critique, 1883, p. 616;

Labbé, Notes dans Sirey, 1885-2-33; 1886-4-25; 1886-2-42; 1889-4-1;

Glasson, Code Civil et la question ouvrière, pp. 30 & 32;

Dalloz, Supplément, verbo Responsabilité, no. 57;

Rouard de Card, France Judiciaire, vol. 15-1-97;

Colin & Capitant, vol. 2, p. 368 (1915).

Il y a donc, suivant ces auteurs, deux espèces de faute, c'est-à-dire la faute contractuelle, si le débiteur n'exécute pas son obligation résultant d'une convention ou l'exécute imparfaitement, et la faute délictuelle, c'est-à-dire celle qui consiste à causer un préjudice à autrui, préjudice autre que celui résultant d'une obligation contractuelle.

Notre code civil a, dans les articles 1070 et suivants, déterminé la responsabilité résultant de la faute contractuelle; et il a, dans les articles 1053 et suivants, fixé la responsabilité qui résulte des délits et quasi-dé-

lits. Il a donc indiqué d'une manière certaine les règles qui doivent nous guider dans le cas de faute contractuelle et dans le cas de faute délictuelle. S'il y a une convention entre les parties, alors nous devons fixer la responsabilité des parties suivant les dispositions du chapitre qui traite de l'effet des obligations: et s'il n'y a pas eu de convention, alors nous devons fixer cette responsabilité suivant les dispositions du chapitre qui traite des délits et des quasi-délits.

Dans les trente dernières années en France une opinion différente a été exprimée par M. Lefebvre, auteur peu connu, qui a prétendu qu'il n'y avait qu'une seule responsabilité, celle résultant de la faute délictuelle (Revue Critique de 1886, p. 485).

Etait-ce l'influence de la doctrine allemande qui se faisait sentir dans cette opinion de M. Lefebvre? En effet, la doctrine allemande veut qu'il n'y ait pas de fautes contractuelles en droit civil, mais que la faute délictuelle soit la seule qui existe et qui donne ouverture à la responsabilité (Voir Saleilles, Traité de l'obligation par le Code allemand, nos. 330 et suivants.)

Cette opinion de Lefebvre a été reprise dans une forme mitigée par Desjardins, Revue des Deux Mondes, 1888, p. 362, et par Grandmoulin, deux auteurs peu connus, et par Planiol, dont on ne saurait contester la grande autorité. Nous trouvons l'opinion de Planiol dans son ouvrage sur le Droit Civil, vol. 2, no. 911, 1ère édition, et dans sa note dans Dalloz, 1896-2-457. Ces derniers auteurs ne disent pas, comme Lefebvre, qu'il n'y a que des fautes délictuelles, mais que l'existence d'un contrat n'exclut pas nécessairement la responsabilité quasi-délictuelle, et que la responsabilité quasi-délictuelle peut trouver son application lorsque dans l'inexécution ou dans l'exécution défectueuse du contrat il apparaît un élément délictueux.

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C'est la théorie que nous retrouvons dans les jugements des cours inférieures, qui déclarent qu'une faute peut être à la fois délictuelle et contractuelle.

Je ne puis, pour ma part, accepter cette théorie de Lefebvre et de Planiol. Si notre code avait voulu établir l'unité de faute, il se serait contenté de l'article 1053; mais il a, au contraire, énoncé la dualité des fautes, tant par les articles 1053 et suivants que par les articles 1070 et suivants, et alors nous devons avoir recours aux articles 1070 et suivants chaque fois qu'il s'agit de dommages résultant de l'inexécution d'un contrat.

Les derniers auteurs qui ont écrit sur la matière sont Colin et Capitant, qui font grande autorité en France. Ils ont succédé à Planiol dans la chaire de droit à Paris, et leur opinion est fort prisée non-seulement dans les cercles universitaires mais aussi au barreau et sur le banc. Voici ce qu'ils enseignent dans leur volume 2, page 368, qui a été publié en 1915:

> Cette distinction, qui constitue l'une des notions fondamentales et élémentaires de notre droit privé, a été très contestée dans ces vingt dernières années. Naturellement, en effet, les jurisconsultes qui voient dans la *faute* constitutive du délit civil le manquement à une obligation préexistante, en donnent une définition qui s'applique tout aussi bien à la faute du débiteur contractuel. Mais cette théorie nouvelle n'a pas détruit la thèse classique de la *dualite* des *fautes*. Elle est demeurée sans influence aucune sur la pratique. Voici en réalité quelles sont les différences qu'il convient de relever entre les deux fautes.
>
> La *faute contractuelle* consiste, nous l'avons vu, dans le fait de la part d'un débiteur de n'avoir pas exécuté l'obligation à laquelle il était astreint par le contrat le liant à son créancier. La faute *délictuelle* consiste à causer un préjudice à autrui, préjudice autre que celui résultant de l'inexécution d'une obligation, et cela, soit par méchanceté et intention de nuire, soit par simple manquement aux précautions que la prudence doit inspirer à un homme diligent.
>
> A cette première opposition, les jurisconsultes classiques ont souvent rattaché ce corollaire qu'il y aurait un degré différent dans la faute répréhensible de la part d'un débiteur et de la part d'un délinquant. Le débiteur répondrait seulement de sa faute légère (culpa levis in

abstracto). Le délinquant répondrait de sa faute même très légère (In lege Aquilia culpa levissima venit). Nous avons vu ce qu'il faut penser de cette prétendue gradation. En matière contractuelle, il y a faute, en réalité, dès lors que le débiteur a contrevenu à son engagement, n'a pas accompli toute la prestation qu'il devait fournir. Le droit en cette matière consacre la responsabilité du *simple fait*. C'est seulement en matière délictuelle qu'il y a lieu de comparer, comme le faisaient les Romains, les agissements concrets du défendeur avec ceux qu'on eût pu attendre du type abstrait de l'homme prudent et diligent.

Ils font ressortir ensuite que la différence la plus importante entre la faute contractuelle et la faute délictuelle est dans *l'onus probandi*.

Notre code de Québec s'étant inspiré de la plupart des auteurs favorables à la dualité ou à la séparation de la faute, il me paraît raisonnable de les suivre et de s'écarter de ce principe du germanisme qui, sur ce point comme sur bien d'autres, ne paraît pas disposé à suivre les principes généralement acceptés dans la civilisation moderne. Je trouve donc que les cours inférieures ont fait erreur en décidant qu'une faute pouvait être à la fois contractuelle et délictuelle.

Maintenant il nous reste à examiner les obligations contractuelles de l'appelant.

Nous sommes en face d'un contrat de vente et nous devons rechercher dans le contrat, ainsi que dans les obligations qui en découlent, les principes qui doivent nous guider. Nous avons à rechercher si le vendeur a violé cette disposition implicite de son obligation qui l'obligeait à garantir son acheteur contre les défauts cachés de la chose.

Qu'est-ce qu'un défaut caché? C'est, nous dit l'article 1522 du code civil, un défaut qui rend la chose vendue impropre à l'usage auquel on la destine.

L'article 1523 nous enseigne que le vendeur n'est pas tenu des vices apparents et dont il a pu lui-même connaître l'existence.

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Le fusil vendu dans le cas actuel n'était pas impropre à l'usage auquel il était destiné; au contraire, c'était un fusil perfectionné qui avait été dûment breveté et qui avait l'avantage de tirer plus rapidement que ceux qui sont sur le marché. Le chasseur, dans le maniement de la culasse, n'a qu'à faire un mouvement, c'est-à-dire la pousser en avant, et alors la culasse se ferme d'elle-même sans exiger le mouvement de fermeture qui est nécessaire pour les autres carabines. On conçoit de suite le grand avantage qu'une invention comme celle-là peut produire. L'économie du temps et des mouvements compte pour beaucoup dans le succès du chasseur ou du soldat.

Mais il est nécessaire que l'assemblage des deux parties de la culasse soit bien fait. Si ces deux parties sont improprement réunies, alors la fermeture ne s'opère pas et il arrive un accident comme dans les causes qui nous occupent.

Les intimés n'avaient évidemment pas les connaissances voulues pour faire l'assemblage requis. Ils se sont fiés à leur connaissance des anciens modèles et ils se sont mis en frais de nettoyer la culasse et le canon du fusil. Ils ont évidemment dérangé le boulon qui va à l'intérieur du cylindre, ne lui ont pas donné, en rassemblant les pièces, la longueur voulue pour qu'il pénètre suffisamment et se ferme ensuite automatiquement. Et alors en tirant la carabine, la culasse, qui n'était pas fermée, a fait un mouvement de recul et a causé l'accident dont les intimés se plaignent.

La question de responsabilité qui se pose est de savoir si le vendeur d'une machine dangereuse, qui est parfaite en elle-même mais dont les parties mal assemblées par l'acheteur causent un accident, est responsable de cet accident. En d'autres termes, a-t-il vendu un article atteint d'un vice caché?

La question a un intérêt considerable, car avec notre développement industriel la décision que nous allons rendre peut être grosse de conséquences. Tous les jours il se met sur le marché des automobiles, des engins à gazoline, des moteurs électriques, qui, s'ils sont mis entre les mains de personnes compétentes, n'offrent pas de grands dangers; mais s'ils sont menés, réparés ou assemblés par les premiers venus, ils peuvent donner lieu à de sérieux accidents. Des mécanismes perfectionnés sont tous les jours mis en vente; mais avant d'y toucher l'acheteur doit se renseigner sur la manière de les manier. Le vendeur a rempli son obligation du moment que la chose vendue n'est pas impropre à l'usage auquel elle est destinée.

Le major Blair, qui a été le témoin expert des demandeurs, nous dit lui-même comment les accidents sont survenus:

It is owing to the bolt having been assembled with the sleeve in the wrong position, in such a position that the sleeve of the bolt was unable to travel forward on the bolt itself and lock the lugs.

Ce n'est donc pas un défaut de l'article vendu qui a causé les accidents, mais ces accidents sont dus au fait qu'on a mal assemblé les pièces de la carabine. Et cela a été fait par les demandeurs eux-mêmes. La preuve démontre que les fusils, quand ils ont laissé la fabrique, étaient parfaitement assemblés.

Le même témoin nous dit:

Q.—What have you to say regarding a rifle that could have its bolt assembled in the wrong way and yet fire? A.—Well, in the hands of one unacquainted with its mechanism, in the hands of the every day individual, I would have to say that there was danger.

On lui demande:

Q.—Would you call that a faulty design? A.—In my opinion, it would be a fault in design.

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Q.—Would you consider it a dangerous defect? A.—I would in the hands of a person who did not know whether it was rightly or wrongly assembled; there would be danger of his getting it into action in a wrong manner which would, if he did so, of course, be dangerous to the firer.

Q.—I am asking you whether there is anything from the external point of view in the rifle to show that that rifle is assembled in the wrong way? A.—To one who knows it, yes; to one who does not know it, there is not; in my opinion there is not.

L'opinion de cet expert n'est pas corroborée, au contraire les autres experts qui ont été entendus ne paraissent pas abonder dans son sens. Mais prenant même son opinion, je dis que le défendeur ne devrait pas être tenu responsable, parce que, suivant les dispositions de l'article 1523 C.C. le vendeur n'est pas tenu des défauts dont l'acheteur a pu lui-même connaître l'existence.

Pothier, Vente, no. 207, parlant des vices qui peuvent s'apercevoir, dit:

> Et quand bien même il (l'acheteur) ne l'aurait pas connu (le défaut) il ne serait pas encore recevable à se plaindre du tort qu'il souffre de ce contrat, car c'est par sa faute qu'il le souffre: il ne tenait qu'à lui d'examiner la chose avant de l'acheter *ou de la faire examiner par quelqu'un* s'il ne s'y connaissait pas lui-même. Or un tort qu'une personne souffre par sa faute n'est pas un tort auquel les lois doivent subvenir.

Baudry-Lacantinerie, au no. 418, Vente, après avoir cité ce passage de Pothier, dit:

> L'ignorance de l'acheteur ne suffirait donc pas pour que le vice fût considéré comme caché quant à lui s'il était apparent pour une personne connaissant les choses dont il s'agit.

Un homme ne doit pas s'aventurer de toucher à des machines dangereuses ou susceptibles de le devenir, à moins qu'il ne soit parfaitement renseigné sur leur mécanisme.

Mais on dit: On aurait pu rendre ce mécanisme tellement parfait qu'un ignorant même n'aurait pas pu en faire improprement l'assemblage.

Il me semble qu'une telle exigence dépasse les dispositions de la loi. Le vendeur n'est pas tenu de protéger son acheteur contre les imprudences de ce dernier. Il n'est tenu que de livrer un article qui ne sera pas impropre à l'usage auquel il est destiné.

L'absence seule de certaines qualités,

disent Aubry et Rau, 4ème édition, vol. 4, p. 387,

dont se trouverait dépourvue le chose vendue ne constitue pas un vice de nature à donner lieu à l'action redhibitoire.

Il en est de même des dommages, car on ne peut réclamer des dommages que si on peut exercer l'action rédhibitoire (arts. 1526, 1527 C.C.).

Si l'acheteur juge à propos de manier une arme, d'en défaire les parties du mécanisme et de les assembler irrégulièrement, il n'a qu'à s'en prendre à lui s'il lui arrive ensuite un accident.

Le vendeur est-il obligé de faire l'éducation de son acheteur? Je n'hésite pas à dire que non.

C'est pourtant cette obligation que les cours inférieures lui ont imposée. On s'est basé sur un jugement rapporté dans Dalloz, 1894-2-573, concernant un bicycle. Mais dans cette cause l'accident était dû à la faiblesse du tube de direction qui avait été dissimulée aux yeux de l'acheteur par différentes pièces. Il y avait défaut caché. Par conséquent, le contrat était susceptible d'être annulé à moins que le vendeur ne mît son acheteur au courant de ce défaut caché.

Mais ici il n'y a pas de défaut caché dans le modèle du fusil et dans le mécanisme de la culasse.

Dans un jugement rapporté dans Dalloz, 1857-1-65, il a été décidé par la Cour de Cassation que le vendeur n'est pas responsable du vice relatif dont deux choses vendues séparément par lui au même acheteur peuvent

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être affectées par leur mode de réunion ou d'assortiment, si cet assortiment constitue un fait personnel à l'acheteur, *qu'on reprocherait vainement au vendeur de n'avoir pas fait connaître à l'acheteur par des prospectus ou autrement dans quelles conditions la réuniom devait être opérée, une telle obligation ne résultant d'aucune loi.*

En résumé, je suis d'opinion:

1° que dans les circonstances actuelles la seule faute qui puisse être imputée au défendeur est une faute contractuelle et non pas quasi-délictuelle;

2° qu'il n'y avait pas de défaut caché dans la carabine qui a été vendue aux demandeurs;

3° que le vendeur n'était pas tenu de faire l'éducation de son acheteur sur la manière de manier ou d'assembler les articles qui lui étaient vendus.

Pour toutes ces raisons, les appels doivent être maintenus avec dépens et les contre-appels doivent être renvoyés aussi avec dépens.

MIGNAULT J.—In these two cases which present virtually the same question of civil responsibility, we have had the advantage of two arguments, the case of *Ross* v. *Dunstall* having been argued in February and that of *Ross* v. *Emery* in May. The accident of which the two respondents complain occurred in a similar manner, through the back-firing of a sporting rifle manufactured by the appellant, and each of the respondents lost the use of his right eye besides suffering other injuries to the head and face. In the case of Dunstall however the rifle was purchased in Minneapolis from dealers in firearms who had themselves procured it from the selling agents of the appellant. In the other case, the respondent Emery bought the rifle directly from the appellant.

This difference in circumstances has given rise to the suggestion that the liability in the *Dunstall case* is delictual and in the *Emery case* contractual. In my opinion, whether the civil responsibility incurred proceeds from a contract or rests on a *quasi-délit*, matters very little in this case. Indeed there is perhaps some ground for the pungent criticism which Mr. Planiol, vol. 2, nos. 873 and following, makes of the generally admitted distinction between *la faute délictuelle* and *la faute contractuelle*, which, in the opinion of the learned author, "*n'a ni sens ni raison d'être.*" It is obvious that no civil responsibility can exist without a *faute*, and *faute* is defined as "un manquement à une obligation préexistante." (Planiol, no. 863). Whether this obligation be one imposed by a law or by a contract, and cases can easily be conceived where there is an obligation imposed by law together with one created by a contract, the result, generally speaking, is the same, in the sense that the person in fault is obliged to indemnify the person aggrieved to the extent of the injury suffered. Therefore, if the appellant was guilty either of a delictual or of a contractual fault, and if this fault caused the injuries complained of, there can be no question as to the civil liability which he has incurred for the damages suffered by the respondents. And while no doubt the code deals separately with the two kinds of responsibility (see articles 1053 and following in the case of *délits* and *quasi-délits*, articles 1070 and following with regard to obligations generally, and articles 1522 and following as to the sale of things having latent defects), and while these articles may be referred to accordingly as they apply to one or the other of the judgments in question on these appeals, I do not apprehend that the practical result of one rule or of the other, as applicable to the cases under consideration, will be in any way different.

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The rifle, the back-firing of which injured the two respondents, is called the "Ross Straight Pull Rifle." Without attempting any too technical description of this rifle, I may say that to be safely fired the bolt of the rifle must be locked. This bolt is contained in a bolt carrier or sleeve and is turned by spiral projections around it which act in spirally cut grooves inside the bolt carrier. To lock it, the handle on the bolt carrier is forced straight forward. This turns the bolt and lugs about one-quarter of a revolution and the lugs are locked into grooves in the extension of the barrel. When the assembled bolt is removed for cleaning the rifle or other purposes, the bolt may easily be slipped back into the wrong spiral groove, bringing the lugs against the end of the bolt carrier about in line with the handle. In this condition the bolt may be returned to its place in the rifle, and have the appearance of being locked, but as the lugs have not turned to the locking position, the rifle is not locked. If then it be fired, and it can be thus fired, the bolt is thrown back in the face of the user. In other rifles with a bolt action, such as the Mauser, Lee-Enfield, Lebel, Mannlicker, Nagant, United States Springfield, the rifle cannot be fired until the bolt is locked.

In so far as any defect has been charged against the Ross rifle, it lies in the fact that the bolt may be improperly assembled and appear to the user to be locked, and that although it be really not locked, the rifle can nevertheless be fired in this unlocked position, with the result of throwing back the bolt in the face of the user. There is no doubt whatever in my mind that it is because the respondents, in using the rifle, improperly assembled the bolt that they suffered the injuries which gave rise to their actions. When the

rifle is properly used and the bolt is locked in position, no such accident is possible. I do not think therefore, although the learned trial judge so found, that there is a defect in the design *qua* design of the rifle, for it contains a properly constructed locking device, and it was never intended that it should be fired in an unlocked position, but there is a possibility that the user, unless he be properly instructed as to the locking of the bolt, may assemble it in the wrong way and be deceived by the appearance of the rifle into thinking it properly locked. And the danger is that, unlike other types of bolt action rifles, the Ross rifle can be fired although the bolt is unlocked, with the consequence that the user, if he aims the rifle in the ordinary way from the shoulder, will be injured as were these respondents.

The evidence is that these rifles, and there was a military as well as a sporting rifle, were inspected at the factory by Government inspectors, that they were fired several times with a charge heavier than the usual one in order to test their strength of resistance, and that no rifle was put on the market except with the bolt properly assembled. To prevent rust, the gun was heavily oiled and the purchaser was warned to wipe it out thoroughly before using it. No warning was given of the possibility of wrongly assembling the bolt, and the danger that the rifle might be fired with the bolt in an unlocked position was not pointed out to users of the rifle. Certain instructions with respect to cleaning the gun accompanied each rifle, but no instructions as to the manner of assembling the bolt were given to purchasers. Indeed the appellant does not appear to have imagined that an accident like the one in question was possible.

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The troops of the Canadian expeditionary force stationed at Valcartier to the number of some 30,000 were all armed with the Ross rifle. I think it sufficiently appears that no accident such as the one in question occurred there, although the rifle was fired thousands of times, but no doubt the troops were carefully instructed as to the use of the rifle. In fact, besides the case of these two respondents, the only other instance testified to is that of one Leonard in 1896, where the bolt is shown to have been thrown back in the face of the user through being improperly assembled in the rifle.

The question now is whether the appellant is liable in damages for the reason that, although he manufactured and sold a rifle with a properly constructed locking device, these respondents were injured because they improperly assembled the bolt in the rifle and were deceived by the general appearance of the rifle into thinking that the bolt action was properly locked. Or perhaps the question should be stated thus, and this appears to be the ground chiefly insisted on by the respondents, is the appellant liable because the rifle constructed by him could be fired in an unlocked position? It is important to mention that both these respondents were experienced in the use of firearms, but, when injured, were using the Ross rifle for the first time. As I have said, the circumstance that one of the respondents purchased the rifle directly from the appellant and the other through a dealer who had obtained it from the selling agents of the appellant, does not alter the responsibility of the latter if through the violation of a contract or by reason of the mere negligence of the appellant either of the respondents suffered injury.

The principles governing civil responsibility are very familiar. In the absence of any contractual relations between two persons, the one is liable towards the other if, being *doli capax*, he has caused him damage by his fault, whether by positive act, imprudence, neglect or want of skill (art. 1053 C.C.). This fault may be an act of commission or of omission, and however slight the negligence may be it engenders civil responsibility where it is productive of injury to another. In the case of the sale of a thing with a latent defect, the usual remedy is the rescission of the sale or a diminution of the price. A distinction is made between the case where the defect was unknown to the seller and where it was known to him; in the former case the price and the expenses of the sale only can be demanded, in the latter, the seller is obliged to pay all damages suffered by the buyer (arts. 1527, 1528 C.C.). Knowledge of the defect is either actual or presumed, for, according to article 1527 C.C., the seller is obliged to pay damages in all cases in which he is legally presumed to know the defects.

The authors, and chiefly Pothier (*Vente*, nos. 212 and following, *Obligations*, no. 163), explain that the seller is legally presumed to know the defects when the thing sold is one in which the seller usually deals, or one manufactured by him. The mere dealer is generally allowed to rebut the legal presumption of knowledge by shewing that in fact it was impossible for him to discover the defect, but the manufacturer is not listened to when he pleads ignorance of the defect, for he is held to have guaranteed the product created by him as free from latent defect, *spondet peritiam artis*, and, as Pothier observes, his ignorance of the defect in the thing manufactured by him is in itself a fault. *Imperitia culpae annumeratur.*

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The appellant here manufactured the rifle and knowledge of any latent defect in it must therefore be imputed to him.

Consequently it is not material in these cases to discuss the nature of the presumption, either *juris tantum* or *juris et de jure*, mentioned by article 1527. If ignorance of a latent defect is in itself a fault, in the case of the manufacturer who sells a thing manufactured by him, it becomes unnecessary to determine whether the presumption of knowledge of this defect can be rebutted by him, for, even if he could rebut it and establish his ignorance, he would nevertheless be in fault, so that whether the appellant knew or did not know that his rifle could be fired in an unlocked position is immaterial if this be a latent defect of the rifle manufactured by him.

After due consideration, I have come to the conclusion that the possibility of the rifle being fired in an unlocked position, when to the ordinary and even cautious user the bolt action would appear to be locked, is a latent defect of the Ross rifle entailing the civil liability of the appellant as its manufacturer for the damages incurred by the respondents. I have been careful to say that I do not consider the design of the rifle defective, as a design, for a properly constructed locking device was provided, but there was a hidden and undisclosed danger and this certainly was a defect in the rifle and a latent one, as an inspection of the rifle locked or unlocked shows. That such a defect might have been detected by an expert is no reason to hold the defect to be other than latent, or to free the appellant from liability, for it suffices that a reasonably prudent user could be deceived by the appearance of the rifle into thinking that it was properly locked and ready to fire. And to put on the

market without proper instructions or warning such a rifle—whether the liability be contractual or delictual—is a fault for the consequences of which the appellant must be held liable.

There is an instructive case in Dalloz, 1894. 2. 573, where the *cour d'appel* of Bruges held in 1893, as follows:

> La faiblesse du tube de direction d'une bicyclette, dissimulée aux yeux de l'acheteur par différentes pièces et ne pouvant d'ailleurs être appreciée en l'absence de connaissances techniques, constitue un vice caché de nature à entraîner la résolution de la vente et le principe de dommages-intérêts au profit de l'acheteur.
>
> Le vendeur exciperait en vain de ce que la rupture du tube de direction aurait été causée par l'élévation trop grande que l'acheteur aurait, par ignorance, donnée au guidon, s'il a négligé de mettre de dernier au courant du mécanisme et des organes de la machine.

The note to this decision contains the following observation:

> Au reste, l'allocation de dommages-intérêts à l'acheteur se justifiait, dans l'espèce, à un autre point de vue par la faute que les vendeurs avaient commise en ne lui faisant pas connaître le mécanisme de la machine et les dangers que pouvaient présenter certains organes.

I have no intention to hold that every manufacturer or vendor of machinery must instruct the purchaser as to its use, or that the purchaser, who without sufficient knowledge attempts to operate machinery, is to be indemnified for the damage resulting from his ignorance, but where as here there is a hidden danger not existing in similar articles and no warning is given as to the manner to safely use a machine, it would appear contrary to the established principles of civil responsibility to refuse any recourse to the purchaser. Subject to what I have said, I do not intend to go beyond the circumstances of the present case in laying down a rule of liability, for each case must be disposed of according to the circumstances disclosed by the evidence.

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The respondent Emery pretends that when the rifle was sent to him the bolt had been improperly assembled, that he fired it in the condition in which he had received it—it was only fired some three years after its receipt—and that consequently the appellant is liable for the accident. The finding of the learned trial judge is adverse to this contention and I do not base my conclusions on it.

The appellant's plea of prescription is not made out, for prescription certainly cannot run before the injury was incurred and these actions were served within the year of the accident. Were this a redhibitory action claiming annulment of the sale, it would possibly be a fatal objection that the respondent Emery allowed the rifle to remain in his possession for three years without firing it. But, as I take it, his action can stand, notwithstanding the contractual relations between the parties, upon article 1053 as well as upon articles 1527, 1528 C.C. The former article is applied every day in the case of passengers injured while travelling on railway carriages, although a contract is made between them and the railway company for their transportation. And I cannot assent to the broad proposition that where the relations between the parties are contractual there cannot also be an action *ex delicto* in favour of one of them. Very much depends on the circumstances of each particular case.

I would therefore dismiss the two appeals with costs.

The cross-appeals of both respondents against the reduction, by the Court of King's Bench, of the damages allowed by the Superior Court, in my opinion, cannot be entertained. The practice of this court, except in

very exceptional cases, is not to allow appeals which put in question the quantum of damages assessed by the courts below. For that reason I would not interfere with the judgment of the Court of King's Bench.

The cross-appeals should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Taschereau, Roy, Cannon, Parent & Taschereau.*

Solicitors for the respondent Dunstall: *A. C. Dobell.*

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

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*May 10, 11.
*Oct. 18.

GOLD SEAL LIMITED (PLAINTIFF)..... } APPELLANT;

AND

DOMINION EXPRESS COMPANY. DEFENDANT

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA. (INTERVENANT)..... } RESPONDENT.

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

Constitutional law—"Canada Temperance Act," R.S.C. (1906) *c.* 152—*Validity of Part IV, as added by (C.)* 1919, 10 *Geo. V., c.* 8—*Proclamation—Essential provisions—Hours of polling—Curative Act of* 1921, 11 & 12 *Geo. V., c.* 20—*Retrospective effect—Civil rights—B.N.A. Act* (1867) *ss.* 91, 91 (2), 92, 121—*"Companies Act," R.S.C.* (1906) *c.* 79—*"Dominion Elections Act,"* 10 & 11 *Geo. V., c.* 46—*"The Liquor Act," (Alta.)* 1916, 7 *Geo. V, c.* 4—*"The Liquor Export Act" (Alta.)* 1918, 8 *Geo. V., c.* 8.

Part IV, added to the "Canada Temperance Act" by c. 8, 10 Geo. V, (1919), and prohibiting the importation of intoxicating liquor into those provinces where its sale for beverage purposes is forbidden by provincial law, is *intra vires* of the Dominion Parliament under its general power "to make laws for the peace, order and good government of Canada."

Per Sir Louis Davies C.J.—The validity of that Act can also be supported upon the power of the Dominion by section 91 (2) B.N.A. Act, to make laws for "the regulation of trade and commerce." Duff J. *semble.*

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

Per Idington J.—Its validity could also be upheld under the powers given to the Parliament of Canada relative to "the criminal law and the procedure in criminal matters," B.N.A. Act, s. 91, s.s. 27.

Held, also, that the Alberta "Liquor Act," though some of its provisions may be *ultra vires*, is still a valid prohibitory Act within the meaning of Part IV of the "Canada Temperance Act."

Held, also, that prohibition of import in aid of temperance legislation is not within the purview of section 121 of the B.N.A. Act, as the object of that section is to ensure that "articles of the growth, produce or manufacture of any one of the provinces" shall not be subjected to any customs duty when carried into any other province. Idington J. *contra*.

Held, also, that the Dominion Parliament can enact laws which may become operative only in certain provinces or which may aid provincial legislation.

Held, also, Duff J. dissenting, that non-compliance with the imperative requirement of sub-section (g) of section 152 of the "Canada Temperance Act," that the proclamation of the Governor in Council for taking the poll should state "the day on which in the event of the vote being in favour of the prohibition, such prohibition will go into force," was fatal to the validity of all subsequent proceedings, including the orders in council bringing prohibition into force.

Per Idington J.—The proclamation was also void on the ground that it extended the hours for taking the poll beyond those expressly provided by the statute, section 101 of the "Dominion Elections Act" not being applicable. Anglin J. *semble*.

Per Duff J.—Under section 109 of the "Canada Temperance Act" and section 153 of the "Canada Temperance Amending Act," the Governor in Council had absolute discretion as to the date on which prohibition shall come into force and he was not authorized to limit the exercise of that discretion by an irrevocable decision at the time of the issue of the proclamation.

Per Sir Louis Davies C.J. and Anglin J.—The provision in Part IV that the prohibition shall be in force "if more than one-half of the total number of votes cast in all the electoral districts are in favour of such prohibition" is satisfied where more than one-half of the total votes cast in the province are in favour of prohibition, although in certain electoral districts there is a majority against prohibition; "in all the electoral districts" does not in the context mean "in each electoral district."

Before judgment was rendered in this case, the Parliament of Canada passed an Act, in 1921, 11 & 12 Geo. V., c. 20, declaring that "no order of the Governor in Council declaring prohibition in force in any province * * * shall be * * * ineffective, inoperative or insufficient to bring prohibition into force at the time thereby declared by reason of any error, defect or omission in the proclamation * * *."

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Held, Idington J. dissenting, that this Act was *intra vires* of the Parliament of Canada and had a retrospective effect. The legislative jurisdiction which authorized the "Canada Temperance Amending Act" of 1919 supports also the interpreting statute of 1921. Its validity cannot be impugned on the ground of interference with civil rights; *per* Duff J.—as this legislation, though affecting such rights, was not passed "in relation to" these rights.

Per Idington J. (dissenting).—The curative statute of 1921 cannot retrospectively affect the civil rights of the appellant which rested on provincial law, and these rights must be determined according to the law applicable to the province as it existed before such enactment.

Judgment of the Appellate Division ([1921] 16 Alta. L.R. 113,) affirmed, Idington J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) dismissing the appellant's action, on a case stated for the opinion of the court raising the question of the validity of Part IV of the "Canada Temperance Act," ch. 8 of 10 Geo. V., 1919, and of the orders in council declaring it in force in Alberta and certain other provinces.

The essential parts of the stated case are the following:

1. The defendant is a body corporate with head office at the City of Toronto, in the Province of Ontario, having an agent and carrying on business at Calgary, in Alberta, and elsewhere throughout the Dominion of Canada.

2. The plaintiff, Gold Seal Limited, is a body corporate and politic duly incorporated by letters patent of the Government of Canada, under the Companies' Act, being Chapter 79, Revised Statutes of Canada, 1906, and amendments thereto.

3. The said letters patent of the plaintiff, Gold Seal Limited, were granted the 8th day of November, 1916, and contain *inter alia* the following provisions:

(1) 16 Alta. L.R. 113 sub. nom. Gold Seal Co. v. Dominion Express Co.

(a) To engage in and carry on in Canada or elsewhere the business of wholesale and retail grocers, wholesale and retail druggists, bonded or other warehousemen, general traders, wholesale and retail merchants, brewers, maltsters, distillers, manufacturers, importers, exporters, packers or bottlers, distributors of all kinds of wines; spirits, malt liquors and of aerated, mineral and artificial waters and other drinks, of teas, coffees, baking powders, fruits, spices, drugs, all kinds of tobaccos and accessories of the tobacco business and any and all other articles and things which may be conveniently dealt in by the Company in connection with above businesses.

(b) To do all such other things as are incidental or conducive to the attainment of the above objects. The operation of the Company to be carried on throughout the Dominion of Canada and elsewhere.

* * *

5. The plaintiff has at all times since its incorporation carried on an interprovincial business throughout Canada as importer and exporter and distributor of all kinds of wines, spirits and malt liquors and has carried on the business of warehousemen in connection with its said goods.

* * *

8. On the 1st day of February, 1921, the plaintiff in the ordinary course of its business pursuant to bona fide transactions in liquor with persons in the Province of Alberta, Saskatchewan and Manitoba, respectively, duly tendered to the defendant as such common carrier the following goods:

* * *

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10. Each of the said packages was plainly labelled so as to show the actual contents thereof and the name and address of the plaintiff, the consignor thereof, and each of the said packages was addressed to a bona fide person, the actual consignee thereof, at his private dwelling house, to be dealt with in a lawful manner, viz.: as a beverage, all of which was within the knowledge of the defendant at the time of the tender to it of the said package.

12. Each of the packages mentioned in paragraph 8 hereof contained intoxicating liquor as defined by the Canada Temperance Act.

13. The defendant has not only refused to carry the goods of the plaintiff as aforementioned but has notified the plaintiff that hereafter it will not carry any such wines, spirits, malt liquors or other intoxicating liquors from the plaintiff at Vancouver in the province of British Columbia to any person or persons or corporation in the Provinces of Alberta or Saskatchewan or Manitoba and that it will not carry any such wines, spirits, malt liquors or other intoxicating liquors from the plaintiff at Calgary in the Province of Alberta to any person or persons or corporation in the Province of Saskatchewan or Manitoba.

14. In addition to the tenders for carriage of the goods before mentioned on the 1st day of February, 1921, the plaintiff in the ordinary course of its business tendered to the defendant at Vancouver in the Province of British Columbia for delivery to the plaintiff's warehouse at Calgary, Alberta, the following goods:

* * *

16. Each of the packages mentioned in paragraph 14 hereof contained intoxicating liquor as defined by the Canada Temperance Act.

17. The defendant has notified the plaintiff that hereafter it will not carry any intoxicating liquors of any kind whatsoever to the plaintiff's warehouse at Calgary, Alberta, whether tendered for carriage by the plaintiff or any other corporation or person and whether to be used for export from Calgary, Alberta, to places where such liquors may be lawfully received or not.

18. The plaintiff is unable to procure any other means of conveyance for any of the goods herein mentioned.

19. The plaintiff is unable to carry on its business as an importer and exporter of intoxicating liquors by reason of the defendant's refusal to carry its goods.

20. The plaintiff has suffered damage in loss of profits on the said goods tendered to the defendant as aforementioned in the sum of $7,260.00, and will continue to suffer damage so long as the defendant refuses to carry intoxicating liquor for the plaintiff.

21. The defendant has refused and continues to refuse to carry the said or any intoxicating liquors to the plaintiff at Calgary, Alberta, and has refused and continues to refuse to carry said or any intoxicating liquors from the plaintiff at Calgary, Alberta, to any person in the provinces of Manitoba or Saskatchewan and has refused and continues to refuse to carry the said or any intoxicating liquors from the plaintiff at Vancouver in the Province of British Columbia to any person in the Province of Alberta on the sole ground that having regard to the provisions of the Canada Temperance Act being chapter 152 of the Revised Statutes of Canada 1906 as amended, and the Dominion Elections Act, chap. 46 of 10-11 George V., and orders-in-council, proclamations and pro-

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ceedings in the next paragraph hereof mentioned, the defendant could not lawfully carry the said or any intoxicating liquors into the Provinces of Alberta or Saskatchewan or Manitoba.

The questions of law stated for the opinion of the court are:

1. Having regard to all matters and things mentioned in this case and having regard to the Canada Temperance Act as amended, the Dominion Elections Act, the proclamations and orders-in-council and notices and proceedings referred to in this case, is the defendant prohibited in law from receiving and carrying intoxicating liquors from a point outside the Province of Alberta to the plaintiff's warehouse at Calgary, Alberta, for reshipment in the ordinary course of business to places in Canada outside the Province of Alberta or in foreign countries where the same may be lawfully received?

* * * *

A. A. McGillivray K.C., for the appellant.—Sections 152 *et seq.*, added to the "Canada Temperance Act" in 1919 by 10 Geo. V., c. 8 are *ultra vires* of the Dominion Parliament. *Russell* v. *The Queen* (1); *Hodge* v. *The Queen* (2); *Attorney General for Ontario* v. *Attorney General for Dominion* (3); *City of Montreal* v. *Montreal Street Railway* (4); *Attorney General for Manitoba* v. *Manitoba Licence Holders' Association* (5); because

(a) they are designed to aid provincial prohibition legislation;

(1) [1882] 7 App. Cas. 829.
(2) [1883] 9 App. Cas. 117.
(3) [1896] A.C. 348.
(4) [1912] A.C. 333.
(5) [1902] A.C. 73.

(b) The initial step for bringing the prohibitive section (No. 154) into force is a resolution of the provincial legislature;

(c) Such a resolution is *ultra vires* of a provincial legislature;

(d) The amendments apply only to certain provinces—those in which a local prohibition law is in force. As legislation dependent on the "Peace, order and good government" provision of sec. 91 of the British North America Act (*Russell* v. *The Queen* (1), Dominion prohibition legislation to be valid must extend to the whole of Canada;

(e) The "liquor evil" is dealt with, not as a matter of Dominion wide importance, but as a matter of local importance in each province affected. *Attorney General for Ontario* v. *Attorney General for Canada* (2).

(f) The amendments interfere with free export and import as between provinces of articles which are the produce or manufacture of one of them, contrary to section 121 of the British North America Act;

(g) The amendments interfere with the civil rights of the individual citizen safeguarded by the provincial law to have intoxicating liquor in his private dwelling-house.

(II) that, if valid, upon a proper construction the prohibitive section, No. 154—one of the added sections—does not forbid the importation of intoxicating liquor intended for export;

(III) that sec. 154 has not been brought into force in Alberta, Saskatchewan or Manitoba,

(a) because there was not in force in such province a valid law prohibiting the sale of intoxicating liquors for use as a beverage; or,

(1) 7 App. Cas. 829. (2) [1896] A.C. 348.

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(b) because the requisite majority for prohibition has not been obtained; or,

(c) because essential steps prescribed for bringing s. 154 into force were not taken.

(d) because the proclamation of the governor in council for taking the poll did not state the day on which prohibition would go into force.

(e) because the proclamation contained different hours of polling than those specified in the statute.

IV. Retrospective operation ought not to be given to the curative statute of 1921 unless Parliament has by clear and unambiguous words made the Act retrospective. *Young* v. *Adams* (1); *Midland Railway Co.* v. *Pye* (2); *Taylor* v. *The Queen* (3); *Boulevard Heights Ltd.* v. *Veilleux* (4); *Smithies* v. *National Association of Operative Plasterers* (5); *Harding* v. *Commissioners of Stamps for Queensland* (6); *Ex parte Wilson* (7); *The Queen* v. *The County Council of Norfolk* (8).

The curative statute of 1921 can have no effect upon this case, as this court can only give the judgment which the court appealed from should have given, on the law as it stood at the date of delivering judgment. *Boulevard Heights* v. *Veilleux* (4); *Lemm* v. *Mitchell* (9)

H. H. Parlee K.C., for the respondent intervenant. The "Canada Temperance Amending Act" of 1919, is *intra vires* of the Dominion Parliament. *Attorney-General for Ontario* v. *Attorney General for Canada* (10); *Russell* v. *The Queen* (11).

(1) [1898] 67 L.J.P.C. 75.
(2) [1861] 30 L.J.C.P. 314.
(3) [1876] 1 Can. S.C.R. 65, at pp. 80, 81.
(4) [1915] 52 Can. S.C.R. 185.
(5) [1908] 78L.J.K.B. 259, at p.268.
(6) [1898] 67 L.J.P.C. 144.
(7) [1898] 67 L.J.Q.B. 935.
(8) [1891] 60 L.J.Q.B. 379, at p. 380.
(9) [1912] 81 L.J.P.C. 173.
(10) [1896] A.C. 348, at p. 371.
(11) 7 App. Cas. 829 at p. 842.

This statute does not interfere with any matters of a local or private nature.

The proclamation is not invalid, as it is in conformity with section 109 of the "Canada Temperance Act" and section 153 of the "Canada Temperance Amending Act."

The "Liquor Act" of Alberta being, as a fact, an Act in force in that province, the governor in council could issue the necessary proclamation. *The Queen* v. *Burah* (1); *Gold Seal Limited* v. *Dominion Express Company* (2).

The objections and grounds of error taken are not open to the appellant as, the vote being favorable to prohibition, the governor in council declared the Amending Act in force and the prior proceedings are not open to attack. *Ex parte Tippett* (3); *The Queen* v. *Hicks* (4); *Reg.* v. *Shavelear* (5).

The curative Act of 1921 has been made applicable to pending litigation; *Boulevard Heights* v. *Veilleux* (6); *Quilter* v. *Mapleson* (7); and the Supreme Court of Canada is bound to consider the effect of this amending statute.

It was the intention of the Parliament of Canada, when it passed the Act of 1921, to make the same retrospective.

THE CHIEF JUSTICE.—After the argument in this appeal, and after giving much consideration to the several points raised by the counsel for the appellant,

(1) [1878] 3 App. Cas. 889.
(2) 16 Alta. L.R. 113.
(3) [1892] 31 N.B. Rep. 139.
(4) [1886] 19 N.S.R. 89.
(5) [1886] 11 O. R. 727.
(6) 52 Can. S.C.R. 185.
(7) [1882] 9 Q.B.D. 672.

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I reached the conclusion that his contention must prevail, viz.: that the requirement of subsection (g) of sec. 152 of the "Canada Temperance Amending Act," 1919, (10 Geo. V., c. 8) was imperative and that non-compliance with it rendered all subsequent proceedings invalid. That section provided that

> in any proclamation to be issued by the Governor in Council for taking the votes of all the electors in all the electoral districts of the province for or against the prohibition of the importation or the bringing of intoxicating liquors into the province, such proclamation shall set forth * * * (g) the day on which, in the event of the vote being in favour of the prohibition, such prohibition will go into force.

No such day was stated in the proclamation in question in this case and, in my opinion, its absence was fatal to the validity of all subsequent proceedings.

This conclusion of mine was concurred in by the majority of the court, but, before judgment was delivered Parliament intervened and passed the Act of 1921, 11 & 12 Geo. V., c. 20, which declared:—

> I. No proclamation heretofore or hereafter issued under Part IV of the Canada Temperance Act, as enacted by chapter eight of the Statutes of 1919, second session, shall be deemed to be void, irregular, defective or insufficient for the purpose intended merely because it does not set out the day on which, in the event of the vote being in favour of the prohibition, such prohibition shall go into force, provided it does state that such prohibition shall go into force on such day and date as shall by order in council under section 109 of the Canada Temperance Act be declared.
>
> 2. No order of the Governor in Council declaring prohibitions in force in any province, whether heretofore passed or hereafter to be passed, shall be or shall be deemed to have been ineffective, inoperative, or insufficient to bring prohibition into force at the time thereby declared by reason of any error, defect, or omission in the proclamation or other proceedings preliminary to the vote of the electors, or in the taking, polling, counting or in the return of the vote or in any step or proceeding precedent to the said order, unless it appear to the court or judge before whom the prohibition is in question that the result of the vote was thereby materially affected.

This statute made no exception from its application of proceedings in any suit pending at the time of

its passage and however unjust this may seem to be, it cannot affect the validity of the Act itself. This Act, in my opinion, is perfectly constitutional, and being so cannot be called into question by us. It cured what I held to be the fatal defect in the proclamation. That being cured, I feel bound to uphold the validity of the proceedings bringing into operation the provisions of the Act of 1919, 10 Geo. V, c. 8, prohibiting the importation into the province of Alberta of intoxicating liquors. It was admittedly not competent for the local legislature to pass such an Act and, in my judgment, the Parliament of Canada, under its general power "to make laws for the peace, order and good government of Canada," and under its enumerated powers in sect. 91 (2) (B.N.A. Act) "for the regulation of trade and commerce" had such power.

On all the other points raised by the appellant in the argument of this case, I have reached the conclusion that the appeal fails and must be dismissed.

Under all the circumstances of this case, however, I think that the appellant company is entitled to be paid its costs throughout.

IDINGTON J. (dissenting).—The appellant is a company incorporated under the "Companies' Act," being chapter 79 of the Revised Statutes of Canada, 1906, for the following purposes amongst others:— (See page 426).

The respondent is a common carrier for hire also incorporated, for the purpose of so carrying from and to all points in Canada through which the Canadian Pacific Railway runs.

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Each of the said parties hereto had been carrying on its said respective business when the Alberta "Liquor Act" was passed and the amendments thereto were also passed and also when the "Liquor Export Act" of said province and amendments in question herein were passed.

The appellant's head office is in the City of Vancouver in British Columbia and there it has a private warehouse and it also, at the time in question herein, had a branch office and private warehouse in the City of Calgary in the Province of Alberta.

The admitted facts of the stated case so far as necessary to present what has to be acted upon in deciding this appeal, are stated therein as follows:—
(See page 426).

The trouble between these parties arises solely out of the question of the validity of certain enactments by the respective legislatures of Alberta and Saskatchewan and Manitoba and supplementing same, the observance or rather non-observance of the provisions of the "Canada Temperance Act," c. 152 of the R.S.C. 1906, as amended, and the failure to observe same in the orders in council, proclamations and proceedings to carry same out; and possibly also the "Dominion Election Act," chapter 46 of 10 & 11 Geo. V.

Shortly and in plain English, if the carrying of said liquor in question so tendered for carriage would have been against the law as claimed by the Government of Alberta it would have been, the respondent must be excused for its refusal, but if the legislative provisions in question, or any of them, were so *ultra vires* the legislatures of Alberta, Saskatchewan or Manitoba as to be ineffective as excuses, then in whole or in part as the case may turn out the respondent is not excused.

The questions raised are somewhat involved and may be made very confusing. It will be observed that the appellant, desirous of testing the various questions of right it sets up, made a series of tenders of shipment of liquor to the respondent and thus got a series of refusals.

The parties agree to submit their disputes to the Alberta court in the shape of a stated case, from which I have adopted above several paragraphs as setting forth essentially what is in dispute; to be illuminated so far as I can see by supplementing thereto the story of relevant law as I understand the decisions of the court above bearing thereon.

Beginning with the latest decision of said court directly bearing upon a very important part of the questions involved, we find that the Province of Manitoba passed in the year 1900 an Act for the suppression of the liquor traffic in that province.

In due course a test case was submitted to the Court of King's Bench for Manitoba by the Attorney General of that province and the Manitoba Licence Holders Association in which the question of its constitutional validity was threshed out. That court held that the legislature had exceeded its powers in enacting "The Liquor Act" as a whole.

On appeal to the Judicial Committee of the Privy Council that court reversed said decision and held that the Legislature had jurisdiction to enact said "Liquor Act." It is reported in *Attorney General of Manitoba* v. *Manitoba Licence Holders' Association* (1). In that Act there was the following clause:—

(1) [1902] A.C. 73.

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119. While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Manitoba, except under a licence or as otherwise specially provided by this Act, and restrict the consumption of liquor within the limits of the Province of Manitoba, it shall not effect and is not intended to affect bona fide transactions in liquor between a person in the province of Manitoba and a person in another province or in a foreign country, and the provisions of this Act shall be construed accordingly.

This was probably the result of the judgment of the Judicial Committee of the Privy Council in the case of *Attorney General of Ontario* v. *Attorney General for the Dominion* (1), where in answer to the following question

(4) has a provincial legislature jurisdiction to prohibit the importation of such liquors into the province? that court answered as follows:—

> Their Lordships answer this question in the negative. It appears to them that the exercise by the provincial legislature of such jurisdiction in the wide and general terms in which it is expressed would probably trench upon the exclusive authority of the Dominion Parliament.

These judgments seem to settle much if duly observed in prohibition legislation.

But unfortunately the Legislature of Alberta after passing, in 1916, an Act taken evidently from said Manitoba Act containing same clauses as above quoted relative to importation, saw fit in 1918 to pass another Act in substitution of the former and not only omitted said section but attempted thereby and by numerous amendments to render importation impossible despite the above cited judgment of the Court above. At the same session the legislature enacted by ch. 8 an Act called "The Liquor Export Act," attempting thereby to prohibit the export thereof.

(1) [1896] A.C. 348.

I cannot refrain from suggesting that the exportation of all the liquor in or coming into Alberta from that province ought to be held as an aid in promoting the prohibition of the use of said liquor in Alberta which is all that the legislature of that province can be legitimately concerned about.

Passing that practical view of the matter I submit that the constitutional aspect of the subject matter thus brought forward seems but the counterpart of the importation question expressly passed upon by the judgment above quoted from the *Ontario Case* (1).

In short I agree with the result reached by the Alberta Court in the case of *Gold Seal Limited* v. *The Dominion Express Co.* (2), holding that Act *ultra vires.*

That brings me to the consideration of the possible bearing of what is involved herein of section 121 of the B.N.A. Act, which reads as follows:—

> 121. All articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

This section has not, so far as I know, received anything but a casual consideration by any of the courts having to deal with such questions as are involved herein.

Indeed until the Alberta Acts, to which I have above referred, there was no legislation in which the rights established by said section would seem to have been plainly disregarded.

In the argument before us herein a reference to said section caused the inquiry to be made as to the facts of whether or not any of the said goods tendered for carriage had been of the "growth, produce, or manufacture of any one of the provinces."

(1) [1896] A.C. 348. (2) 16 Alta. L.R. 113.

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That fact was admitted and subsequently made to appear in a consent filed by leave of this court so far as appears therein.

Hence the question arises whether or not this section does not render *ultra vires* any effort by either local legislatures or parliament to override the said provision.

I incline to hold that it does unless in the possible case of an enactment by Parliament in the exercise of its exclusive jurisdiction over criminal law.

Certainly no single province, nor all combined, can override the plain meaning of the language used.

And when we turn to the "Regulation of Trade and Commerce," I think there are many decisions shewing that the powers to be exercised thereby are not applicable to anything that is likely to be involved in the meddling with this provision.

There may be, however, times when the products of a province may be infected with, for example, some contagious disease rendering it absolutely necessary, as matter of public safety, to forbid transportation across the lines bounding a province or a district therein.

It seems to me that the true and only remedy for such a condition of things would be the exercise by Parliament of its powers resting in its jurisdiction over criminal law and procedure in criminal matters.

The section, in my opinion, adds to the difficulties in the way of any provincial legislature seeking to bar the importation of liquor not alone from another country, which the court above expressly decided in the *Attorney General for Ontario* v. *The Attorney-General for the Dominion* (1), such legislation could not do, but also from one province where manufactured into another.

(1) [1896] A.C. 348.

Again there is, by virtue of the recent decisions of the Judicial Committee of the Privy Council in the *Great West Saddlery Company* v. *The King* (1), and other cases heard together therewith, established the doctrine that a legal entity created by virtue of the provisions in the "Dominion Companies Act" above cited, has rights, despite local legislation, such as no individual citizen would think of asserting.

It adds to the strength of appellant's case so far as Alberta and much of Saskatchewan legislation is concerned.

Until recently it had been generally supposed to be quite clear that corporations created by Parliament in virtue of its exclusive jurisdiction, for the due execution of any of the specific purposes, falling within the enumerated classes of subjects defined in section 91, of the B.N.A. Act, as, for example, banks and others, could be assigned such rights over property and civil rights as Parliament chose to confer.

On the other hand it had been as generally assumed that other corporate creations of Parliament rested upon its residuary powers alone and could not, as regards property and civil rights, exceed in capacity the powers of the private citizen when operating in any province, unless so far as the legislature of the province so concerned, in virtue of its exclusive authority over property and civil rights, had otherwise enacted.

Hence at a very early date the decision in the *Citizens Insurance Co.* v. *Parsons* (2), maintained the right of a provincial legislature to declare, by virtue of its said exclusive power over property and civil rights, the contractual capacity of any insurance company opera-

(1) [1921] 2 A.C. 91. (2) [1881] 7 App. Cas. 96.

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ting in the province and the effective limitations of its contract and conditions therein, whether the company had been incorporated by the Dominion Parliament or elsewhere.

That I respectfully submit was an exercise by a provincial legislature of a power as great as or greater than to refuse a company, unless licensed, the right to assert its pretensions in the courts of its province.

The item of "Regulation of Trade and Commerce" in the enumeration of the class of exclusive powers assigned Parliament was pressed then and therein as it has been in numerous cases since, without availing the companies anything.

It was again brought forward in the *John Deere Plow Co.* v. *Wharton* (1).

The reasoning upon which the court proceeded is now declared, in the recent judgment above referred to, to have rested upon said item No. 2 of the British North America Act, though upon considering it in same cases when before us I doubted that intention, for reasons I set forth in that case (2).

The pith of all that was necessarily involved in the *John Deere Plow Case* (1), was the refusal of the authorities in British Columbia to register the company unless and until it changed its name. I humbly conceived that it was not necessary in order to rectify such a wrong to hold that the item 2 of sec. 91 was the basis of the existence of all Dominion corporations save in specified cases otherwise covered by the enumeration of classes in said section.

Unfortunately the judgment of the court above in said *Great West Saddlery Case* (3) and other cases makes it clear that there can no longer be any hope of

(1) [1915] A.C. 330.

(2) [1919] 59 Can. S.C.R. 19, at pp. 30, 31.

(3) [1921] 2 A.C. 91

resting the creation of such corporations upon anything save in said item No. 2, relative to "trade and commerce," and that we cannot properly shrink from the very grave consequences of such a departure from the old view that the basis of such incorporation as there in question was the residual power of Parliament and not the item No. 2 relative to the regulation of trade and commerce as now asserted.

It is not our province to reconcile the view taken in the *Parson's Case* (1) and other cases with the latest exposition and decision pursuant thereto, but to apply the latest decision when no way of escape therefrom seems possible as bearing upon the issues raised herein.

It would therefore seem clear that a Dominion incorporation such as appellant, engaged merely in the import and export business, cannot by virtue of local legislation be debarred from carrying on its business.

Honestly doing such as it professes to have been doing could not necessarily infringe upon the prohibition of the local law against the consumption or selling of intoxicating beverages in the Province of Alberta.

Neither would the carrying by respondent for appellant to another province be necessarily against, or a violation of, the prohibitory legislation thereof, so long or far as such legislation could be held *intra vires*.

For the several foregoing reasons I am of the opinion that the refusal of the respondent to carry appellant's goods in question cannot be upheld unless by virtue of some enactment of Parliament.

It is contended by respondent that such legislation had been effectively enacted at the time in question.

(1) 7 App. cas. 96.

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Have each and all of the foregoing difficulties in the way of a provincial legislature, rendering illegal such service as the respondent herein was asked by appellant to perform, been so overcome by Dominion legislation which has become effective and is not *ultra vires*.

That seems to me the crucial question herein.

10 Geo. V, ch. 8 amending the "Canada Temperance Act," if its several provisions for bringing it into force had been duly observed, in my opinion would have had such effect so far as Alberta was concerned.

The tender made for carriage of such goods from British Columbia into any of the other provinces in question herein, wherein said amendment has not been made effective, or elsewhere permitting of lawful carriage there of course stands good.

The appellant raises many objections to the validity of the proceedings to bring the amendment into effect.

In the first place its counsel points out that the same is only applicable to a

> province in which there is at the time in force a law prohibiting the sale of intoxicating liquors for beverage purposes.

Although, for the reasons I have pointed out, the legislation in Alberta on the subject has exceeded I had almost said, all bounds, by enacting provisions that seemed in conflict with the law so declared by the court above in the *Ontario Case* (1), and in other respects which I need not repeat, yet when all these unwarranted attempts are blotted out there still remains a substantial enactment of what was taken from the Manitoba Act held valid, to constitute what might answer to the descriptive terms I have quoted as the basis for a further Dominion Act such as 10 Geo. V, ch. 8.

(1) [1896] A.C. 348.

Another objection taken is that Parliament cannot supplement and aid provincial legislation. I am of the opinion that it can and in doubtful cases of the respective jurisdiction of the provincial legislature and Dominion Parliament it is often advisable that there should be concurrent legislation to overcome such doubt or difficulty.

Again it is contended that Parliament cannot enact a law which may only become operative in a part of Canada.

I am quite unable to understand such a contention in face of the fact that the "Canada Temperance Act," which distinctly provided for counties and other municipalities by the votes of the electors, bringing same into force it should then and there become effective, and such conditional legislation was upheld in the *Russell Case* (1).

The condition of its becoming operative is by this amendment made dependent upon the vote of the electorate of the province to be affected, instead of being confined to that of the county or other municipality in question, rendering it so.

The conditional character of the legislation is in principle the same. And there is a very good reason for Parliament providing such a course. It requires the support of public opinion in any district affected by such legislation in order to render its enforcement effective, instead of becoming a mockery leading to evil results of a most undesirable kind.

Indeed it may be doubted whether or not the support of a bare majority of those voting can be relied upon as a safe guide in that respect. That, however, is a question with which we are not concerned. All we have to deal with is the existence of the power to enact such a conditional form of legislation.

(1) 7 App. Cas. 829.

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A number of other objections of less import made by counsel for appellant seem to me answered by the same mode of reasoning I have adopted as to one or more of the foregoing objections which I have specifically dealt with out of respect to the arguments presented.

Assuming for argument's sake, as has been suggested, that parts of the Alberta Acts trespass on the field of criminal law, when the Dominion Parliament which is possessed of absolute power over "criminal law and procedure in criminal matters," sees fit to pass an enactment which, with the rest of the "Canada Temperance Act," may well fall within and be attributed to an exercise of that source of its jurisdiction for so enacting though their Lordships in the court above in the *Russell Case* (1), assigned another as preferable, the room for dispute seems to me ended.

Even if to enforce that enacted within the reserved power of "peace, order and good government" I submit the powers given relative to "criminal law and procedure in criminal matters" may be relied upon as well as the other, if inherently applicable.

There remains a further ground of objection taken by the appellant that the right of export is not touched by the amendment in question and hence the importation for the mere purpose of export is for a commercial purpose within the meaning of the amendment, sec. 154, s.s. 3.

This certainly is a fairly arguable point but I incline to think, having regard to what subsection (c) of section 154 regarding the transportation of liquor through the province and a doubtful import of the word "commercial" when read in connection with the

(1) 7 App. Cas. 829.

rest of the proviso in which it appears, it was the evident purpose of the amendment, read as a whole, to exclude any other form of export but that provided by through transportation.

The final point made that the statutory provisions made for the amendment coming into force have not been duly followed seems to me fatal to the said proceedings.

The amended Act in question expressly provides that the Governor in Council

> may issue a proclamation in which shall be set forth
>
> (a) The day on which the poll for taking the votes of the electors for and against the prohibition will be held;
>
> (b) that such votes will be taken by ballot between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of that day;
>
> (c) the day on which, in the event of the vote being in favour of the prohibition, such prohibition will go into force.

It seems to me idle to try to minimize the effect of these provisions and to try to justify such plain departures therefrom as were taken by extending, in the case of Manitoba and part of Alberta, the hours for taking the poll and also failing in each of the three provinces to declare when the Act was to come into force.

In the case of Manitoba the extension of the hours for taking the poll was directed by the proclamation in absolute disregard of the express provisions in subsection (b) above quoted.

In the case of Alberta the disregard thereof was the work of a returning officer who presumed to assert, contrary to the fact, in his notice to the electors, that the extended hours had been named by the proclamation.

Can such elections be held to be in due conformity with the imperative basic conditions precedent, laid down in the statute as the only method of procedure which should be taken to enable the constituted authorities to take steps for bringing that statute into force and rendering it effective?

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The word "shall" used in declaring what such a proclamation should, if ventured on, contain, shews the peremptory nature of the enactment.

That governed items therein from (a) to (g) and the only permissive thing, in way of adding thereto, was as follows

(h) any further particulars with respect to the taking and summing up of the votes of the electors as to the Governor in Council sees fit to insert therein,

which was not acted upon.

I cannot find existent in the legislation providing for this peculiar election, or elsewhere, any curative or validating enactment anticipating and providing for such gross or any departures from the express provisions of Parliament requiring the hours stated of voting (nine to five) to be observed and the date of the coming into force to be named.

The only such enactment cited and relied upon is section 101 of the "Dominion Elections Act" assented to 1st July, 1920, which by its first subsection enacted as follows:—

101. (1). Whenever under the Canada Temperance Act a vote is to be taken, the procedure to be followed shall, in lieu of the procedure therein directed, be the procedure laid down in this Act with such modifications as the Chief Electoral Officer may direct as being necessary by reason of the difference in the nature of the question to be submitted, and with such omissions as he may specify on the ground that compliance with the procedure laid down is not required.

This was enacted two months after the respective proclamations for Alberta and Saskatchewan, calling the election for taking the required poll, to bring into force the amendment in question to the "Canada Temperance Act," had been issued.

In each of these proclamations the hours named within which the votes were to be taken were nine o'clock in the forenoon and five o'clock in the after-

noon. In the case of Manitoba the proclamation was issued on the 14th of Aug., 1920, and the hours named within which the votes were to be taken were, as to urban polling subdivisions, between six o'clock in the forenoon and six o'clock in the afternoon, and as to rural polling subdivisions, eight o'clock in the forenoon and six o'clock in the afternoon. The said section 101 could not by its terms be made applicable to such a change of the said imperative conditions I quote, and the Chief Electoral Officer never attempted to so apply it—though acting thereon in other regards not in question.

It is to be observed that the hours within which voting must take place had been peremptorily fixed by the enactment and that no one can now tell what the exact result would have been had that been adhered to; and also that the delegated duty of fixing the time when its result was, if favourable, to become law was imperatively required to be declared by order-in-council previous to such voting and stated in the proclamation calling the election.

These departures from the express conditions of bringing the statutes into effect were, to my mind, fatal errors and rendered ineffective the attempt to bring the Act into force in said three provinces, and thus left the appellant's tenders of goods for carriage by respondent so effective, at the time when made, as to entitle the appellant to succeed therein.

It is true that Parliament has, after the argument herein and pending the delivery of judgment thereon, enacted a statute for the purpose of curing the effect of such errors.

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Clearly that statute cannot retrospectively affect the civil rights of appellant though Parliament proceeds in a general way therein to deal with pending cases as if possessed with plenary powers over property and civil rights. With great respect I cannot so hold or maintain the attempt to take away the rights of a litigant which must be determined by the relevant law of the province bearing thereon where its cause of action arose, and, I submit, cannot be properly affected by any enactment of Parliament.

There might arise cases of corporate bodies created within and by virtue of the powers assigned specifically by the enumerated items of section 91 of the B.N.A. Act to the Dominion alone, and solely dependent for their civil rights thereon, when a judgment founded thereon might be affected by retrospective legislation, but this is not such a case. The appellant's rights herein rested entirely, save as to the important fact of its incorporation, on provincial law, as to property and civil rights which were, save as to its incorporation, not conferred by Parliament and over which it is powerless either to impair or take away. I do not think the destruction of limitation of any of the powers of the legal entity of appellant can be held as within the purview of the said Act. I cannot conceive that Parliament intended to discriminate against a creation of its own when clearly it intended all to be treated alike. Private citizens and provincial or other than Parliament's non-corporate creations, clearly could not be affected by such legislation.

It would, in my view, be improper to express any opinion as to the effect of this curative legislation beyond dealing with the civil rights of the parties hereto.

In my opinion the appellant is entitled to have the judgment from us which the court below should have pronounced, or, in other words, determine the civil rights of the parties by the law applicable to the province as it stood before this enactment.

We have no jurisdiction to determine otherwise.

It is suggested by the intervenant's counsel in a supplementary factum, that though we have by the "Supreme Court Act" to declare the law as the court below should have done, yet this amendment by Parliament which created the court and so defined its limitations of jurisdiction, must have intended by this enactment to have changed, for the purposes of this case, that limitation.

I do not find in the Act in question any such intention either express or implied.

The Act, so far as I can understand it, was to my mind so framed in this regard by reason of haste and accidental oversight of the limited powers of Parliament over property and civil rights.

Let us assume for a moment that Parliament had at any time enacted, quite independently of this conditional form of legislation, by way of referendum, as I conceive would be quite competent for it, if rested on its exclusive jurisdiction over criminal law, a statute prohibiting the import or export of liquor, and pretended therein to deal with the rights theretofore acquired by any one over property or civil rights resting solely upon the provincial legislation in virtue of the exclusive jurisdiction of the provincial legislatures over property and civil rights; and to take such rights away by merely making such enactment retrospective, as is attempted by the Act in question herein, how long would argument in support of such legislation be listened to by any court acquainted with the B.N.A. Act?

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Of course if Parliament acting upon item No. 2 and asserting an obvious intention to destroy or limit the powers of its creature resting thereon, I conceive it might do so even if retroactive legislation of another character than presented for consideration herein.

Or suppose the appellant had chosen to pass this court and go to the court above, is it conceivable that it would, if taking the view I do as to the effect of non-observance of the conditions of bringing into operation this referendum style of legislation, feel bound to hold such an infringement upon property and civil rights as they existed before the enactment of such an Act as binding it?

I am of the opinion that on the stated case the appellant is entitled to succeed and that the appeal should be allowed with costs.

DUFF J.—I concur in the view of the majority of the Appellate Division that the proclamation was not invalid. The evidence furnished by the parent enactment ("The Canada Temperance Act") as well as by the amending statute of 1919 appears to point rather definitely to the conclusion that the order in council to be passed after the vote has been taken is intended to be the operative instrument by which the prohibitions are to be brought into force and the instrument governing the date upon which they are to become law.

Consider first the provisions of the parent Act, the relevant section being section 109. The language is unqualified. Where a petition has been adopted, the section provides

> the Governor in Council may at any time after the expiration of 60 days from the day on which the same was adopted declare that Part II of this Act shall be in force and take effect

on the day on which the licenses then in force shall expire if such day be not less than 90 days from the "date of such order in council" and if less "then on the like day in the following year," and "upon, from and after that day" Part II of the Act shall become and be in force. It is to be observed that the section commits it to the uncontrolled discretion of the Governor in Council to determine the time when the order in council shall pass and it is by reference to this date that the time is fixed when the prohibitions are to come into force.

The second subsection (which applies where there are no unexpired licences) in terms entrusts the Governor in Council with absolute authority to decide when Part II shall come into operation.

This authority of the Governor in Council which arises only after the vote has been taken seems to extend to all cases; and it would extend, I think, to any case in which by the proclamation, a specified day has been named.

The fact, no doubt, that by section 2 the Governor in Council is authorized to state in the proclamation the date upon which, in the case of a favourable vote, Part II is to come into operation gives colour to the suggestion that it is intended to authorize the Governor in Council to decide upon that date in advance. But the tenor of section 109 seems opposed to such an inference. It is the order in council in every case which brings the prohibitions into force and it is the date of the order in council which in every case automatically determines the time when they are to take effect. The section in pointed terms authorizes the Governor in Council to act "at any time" after the expiration of 60 days from the adoption of the petition and it would seem singular indeed, if his discretion

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was to be controlled by the naming of a date in the proclamation, that some reference to that contingency does not appear in section 109. It may be suggested, of course, that votes might conceivably be influenced by the circumstance that the prohibitions are to come into force upon this or that date and that to change the date would involve something like a breach of faith. But giving the fullest weight to that suggestion it seems to be quite overborne by the obvious inconveniences entailed by adopting the alternative construction under which all the labour and expense of taking the vote might be wasted by the accident of the proceedings being prolonged (in consequence, for example, of legal controversies) beyond the date named in the proclamation. It is difficult to suppose such a result to have been contemplated.

The language of section 153 of the "Canada Temperance Amending Act" is just as pointed and imposes an imperative duty upon the Governor in council to "declare the prohibition in force" if the vote proves to be favourable to the petition.

The inconvenience, indeed, of the alternative construction is perhaps even more obvious in the case of proceedings under the amending Act. Harvey C.J. has alluded to circumstances indicating the impracticability of fixing in advance the day upon which the Governor in Council is to act after the result of the poll is finally known. Needless to say, there is nothing fanciful in these suggestions; and where the area (as under the amending Act) in which the vote is to be taken is a whole province they are of the gravest practical importance.

For these reasons I think the weight of argument favours the conclusion that the discretion of the

Governor in Council under section 109 and under section 153 is not fettered by anything stated in the proclamation as to the date when the prohibitions are to come into force, in other words, that he was not authorized under the original Act or under the amending Act to limit the exercise of that discretion by an irrevocable decision at the time of the issue of the proclamation.

It seems accordingly that if a date be named it must be as a provisional date subject to the possibility, at all events, of any change which the Governor in Council may consider necessary in the exercise of his judgment after the result of the vote has been ascertained; and if that be the manner in which this machinery was intended to operate it would seem to be in furtherance of the intention of Parliament to say simply, as does the proclamation in question, that the prohibitions shall come into force in accordance with the order of the Governor in Council under section 109 of the Act.

The fact that a direction is mandatory in form is not conclusive, of course, as to the result of non-compliance; and the statute in this case does not assist us by any express provision. The duty of the court therefore is to collect the intention of Parliament by examining the whole scope of the enactment. *Liverpool Bank* v. *Turner* (1). As Lord Penzance said in *Howard* v. *Bodington* (2):—

> You must in each case look to the subject matter; consider the importance of the provision (in question) and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.

(1) [1860] 2 deG. F. & J. 502. (2) 2 P.D. 203 at p. 211.

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Considering the matter in this aspect and guided by the considerations indicated above, my conclusion must be that even if the appellants are right in their view that section 152 directs the insertion in the proclamation of the date of coming into force of the prohibitions (specified by the day of the month), then the direction is what is called "directory" only, that is to say, there is no solid ground for implying that nullity shall be the consequence of disobedience.

The prohibitions of the amending Act of 1919 were therefore duly brought into force if the Parliament of Canada had authority to enact them and if the other conditions mentioned in the Act have been fulfilled, namely, that there shall be a "law prohibiting" the sale of intoxicating liquor "in force" in the Province of Alberta and that the result of the vote shall be favourable.

I agree with the reasons given by the Chief Justice in the court below that both these conditions were satisfied.

The capacity of the Parliament of Canada to enact the amendment of 1919 is denied. With this I do not agree. And, first, I am unable to accept the contention founded upon section 121 of the B.N.A. Act; the phraseology adopted, when the context is considered in which this section is found, shews, I think, that the real object of the clause is to prohibit the establishment of customs duties affecting interprovincial trade in the products of any province of the Union.

It is not strictly necessary to express any opinion upon the point whether this statute can be supported as passed in exercise of the power given by the second enumerated head of section 91. It has been held that the literal meaning of the words "trade and commerce" must be restricted in order to give scope

for the exercise of the powers committed to the provinces by section 92. The legislation of 1919, however, deals only with imports into the provinces to which it applies and it is legislation clearly, I think, beyond the authority of a province to enact. The reason mentioned therefore seems to fail of application. It has been held also that the regulation of a particular business in each of the provinces throughout the Dominion by a general system of Dominion licensing is not a "regulation of trade and commerce" within the meaning of the phrase as here employed. That rests, in part at least, upon the ground that such a construction would give to No. 2 a scope including subjects specially dealt with by other heads of section 91, banking, e.g. and shipping. This is an objection which would appear to have little force as applied to legislation dealing only with foreign or interprovincial trade and it seems at least much open to question whether the general elucidation of the language of No. 2 in *Parson's Case* (1), when properly construed, contemplates the exclusion of legislation dealing with exports or imports even of a specified commodity from the ambit of the authority arising under that head; and in the *Insurance Act Reference* (2), it was expressly held that an enactment requiring a foreign company to take out a licence before carrying on the business of insurance in Canada was an enactment within the category of "regulation of trade and commerce."

A much more serious objection, however, arises from the decision of the Lords of the Judicial Committee in *Attorney General for Ontario* v. *Attorney-General for Dominion* (3). It was there held that the

(1) 7 App. Cas. 96. (2) [1916] 1 A.C. 588.
(3) [1896] A.C. 348 at p. 363.

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authority touching the regulation of "trade and commerce" given by section 91 contemplates the passing of laws with the view to the preservation of the thing to be regulated and not with a view to its destruction and consequently that a law abolishing all retail transactions in liquor within a specified area could not be supported as a law passed in the exercise of this power.

It is undoubted that the Act of 1919 was passed in aid of provincial liquor enactments and in substance aims at the abolition of transactions in liquor within the provinces to which it applies, and that being the case there is of course much force in the suggestion that the Act of 1919 could not be sustained as a valid enactment in "regulation of trade and commerce" consistently with their Lordships' decision.

In a wider view it might be well suggested that a law prohibiting the export or the importation of a specified commodity or class of commodities from or into a particular province is, when considered in its bearing upon the trade and commerce of the Dominion as a whole, a law passed in "regulation of trade and commerce;" and it may be open to doubt whether their Lordships' decision on the reference of 1896 ought to be regarded as applying to an enactment solely directed to the prohibition of such exports or imports.

On the other hand the enactments of the amending Act are not enactments dealing with a matter falling within any of the classes of matters exclusively assigned to the provinces by section 92 and they are within Dominion competence if they are enactments touching "the peace, order and good government of Canada" which seems too clear for argument. It is argued that such an enactment must be one whose operation extends to the whole of Canada—which this enactment

does, conditionally at all events. But I am not prepared without further examination of the point to agree that an enactment in the terms of the Act of 1919 confined in its operation to one province could not be sustained as relating to "the peace, order and good government of Canada." I pass no opinion upon that point.

In this view it is not necessary to pass upon the question of the validity of the statute of 1921 but as it has been the subject of discussion by other members of the court I will give my opinion upon it.

Clearly, I think, if the Dominion had power to pass the Act of 1919 it had power by a subsequent enactment to construe it with the consequence that all courts would be bound to observe the construction so placed upon it. That is so because the power of legislation is plenary and it could not be seriously disputed that given legislation being valid as dealing with a subject within the jurisdiction of the Dominion Parliament a subsequent interpreting statute would equally be valid provided of course that the interpreting statute did not so entirely change the character of the legislation as to cause it to operate within a field withdrawn from Dominion authority. If the enactment as construed could validly have been passed then the construing statute is *intra vires*. Could the provisions of 1921 have been enacted as part of the statute of 1919 without impairing the validity of this last mentioned statute? The answer to this question must be in the affirmative except at all events as to the third section. And it is no objection that pending litigation is affected since that is only one of the consequences necessarily involved in the full exercise of the authority to pass legislation of the type in question.

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The fallacy lies in failing to distinguish between legislation affecting civil rights and legislation "in relation to" civil rights. Most legislation of a repressive character does incidentally or consequentially affect civil rights. But if in its true character it is not legislation "in relation to" the subject matter of "property and civil rights" within the provinces, within the meaning of section 92 of the British North America Act, then that is no objection although it be passed in exercise of the residuary authority conferred by the introductory clause. Ancillary legislation permissible as in exercise of the powers given by the enumerated heads of 91 may be legislation of a different order, that is to say, it may be legislation which, if enacted by a province, would be legislation "in relation to" some at least of the matters (civil rights, for example) falling within the classes of subjects specified in section 92. *Tennant* v. *Union Bank of Canada* (1). The parent Act as well as the amending Act affect property and civil rights although they are not enactments in relation to that subject. The amending Act makes the importation of liquors into Alberta unlawful and accordingly a common carrier could not either under the provisions of the Dominion "Railway Act" or by the common law be required to accept liquor for shipment into Alberta. The right which otherwise the owner of the liquor would have possessed has therefore ceased to exist because the Dominion Parliament has validly declared the act he could before have required to be done an unlawful act. The legislation does not deal with the duties of common carriers as such but the law as declared by it necessarily has a very important effect upon the duties of common carriers.

(1) [1894] A.C. 31.

So the Act of 1921 declares that certain acts shall be deemed to have been unlawful and it follows that a court holding that the importation would have been unlawful must, as a consequence, hold that the right set up by the shipper did not exist.

It is not quite clear indeed whether or not the right set up in this case is not really a right derived from Dominion legislation, but that is of little importance. Neither by the law of British Columbia nor by that of Alberta could a common carrier be required to do an act which by competent legislative authority had been declared to be illegal.

Section 3 presents a different question. It may well be argued that it is legislation relating to civil rights or to the administration of justice and not within the competence of Parliament to enact in exercise of the residuary power. I express no opinion upon this as there has been no argument upon it.

For these reasons the appeal should, in my opinion, be dismissed with costs.

ANGLIN J.—The plaintiff company is incorporated under the Dominion "Companies' Act" and empowered to engage throughout Canada, in buying, selling, importing and exporting intoxicating liquors. The defendant company is a common carrier and operates between the points to and from which the liquors, of which the carriage is in question in this action, were consigned. The plaintiff sues to recover damages for alleged wrongful refusal by the defendant to accept for transport four consignments of intoxicating liquors, within the meaning of that term in the "Canada Temperance Act," which were duly tendered to it. One of these shipments, tendered at Vancouver, British

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Columbia, was, to the knowledge of the defendant, intended for export by the plaintiff from its warehouse at the City of Calgary in the Province of Alberta to which it was consigned. Each of the other three shipments was, to the defendant's knowledge, *bona fide* consigned to an individual at his private dwelling house where the provincial law in each instance permitted such liquors to be received and used.

The material facts are stated in a special case submitted, pursuant to an order of a judge of the Supreme Court of Alberta, for the opinion of the Appellate Division as to the legality of the defendant's refusal to carry. If the plaintiff should be entitled to recover in respect of the rejection of the four shipments the parties have agreed that the damages sustained by it amounted to $7,260 and that judgment should be entered for that sum.

It is stated in the special case that the defendant justified its refusal to accept the tendered shipments solely on the ground that, having regard to the "Canada Temperance Act" (R.S.C. [1906], c. 152), as amended in 1919, and the Dominion "Elections Act" (10 & 11 Geo. V, c. 46) and certain orders in council, proclamations and proceedings purporting to have been made, issued and taken by virtue of those statutes, it could not lawfully carry intoxicating liquors into the several provinces for which the shipments were respectively destined, viz.: Alberta, Saskatchewan and Manitoba.

The Appellate Division of the Supreme Court of Alberta by a majority judgment determined the issue so presented in favour of the defendant and dismissed the action. From that judgment the present appeal is brought.

In the provincial court counsel were heard representing the parties to the litigation and the Attorney General of Alberta, who, upon being notified of the hearing by direction of the court, intervened to oppose the plaintiff's contention. The Minister of Justice, although likewise notified, was not represented. In this court counsel appeared for the plaintiff as appellant and for the Attorney General of Alberta as intervenent. Neither the defendant nor the Minister of Justice was represented.

The appellant urged the following grounds of appeal:

(The learned judge here sets out the grounds of appeal as the same are stated at pages 430 *et seq. supra*).

But for legislation (11 & 12 Geo. V, c. 20), passed since the argument I should have been prepared to give effect to the appellants' contention that non-compliance with the imperative requirement of clause (g) of s. 152 of the "Canada Temperance Act"—that the proclamation of the Governor in Council for taking the poll should state

> the day on which, in the event of the vote being in favour of the prohibition such prohibition will go into force—

was fatal to the validity of all the subsequent proceedings, including the orders in council bringing prohibition into force. This would have meant that they would recover judgment for $7,260 and costs. Parliament has, however, by an Act, so framed as to admit no doubt as to its construction in this particular ordained (s. 2) that, notwithstanding any such defects, those orders in council shall be and shall be deemed to have been valid, effective and sufficient from their respective dates.

Although at first disposed to doubt the power of Parliament thus to take away the civil rights of litigants, further consideration has satisfied me that,

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since such interference with civil rights, though no doubt intended (vide s. 3), is merely an incidental consequence of the legislation, its validity cannot be successfully impugned on that ground. The legislative jurisdiction which authorized the Act of 1919 will likewise support the auxiliary statute of 1921—at all events sections 1 and 2 thereof.

This recent Act also overcomes any objection to the orders in council bringing prohibition into force based on prolongation of the hours of polling beyond those prescribed by clause (b) of sec. 152. There is nothing in the record to shew that the result of the vote was materially affected either by that irregularity or by the omission from the proclamation of the date on which prohibition should go into force.

Interference by *ex post facto* legislation with rights involved in pending legislation, even when deemed necessary in the public interest, is to be deprecated. Where such interference is not necessary to the attainment of the object of the legislation it is difficult to conceive of any defence for it. Here, if my view of the fatal effect of the omission from the proclamation of the Governor in Council of the date on which prohibition should come into force be correct, the plaintiffs' right to recover $7,260 has been taken away. The purpose of the act of June last—to prevent the loss of the thousands of dollars expended in taking polls in several provinces—would have been fully attained had a proviso saving the rights of the plaintiffs and others in like plight been inserted in it.

The legislation of 1919 when brought into force prohibits the importation of intoxicating liquor into those provinces where its sale for beverage purposes is forbidden by provincial law. It was enacted as Part IV (secs. 152 to 156) of the Canada "Temperance

Act" (R.S.C. [1906], c. 152) and was passed in order to supplement and make more effective such provincial prohibitory laws. Its true character therefore is temperance legislation rather than legislation regulating the importation of liquor as a matter of trade and commerce. It prohibits; it does not regulate. Moreover, it deals with trade in only one class of commodities. In view of these facts Part IV itself should be regarded, as the Canada "Temperance Act" has been (*Attorney General for Ontario* v. *Attorney General for Dominion* (1); *Attorney-General for Canada* v. *Attorney General for Alberta* (2), rather as an exercise of the general power of Parliament to pass laws for the "peace, order and good government of Canada," than ascribable to its powers to legislate for "the regulation of trade and commerce" (the only enumerated head invoked to support it) or authorized by any other of the enumerated powers conferred by s. 91 of the B.N.A. Act.

It is common ground that the prohibition of importation is beyond the legislative jurisdiction of the province. It is not covered by any of the enumerated heads of s. 92. It lies outside of the subject matters enumeratively entrusted to the provinces under that section and upon it, therefore, the Dominion Parliament can legislate effectively as regards a Province under its general power "to make laws for the peace, order and good government of Canada". *Attorney General for Canada* v. *Attorney General for Alberta* (2). The "Canada Temperance Act" itself, the validity of which was upheld in *Russell* v. *The Queen* (3), Lord Haldane assures us is an instance of such a case.

(1) [1896] A.C. 348, at pp. 362-3. (2) [1916] 1 A.C. 588, at p. 597.
(3) 7 App. Cas. 829.

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The facts that the legislation of 1919 was designed to aid provincial prohibition legislation, that it applies only to certain provinces,—those in which a local prohibition law is from time to time in force,—that it deals with the liquor evil as a matter of local importance in each province affected, and that it interferes with civil rights of the individual citizen safeguarded by the provincial law therefore do not afford arguments against its validity. The propriety of concurrent or supplementary legislation to cover a field which lies partly within the jurisdiction of the provincial legislatures and partly within that of the Dominion Parliament was indicated by Lord Atkinson in delivering the judgment of the Judicial Committee in *City of Montreal* v. *Montreal Street Railway* (1).

Nor do I see any force in the objection that the initial step towards bringing the prohibitive section 154 into force is a resolution of the provincial legislature. I see no reason why a provincial legislature may not thus intimate its opinion that concurrent action by the Dominion authorities is desirable. Under the "Canada Temperance Act" the initial step is a petition of one-fourth of the electors of the county or city in which it is sought to bring that Act into force.

Neither is the legislation under consideration in my opinion obnoxious to s. 121 of the B.N.A. Act. The purpose of that section is to ensure that articles of the growth, produce or manufacture of any province shall not be subjected to any customs duty when carried into any other province. Prohibition of import in aid of temperance legislation is not within the purview of the section.

(1) [1912] A.C. 333 at p. 346.

The prohibition of import and of inward transportation by sec. 154 is absolute. No exception is made in favour of liquor intended for export from the province into which it is sought to take it. I find nothing to justify the reading of such an exception into the statute.

The two remaining grounds taken by the appellants were that sec. 154 was not in force in the province of Alberta (a) because the law of that province prohibiting the sale of intoxicating liquor as a beverage is *ultra vires* in that it prohibits the holding within the province of liquor for export therefrom, and (b) because a majority in favour of prohibition was not obtained in each of the electoral districts of the province.

(a) The stated case submits no question as to the Alberta "Liquor Act." That statute is not set up as a justification of the defendants' refusal to accept the tendered shipments. In fact it is not mentioned in the stated case at all. Its invalidity was raised in argument by counsel for the plaintiff solely to support his contention that because there was not a valid prohibition law in force in Alberta a condition precedent to the Dominion prohibition of import being brought into effect in the province did not exist. If the Alberta "Liquor Act" should be construed as prohibiting the holding within that province of intoxicating liquor for export (having regard to the provisions of the "Liquor Export Act" I do not think that is its effect) it might be *pro tanto*, but *pro tanto* only, *ultra vires*. The question is discussed at length in the judgments rendered by the Supreme Court of Alberta in *Gold Seal Ltd.* v. *Dominion Express Co.* (1). Speaking generally, I am disposed to accept the dissenting opinions of the Chief Justice and Mr. Justice Stuart in that case.

(1) 16 Alta. L. R. 113.

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(b) Section 153 of the amended "Canada Temperance Act" provides that

> the Governor in Council shall by order in council declare the prohibition in force (in the province) if more than one-half of the total number of votes cast in all the electoral districts are in favour of such prohibition.

Counsel for the appellant contends that the word "all" is here used in the sense of "each and every of." No doubt "all" is often susceptible of that meaning. But the context, particularly the words immediately preceding, viz., "one-half of the total number of votes cast,"—and the general tenor of the statute makes it plain that the phrase "in all the electoral districts" is here used as the equivalent of "in the whole province." Any other interpretation of it would shock common sense. Although the majority in some of the electoral districts in each of the three provinces was against prohibition, a majority of the total number of votes cast in each province, taken as a whole, was distinctly in favour of it. This contention of the appellant fails.

On the whole case therefore, although with some reluctance because I think the plaintiffs were quite unnecessarily and, if I may say so with respect, arbitrarily deprived of what I regard as a good cause of action by the *ex post facto* legislation of last June, I concur in the dismissal of this appeal.

With some hesitation, because of the presence in section 3 in the recent Act of the concluding words "having regard to the provisions of this Act," I concur in the exercise of discretion by this court in awarding to the plaintiffs their costs of this litigation throughout.

MIGNAULT J.—As this case stood after the argument, and before Parliament enacted the recent statute, 11-12 Geo. V, ch. 20, which received Royal sanction

on the 4th June 1921, my opinion was that the proclamation ordering the vote should have mentioned the day on which prohibition would go into force in the event of the vote being in its favour (section 152 "Canada Temperance Act"), and that the omission of this statement rendered the subsequent proceedings void. This would have entitled the appellant to judgment for $7,260, the agreed amount of its damages by reason of the respondent's refusal to carry its goods.

The new statute materially modified this situation, and notwithstanding Mr. McGillivray's ingenious argument I must hold that it is clearly retrospective. The omission made in the proclamation therefore can no longer justify a judgment in favour of the appellant.

On all other features of the case my opinion was against the contentions of Mr. McGillivray. I take it that the validity of the "Canada Temperance Act" having been affirmed by the Judicial Committee in *Russell* v. *The Queen* (1), the amendment of 1919, 10 Geo. V., ch. 8, being legislation of the same character, cannot be assailed as transcending the powers of Parliament.

Nor do I think that any argument can be based on sec. 121 of the British North America Act which states that

> all articles of the growth, produce or manufacture of any of the provinces shall, from and after the Union, be admitted free in each of the other provinces.

This section, which so far as I know has never been judicially construed, is in Part VIII of the Act, bearing the heading "Revenues, Debts, Assets, Taxation," and is followed by two sections which deal with customs and excise laws and custom duties.

(1) 7 App. Cas. 829.

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GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Mignault J.

In the United States constitution, to which reference may be made for purposes of comparison, there is a somewhat similar provision (art. 1, sec. 9 par. 5 and 6) the language of which, however, is much clearer than that of sec. 121. It says:—

> No tax or duty shall be laid on articles exported from any state.
> No preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear or pay duties to another.

I think that, like the enactment I have just quoted, the object of section 121 was not to decree that all articles of the growth, produce or manufacture of any of the provinces should be admitted into the others, but merely to secure that they should be admitted "free," that is to say without any tax or duty imposed as a condition of their admission. The essential word here is "free" and what is prohibited is the levying of custom duties or other charges of a like nature in matters of interprovincial trade.

My conclusion therefore is that in view of the provisions of the statute of 1921 judgment can no longer be rendered in favour of the appellant on the only point where, in my opinion, under the then state of the law, it was justified in attacking the proclamation and the order in council. The appeal must consequently be dismissed.

On the question of costs, however, other considerations arise. Here the statute of 1921 gives the court full discretion to make such order as it may see fit, and it is natural that it should have done so. Retrospective legislation of this nature, affecting pending litigation, can only be justified under very extraordinary circumstances. It takes away from the appellant its right to obtain damages for the

refusal of the respondent to carry its goods, refusal which was not, when made, justified by the proceedings had under the "Canada Temperance Act." But as it leaves to the court full discretion to adjudicate upon the costs, I think that the appellant should have its costs throughout. As I have said, before the statute of 1921, the appellant was right in attacking the proclamation as being insufficient in an essential particular, and I would not further penalize it by making it bear the costs it has incurred. And although, as a rule, costs should follow the event, here, carrying out what I take to be the intention of section 3 of the new statute, I would grant them to the appellant.

My opinion is to dismiss the appeal but to give to the appellant its costs here and below.

Appeal dismissed with costs against respondent.

Solicitors for the appellant: *Tweedie & McGillivray.*

Solicitor for the defendant: *George A. Walker.*

Solicitor for the respondent: *H. H. Parlee.*

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*June 10, 13.
*Oct. 11.

FRANK SAMUEL AND OTHERS (PLAINTIFFS)..... } APPELLANTS.

AND

BLACK LAKE ASBESTOS AND CHROME COMPANY (DEFENDANT)..... } RESPONDENT.

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

Contract—Purchase of goods—Time for delivery—Extension—Breach—Measure of damages—Substituted contract.

By a contract entered into in April, 1917, S. agreed to purchase a specified quantity of chrome ore from the Black Lake Co., delivery to be completed on Nov. 1st. The ore was not delivered on that date though S. had been urging expedition and had offered to extend the time and in October the company wrote S. that material shipments could not be made for some months and suggesting that the contract be cancelled, which S. refused to do. There was no formal extension. In November conversations took place between S. or his representative and the manager of the mines which ended in the latter undertaking to deliver the ore as fast as it could be got out. The delays continued with S. still urging expedition until June, 1918, when the company wrote that no further deliveries would be made. In an action by S. for damages the breach of contract was admitted the only question being its date and the consequent measure of damages.

Held, reversing the judgment of the Appellate Division (48 Ont. L.R. 561) that there was no breach of the contract before June, 1918; that there was no new contract entered into as a result of the conversations that took place in November, 1917, but the parties acted throughout on the basis of the original agreement made in April; and that the measure of damages was the difference between the contract price and the value of the ore in June, 1918.

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

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment at the trial as to the measure of damages.

The material facts are stated in the above head-note.

Anglin K.C. and *R. C. H. Cassels* for the appellants. The respondents were in fault and the appellants exercised forbearance up to June 21st, 1918. The breach occurred on that date and the measure of damages should be the difference between the contract price and the value of the ore then as there was no market. See *Ogle* v. *Earl Vane* (2); *Hickman* v. *Haynes* (3).

H. J. Scott K.C. and *R. S. Cassels K.C.* for the respondents referred to *British Westinghouse Electric Co.* v. *Underground Electric Railways Co.* (4).

IDINGTON J.—The respondent, in the end of April and beginning of May, 1917, entered into two written contracts with the appellants to sell and deliver to them Canadian Lump Chrome ore.

The following is a copy of the first of these contracts:

Philadelphia, April 25th, 1917.

Messrs. Black Lake Asbestos & Chrome Co., Ltd.,
Black Lake, P. .Q., Canada.

Dear Sirs:—We have to-day bought for our account from you a lot of Canadian Lump Chrome Ore on the following conditions, viz.:

Quantity 1,500 gross tons of 2,240 lbs. each.

Brand or make.

Quality good, well prepared chrome ore.

Price: Ore analyzing 32 to 35% chromic oxide, $23.50; for ore analyzing over 35% to 38%, $25.75; for ore analyzing over 38% up to 39%, $27.50, with a scale of $1.00 for each full unit over 39% and up to 42%. All per gross ton.

(1) 48 Ont. L.R. 561.
(2) [1868] L.R. 2 Q. B. 275; 3 Q. B. 272.
(3) [1875] L.R. 10 C.P. 598.
(4) [1912] A.C. 673.

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Terms of payment to be made in U.S. gold coin or equivalent.

Cash in full to be paid in Black Lake, less 25c. per ton as heretofore.

Place of delivery f.o.b. cars, Quebec Central Railroad Company's tracks, between Robertsonville and D'Israeli, P.Q.

Time of shipment: As fast as possible. The entire quantity to be shipped not later than first of November. This purchase is subject to the Canadian Government granting permission to ship to the United States.

Shipping directions: Will be given as fast as the ore is loaded.

Remarks: Sampling and analyzing to be done by us, at our expense. Where our determinations are not satisfactory to seller, he is to have the privilege of disposing of such carloads which are to be replaced.

Note: Each delivery to constitute a separate and independent contract unless otherwise stated.

All agreements contingent upon strikes, accidents, delays of carriers, or other unforeseen circumstances beyond the reasonable control of the sellers, wars of this or other nations, as well as interruptions of navigation through strikes or other causes, in which case deliveries against this contract may be suspended.

Sellers are not compelled to replace shipments lost at sea.

Accept. May 29, 1917.

Black Lake Asbestos & Chrome Co., Limited.

(Sgd.) J. E. Murphy, Jr.

Yours truly,

(Signed) Frank Samuel.

The second is identical in its terms save being for 2,000 gross tons instead of as in the first for 1,500 tons and the dates of the making being 2nd May, and acceptance the 29th of May and in the use of the word "analyzing" for "containing." A printed form was used in each case and I surmise one used by appellants.

The respondent not only failed to complete delivery by the 1st November, 1917, named in each of the respective contracts for limit of time therefor, but continually held out to appellants hopes of doing so and accepted their forbearance from time to time until June, 1918, when the respondents' many broken promises had apparently become unbearable to appellants and led them to write respondents the following letter:—

Philadelphia, Pa., June 11th, 1918.

Messrs. Black Lake Asbestos & Chrome Co.:

Dear Sirs:—Referring to our two contracts with you for chrome ore on April 25th and May 3rd, 1917, we are advised by our representative at Black Lake that your Black Lake office is shipping chrome ore to other parties without giving us the opportunity to sample and analyze this ore and apply against our contracts with you. We consider this a repudiation on your part of our contracts, and therefore, will have to take legal action and hold you for non-delivery of this ore.

We telegraphed you to this effect to-day and must have an immediate answer in reference to same. We are sending a copy of this letter to your Black Lake office.

Yours very truly,

(Sgd.) Frank Samuel.

The substance of this letter was also sent by telegraph on the 11th of June, but no reply came to either until the following:—

No 20 Victoria Street,

Toronto, Ontario, June 21st, 1918.

Frank Samuel, Esq.,

Harrison Building,

Philadelphia, Pa., U.S.A.

Dear Sir:—Delay in answering your telegram and communication of the 11th inst. has been due to the writer's absence from the city.

The contracts to which you refer bear on their face a ground for termination, viz., the pinching out of ore, which unfortunately took place on our properties.

We regret to say, also that the sampling and analysis which has been done by your representative in the past has been most unsatisfactory.

In addition, practically our entire output at the present time is being used for home consumption, and we regret that we cannot make any further shipments to you.

Yours very truly,

Black Lake Asbestos & Chrome Company, Limited,

(Sgd.) Robert F. Massie,

Managing Director.

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Hence this action for damages in which respondents set up many defences all of which were decided by the learned trial judge to be unfounded.

He assessed (expressly relying upon *Ogle* v. *Vane* (1), hereinafter referred to) the damages on the basis of the difference in market price for such goods on the date of respondents' last letter, quoted above, and the price named in each of said contracts.

On appeal therefrom to the first Appellate Division of the Supreme Court for Ontario, that court maintained said judgment in all respects save in the taking of said date as basis for the assessment of damages.

It instead thereof directed a reference to the Master in Ordinary to inquire and state the damages.

Instead of taking any fixed date as the basis for applying the relevant law to the existent facts it directs said master

> to ascertain and state what quantity of Canadian lump chrome ore within the grades contracted for was diverted from delivery to the plaintiffs by the defendants other than for unsatisfactory analysis of the ore, and sold to other persons between May 1st, 1917, and June 22nd, 1918, and whether any and if so what quantity of similar ore was purchased by the plaintiffs between the said dates to replace the ore so diverted and sold to other persons, and is to allow to the plaintiffs, as damages, in respect to the ore, so diverted and replaced, the excess, if any, between the price paid by the plaintiffs in each case and the contract price for the same grade of ore. And as to the residue of the 2,660 tons undelivered by the defendant the said Master shall allow as damages the sum of $30.26 per ton, being the difference per ton between $23.50 the contract price and $53.76, the market price on June 21st, 1918, of ore of the lowest grade contracted for, but the defendant shall be entitled to shew before the said Master in mitigation of the said last mentioned damages: (1) that the plaintiffs bought at a lower price than $53.76 per ton by reason of the situation caused by the defendants default in delivery, and (2) that the plaintiffs bought in in the market at a lower price than $53.76 per ton in excess of the amount required to fill their forward contracts, and in either of the said events the damages on the ore so bought shall be calculated on the basis of the said lower price instead of at the sum of $30.26 per ton.

(1) L.R. 3 Q.B. 272.

I, with great respect, cannot find in my view of the contract above set forth and the relevant facts anything to warrant the court below in finding as the reasons for its judgment shew, that

as each car was diverted from the respondent (now appellant) and shipped elsewhere that was a repudiation *pro tanto* and was known to be so by the respondent (now appellant) through his agent Wooler.

The contract was not for the entire output of the mines of respondent regardless of its obligations to others either express or implied. The only words in the contract giving any colour for such an interpretation are, I submit, the words "fast as possible" which, seeing it had till the 1st November—a period of seven months—to get out and load about three thousand tons of the desired ore, must be interpreted reasonably.

Let us imagine a buyer under such like contract, on discovery that other customers of the vendors were getting shipments from him of the like goods, immediately going into the open market and buying at a lower price than named in his contract and trying then to evade the acceptance of delivery tendered him within the ultimate time named for delivery and setting up such a defence.

I submit such a proceeding could not be countenanced and that such a defence would not be listened to for a moment. Nor can the counterpart thereof as presented herein be maintainable. Contracts for delivery by instalments at stated times have been presented in some cases to courts and damages assessed on that basis as evidently what was within the contemplation of the parties concerned therein. But that is not the nature of this contract. Nor do the words therein "note: each delivery to constitute a separate and independent contract unless otherwise

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stated," which seem to be relied on by the reasons assigned below, make it so. They are words which form part of a printed form used in making the contract and the only operative effect they can have herein would be in the event of a contest as to the quality of goods that had been so delivered, or something akin thereto, arising out of such delivery or in relation to such goods as had been delivered.

There is no dispute herein arising out of past deliveries.

The only thing here in question is what arises out of non-delivery to which the said note is entirely inapplicable.

I submit, therefore, the first part of the above quoted direction to the master is not maintainable.

Thus, I conceive, is also eliminated from our consideration, all that transpired up to the time limit of 1st November for the complete fulfilment of the contract, save in so far as the correspondence between the parties hereto prior to that date may, and I think, must, be looked at to help in the due appreciation of what followed up to the 21st of June, 1918.

It is upon the correct appreciation of the said correspondence so had, that maintenance of the remaining parts of the order of reference should depend.

The difference between the market price of such goods as in question, on the 1st November, 1917, and the price agreed for under the contract, would be the true measure of damages for the breach then, of the contract, unless otherwise provided, or determined by the conduct of the parties.

On the 17th October, 1917, in reply to a complaint as to the tardy nature of deliveries under the contract, on the part of appellants, the respondent wrote Samuel (the writer of said complaint) as follows:—

Dear Sir:—We have your favour of the 11th inst. and in reply beg to advise, that we do not expect to be in a position to make larger shipments of chrome ore on your contract before next summer, so if you wish to cancel your contract on the first of next month we will do so. We regret very much that we are unable to make larger shipments on your contract at present, but it is a cause beyond our control. Kindly let us have your reply to this offer at an early date.

Yours truly,

Black Lake Asbestos & Chrome Co., Ltd.,
Per J. E. Murphy, Jr.

Reply thereto (dated 23rd October) was as follows:—

Dear Sirs:—We are in receipt of your favour of October 17th, and in reply would state that we cannot cancel our contract with you for chrome ore, as our people are willing and anxious to receive this ore at the present time, and we must ask you to get shipments off as rapidly as possible.

Very truly yours,

(Sgd.) Frank Samuel.

It seems quite clear that respondent by offering cancellation meant literally what it said and did not intend to be held for damages in case of assent on the part of appellants to the proposition presented.

On the 20th November the correspondence is resumed and it continued until June following of such a character as clearly to demonstrate that the respondent was claiming it was doing the best it could to live up to the contract and was asking and accepting appellants' forbearance and promising future deliveries and that the appellants were exercising due forbearance and perhaps more than the respondent deserved.

Indeed it would have been improper under such relations as said correspondence discloses to have brought chrome ore of kind and quality named in the contract for the sole purpose of asserting an action for damages and thereby establishing the measure of such damages as appellant had suffered.

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The respondent's factum points to a letter of appellant of 18th March, 1918, pointing out to the former the measure in which it had failed to live up to its promises and to threats it had made of a discontinuance of the forbearance that had hitherto been shewn respondent unless it shewed a better appreciation thereof.

It is to be observed that said letter went no further than pointing out the course which the appellant might be driven to adopt and hence they remained liable to fulfil their part of the contract until they had gone further or the respondent had as it did later repudiate in clear and explicit terms.

The answer to the respondent's attempt to use this letter as evidence that the contract had ended is not confined to that alone for the effect of it was to produce a delivery of it and acceptance by appellants of two more car loads of chrome ore in the month of April.

Thus by the concurrence of both parties the contract had not ended and the final breach thereof taken place.

The decision in the case of *Ogle* v. *Earl Vane* (1), seems to me to exactly fit the facts in the case as I find them by a perusal of the entire correspondence. In that case Blackburn J. wrote the leading judgment. In the Exchequer Chamber, in appeal therefrom, the court was unanimous and it may not be amiss to remark that Willes J. was one of those writing to express the opinion of the court. Shortly thereafter in 1875, in the case of *Hickman* v. *Haynes* (2), a strong court in appeal, Lindley J. writing the judgment, accepted that decision as a guide and applied the principle involved.

(1) L.R. 3 Q.B. 272. (2) L.R. 10 C.P. 598.

In 1899 the late Chief Justice Lord Russell of Killowen in the Commercial Court applied the identical principle thus involved to the decision of the case of *Ashmore & Son* v. *C. S. Cox & Co.* (1), and at the close of his judgment page 443 furnished an apt illustration of what should be borne in mind in dealing with the facts presented herein.

Unfortunately respondent seemed to have been inclined herein throughout to get away from the actual facts as I view them both in its dealing with the appellants and the case presented to the court, or to read them backwards.

In my view of the facts the case is simple and the appeal should be allowed and the judgment of the learned trial judge be restored with costs here and in the first Appellate Division of the Supreme Court of Ontario.

DUFF J.—The appellants, I think, are entitled to succeed on the principal ground on which they based their appeal, namely that there was no substituted contract but that the time for delivery was extended from time to time in forbearance and by way of indulgence at the request of the defendants. That is, I think, a substantially just interpretation of what occurred between the parties, and it is also, I think, what the trial judge intended to find although his findings, perhaps, are not very precisely expressed.

No question arises here such as that which, but for the arrangement between the parties, might have arisen in *Tyres* v. *Rosedale Iron Co.* (2), where the

(1) [1899] 1 Q.B. 436.

(2) [1875] L.R. 10 Ex. 195.

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plaintiffs insisted upon putting an end at once to the indulgence and required immediate delivery of all the overdue instalments. No such question arises here, because the immediate cause of the indulgence being terminated was the repudiation by the defendants of their obligations under their contract.

ANGLIN J.—At the conclusion of the argument I had a strong impression that the disposition made of this case by the learned trial judge had been entirely satisfactory and should not have been interfered with. Further consideration has confirmed that view. The issues as to the breach of the contract by the defendants, the date when such breach occurred, alleged purchases by the plaintiffs to replace ore which the defendants had failed to supply and the quantum of the plaintiff's damages were presented for trial and were tried out. The evidence supports the finding of a wilful breach of contract by the defendants deliberately made in order to take advantage of an increased market price. Forbearance by the plaintiffs at the instance of the defendants prevented an actionable breach before the 21st of June, 1918, when such a breach undoubtedly occurred. The assessment of damages as of that date was therefore warranted. The measure of damages adopted by the trial judge—the difference between the sale price and the value at the date of breach—was that prescribed by the law under such circumstances as the evidence disclosed no market in which the goods were procurable at the date of the breach. The quantum allowed has not been successfully challenged. Prior to the 21st of June, 1918, the plaintiffs were under no obligation to look elsewhere for ore in order to mitigate their damages. Indeed they could not safely purchase ore to

replace what the defendants were bound to furnish as the contract being still open they might be compelled to take the latter. After the 21st of June, so far as the evidence shews, no ore was available—certainly none at any price less than that which the learned trial judge fixed as the value at that date of the ore in the delivery of which the defendants made default.

There is in my opinion nothing to justify further investigation. The appellants had their day in court. They took their chances on the evidence submitted at the trial. If they failed to take every advantage of the opportunity they then had they must suffer the consequences. With respect, the judgment of the trial judge was in my opinion entirely right; it should not have been disturbed and should now be restored.

BRODEUR J.—I concur in the result.

MIGNAULT J.—The only question here is as to the quantum of the damages to which the appellants are entitled for the admitted default of the respondent to make deliveries in accordance with the requirements of the two contracts which it had made with the appellants to sell them the total quantity of 3,500 gross tons of Canadian lump chrome ore. The quantity undelivered was 2,660 tons, and by the terms of the contracts the whole of the ore should have been delivered not later than the first of November, 1917.

The finding of fact of the learned trial judge with regard to the question whether the time for delivery had been extended beyond November 1st, 1917, is as follows:—

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From the beginning defendants were dilatory in making delivery, so that long before November 1st—the date fixed for the completion of the deliveries—it became apparent that full delivery would not be made within that time. Plaintiffs did not then stand on their strict right to enforce performance at that time, but while continually pressing for more prompt and larger deliveries than they were getting, the facts warrant the inference that the effect of what happened between them was an extension from time to time of the time for making deliveries until hope for further deliveries was ended by a notice of June 21st, 1918, by the defendants declining to make further shipments to plaintiffs. Not only is this so but Mr. Tomlinson makes the statement that plaintiffs had extended the time for delivery down to the time defendants repudiated the contracts, which statement has not been contradicted.

It is true that the learned judge arrives at this finding by means of an inference from the facts proved, but there was certainly no refusal of the respondent to make any deliveries after November 1st, and subsequently to that date the appellants pressed for the carrying out of the contracts, and the respondent made certain deliveries thereunder, so that until the final refusal to make further deliveries in June, 1918, both parties were acting under the original contracts of sale. The inference of the learned trial judge is therefore fully justified by the evidence.

I cannot accept the contention of the respondent that after the 1st of November, 1917, a substituted contract was entered into to sell ore to the appellants as fast as it could be mined, which contract not being in writing could not be enforced, but, according to my reading of the correspondence, until the final repudiation in June, 1918, the original contracts were considered in force and acted upon by both of these parties.

If therefore there was not a substituted contract, but a mere forbearance as to deliveries under the original contracts, the time of repudiation or of refusal to make further deliveries is the time at which the

damages for breach of contract should be assessed. Unfortunately for the respondent the price of chrome ore had very notably increased from November 1st, 1917, to June 21st, 1918, when the letter of repudiation was written, so that its position is worse than if it had declined to make further deliveries after November 1st. But it is impossible to accept the latter date as the one at which the damages should be assessed, for both parties acted under the contract for several months afterwards, and really the respondent, by its letter of repudiation, has determined the time for ascertaining the damages to which its repudiation entitles the appellants.

The only point remaining is whether the variation made by the Appellate Division in the judgment of the learned trial judge should be sustained. This involves the question whether an opportunity should be given to the respondent to shew, if it can, whether or not the appellants, under their obligation to minimize the damages, bought chrome ore to replace that undelivered by the respondent, the damages then being the difference between the contract price and the price at which such ore was purchased. After due consideration, I have come to the conclusion that up to the time of repudiation the appellants were not entitled to purchase chrome ore to replace that yet undelivered by the respondent, and that if they had made such a purchase they could nevertheless have been forced by the respondent to take the full quantity mentioned in the contracts. The reference ordered by the Appellate Division would therefore be without any possible use, for, if the appellants could not buy as against their contract, it is immaterial to inquire at what price they did in fact purchase ore. The appellants were dealers in ore and as there was a great

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demand for the commodity they naturally bought all they could. It is true that the contract states that each delivery should constitute a separate and independent contract, but that certainly does not mean that as to the quantity undelivered there should be as many contracts of sale as there were tons or carloads to be delivered. And even were there such a multitude of contracts to be fulfilled not later than November 1st, unquestionably the time for delivery could be extended by forbearance beyond that date, and then the damages for the final breach of contract would have to be determined as of the time of the breach.

In my opinion, therefore, the judgment of the learned trial judge should not have been disturbed, and the appeal should be allowed and this judgment restored. The cross-appeal of the respondent should be dismissed with costs.

I may add that inasmuch as the contracts in question were made in the Province of Quebec where also the breach occurred, the liability of the respondent should have been determined according to the Quebec law. The parties however assumed otherwise and they appealed to the law of the forum which was applied by the courts below. I am not to be taken as dealing with the matter under any other basis.

Appeal allowed with costs.

Solicitors for the appellants: *Blake, Lash, Anglin & Cassels.*

Solicitors for the respondent: *Cassels, Brock & Kelley.*

FRANK K. BROWN (DEFENDANT) APPELLANT; 1921

*Oct. 19.
*Nov. 21.

AND

PHIL H. MOORE (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Company—Sale of land—Implied powers—Exercise of option—Specific performance.

The charter of a pulp and paper company empowered it to purchase and hold lands, mill privileges, growing timber and other property.

Held, that from this power to purchase the power to sell is implied having regard to the nature of the business to be carried on.

Held also, Duff J. dissenting and Cassels J. expressing no opinion, that the company could sell all the property so acquired as long as it did not dispose of its whole undertaking.

M. obtained from the company a lease of all its real and personal property with an option to purchase the same at any time during the term. He assigned the lease to B. who agreed in writing that, if he exercised said option he would convey to M. a quarter interest in the property he acquired. B. did not formally exercise the option but with intent to defraud M. he acquired enough stock in the company to give him control. In an action by M. for specific performance of the agreement to give him a quarter interest.

Held, Duff and Cassels JJ. dissenting, that B. having complete control by his acquisition of the stock in fact exercised the option to purchase and may be compelled to procure the conveyance necessary to vest in M. the quarter interest to which he is entitled.

Per Duff J.—The option to purchase was *ultra vires* of the company; it dealt with all the land, etc., which the company was authorized to acquire and the powers given the company by its charter made it an undertaking in which the public must be presumed to have an interest; in such case the sale of all the land, the whole substratum of the undertaking, which the charter does not authorize would be an interference with the carrying out of the undertaking as authorized by the legislature and must be deemed to be prohibited.

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*PRESENT:—Idington, Duff, Anglin and Mignault JJ. and Cassels J. *ad hoc*.

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BROWN v. MOORE.

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

The material facts are stated in the above head-note.

Paton K.C. for the appellant. The appellant never exercised the option and cannot be compelled to convey a fourth interest in what he has not acquired.

The company cannot convey all its property. See Lindley on Companies (6 ed.) page 245; *Simpson* v. *Westminster Palace Hotel Co.* (1).

L. A. Lovett K.C. for the respondent.

IDINGTON J.—I agree for the reasons assigned in the courts below that this appeal should be dismissed with costs.

I do not think, however, that the resort to a voluntary winding up of the company is at all necessary or the only means of enforcing the contract.

The appellant is just as much bound to procure the conveyance to the respondent of what he is entitled to as if he had procured, pursuant to his agreement with the company's covenant with the respondent, the conveyance of the property to his own attorney or any one else he chose to select.

The court below can, no doubt, if necessary, find other means of enforcing the execution by the appellant of his obligation to the respondent.

DUFF J. (dissenting)—The Nova Scotia Wood, Pulp and Paper Company, Limited, was incorporated by a Nova Scotia Statute, 44 Vict., ch. 27, "for the purpose of manufacturing wood pulp and paper" in Nova Scotia

(1) [1860] 8 H. L. Cas. 712.

and of purchasing and holding lands, leases, privileges, growing timber and other property at and near Mill village and elsewhere in the County of Queens, and for transacting all business in connection therewith.

The Company was (sec. 7) invested with power to expropriate

lands and wood contiguous to or connected with lands and works of the company.

The municipality of Queen's County (sec. 10) was empowered to exempt the company from taxation.

By a lease dated the 2nd October, 1916, the company leased to the respondent all its

mills, buildings, machinery and all its lands, tenements, privileges easements and appurtenances situate in the County of Queens;

and by the same instrument it was provided that the appellant should have

the sole and exclusive option at any time during the existence of this lease, of purchasing the fee simple of the lands, tenements, easements and appurtenances hereby demised together with all buildings, plant and machinery thereon

on certain specified terms. On the same date the respondent assigned this lease to the appellant and again on the same date the appellant and the respondent executed an agreement by which the appellant agreed to engage the respondent as his manager upon certain terms as to remuneration and by which it was further provided:—

4.—If at any time Frank K. Brown purchases the said premises described in the said lease out of the aggregate net earnings as set forth above in this agreement then and immediately thereafter the said Phil. H. Moore is to become the owner of 25 per cent thereof and the said Frank K. Brown is to assign and transfer to the said Phil. H. Moore 25 per cent or one quarter interest therein by good and sufficient deeds thereof always conveying only such title as he may have acquired from the said Nova Scotia Wood, Pulp and Paper Company, Limited.

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5.—In the event of the said Frank K. Brown being desirous to purchase the said property before the said aggregate net earnings as hereinbefore referred to, are sufficient to complete the amount of the said purchase price, the said Phil. H. Moore shall have the option of drawing from the said capital account of the said company his proportion of the profits to that date or of purchasing with his said proportion of profits and any other money which he may desire to invest in the said property an interest in the same not to exceed 25 per cent of the said property at the same valuation as the said Frank K. Brown will pay to the Nova Scotia Wood, Pulp and Paper Company, Limited, for the purchase of the said property, namely, $30,000.00.

The respondent during the currency of the lease purchased from the shareholders of the company the whole of the shares of the company and the appellant thereupon demanded a transfer of a one-fourth interest in the property comprised in the lease and tendered one quarter of the purchase price paid. This the respondent refused offering at the same time to transfer one quarter of the shares purchased. The respondent thereupon brought this action and the courts of Nova Scotia upheld his claim that he is entitled to a conveyance from the appellant of an undivided one-fourth interest in the property comprised in the lease.

The purchase by the respondent was not technically a purchase in pursuance of the option. It was nevertheless, I think, a transaction within the scope and intendment of articles 4 and 5 of the agreement between the appellant and the respondent.

Article 4 provides that the respondent is to participate in the fruits of the exercise of the option upon the same footing as the appellant. If the conditions are fulfilled under which that article is to come into play, then whatever title or interest the appellant acquires by the exercise of the option is immediately to be effected by a trust in favour of the respondent. The article treats the appellant as a

trustee, it treats the rights under the option as trust property held for the benefit of the appellant and the respondent, and it is from this point of view also that we must construe article 5. Article 5 was intended to apply to every interest acquired by the appellant which (if the conditions of article 4 had happened), would have been of such a character that the trust thereby declared would have captured it.

The respondent's rights under these articles could not be affected by the form of the transaction between the appellant and the company. If what was done was done for the purpose of effectually securing, so far as possible, the benefits of the option, then the interest, whatever form it might take, of which the appellant was the recipient was to be subject to the respondent's rights as declared by these articles.

The respondent was to be entitled under the terms of article 5 to have transferred to him a one-fourth interest in what the appellant acquired and it is important to note that it was his right to demand an interest which, while differing in quantity from that of the appellant, should in point of quality be identical with the appellant's. He was entitled to be put in point of quality upon the same footing as the appellant.

Now it is quite obvious that what the appellant offered the respondent, namely, one quarter of the shares acquired by him, was not an interest which the appellant was bound to accept as in satisfaction of his rights. The acceptance of the appellant's offer would place him in the position of a minority shareholder, a position in which he might well find that share for share what he had accepted was not equal in value to that one-fourth the appellant had retained.

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He was clearly entitled to have a transfer of an undivided one-fourth interest in every share acquired by the appellant or at all events a declaration of trust by the appellant in respect of such a one-fourth interest.

On the other hand the claim made by the respondent which has been admitted in the court below is, I think, an inadmissible one. There can be no doubt that the method adopted by the appellant for securing the fruits of the option was adopted in good faith. There were at least two most cogent reasons for pursuing the course that was taken. 1st, it was gravely questionable (so much is admitted and I shall point out in a moment that the option was *ultra vires* and unenforceable) whether a conveyance literally in execution of the terms of the option would not be wholly inoperative at law, and 2nd, assuming such a conveyance could have any operation, it would have the effect of divesting the title to the company's properties from the company and depriving the purchasers consequently of the benefits of the compulsory powers given by the Act of incorporation as well as of the privilege in respect of taxation. That the parties were alive to these considerations is proved by the evidence of the respondent himself who says he pointed out the "value" of the "charter" and the importance of securing it. His precise words are:—

> I pointed out the value of the charter and that we should get that with other assets when he exercised his option.

In these circumstances the respondent is in this dilemma. The shares acquired by the appellant are within the contemplation of articles 4 and 5 or they are not. If they are not he has no claim upon them or upon the appellant under article 5. If they are, and I have stated the reasons for concluding that they

are, then these shares are the subject in respect of which the respondent's rights under articles 4 and 5 are exercisable. Indeed, the conduct of the respondent as disclosed by the evidence just quoted, especially in a proceeding in which he invokes the equitable powers of the court, would preclude him from denying it.

This is sufficient to dispose of the questions raised by the appeal but it is not right, I think, that I should take leave of the appeal without expressing the opinion I have definitely formed after a most careful consideration of the subject that the option was *ultra vires* (I express no opinion about the validity of the lease itself) and that by the express terms of the articles the respondent is precluded from demanding from the appellant a title which the appellant did not and could not acquire from the company. As to the last mentioned point the words of article 4 are express, and, as I have already said, it is quite clear that the subject dealt with in article 5, that is to say, the subject of the rights vested in the respondent under article 5 is the same as that in respect of which rights are given him by article 4.

The general rule as to the powers of the modern statutory companies is stated by Lord Blackburn in *Attorney General* v. *Great Eastern Ry. Co.* (1), in these words;

> where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited;

and where extraordinary powers are conferred such as compulsory powers to take land or such as a right to treat with a municipality for exemption from taxes, a stricter rule is applied. Such powers are presumed

(1) 5 App. Cas. 473 at page 481.

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to be conferred in the public interest, and it is conclusively presumed that the undertaking is one in which the public has an interest and any dealing with the property of the company which interferes with the carrying out of the undertaking as authorized by the legislature is deemed (in the absence of some provisions to the contrary effect) to be prohibited and rendered inoperative if attempted.

In *Esquimalt Water Works Co.* v. *Victoria* (1), I stated the principle thus:—

> The power to dispose of its property is, in the case of a quasi public corporation, created by special Act of Parliament, such as the plaintiff company (see *Proprietors of Staffordshire and Worcestershire Canal Navigation* v. *Proprietors of Birmingham Canal Navigation* (2) and *Reg.* v. *South Wales Rly. Co.*, (3) a limited power. It is limited by this rule, namely, that apart from authority expressly given or appearing by necessary implication from its incorporating Act such a corporation may not dispose of its property if by such disposition it should disable itself from carrying out the objects (in which the public have an interest) for which its special powers were conferred upon it.

To the cases cited in this passage may be added *Mulliner* v. *Midland Ry. Co.* (4).

The option now before us was in form a contract by which the company professed to agree upon certain conditions to dispose of property constituting the whole substratum of its undertaking. I do not think it is affirmatively established in the evidence that the company was not in possession of other property; it may have had, for example, a bank account; but the power to acquire property given by the statute, that is to say the power to acquire lands, etc., was limited in its territorial operation to the county of Queens and the lease professes to deal with the whole of the company's landed property in that county. Such a virtual alienation of all its property would be beyond

(1) 12 B.C. Rep. 302 at page 318.
(2) (1886) L.R. 1. H. L. 254.
(3) (1850) 14 Q. B. 902.
(4) 11 Ch.D. 611 at page 622.

the power of a trading company possessing powers of selling its property in the course of its business in the absence of authority given by its charter or by statute; *Simpson* v. *Westminster Palace Hotel Co.* (1); a disability which can, in some cases where the undertaking is not affected by a public interest, be overcome by the consent of all the shareholders. Where the transaction, however, concerns an undertaking of the class to which that now in question belongs, namely, an undertaking in which the public is conclusively presumed to have an interest by reason of the extraordinary powers given to the corporation authorized to carry it out, the consent of the shareholders is of no effect.

It does not appear that the property of the company was in fact procured by means of the exercise of its compulsory powers; but this is immaterial. A company endowed with such powers enters upon a negotiation for purchase armed with a powerful weapon which gives it a real advantage. But generally speaking such weapons are not put into its hands to enable it to make a profit by trading with the property so acquired and selling it at an advanced price to a purchaser less advantageously situated.

There are one or two subsidiary points to which perhaps one ought to refer. It was suggested by Mr. Lovitt in the course of his ingenious argument that there were cases in which the proprietor of a "one man company" had been directed to bring about the winding up of the company in order to carry out an agreement to convey property. Such cases may be quite intelligible where a public interest is not involved but obviously they have no sort of application to an undertaking of the class with which we are now dealing.

(1) 8 H.L. Cas. 712.

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Further I cannot help observing that it seems a strange misapplication of equitable powers to exert them in lending assistance to the design of the respondent to dismember this undertaking, to deprive it of very important elements of value (on that his own evidence is conclusive) by separating the ownership of the property from the valuable privileges vested in the company itself by statute. Under articles 4 and 5 the respondent, as I have said, is entitled to be put as regards the quality of his interest in the same case with the appellant; he is entitled to have his share of every kind of economic benefit which the ownership of shares gives; but, by the articles themselves as well as by his own conduct, and as well indeed by the plain dictates of justice, he seems to be precluded from demanding that which he had demanded in this litigation.

ANGLIN J.—It has been found by the learned trial judge and the court *en banc* that in acquiring the stock of the Nova Scotia Wood, Pulp, and Paper Company and thus obtaining control of its property and assets the defendant in fact exercised an option which he held to purchase that company's mills, buildings, machinery and lands for $30,000. It has further been held by the Supreme Court of Nova Scotia that in putting the transaction for the acquisition of the property from the company into this form, the defendant acted in bad faith, i.e., as I understand it, with the intent of defrauding the plaintiff of the interests he had contracted to give him in the property to be acquired from the company in the event of the option to purchase it being exercised. It is not possible to set aside these findings. There is evidence to warrant them. The principal question

in issue is whether the plaintiff by the device to which he resorted has created a situation that renders the court impotent to give to the plaintiff the relief of specific performance which he claims.

Two obstacles were urged by counsel for the appellant; (a) that while the Nova Scotia Wood, Pulp and Paper Company has statutory power to acquire lands, it has not the power to sell them; (b) that the property in question is vested, not in the defendant, but in the company.

As to the first objection, I think the power to sell its lands and other property (short of disposing of its whole undertaking—and it is not established that the option covered the entire undertaking of the company) is implied in the nature of the business which the company was incorporated to carry on. *In re Kingsbury Collieries*, and *Moore's Contract* (1).

As to the second objection, I do not see sufficient reason for presently reversing the decision of the Supreme Court of Nova Scotia that its jurisdiction *in personam* should be exercised to thwart the dishonest purpose of the defendant and compel him to fulfil his obligation to the plaintiff on the ground that the decree pronounced may prove to be *brutum fulmen*. Having secured complete control of the company the defendant can, and may probably be forced to, procure the execution by it of any conveyances necessary to vest in the plaintiff the one-quarter interest to which he has been found entitled. Should any insuperable difficulty to carrying out the decree supervene, it will be within the power of the court,

(1) [1907] 2 Ch. 259.

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under the reservation of further consideration, to order an assessment of damages in lieu of specific performance or to award the plaintiff such other alternate relief as the circumstances may call for. *Vide* N. S. Rules Nos. 517 and 538.

I would dismiss the appeal.

MIGNAULT J.—The only question in this case which requires consideration is the objection of the appellant that he is asked to do something which cannot legally be done, to wit, to assign or cause to be assigned to the respondent one quarter interest in the properties mentioned in the lease and option. His objection that he has acquired only the shares of the Nova Scotia Wood, Pulp and Paper Company and that that company alone can dispose of these properties, does not impress me, for the appellant, as owner of all the shares, can certainly cause such an assignment to be made by the company. But would the assignment, if made by the company, be of legal effect?

The objection of the appellant is that while this company can acquire lands it has not the power to sell them. I have examined the company's charter, 44 Vict. (Nova Scotia), ch. 71. It gives the company the power to manufacture wood, pulp and paper in the province, to purchase and hold lands, mill privileges, growing timber and other property at and near Mill Village and elsewhere in the county of Queens, and to transact all business in connection therewith. In my opinion, such a company has the power to sell any land which it has acquired, this power being implied in the authority given it to purchase and hold lands, mill privileges, growing timber and other property and to transact all business in connection

therewith. *In re Kingsbury's Collieries* (1). Any other decision would force the company to hold in perpetuity or until its dissolution the property acquired by it.

But here the evidence shews that the properties mentioned in the lease and option to purchase were all the properties belonging to the company. All the shares in the Nova Scotia Wood, Pulp and Paper Company several years before had been acquired by one Davison, and after his death belonged to his son and two daughters. For some time the company's operations had not been carried on and the mill property was in a somewhat dilapitated condition, and no doubt the lease in question was made for the purpose of securing some one who would carry on the business, improve the property and who might eventually purchase the mill property.

If this lease had conferred an option to purchase the whole undertaking of the company with its charter as well as its properties, it might well be beyond its powers. But the option is an offer to sell for $30,000.00 the fee simple of the lands, tenements, easements and appurtenances demised by the lease, together with all buildings, plant and machinery thereon. The lease covered all the mills, buildings, machinery and all the lands, tenements, privileges, easements and appurtenances of the company situate in the county of Queens and more particularly described in some twenty-four deeds. I think such an offer of sale comes well within the decision in *Wilson* v. *Miers* (2), where a navigation company had agreed to sell its entire fleet of twelve ships, and it was held that such a sale was within the powers of the directors. Under the clauses of settlement of the company the

(1) [1907] 2 Ch. 259. (2) [1861] 10 C.B.N.S. 348.

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directors were authorized to sell, let to hire and charter the company's vessels. In the present case the power to sell the properties of the company, I have said, must be implied, while in the case of *Wilson* v. *Miers* (1), it was expressed, but the point here is that there is a distinction between selling the business of a company as a whole and selling all its existing goods and chattels. (See Lindley, Law of Companies, 6th ed., 1902, vol. 1, p. 256.) I therefore think that a sale can legally be made to the respondent of one quarter interest in the fee simple of the properties covered by the lease and option to purchase.

On the other points I accept the findings of the two courts that the appellant acquired all the stock of the company under the terms of the original agreement, and that, as between him and the respondent, he must be held to have purchased the property within the meaning of the agreement between them. In the opinion of Ritchie E. J., in the appellate court, the appellant acted in bad faith and is subject to the control of a court of equity. The trial court, after declaring that the respondent is entitled to have the appellant assign and transfer or cause to be assigned and transferred to the respondent one quarter interest in the premises by good and sufficient deeds thereof, retained further consideration of the action, so that it will no doubt be able to make any additional order which may be necessary to give effect to its decree, the action being one *in personam*.

I would therefore dismiss the appeal with costs.

CASSELS J. (dissenting). With all respect I am unable to arrive at the conclusions come to by the learned trial judge (Mr. Justice Mellish) and the learned judges in the Court of Appeal.

(2) [1861] 10 C.B.N.S. 348.

The Nova Scotia Wood, Pulp and Paper Company, Limited, were incorporated by special charter, ch. 71, 44 Vict. (1881). They were incorporated for the purpose of manufacturing wood pulp and paper in the province of Nova Scotia, and purchasing and holding lands, mill privileges, growing timber and other property at and near Mill Village and elsewhere in the county of Queens, and for transacting all business in connection therewith.

On the 2nd day of October, 1916, the Nova Scotia Wood, Pulp and Paper Company, Limited, leased to the present respondent, Phil. H. Moore, the properties set out and described in the statement of claim. By the terms of the lease, the lessee was to hold the said lands, premises, easements and appurtenances for the term of three years from the 1st of October, 1916, paying the rent provided for in the said lease. The lease further provided as follows:

> The lessee shall have the sole and exclusive option at any time during the existence of this lease of purchasing the fee simple of the lands, tenements, easements and appurtenances hereby demised together with all buildings, plant and machinery thereon at and for the sum of $30,000.00 with the proviso that all monies paid on account of said yearly rentals of $2,000 shall be credited on the said purchase price.

It is also provided as follows:

> And it is hereby declared and agreed that this indenture and everything herein contained shall enure to the benefit of and be binding on the parties hereto, their heirs, executors, administrators, successors and assigns respectively.

On the 2nd day of October, 1916, the same date as the lease, an agreement in writing was made between the plaintiff, Moore, and the defendant, Brown, which is set out in the statement of claim.

By this agreement Moore assigned and delivered the said lease and option to said Frank K. Brown. The fourth clause of this agreement provides as follows:—

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4. If at any time the said Frank K. Brown purchases the said premises described in the said lease out of the aggregate net earnings as set forth above in this agreement then and immediately thereafter the said Phil. H. Moore is to become the owner of 25 per cent thereof and the said Frank K. Brown is to assign and transfer to the said Phil. H. Moore 25 per cent or one quarter interest therein by good and sufficient deeds thereof always conveying only such title as he may have acquired from the said Nova Scotia Wood, Pulp and Paper Company, Limited.

There is no covenant or agreement binding Brown to exercise the option of purchase.

I quote a few sentences from the evidence of Moore:—

Q.—Now about this option, did you have any conversation with Brown about exercising the option at any time? A.—Yes, we discussed it a number of times.

Q.—As to the method of transfer of the properties, did you have any discussion with Brown about that prior to the end of the option? A.—Yes, I pointed out the value of the charter and that we should get that with other assets when he exercised his option.

Q.—Did you discuss the way the property should be taken over under the option? A.—I don't think we went into details about that; it was to be transferred by some method satisfactory to the two parties.

Q.—Was any different method of transfer discussed with Brown? A.—No, not with me.

At the hearing of this appeal a very elaborate argument was presented by Mr. Paton as to the power of the company to sell these assets. In the view I take of the case it is unnecessary to consider these nice questions of law.

In point of fact Brown never did exercise the option. What happened was that, very likely acting on the suggestion of Moore, he acquired practically the whole of the stock of the company, and it would appear from the argument and the statement that Brown is quite willing to assign to Moore one quarter in value of the stock subject to payment by Moore of the amount due to him. The ownership of the stock would carry with it the ownership of the assets.

It is said on behalf of Moore that the ownership of one quarter of the stock is not the same thing as the ownership of one quarter of the assets. This may be so but Brown, not having exercised the option, is not in a position to convey 25 per cent of the assets. The right of Moore to the 25 per cent of the assets is necessarily based upon the option being exercised by Brown.

I am of the opinion that the offer made by Brown to transfer 25 per cent of the stock is a reasonable one and will practically give Moore one fourth interest. It will also prevent the breaking up of the company and will enable the company to carry on the business for which they were incorporated.

I would allow the appeal with costs of the trial and of the appeal to the court of appeal in Nova Scotia, and also of the appeal to this court.

I think the judgment should contain an undertaking on the part of the appellant Brown to transfer to Moore 25 per cent of the stock upon Moore paying what is properly due by him, if not already paid. In other respects the judgment should stand.

Appeal dismissed with costs.

Solicitor for the appellant: *V. J. Paton.*

Solicitor for the respondent: *L. A. Lovett.*

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**JANE E. McNEIL (DEFENDANT)....APPELLANT;

AND

FREDERICK W. SHARPE, CURATOR OF THE ESTATE OF SPARROW AND McNEIL (PLAINTIFF).....} RESPONDENT.

Insolvency—Statute of Elizabeth—Firm's moneys paid for private debt—Bona fides of private creditor—Rights of Quebec curator in Nova Scotia.

A business firm in the Province of Quebec on the eve of insolvency obtained an advance from their bankers of $2,000 to purchase property on behalf of the firm in Nova Scotia. One of the partners forwarded the money to his sister in Nova Scotia requesting her to purchase the property in question in her own name and retain the same in satisfaction of a promise previously given her by him to reimburse her for certain advances made and services rendered.

In an action brought in a Nova Scotia court by the curator of the insolvent firm appointed by a Superior Court in Quebec.

Held, affirming the judgment of the Supreme Court of Nova Scotia, that the curator was entitled to have the transaction set aside and the lands purchased treated as part of the insolvent's estate.

Held, per Duff J. The equitable interest of the insolvent in real estate in Nova Scotia could only be vested in the curator by some process effective under the law of that province. His Lordship did not wish to be deemed to sanction the view that it would vest, *virtute officii*, in a curator appointed pursuant to an abandonment of property under the provisions of the Quebec Code of Civil Procedure.

APPEAL from a judgment of the Supreme Court of Nova Scotia reversing the judgment of the trial judge and maintaining the respondent's action.

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*PRESENT:—Fitzpatrick, C. J. Davies, Idington, Duff and Brodeur JJ.

**This case could not be reported sooner.

Sparrow & McNeil were contractors carrying on business in the City of Montreal in the Province of Quebec. On the 13th day of April, 1911, the firm borrowed from their bankers $2,000 to purchase certain gypsum property in the county of Victoria in the Province of Nova Scotia. The partner Francis J. McNeil obtained for his firm the $2,000 and had the conveyance of the lands made to his sister, the appellant. The firm of Sparrow & McNeil made a judicial abandonment of their property and the respondent on the 12th July, 1911, was appointed curator by the Superior Court at Montreal. The present action was brought against Francis T. McNeil and Jane E. McNeil by the curator claiming that the lands so conveyed were paid by the moneys of the insolvent firm, that the defendant had caused the conveyance to be made to the appellant in fraud of the firm and its creditors.

The trial judge discredited the evidence of the defendant Francis T. McNeil, but found that the defendant Jane E. McNeil had acted in good faith throughout and had no knowledge that the $2,000 used in the purchase was the property of the firm; that as between her and her brother there was good consideration for the conveyance being made to her, as she had supported her younger brothers and sisters for many years at an expenditure of $1,500 under an agreement with her brother that he was to buy a farm for her. He also found there was no evidence that the firm of Sparrow & McNeil were insolvent when the bargain was made between brother and sister,—and that accordingly the transaction should stand. The majority of the Supreme Court of Nova Scotia held that the $2,000 was advanced by the bank to buy partnership property and that defendant

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Francis T. McNeil had fraudulently taken the conveyance in the name of his sister and that she as regards the property was a trustee for the curator and the creditors of the insolvent firm.

J. L. Ralston K.C. for appellant. The evidence shows that as between the partners, McNeil had a claim against the partnership assets for $3,500; that the $2,000 borrowed from the bank became partnership funds and that while defendant McNeil might owe that sum to the partnership, the curator could not claim the property which was purchased with it. That the doctrine of resulting trusts does not apply. *Taylor* v. *Blakelock* (1); *Taylor* v. *London & County Banking Company* (2); Halsbury's Laws of England, vol. 13, title Equity, p. 78; Vol. 15 Fraudulent and Voidable Conveyances, p. 81. Lewin on Trusts, 10th Ed., p. 1045; the statute of Elizabeth does not apply. *Clough* v. *Samuel* (3).

E. L. Newcombe K.C. for respondent. The appellant Jane E. McNeil was disbelieved by a majority of the judges in the court appealed from. The family arrangement relied upon by the trial judge gave rise to no contractual liability and being non-enforceable could not constitute a good and valuable consideration for the transfer of property impeached.

THE CHIEF JUSTICE.—I am of opinion that the appeal should be allowed for the reasons given by Mr. Justice Russell.

(1) 32 C.D. 560. (2) [1901] 2 Ch. 231.
(3) [1905] A.C. 442.

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DAVIES J.—During the argument of this appeal I felt that the appellant's case was a meritorious one, the trial judge had found strongly in her favour and there was a strong dissent by Russell J. from the judgment of the Supreme Court of Nova Scotia reversing that of the trial judge.

I have not, however, after reading and studying the appellant's evidence which the trial judge fully accepted and believed, been able to convince myself that she had established either a legal or equitable contract between her and her brother capable of being enforced either at law or in equity.

I cannot help expressing my regret at being forced to this conclusion because it results in the loss by the appellant of all the time given and money spent by her in the bringing up and education of her young brothers and sisters. Meritorious as her case may be it fails, nevertheless, for the reasons I have stated and I therefore concur in the dismissal of the appeal.

IDINGTON J.—This action was brought by respondent as curator of an insolvent estate which had been the property of a Montreal firm of contractors and was abandoned there. The law of the domicile of such insolvents must *prima facie* determine the rights of the creditors in such cases.

There may arise in the pursuit of such rights in another province, which is also *prima facie* to be looked upon in that regard as a foreign state, many different and difficult questions of law either in relation to the administration of the insolvent's estate found there when creditors in such province may have also taken proceedings, or in many other cases in relation to the real estate of the insolvent in such other province.

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Here we have no such difficulties raised save in the most incidental way for there are no creditors in Nova Scotia where the action was brought who have taken any action and the real estate in question is not alleged to have been so affected by any local law as to render it non-exigible by any creditor or especially any foreign creditor.

In short there does not seem to be raised any legal objection which would throw an impediment in the way of the courts of Nova Scotia acting upon the ordinary well recognized comity of nations and aiding the curator resting for his rights upon Quebec law and the direction of Quebec courts to take such action as he may have been advised to be his duty to take.

Such local laws as exist bearing upon the questions raised are in harmony with the law upon which the curator's title to relief rests. It is only in this sense that the statutes of Elizabeth can be properly referred to or relied upon herein.

It is the debtor's property in the Quebec legal sense of the term that measures the right of the curator here in question.

And even if the *lex fori* might in a given case give creditors as such a wider and more effective measure of relief than the curator can assert claim to without that given by Quebec law, he could not claim the benefit thereof.

If again there happened to be in the *lex fori* some provision which furnished a bar to attacking and realizing out of immovable property the claims of the curator, he might fail even though under the law of Quebec such a defence could not be maintained if the immovable property were situate there. No such conflict is apparent in the case we are dealing with.

It is unnecessary, therefore, to dwell at length upon the authorities maintaining the several propositions I have put forward. They are collected and discussed in such well known works as Westlake's "Private International Law," Foote's "Private International Jurisprudence" and Story's "Conflict of Laws."

It is only necessary for our present purpose to have a clear apprehension of the general principles of law applicable to the rights of the respondent under the facts presented herein.

It is, as I view the facts, the law of Quebec to which we must look in this case. That law is given by a local expert in a brief and summary manner testifying thereto. And though his evidence may fall short of covering the whole ground upon which we must proceed yet we are entitled and indeed bound in this court to recognize judicially the law of each province as we decided in the case of *Logan* v. *Lee* (1), following *Cooper* v. *Cooper* (2), referred to therein.

Coming to the facts in evidence as I agree in the main with the analysis thereof in the judgment of Mr. Justice Meagher in the court below, I need not go into details.

The money which paid for the land in question, except possibly $100, to which I will presently refer, was got by the insolvents as a firm and for the express purpose of paying for the land in question. I accept entirely the evidence of Mr. Johnson the agent of the bank from which it was got. And his letters to the Royal Bank providing therefor five days before the deed in question was got and the transaction completed so far away as North Sydney in Nova Scotia, indicate no time was lost.

(1) 39 Can. S.C.R. 311. (2) 13 A. C. 88.

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Idington J.

The appellant never paid any part of the purchase money, yet in answer to the interrogatories delivered before the trial, answered as follows:—

43.—Did you purchase a piece of land at Island Point, Victoria County, from John McLeod, April 18, 1911; and if so, what did you pay for same, how was it paid, by whom and when?—A. I purchased a piece of land at Island Point from John McLeod, and paid him $2,000 for it; my brother, I think, handed him the money, and I think the date was on or about the 18th of April, 1911.

44.—Was the transaction and negotiation, if any, for purchase carried through by you personally and how long did same take?—A. I carried on personal negotiations for purchase of said property, I cannot say how long.

45.—How long since your brother Francis J. McNeil has been in Cape Breton so far as you know?—A. April, 1911.

46.—Did you ever see a cheque for $2,000.00 dated April 18, 1911, drawn by W. F. Sparrow on the Molsons Bank, Montreal, in favour of Francis J. McNeil; if so, under what circumstances.—A. No.

When we find that her brother, who was one of the said firm of Sparrow and McNeil in question, managed personally and through his solicitor, and agent, the whole transaction relative to getting the deed executed and paid the money got as above mentioned, I submit that these statements under oath can hardly be properly described as counsel suggested as being merely "uncandid."

It rather shocks one to be asked in face of such a perversion, under oath, of the truth by the appellant, to treat her as a credible witness when testifying relatively to the same transaction. And still more so when we find she is not ignorant or stupid, but a school teacher of such attainments that at eighteen years of age she was earning a salary of nearly $600 a year, and was not in making such answers driven by the nervous excitement so often incidental to a cross-examination in a public crowded court. When later at the trial she abandons this version and seeks to set up that she had some correspondence by letters

with her brother, and later some conversation with him in which he or she proposed buying a farm to put the younger members of the family upon and that she was to help out of her earnings to pay for their keep and did so help and in course of doing so paid $1,500 and she rests her claim upon that, I must, in view of her former testimony, be permitted to doubt the whole story so far as having any relation to the transaction now in question. To do her justice she says without any special questions as to it, that she would have done so anyway and I quite believe that.

But when we find that she tells us that the brother destroyed the letters she wrote him and she fails to tell anything of the answers thereto, and that there is no corroboration of her story, except by him, and even taking her statement of earnings up to the time of the transaction and deducting her admitted expenses, the balance could not reach any such sum, how can we rely on it for anything beyond the obvious truth that she would have done so anyway. Besides she got $200 from him on account of help needed for the family. It is not as if she had paid out in this way $2,000 and then been repaid for it by the brother advancing this money to her. In that case her first oath would have had more semblance of justification though quite inaccurate.

Even if she had been the most accurate trustworthy person in all her statements, how could she maintain a contract by this later version upon which she could bring an action?

The whole story furnishes nothing upon which to rest any legal claim to fulfillment of it by this purchase. And when she must have been a minor at the time how much less can she be allowed to put it forward as a binding contract upon which to furnish not a good, but a valuable consideration?

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This story is at best a loose and rather inchoate thing, but her way of looking at her oath forbids us attempting to found thereon something definite and rational by inferring things not expressed.

I do not see my way to accept the story or to found upon it anything which can be called a valuable consideration needed to uphold her right to the land in question.

And we find evidence scattered through the case showing almost as clearly as the learned trial judge has expressed his opinion of him, how utterly wanting in the truth is the brother who has misled the unfortunate plaintiff and I cannot help thinking, is still doing so.

The story of his having paid some months before the sum of $100 deposit and got a receipt for it, ought to have been followed up in a way it was not, but taking it as told, where is the receipt? In whose name was it given? If in the appellant's name no doubt we would have had it produced and pressed on the court as proof of the alleged agreement at a time when insolvency was not so close at hand, or at least so apparent. I think the fair inference is it was in the name of this insolvent brother, if not of the firm. The vendor of the property was not called, nor were the facts and circumstances bearing upon the condition and maintenance of the family gone into as they might have been had the story now put forward been given in answer to the interrogatories. To allow it now to succeed would be putting a premium upon answering untruly such interrogatories which are intended as a means of discovery.

I think the transaction in question was clearly a gift or simulated to cover a fraud.

In view of all the facts and especially the obvious unfitness of this property to serve as the suggested home farm for a family, possibly unfitted for it, and the fact that within three weeks after the deed was executed to appellant, her brother was offering an option for that part of the land, possibly the whole, which could be mined for gypsum, at an extravagant figure and Sparrow signing that option as a witness, I incline to the opinion that the later view represented the actual truth in regard to the matter and appellant but a tool in the hands of an unscrupulous brother.

In the former view the insolvent condition of the firms renders the transaction one entitling respondent to succeed herein.

In either way of looking at the matter the result must be the same.

The circumstance that the partner Sparrow subscribed as a witness to the option given for the gypsum bed, counts for nothing when we find that he was active in getting if not the man who got the money from the bank.

To concoct theories which would help such men to exploit their creditors is not generally what courts endeavour to accomplish. Yet that seems to me what we are invited to attempt herein on the curious and dubious import of this incident in a career of fraud which ended in leaving creditors to the amount of forty thousand dollars, and but four or five thousand dollars and perhaps not that to pay them.

The members of the firm were acting in harmony till sometime later. Then we have the desperate financial condition of the firm and in face of that and no legal obligation to her, a gift to appellant of $2,000 for which the bank had to be drawn upon and repre-

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sentations made to it which, if the story now set up by appellant and her brother be true, I am not disposed to rate this man McNeil's integrity very high, but I do not credit him with being such a deliberate rascal as the established facts and a belief in the story now set up would imply.

We have heard of something akin to men plundering a bank to give their friends or relations what they wished them to enjoy. Such a thing is possible.

The option sold three weeks after these men had got the money out of the bank to lay the foundation for such a sale of an option rather indicates another purpose operating in their minds. They were insolvents, ruined men, gambling on any chance, needing some one to hold the stakes, the appellant was such—merely the stake-holder. The story now set up was not then planned. It was never then supposed to be needed. Hence at first it seemed necessary for both appellant and her brother to deny by implication in their statements, that the money was got from the source it came from and to pretend she paid the price. Later the present story was put forward. When was it invented? Why?

Passing these suggestions which furnish ground for believing it a case of simulation I may say it is not necessary to solve exactly what was the moving cause.

The money of the firm paid for the property and the illustration of a resulting trust put forward by Chief Justice Townsend is very apt as showing how in our English law such a transaction might be looked at. The result according to the common sense of every system of law must inevitably lead to the same conclusion, that is, that this property became the property of the firm unless displaced by something stronger than has been brought forward.

Stress is laid in appellant's factum upon Sparrow's not contradicting things told by McNeil at the trial. As the former was examined by way of commission and latter at the trial, there does not seem much force in such an argument especially in light of answers by him and the appellant to the interrogatories.

Was the firm insolvent when the deed was made?

The respondent presents an estate of such hopeless insolvency, three months later, which is unexplained by any losses meantime, as to render it easy to answer that the firm was seemingly just as hopelessly insolvent at that time the gift was made, as one sometimes, but seldom, finds. The respondent is therefore entitled on the foregoing view of the facts to succeed.

The appeal should be dismissed with costs.

DUFF J.—I agree that the appeal should be dismissed. The property having been purchased with funds which were held to be—and I am convinced that the finding was right—the property of Sparrow, and McNeil; and being property which in the circumstances either of them was, I think, entitled as against the other to have applied in payment of partnership debts, the appellant could only succeed as against Sparrow by showing that she was a purchaser for value without notice of Sparrow's rights. I think she has not shewn that by satisfactory evidence. The ground on which the appeal was supported by Mr. Ralston therefore fails.

It seems right to observe that the point as to the status of the respondent mentioned during the argument from the Bench is not passed upon. If taken at an earlier stage it could have been met by adding

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Sparrow as a party plaintiff and that no doubt accounts for the fact that it was not taken and in any view of the merits of this objection would be sufficient reason for not giving effect to it now.

It is only necessary to say that Sparrow's equitable interest in real property in Nova Scotia arising from his right to have the property applied in payment of partnership debts the partnership assets proper being insufficient could only become vested in the respondent by some process which would be effective for that purpose according to the law of Nova Scotia; whether the supplementary abandonment of the 7th Sept., 1911, was sufficient for that purpose need not be discussed. The point is mentioned only to avoid the appearance of sanctioning the view that a curator appointed pursuant to an abandonment of property under the provisions of the Civil Code of Procedure of the Province of Quebec has vested in him *virtute officii* all the debtor's equitable interests in real property situated in other provinces.

Brodeur J.—I concur with the Chief Justice.

Appeal dismissed with costs.

Solicitor for the appellant: *A. D. Gunn.*

Solicitors for the respondent: *Gillies & Hill.*

AMELIA MacKENZIE (PLAINTIFF) . APPELLANT;

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*Oct. 14.
*Nov. 21.

AND

ROBERT PALMER (DEFENDANT) . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Seduction—Evidence—Indecent assault—Damages. Sec. 13 Cr. C.

In an action framed for damages for indecent assault, although the plaintiff's evidence of force and want of consent on her part is discredited, the court can, nevertheless, accept her evidence that the defendant is the father of the child and find that there was seduction. Cassels J. dissenting.

Judgment of the Court of Appeal (14 Sask. L.R. 117) reversed, Cassels J. dissenting.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of Taylor J. at the trial (1), and dismissing the appellant's action.

This action is one for damages by the appellant against the respondent alleging that the latter did carnally know her against her will, whereby she became pregnant. The appellant testified that she did not consent to the intercourse with the respondent. The trial judge disbelieved this evidence, but found that she had been seduced by the respondent and that the defendant was the father of her child, and he allowed her $2,500 damages. The Court of Appeal

*PRESENT:—Idington, Duff, Anglin, Mignault JJ. and Cassels J. *ad hoc*.

(1) [1921] 14 Sask. L.R. 117.

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held that, as the appellant's evidence of force and want of consent on her part was discredited, and as there was no other evidence than appellant's that she had been seduced, the respondent denying any connection at all, the court could not find that there was seduction.

W. S. Gray for the appellant. It was open to the trial judge to accept the appellant's evidence in part and reject it in part. *E.* v. *F.* (1); *Brown* v. *Dalby* (2).

H. Fisher for respondent. The appellant failed to prove her action as brought for criminal assault. The appellant on the evidence is not entitled to a judgment for damages for seduction. *Gibson* v. *Rabey* (3).

IDINGTON J.—I am of the opinion that this appeal should be allowed with costs and the judgment of the learned trial judge be restored.

I agree so fully with the reasons assigned by Mr. Justice Lamont in his dissenting judgment in the Court of Appeal that I need not repeat same here.

DUFF J.—The judgment of Mr. Justice Taylor was reversed by the Court of Appeal on the ground that the evidence of the plaintiff established that there was no seduction within the meaning of the statute. Mr. Justice Taylor's view evidently was that the plaintiff's account of the occurrence to the effect that she was overwhelmed by force could not be accepted in view of certain facts which he considered established.

(1) [1905] 10 Ont. L.R. 489; [1906] 11 Ont. L.R. 582.
(2) [1883] 7 U.C.R. 160.
(3) [1916] 9 Alta. L.R. 409.

These facts he thought incompatible with the hypothesis of serious resistance by the plaintiff. Is the plaintiff precluded by her own evidence given on cross-examination from maintaining the allegations of her statement of claim which are the essential allegations of a cause of action under the statute? The question is not without difficulty; but on the whole I think it may properly be answered as Mr. Justice Taylor impliedly answered it. If the rejection of the plaintiff's account necessarily involved the assumption that she had committed perjury then I think the law would not permit her to recover a judgment based on that assumption. But here no such assumption was involved; the learned trial judge might very properly, as he did, conclude that in the plaintiff's state of health, the plaintiff's impression of what occurred had become blurred and could not be wholly relied upon as an accurate register of what actually happened and that the only safe course was to draw the inference properly arising from certain physical facts which pointed as he thought very clearly to the conclusion at which he arrived. As a general rule, no doubt, where a party calls a witness with his eyes open with full knowledge of what the witness is likely to say (and more especially where the witness is the party), it is not competent to that party to contradict him on a vital point. That was held in *Sumner* v. *Brown* (1), by Mr. Justice Hamilton. I think that rule is inapplicable to this case. It is, I think, a question for the tribunal of fact to determine in such a case whether statements made on cross-examination by such a witness as the plaintiff with respect to such an occurrence was one which, having regard to all the circumstances, ought to be treated as conclusive against her.

(1) [1909] 25 Times L.R. 745.

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Assuming in any case that there was an absence of consent there was still a right of action for assault.

It has been laid down (see *Smith* v. *Selwyn* (1)), that where the facts constituting the foundation of a cause of action in themselves constitute a felony the right of action for tort is suspended until the plaintiff has prosecuted the defendant if the plaintiff is the person on whom the duty of prosecution falls; but this is an objection which cannot be raised as a defense to an action on the pleadings and it is not a proper ground for non-suit. The defendant's proper course is to raise it by an application to stay. Section 13 of the Criminal Code of Canada professes to abolish this rule. It may be questioned whether this is a subject within the competence of the Parliament of Canada as appertaining to the domain of the criminal law or as a proper subject for the exercise of ancillary jurisdiction in the enactment of a Criminal Code. But at least there is a declaration in the most deliberate and solemn form by the legislative authority having jurisdiction over the criminal law, that the rule is no longer necessary in the interests of public justice. As the rule has its foundation in the supposed interests of public justice, it is at least, I think, exceedingly doubtful whether in this country any action ought to be stayed on such a ground.

That is a question which does not strictly arise here because no application was made for a stay of the action and the rule, if not entirely obsolete, ought at least to operate only within the straitest limits allowed by precedent.

(1) [1914] 3 K.B. 98.

ANGLIN J.—I had occasion very fully to consider the chief question which arises on this appeal in the case of *E.* v. *F.* (1). I have had no reason to change the views there expressed. The only difference between that case and the case at bar is that there the plaintiff was the father whereas in the present case the girl herself brings the action by virtue of a statutory provision enabling her to do so. That difference in my opinion does not suffice to render inapplicable here the ground of decision in *E.* v. *F.* (1). I agree with the view of Mr. Justice Lamont that where, in an action constituted as is that at bar, the plaintiff either in examination-in-chief or in cross-examination gives evidence of circumstances which negative the existence of violence sufficient to establish a case of ravishment, her right to recover is not necessarily destroyed because she has alleged and sworn to such violence. The reasons assigned by that learned judge in his dissenting opinion are so satisfactory that I feel I cannot usefully add to them.

I would therefore with respect allow this appeal with costs here and in the court of appeal and would restore the judgment of the learned trial judge.

MIGNAULT J.—The appellant testified that the respondent had connection with her, but that it was without her consent and by force. The learned trial judge discredited this latter statement, and indeed under the circumstances described by the appellant it seems impossible that the respondent could have succeeded in having connection with her unless she had allowed him to do so. But the learned trial judge none the less believed that connection had taken place and that the respondent was the father of the child to whom the appellant had given birth.

(1) 10 Ont. L.R. 489; 11 Ont. L.R. 582.

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Mignault J.

The respondent argues that the appellant's action was an action for an assault amounting to rape; that in such an action the learned trial judge could not give her judgment for seduction; and that the appellant could not obtain a judgment for assault, because her statement that connection with her was had by force and without her consent was rejected by the trial judge.

In my opinion the learned trial judge could credit one part of the appellant's testimony and disbelieve the other part as being grossly improbable, not to say impossible. If, notwithstanding her statement that she was not a consenting party but was overcome by force the learned trial judge really believed, under all the circumstances, that a case of seduction had been made out, he was certainly entitled to give the appellant judgment for seduction. Of course, the position of the appellant on this appeal is somewhat extraordinary for she, or her counsel for her, is forced to contend that a part of her testimony was rightly discredited by the trial judge. But there is no doubt in my mind that the judge at the trial could partly accept and partly reject the appellant's story, as unquestionably a jury could do. That is all I need to say, for I feel that I can add nothing to the dissenting opinion of Mr. Justice Lamont in which I fully concur.

The judgment of the Court of Appeal should be reversed and the judgment of the trial judge restored.

CASSELS J. (dissenting).—I would dismiss this appeal. I agree with the reasons of the learned Chief Justice. The plaintiff, Amelia MacKenzie, was at the date of the alleged assault or rape (1st July, 1917) of the age of twenty years. On the 30th

of June, 1920, she was twenty-three years of age. Her story as well as her conduct is full of inconsistencies and in my opinion it would be a dangerous precedent to allow a judgment to stand based on evidence such as that given on behalf of the appellant.

Appeal allowed with costs.

Solicitors for the appellant: *Laidlaw, Blanchard & Co.*

Solicitors for the respondent: *Bothwell, Campbell & Roth.*

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*Oct. 18.
*Nov. 21.

CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT)..... APPELLANT;

AND

HATFIELD AND SCOTT, LIMITED (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK.

Carrier—Liability—Carrier or warehousemen—Notice to owner.

A condition in the bill of lading for carriage of goods by the C.P.R. Co. to New York under a joint tariff was that the company would be liable for loss of, or injury to, the goods caused by the negligence of another carrier from which the latter was not relieved by the terms of the bill of lading. The goods were lost while in the custody of the other carrier after they arrived in New York.

Held, that the onus was on the C.P.R. Co. of showing that the loss was not caused by negligence or, if it was, that the other carrier was relieved from liability.

Another condition was that if the goods were not removed within forty-eight hours after written notice had been given of their arrival the carrier could keep them on its premises and be responsible as warehouseman only or, at its option, after giving notice of its intention to do so, place them in a public warehouse at the risk of the owner and be free from liability. The goods were kept on the premises for a few days after notice of their arrival was given to the consignee and then, without further notice, were placed in a public warehouse where they became unfit for sale and were abandoned by the owner.

Held, that the carrier was not relieved by the terms of this condition; the goods were not kept on the premises and so the liability was not that of a mere warehouseman; and it was not relieved from liability by placing them in a public warehouse as no notice was given of its intention to do so.

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*PRESENT:—Idington, Duff, Anglin and Mignault JJ. and Cassels J. *ad hoc*.

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APPEAL from the judgment of the Appeal Division of the Supreme Court of New Brunswick (1), affirming the verdict at the trial in favour of the respondent.

Potatoes were shipped from Hartland, N.B., for carriage by the appellant to New York. The bill of lading contained the following clauses:—

Sec. 1. The carrier of any of the goods herein described shall be liable for any loss thereof or damage thereto except as hereinafter provided.

Sec. 2. In the case of shipments from one point in Canada to another point in Canada, or where goods are shipped under a joint tariff, the carrier issuing this bill of lading, in addition to its other liability hereunder, shall be liable for any loss, damage or injury to such goods from which the other carrier is not by the terms of this bill of lading relieved, caused by or resulting from the act, neglect, or default of any other carrier to which such goods may be delivered in Canada, or under such joint tariff, or over whose line or lines such goods may pass in Canada or under such joint tariff, the onus of proving that such loss was not so caused or did not so result being upon the carrier issuing this bill of lading. The carrier issuing this bill of lading shall be entitled to recover from the other carrier on whose line or lines the loss, damage, or injury to the said goods shall have been sustained the amount of such loss, damage, or injury as it may be required to pay hereunder, as may be evidenced by any receipt, judgment, or transcript thereof. Nothing in this section shall deprive the holder of this bill of lading or party entitled to the goods of any remedy or right of action which he may have against the carrier issuing this bill of lading or any other carrier.

Sec. 6 (part) Goods not removed by the party entitled to receive them within forty-eight hours (exclusive of legal holidays), or in the case of bonded goods within seventy-two hours (exclusive of legal holidays), after written notice has been sent or given, may be kept in car, station, or place of delivery or warehouse of the carrier, subject to a reasonable charge for storage and to the carrier's responsibility as warehousemen only, or may, at the option of the carrier (after written notice of the carrier's intention to do so has been sent or given), be removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the risk of the owner and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(1) 57 D.L.R. 453

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The goods were carried to New York over the line of the New York Central Ry. Co. On arrival notice was given to the consignee who did not take delivery. They were kept on the premises for a few days and then placed in a public warehouse, but the carrier did not give written notice of its intention to do so. While in the warehouse they became unfit for sale and were abandoned by the owners.

F. R. Taylor K.C. for the appellant. The evidence does not establish negligence on the part of the carrier. But in any event it is only liable as a warehouseman. At common law after notice is given of the arrival of the goods at their destination, and after a reasonable time therefrom has elapsed, the liability as carrier ceases, and it is then only that of bailee. *Mitchell* v. *Lancashire and Yorkshire Ry. Co.* (1); *Chapman* v. *Great Western Ry. Co.* (2).

The same is the case under condition 6 of the bill of lading. By keeping the potatoes on the carriers' premises for more than forty-eight hours after notice of arrival was given the liability of warehouseman was established and that of carrier was not restored by placing them in the warehouse.

W. P. Jones K.C. for the respondent, referred to *Getty & Scott* v. *Canadian Pacific Ry. Co.* (3); *Rogers Lumber Co.* v. *Canadian Pacific Ry. Co.* (4).

IDINGTON J.—The appellant and those for whom it is, by the terms of its contract, responsible, disregarded the conditions imposed upon it thereby and placed the goods in question where such goods never should have been placed and caused thereby the destruction of said goods.

(1) [1875] L.R. 10 Q.B. 256.
(2) [1880] 5 Q.B.D. 278.
(3) [1917] 40 Ont. L.R. 260.
(4) [1916] 27 D.L.R. 414.

The learned judge in a fair and lucid charge to which no objection of any kind was taken by counsel submitted to the jury questions to which no exception was taken.

Upon the answers thereto and the admitted facts the learned trial judge for the reasons that appear in his opinion directed judgment to be entered for respondent.

The Appeal Division of the Supreme Court of New Brunswick, upon an appeal taken thereto by appellant herein, for reasons assigned by it, covering, correctly, so far as I understand, some points of fact not expressly mentioned by the learned trial judge, upholds his reasons and thus leaves me, agreeing as I do in all said reasons, unable to add anything useful thereto.

I therefore am of the opinion that this appeal should be dismissed with costs.

DUFF J.—The contract provides that where goods are shipped under a joint tariff, (which is the present case) "the carrier issuing this bill of lading * * * shall be liable for any loss, damages or injury from which the other carrier is not, by the terms of the bill of lading, relieved, caused by, or resulting from the act, neglect or default of any other carrier to which such goods may be delivered * * * under such joint tariff * * * the onus of proving that such loss was not so caused or did not so result, being on the carrier issuing this bill of lading." This language is clear and the effect of it is that on proof that goods were received by a carrier under "a joint tariff" the appellant company is "liable" for the loss, damage or injury to such goods unless it establishes one of two things: 1st, that such loss, damage or injury is something in respect of which, by

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the terms of the bill of lading, "the other carrier" is not to be responsible, or 2nd, that such loss, etc., was not caused or did not result from the act, neglect or default of "the other carrier."

The onus resting upon the company is the *onus probandi* in the strict sense, that is to say, the company is the actor in the litigation in respect of these two issues, and in so far as they involve questions of fact the company must fail unless it establish affirmatively by reasonable evidence that upon them it is entitled to succeed. The company relies upon article 6 of the conditions, which is in these words:—

> Section 6 (part). Goods not removed by the party entitled to receive them within forty-eighth hours (exclusive of legal holidays), or in the case of bonded goods within seventy-two hours (exclusive of legal holidays), after written notice has been sent or given, may be kept in car, station or place of delivery or warehouse of the carrier, subject to a reasonable charge for storage and to the carrier's responsibility as warehouseman only, or may at the option of the carrier (after written notice of the carrier's intention to do so has been given), be removed to and stored in a public or licensed warehouse at the cost of the owner, and there held at the risk of the owner and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

Now it is undisputed that the goods were not "kept in car, station or place of delivery or warehouse of the carrier" and therefore that branch of this article limiting the carrier's responsibility in such a case to that of warehouseman has no application and the company's sole recourse must be to the provision which entitles the carrier, upon giving written notice, to remove the goods to a public or licensed warehouse. I have no doubt that written notice here means written notice to the owner and it is admitted that such notice was not given; such notice is an essential condition and accordingly it follows that this branch of the article is also without application.

As to damages, I concur in the view taken in the court below that section 4 of the contract fixes the damages. The trial judge was therefore right in instructing the jury as he did. The sole issues were issues in respect of which as already mentioned the company was actor. There is no evidence upon which the jury could properly have found for the company upon those issues. The case appears to be a peculiarly simple one although it has perhaps been obscured by the accumulation of irrelevancies which it has attracted during its progress through the courts. It is proper, however, to observe that the argument advanced to the effect that the New York Central Company's responsibility ceased after the expiration of forty-eight hours after the arrival of the goods in New York, is really beside the point. The conditions prescribed by the second section impose responsibility for loss unless that loss is something in respect of which the bill of lading itself relieves the carrier; and these conditions are not satisfied unless such release is to be found in express language or by necessary implication from the language of the document. Section 6 provides for exemption from liability in certain specified cases and the facts of the present case do not bring it within any of these exemptions.

ANGLIN J.—The material facts of this case are sufficiently stated in the opinion of the learned trial judge and in that of the Chief Justice of New Brunswick delivering the unanimous judgment of the Court of Appeal (1).

(1) 57 D.L.R. 453.

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Anglin J.

If findings of the jury were necessary to maintain the judgment which the plaintiff holds, I incline to think it could not be sustained. But I agree with the trial judge and the court of appeal of New Brunswick that upon the conditions of the bill of lading under which the plaintiff's goods were shipped, their loss raises a presumption of liability on the part of the defendant as the primary or issuing carrier, and that there is no evidence in the record on which a finding could be based that would rebut that presumption.

By clause 1 of the conditions the issuing carrier (the defendant) assumes liability for any loss of, or damage to, the goods, except as otherwise therein provided.

By clause 2 where goods are shipped under a joint tariff (admittedly this case), the issuing carrier assumes liability for loss, damage or injury to such goods caused by, or arising from, any act, neglect or default of any other carrier to whom the goods may be delivered under such joint tariff, (in this case the New York Central Rly. Co.) from which such other carrier is not relieved by the terms of the bill of lading. The issuing carrier also assumes the onus of proving that such loss was not so caused or did not so arise.

By clause 3 a number of possible causes of loss or injury are categorically excepted from those entailing liability on the carrier. None of them was the cause of the loss of the plaintiff's potatoes. The only one of these excepted causes relied on by counsel for the appellant was "inherent vice in the goods." There is nothing in evidence to suggest the existence of such a vice—nothing to shew that the potatoes would have become unfit for sale if given reasonable care and attention.

Clause 3 further provides for the carrier's liability being that of a warehouseman in the event of the goods being destroyed by fire more than 48 hours (72 hours in the case of bonded goods) after written notice of arrival of the goods at destination—making it clear that responsibility as carrier does not terminate when actual transit is completed and also that it continues as to other causes of loss even after expiry of the 48 hours "free time."

Clause 6 provides two methods by which the carrier may be relieved of this responsibility. By adopting one its responsibility may be reduced to that of a warehouseman; by pursuing the other it may entirely escape further responsibility. In this case neither of the prescribed courses was taken. The New York Central Railway Company placed the goods in a public or licensed warehouse, but without giving notice of intention to do so. The goods became unfit for sale while in this warehouse and still under the control of the carrier to whom they had been transferred by the original carrier who issued the bill of lading, and whose responsibility had not been either reduced to that of a warehouseman or extinguished because of non-compliance with the conditions prescribed by clause 6 for effecting one or other of these results.

There is no evidence to negative the presumption arising under the bill of lading that the loss of the potatoes is ascribable to some neglect or default of such transferee-carrier. Indeed there is not a little pointing to the conclusion that its selection of a public or licensed warehouse unsuited for the storage of the potatoes was the direct cause of their loss. Had the jury found negligence of the New York

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Central Railway in this respect, in the absence of the notice of intention requisite to bring the defendant within the protection of clause 6, a judgment against it based on that finding would have been unassailable. But without such a finding the failure of the defendant to discharge the onus which it assumed by the bill of lading of disproving that the loss of the plaintiff's goods was due to some act, neglect or default of its transferee-carrier justifies a judgment upholding its responsibility. I agree with the reasoning on which Mr. Justice Crocket founded his conclusion that the defendants remained liable in respect of the shipment in question as common carriers under the terms of the bill of lading.

The full value of the consignment at the point of shipment, plus freight charges, etc., paid by the plaintiff, has been allowed as damages. There is evidence that the price of potatoes had declined before the plaintiff's potatoes had suffered deterioration attributable to any act or omission of the New York Central Railway Company. But clause 4 of the bill of lading provides that the amount of the loss for which the carrier shall be liable shall be computed on the basis of the value of the goods at the place and time of shipment (including freight and other charges, if paid, and duty, if paid or payable and not refunded), unless a lower value has been represented in writing by the shipper or agreed upon, or is determined by the classification or tariff on which the rate charged for carriage is based. None of these exceptions is invoked but it is said that from the value of the goods at the time and place of shipment should be deducted any decline in price before the happening of the event which entails liability on the carrier. The amount of the damages awarded is admitted to have

been the value at the time and place of shipment. The total loss of the shipment is conceded. I agree with the learned trial judge and the court of appeal that clause 4 deprives the defendant of any advantage which it might otherwise have had from falling prices in the potato market just as it would preclude the plaintiff from claiming the benefit of an advance in the price of potatoes. The clause was no doubt inserted to avoid difficulty and uncertainty in the assessment of damages. The value of the goods at the place and time of shipment would probably be known to the carrier when assuming responsibility and it would be in its interest to have this value fixed as the basis of that responsibility rather than the uncertain and unknown future value at the place and time of delivery. This stipulation probably operates in the interest of the carrier more often than in that of the shipper.

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

MIGNAULT J.—I concur with Mr. Justice Anglin.

CASSELS J.—I concur with Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitor for the appellant: *H. H. McLean.*

Solicitors for the respondent: *Jones & Jones.*

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*Oct. 18, 19.
*Nov. 21.

W. J. HOPGOOD & SON (DEFENDANTS) ..... APPELLANTS;

AND

AUSTIN J. FEENER (PLAINTIFF) .. RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Contract—Price for completion—Percentage—Payable as work progresses—Basis of computation—Security retained—Architect's certificate.

By a building contract the contractor was to be paid a specified amount for the whole work in instalments of eighty per cent of labour and materials delivered on the certificate of the architect.

Held, Mignault J. dissenting, that to make the twenty per cent retained by the owner a valid security for completion of the work, the architect, in certifying the eighty per cent due, should base his estimate on the proportion that the value of the work done bears to the cost of the entire undertaking.

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

The only question to be determined on the appeal is the basis on which the respondent should be paid under the clause in the contract set out in the head-note. The trial judge held the view stated in the head-note. The full court decided that it should be 80 per cent of the actual value of the work done.

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*PRESENT:—Idington, Duff, Anglin and Mignault JJ. and Cassels J. *ad hoc*.

W. C. Macdonald for the appellant. In *Hawkins* v. *Burrill* (1), where a contractor was to be paid 80 per cent of the "value of the work done," it was held that this value was not the cost to the contractor but that of the partial work measured by the total price. See also 3 Hals. Laws of England, page 213; *Fidelity Co.* v. *Agnew* (2).

Burchell K. C. for the respondent referred to Emden on Building Contracts (4 ed.) page 112; *Société Génerale* v. *Milders* (3).

IDINGTON J.—This is an appeal from the judgment of the Supreme Court of Nova Scotia reversing a judgment of the learned trial judge in an action brought by respondent upon a building contract against the appellants seeking to recover for work and material, and damages for dismissal terminating the contract.

The contract provided for payment by the appellant of $13,875.00 for the entire work and material

in instalments * * * of eighty per cent of labour and materials delivered on the certificate of the architects.

When the respondent contractor had realized that he had undertaken the work at too low a price and could not induce the architects to give him progress certificates for the eighty per cent on his own basis of what was due him, he wrote letters to the appellant and the architects clearly declaring that unless the architects yielded to his wishes the work would cease.

There were negotiations and a fruitless proposal for arbitration designed to override the architects' certificate and decision as to what was due, all of which fails to touch the vital points in question herein.

(1) [1902] 69 N.Y. App. Div. 462. (2) [1907] 152 Fed. R. 955.
(3) [1883] 49 L. T. 55.

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Then the architects gave appellants under article 5 of the contract which reads as follows;

Art. 5. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty after *three* days' written notice to the contractor, to provide any such labour or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereof, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architect, whose certificate thereof shall be conclusive upon the parties;

a certificate which reads as follows:—

Halifax, N.S., August 21st, 1919.

W. J. Hopgood & Sons,
Halifax.

Dear Sirs:—In accordance with article 5, of signed contract, dated 20th May, 1919, between Austin J. Feener, contractor and yourselves, we hereby certify that the aforesaid contractor has stopped the work and nothing has been done on the building since Saturday last noon.

We further certify that such neglect and failure of the contractor is sufficient ground for you to terminate the employment of the contractor and to proceed as provided in article 5, of the contract.

Yours truly,

(Sgd.) Harris & Horton.

Thereupon the appellant pursuant thereto and in literal compliance therewith wrote the respondent as follows:—

Halifax, N.S., August 22nd, 1919.

To Austin J. Feener, Esq.,
Halifax, N.S.

Sir:—We beg to enclose herewith copy of certificate of Messrs. Harris & Horton, under article five, of the contract between us, dated May 20th, 1919.

Please take notice that you having stopped the work under said contract and nothing having been done on the building since Saturday noon last, we hereby terminate your employment for the said work and will, on Wednesday morning next, August 27th, 1919, enter upon the said premises and take possession for the purpose of completing the work comprehended under said contract, of all materials, tools and appliances therefor and will employ other person or persons to finish the work and to provide the materials therefor, and we hold you responsible for the excess of the expense incurred by us therefor over the unpaid balance of the contract price, and will also hold you responsible for any damage incurred through your default.

Yours truly,

W. J. Hopgood & Son.

Pursuant thereto appellants after the expiration of the time specified therein and in due accordance with the terms of the contract as expressed in said article five thereof, proceeded to finish the work in question on a basis of paying therefor the cost of labour and materials plus ten per cent.

The work cost them in all over twenty thousand dollars instead of the contract price.

The respondent on the day following the date and delivery of appellants' letter issued the writ commencing this action and pursued it despite all the foregoing circumstances.

I am unable to understand the process of reasoning by which it is sought to overrule the absolute discretion of the architects as to the progress certificate

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upon which alone appellants were bound to pay and the respondent was to become entitled to recover payments unless and until the work had been duly completed.

The contention that the alleged cost of labour and materials incurred by the respondent instead of the value thereof having regard to the total price is to be paid therefor by appellants, certainly is in conflict with the express language above quoted from the written contract and with the following provision which therein followed that,

> All payments shall be made upon written certificates of the architects to the effect that such payments have become due.

And in article 10 of the contract there is an express provision that no such certificate

> shall be conclusive evidence of the performance of the contract either wholly or in part.

This provision is evidently designed to protect the appellants against possible errors af the architects in making progress certificates and enable the architects to correct any such when coming to give the final certificates.

I think the appeal should be allowed with costs here and in the court of appeal below and the judgment of the learned trial judge be restored.

DUFF J.—I concur in the view of the contract taken by the learned trial judge. "Labour and materials" means in this context, in my judgment, the value of the labour and materials as represented by the work done, which value, of course, must be ascertained by reference to the standard furnished by the contract price. That is a perfectly reasonable

construction of the language and it gives also reasonable effect to the intention of the parties as disclosed by the contract as a whole. The evidence seems to establish quite conclusively that the respondent found himself in a position in which he considered he was unable to proceed with the work in the absence of some readjustment of the terms. This he made known to the appellants. It is quite true that the respondent desired to go on with the contract but conditionally upon some readjustment of its terms resulting in an arrangement more favourable to himself. There was, I think, a perfectly clear declaration by him that otherwise he could not and would not carry out his agreement.

In these circumstances the respondent cannot successfully allege either that he completed his contract or that he was ready and willing to complete it but that he was prevented from doing so by the appellant. As the learned trial judge says, the essential averment that he was ready and willing to perform his contract is an allegation which is negatived by the evidence. See *Forrestt* v. *Aramayo* (1), at page 338.

ANGLIN J.—I am with great respect of the opinion that the construction put upon the contract between the parties to this action by the learned trial judge was correct and that his judgment dismissing the plaintiff's action was therefore right and should be restored.

Read literally and taken by itself, the clause,

> eighty per cent of labour and materials delivered on the certificates of the architects.

(1) [1900] 83 L. T. 335.

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might support the plaintiff's contention—that is if the architects' certificate should not be regarded as indispensable. But the contract also contains a stipulation for a twenty per cent draw-back payable only 33 days after completion of the work. Now the obvious purpose of inserting this latter provision was to afford reasonable security to the owner for the completion of the work by the contractor as well as to protect him against liens for wages and materials. Having regard to that purpose, the proper construction of such a provision in my opinion is that twenty per cent of the proportion of the contract price earned shall be withheld from time to time as progress payments are made. Otherwise the owner would have no security whatever should the contractor become insolvent or make default during the progress of the work. The two clauses, one for the protection of the contractor, the other for that of the owner, must be read together. The object of the court in construing a contract must be to ascertain and give effect to the intention of the parties gathered from the contract as a whole—not from the consideration of a single provision divorced from its context.

It is conceded that the clause providing for payment of eighty per cent of labour and materials is subject to the later clause providing for the twenty per cent drawback, to the extent that if at any time the payments made for the value of labour and materials should amount to eighty per cent of the whole contract price the contractor would not be entitled to receive any further payment until 33 days had expired after the completion of the work. It might be that with only fifty per cent or even less of the total work completed the actual value of labour and materials furnished would amount to eighty per cent of the

contract price. According to the plaintiff's contention he would then be entitled to be paid such eighty per cent, leaving only twenty per cent of the total price in the owner's hands to secure the completion of the remaining fifty per cent or more of the work. I cannot think that a construction which would lead to such a result can be correct. It does not give to the draw-back clause the effect it was intended to have.

In my opinion the interpretation put upon the contract by the architects was sound and the contractor's right to be paid from time to time eighty per cent of labour and materials furnished was subject to the restriction that a sum equal to twenty per cent of the value of the work done and materials on the ground estimated in proportion to the contract price for the completed work should from time to time be retained by the owner as drawback. In other words, the contractor's right was not to receive on progress certificates eighty per cent of the absolute value of the labour and materials furnished but of the relative or proportionate value thereof estimated on the basis of the contract price representing the total value of the completed work. Fair effect—and I am convinced the effect intended—is thus given to both the eighty per cent and the twenty per cent provisions.

The plaintiff stopped work and practically refused to proceed further unless his interpretation of the contract should be accepted. The architects certified to the owner that there had been such neglect and failure of the contractor as warranted the termination of the contract under article 5. The defendant was thereupon entitled forthwith to terminate the plaintiff's employment. As I read the contract the three days' notice clause applicable to an earlier provision for delay in the work does not apply to this case.

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On this ground and also on the ground that the plaintiff had abandoned the work and sufficiently intimated his purpose to repudiate the contract to warrant the defendant in treating it as at an end I think the action was rightly dismissed at the trial.

In the absence of any evidence of fraud or collusion with the defendant on the part of the architects the failure of the plaintiff to produce their certificate for the sum which he claims was due him by the owner presents a formidable obstacle to his success.

The appeal should be allowed with costs in this court and in the court en banc and the judgment of the learned trial judge restored.

MIGNAULT J. (dissenting).—The principal question here turns on the construction of clause 9 of the contract whereby the respondent undertook certain construction and repair work for the appellants for the sum of $13,875.00. A difference arose between the parties owing to the refusal of the architect to grant progress estimates for an amount equivalent to eighty per cent of the labour and materials furnished by the respondent, so that the latter was deprived, during the progress of the work, of the payments to which he claimed he was entitled. The respondent having notified the appellants that he would not continue his work unless he received the amount due according to the agreement, the appellants put an end to his contract. This action was brought by the respondent for the value of his work and for damages.

The material portion of clause 9 reads as follows:—

Art. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and materials shall be $13,875.00 (thirteen thousand eight hundred and seventy-five dollars), subject to additions and deductions as hereinbefore provided, and that such sum shall be paid in current funds by the owner to the contractor in instalments, as follows:—

Eighty per cent of labour and materials delivered on the certificate of the architects.

First payment on the value of labour amounting to five hundred dollars.

Other payments fortnightly as the work progresses.

Twenty per cent of full amount of contract to be paid as herein provided.

The final payment shall be made within thirty-three days after this contract is fulfilled.

All payments shall be made upon written certificates of the architects to the effect that such payments have become due.

The construction which the architect placed on the clause was that the payments during the work were not to be of eighty per cent of the actual value of labour and materials, but, inasmuch as the contractor had undertaken the work for too low a price, the eighty per cent was to be determined with reference to the portion of work executed as compared to what remained to be done. Thus if a quarter of the work contracted for was performed up to a certain date, the payment was to be of eighty per cent of one-quarter of the contract price, and not eighty per cent of the actual value of the labour and materials.

I cannot agree with this construction which the learned trial judge adopted.

In plain English the contractor is entitled, as the work progresses, to instalments of eighty per cent of the labour and materials furnished. There is no reference here to the proportion between what is performed and what remains to be done. The contract provides that the first payment is to be made on the value of labour amounting to $500.00. This clearly refers to the actual value, and in my opinion the actual value of the work done, measured generally but not necessarily by the actual expenditure, is the basis on which the architect should have granted certificates for the fortnightly payments.

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It is true that the final instalment is to be twenty per cent of the full amount of the contract, and is payable within 33 days after completion of the work. And it is urged that, assuming the contract to be for too low a price, the contractor would receive eighty per cent of the contract price before eighty per cent of the work had been completed, and that therefore the owner's security for due performance would be gone, or would be limited to the twenty per cent retained for the final payment.

The only security which the contract provides is this twenty per cent and the owner remains fully entitled to it. The objection is one which the owner should have considered before making the contract, but certainly is no reason to refuse to give effect to the plain meaning of its language. If the appellants are right, where the contract price is too low, in claiming that the eighty per cent should be calculated on the proportion of the work done and not on the actual value of the labour and materials furnished then, when the contract price is too high, the eighty per cent would be estimated on a similar proportion, and might conceivably exceed the actual expenditure. I cannot place so forced a construction on the plain language of this contract, so I may simply say that finding myself in entire agreement with the reasoning of Mr. Justice Russell in the appellate court, I would dismiss the appeal with costs.

CASSELS J.—I am of the opinion that this appeal should be allowed and the judgment of the trial judge, Mr. Justice Mellish, restored.

I agree entirely with the reasons of the learned trial judge. He has dealt fully with the facts of the case and it is unnecessary to repeat them. If the con-

tention of the respondent be correct, the protection of the owners in having 20 per cent held back as security would be wiped out before half of the work was performed. The contractor might have received the whole contract price and if dishonest (not that there is any suggestion of dishonesty on the part of the present contractor) or from pecuniary troubles be unable to finish the work the owner would lose his 20 per cent drawback. I also am of opinion that a certificate of the architect was a condition precedent to the contractor being entitled to payment. There is no allegation of fraud nor proof thereof entitling the contractor to have the architect disqualified.

Appeal allowed with costs.

Solicitor for the appellant: *L. A. Lovett.*

Solicitor for the respondent: *C. J. Burchell.*

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*Oct. 19.
*Nov. 21.

W. A. KINNEY (DEFENDANT).....APPELLANT;

AND

ESTHER FLORENCE FISHER (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Libel—Demand for payment of account—Reply—Privilege—Criminal charge—Res judicata.

To a demand by F. for payment of an account K. replied by pointing out errors and demanding payment of the amount of a cheque drawn by a third party in the felonious conversion of which, he alleged, F's wife took part and that the rights in said cheque had been transferred to him.

Held, Duff and Mignault JJ. dissenting, that any privilege which attaches to K.'s letter as a reply to a demand for payment of an account does not extend to the portion containing the criminal charge, there being no proof that K. possessed any rights in respect to said cheque or had any interest in making such charge.

On appeal from the result of a former trial of this case the Supreme Court of Nova Scotia held (53 N.S. Rep. 406) that the whole letter was privileged but ordered a new trial of the whole case on the ground that the question of malice should have been left to the jury.

Held, Duff J. dissenting, that as the order was for a new trial without restriction, and the evidence given on the former trial is not before the court, the question of privilege is not *res judicata* by the decision of the provincial court.

Per Duff J. When a court, in granting a new trial, decides a substantive question in the litigation, that question, for the purposes of that litigation, is to be taken to have been conclusively determined as between the parties.

APPEAL from a decision of the Supreme Court of Nova Scotia setting aside the judgment for the defendant and ordering a new trial.

*PRESENT: Idington, Duff, Anglin and Mignault JJ. and Cassels J. *ad hoc*.

The plaintiff's husband wrote to the defendant asking for payment of an account enclosed and received the following reply.

September 10th, 1918.

Mr. Vince Fisher,

Dear Sir:—Replying to your request to pay your balance of wages I would say outside of errors in your account in which you have failed to credit me with meals furnished you and have charged for more time than you worked particularly on the last day, I have a counter-claim against you for $25 due me from you on your wife's account being the amount of Mrs. McDonald's lost check, in the felonious conversion of which and the cashing of same by falsely impersonating Mrs. McDonald at the Bank I have reason to believe and do believe your wife took part.

This of course would leave you in debt to me which balance I hereby demand you pay forthwith to me.

Yours truly,

W. A. Kinney.

P.S.—Mrs. McDonald has transferred all her rights to me in the check in question.

Mrs. Fisher brought action claiming damages for libel. On the trial defendant failed to prove the criminal charge and also his rights in said cheque but he relied on his plea that the letter was privileged. There had been a former trial of the action, in which a judgment for the plaintiff had been set aside by the full court (1), which held that the whole letter of defendant was privileged and ordered a new trial to have the question of malice submitted to the jury. On the second trial plaintiff's action was dismissed, the case being withdrawn from the jury, and the full court again ordered a new trial. The defendant appealed to the Supreme Court of Canada.

(1) 53 N. S. Rep. 406.

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The questions to be determined were: First, was the decision of the court below after the first trial conclusive as against the parties as to the question of privilege? Secondly, if that question is not *res judicata* was the whole letter really privileged? Thirdly, if it was privileged was there evidence of malice to be submitted to the jury?

Paton K.C. for the appellant. The court below has twice held that the letter was privileged and on neither occasion did the plaintiff appeal from the decision. That question is now *res judicata.*

The plaintiff has had two opportunities to prove actual malice. Two members of the court below hold that he has entirely failed and two that some evidence has been given.

A mere scintilla of evidence will not support even a finding by the jury. See *Laughton* v. *Bishop of Sodor and Man* (1), at page 505.

If the evidence is equally consistent with the presence or absence of malice there is nothing to be submitted to the jury. *Spill* v. *Maule* (2).

L. A. Lovett K.C. for the respondent. For the privilege to attach to the criminal charge in his letter defendant must prove that he has an interest in the subject matter of the charge. *Harrison* v. *Bush* (3), at page 348.

As to malice see *Adam* v. *Ward* (4), at page 318; *Royal Aquarium* v. *Parkinson* (5), at page 444.

(1) [1872] L.R. 4 P.C. 495.
(2) [1869] L.R. 4 Ex. 232.
(3) [1855] 5 E. & B. 344.
(4) [1917] A.C. 309.
(5) [1892] 1 Q.B. 431.

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IDINGTON J.—This is an appeal from a judgment of the Supreme Court of Nova Scotia directing a new trial in an action for libel founded on the following letter written by appellant to the respondent's husband:—

Mr. Vince Fisher:

Dear Sir:—Replying to your request to pay your balance of wages I would say outside of errors in your acct. which you have failed to credit to me with meals furnished you and have charged for more time than you worked particularly on the last day, I have a counter claim against you for $25 due me from you on your wife's account being the amount of Mrs. McDonald's lost cheque, in the felonious conversion of which and the cashing of same by falsely impersonating Mrs. McDonald at the bank I have reason to believe and do believe your wife took part.

This of course would leave you in debt to me which balance I hereby demand you pay forthwith to me.

Yours truly,

W. A. Kinney.

P.S.—Mrs. McDonald has transferred all her rights to me in the cheque in question.

This was in reply to the following letter of respondent's husband:—

Mr. Kinney:

Dear Sir:—Please find enclosed my bill and also time of labour. Please settle at $2.00 a day for 10 days.

Vincent Fisher.

The ground upon which the court below proceeded was that there was evidence before the learned trial judge of malice on the part of appellant sufficient to entitle the respondent to have her case submitted to the jury instead of being dismissed as it was at the close of the respondent's case.

I agree with the appellate court below in the result reached, but cannot agree with all the reasons assigned.

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There is another ground on which I hold the learned trial judge erred, and which the reasons of the appellate court seem to countenance, and that was in holding the publication of such a libel was privileged by reason of the occasion therefor being so.

This probably arose from the fact that there had been a prior trial of same cause of action in which a verdict had been rendered in favour of the plaintiff (now respondent) and judgment therein had been set aside on the ground that the publication was privileged by reason of the occasion giving rise thereto.

The new trial granted therein was unrestricted and in no *res judicata* sense was plaintiff, or the learned trial judge, bound by such ruling of the court.

In the sense that such a ruling as matter of precedent in the court above bound the judge if the facts presented were exactly the same as on the first trial he may have been bound by such ruling and to leave the plaintiff if she so desired to appeal therefrom.

In like manner the appellate court may have felt bound.

If that court of appeal from the first trial holding as it did in fact, had desired to render its judgment conclusive, it might have so directed, and restricted the second trial to a single issue and thus forced appellant to come here for relief.

In the absence of such direction the whole case is open to us now and, assuming the evidence on the first trial exactly the same as on the trial now in question there was such obvious error that it is I conceive our duty in the interest of the administration of justice to make clear that such a holding not only is no bar to the respondent now, but also that she is entitled to our ruling upon the point in dismissing this appeal.

And all the more so by reason of the appellate court holding that the statements of alleged fact which appear in the alleged libel must be taken as evidence of the occasion being privileged.

I, with respect, cannot assent to such a proposition of law.

To maintain that because a plaintiff in a libel suit driven by necessity of law to put in evidence the whole document is bound by all the alleged facts therein is, I submit, quite untenable.

If that were the case there would be no necessity for a libeller to prove the truth of his accusation.

As a means of interpreting the alleged libel they may be valuable, but not as proof of existence of a privileged occasion.

To bring any defendant within a privilege claimed by him under the law he must prove the facts upon and by virtue of which he is entitled to make such claim unless they have already been proven in the case.

It is not what such a defendant says or believes that constitutes the privilege, but the proven facts and circumstances which, if sufficient, constitute in law the privilege.

It sometimes happens as, for example, in the common case of a man asking another as to the integrity or fidelity of a former servant and his answer is given fairly that no further evidence is needed inasmuch as the circumstances involved in the proven facts constitute the privilege.

In this case there was nothing resembling that condition of things.

And the excuse that the appellant might believe what he related does not alone constitute the privilege.

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See the judgments of the several able judges in the case of *Hebditch* v. *MacIlwaine* (1), dealing with the case of belief as an element which proved nothing as part of what could constitute the occasion a privileged one.

And in another aspect of this phase of the question as to proof needed, see the case of *London Association for Protection of Trade* v. *Greenlands* (2), and especially the following sentence on page 26:

> I do not think that *Macintosh* v. *Dun* (3), affects the consideration of this case, beyond shewing that in determining what is a privileged occasion all the circumstances under which the publication is made need to be considered for the purpose of determining whether privilege attaches or no.

That sentence expresses what I think must be observed in this case, and the said case of *Macintosh* v. *Dun* (3), is worth considering in the same connection.

When we try to find out those circumstances we cannot accept as proven all the appellant imagines and utters unless and until he has proven same or what he alleges is admitted as fact which is not the case by filing as of necessity the libel as a whole.

That is, however, evidence against him and somewhat cogent that there never was a basis for supposing that the man addressed was at all concerned in the story put forward as a means of answering an honest debt by way of counterclaim, which is the only matter in which they had a common interest.

According to what he relates the cheque belonged first to Mrs. Macdonald and then possibly to the bank.

It was no concern of his unless and until he had proven the postscript allegation of his that he had acquired her rights. No evidence being given on

(1) [1894] 2 Q.B. 54. (2) [1916] 2. A.C. 15.
(3) [1908] A.C. 390.

that point and his allegation being unproven, there remains no possibility of his claiming the occasion as privileged until he does, and proof thereof would possibly destroy his pretensions.

And when he has proven, if ever, that fact I fail to see how he could, without a good deal more, come near establishing a counterclaim resting thereon as against the husband of respondent.

Assuming the law of Nova Scotia as stated by counsel for respondent and not denied by appellant's counsel as to the liability of the husband for a wife's torts, the foundation for the privilege claimed is far from being established.

And the fact of his pleading justification is one open to very serious and grave remarks even if withdrawn, which is stated by court and counsel for appellant.

So far as appears in the case before us it stands there yet.

In this connection a perusal of the opinion of Odgers on Libel and Slander, 5 ed. (Can.) at page 249, is worth while for those concerned.

There is abundant evidence, in the case as it stands, of malice which entitled the respondent to the opinion of the jury even if there had been proven a case of privilege which I hold there was not.

The appeal should be dismissed with costs.

DUFF J. (dissenting).—Two questions arise. And first was the occasion privileged? This question was passed upon by the full court when ordering a new trial. It was then held, and this was the basis of the court's judgment, that the occasion was privileged. It is not suggested that the pertinent evidence presented at the second trial differs in any relevant way from the

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evidence presented at the first trial. The full court proceeded upon the assumption that it did not, and that tribunal may fairly be presumed to know the grounds of its own previous decision. The former decision was therefore binding upon the full court and in my judgment it is conclusive as between the parties in this court also. I had occasion to discuss the effect of the decisions of a court of appeal in making an order directing a new trial based upon definite conclusions of law and fact in *Western Canada Power Co.* v. *Berglint* (1), at p. 299. I cite the passage:—

> There is some authority indicating that where a court of appeal in granting a new trial decides a substantive question in the litigation, that question, for the purposes of that litigation, is to be taken to have been conclusively determined as between the parties. I refer without further discussion to the observations of Lord Macnaghten in *Bader Bee* v. *Habib Merican Noordin* (2) at page 623, and to their Lordships' decision in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari* (3). (See especially page 41 as to the effect of determinations in interlocutory judgments upon the rights of parties in the suits in which the judgments are given.) It seems quite clear that for this purpose we are not confined to the formal judgment; *Kali Krishna Tagore* v. *Secretary of State for India* (4) at page 192, and *Petherpermal Chetty* v. *Muniandi Servai* (5) at page 108.

I think the view here tentatively put forward is the sound view of the effect of a decision of the character under discussion.

There remains the question whether there was sufficient evidence of express malice to support the verdict of the jury. The case, on this branch of it, is very close to the line. On the whole I prefer the view of Harris C. J. and Mellish J. and in consequence my conclusion is that the action should be dismissed.

(1) 54 Can. S.C.R. 285.
(2) [1909] A.C. 615.
(3) [1883] 11 Ind. App. 37.
(4) [1888] 15 Ind. App. 186.
(5) [1908] 35 Ind. App. 98.

ANGLIN J.—The law governing occasions of qualified privilege in actions for libel, as to the respective functions of the judge and the jury in dealing with the issue raised by such a defence and as to the nature and degree of evidence of express malice relied on to destroy the privilege which may properly be submitted to the jury, has been so fully reviewed by the House of Lords and the authorities so exhaustively discussed in the recent case of *Adam* v. *Ward* (1), that it is no longer necessary to look to earlier reported decisions and a re-statement of the principles established by them is uncalled for.

In my opinion whatever privilege may have attached to the defendant's letter in so far as it was a reply to the plaintiff's reiterated demand for payment of his wages did not extend to the charge of felonious misappropriation of a cheque by the plaintiff which it contained. There is an utter absence of evidence in the record before us to establish any interest of the defendant in making such a charge. If an assignment of Mrs. MacDonald's rights in regard to the cheque would have given him such an interest, the fact of such assignment is not proved. With respect, I cannot accept the view of Mr. Justice Ritchie that the libellous letter, because put in evidence on behalf of the plaintiff to prove the libel and its publication, affords evidence against him of all the facts which it states. The plaintiff was obliged to put in the whole document. That was the defendant's right.

We do not know on what evidence the Supreme Court of Nova Scotia *en banc* when dealing with the record of a former trial held that the privilege of the occasion on which the letter complained of was written extended to the libellous portion of it. It may be that if the same evidence was again before him the

(1) [1917] A.C. 309.

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learned Chief Justice, who presided at the second trial, would properly have held himself bound by the ruling of the full court. Indeed the full court itself might have been so bound. But the evidence given at the former trial is not before us. We have no means of knowing whether it was the same as that given at the second trial. The order of the full court on the appeal from the judgment at the first trial directed a new trial of the whole case. It was not limited to the question of malice but left open the entire issue raised by the defence of privilege. We therefore must deal with the evidence now before us and determine whether it discloses such an interest in the defendant as would entitle him to claim qualified privilege for the libellous statement complained of made when he was replying to the demand of the plaintiff's husband for payment of his wages. That it does not do so I am quite satisfied.

But if the privilege of the occasion on which the defendant's letter was written extended to the libellous matter complained of I should be disposed to agree with the view which prevailed in the court *en banc* that the language in which it was couched and the subsequent incident indicative of persistence by the defendant in the accusation against the plaintiff afforded some evidence of actual malice which should have been left to the jury.

MIGNAULT J.—I would dismiss this appeal for the reasons stated by Mr. Justice Ritchie in the Appellate Court.

CASSELS J.—I concur with Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitor for the appellant: *V. J. Paton.*

Solicitor for the respondent: *J. J. Cameron.*

LOUIS LAFERRIÈRE AND OTHERS AND GERVAIS ET SAMSON (DEFENDANTS) ..... APPELLANTS;

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*Oct. 20, 21.
*Nov. 21.

AND

A. J. H. ST. DENIS (DEFENDANT)

AND

HERMAS GARIÉPY (PLAINTIFF). RESPONDENT.

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

Lease—Annulment—Series of actions—Appeals—Discontinuance—Chose jugée—Right of ejection by subsequent tenant—Arts. 1031, 1241 C. C.

St. D. and the heirs of L. were co-owners of an hotel property, the interest of St. D. being seven-eighths. In March, 1914, St. D. declaring that he was acting personally and on behalf of the heirs L., rented the hotel to G. & S., the lease expiring on the 30th of April, 1920. On the 20th of February, 1920, St. D. acting as above leased the same property to the respondent for a term of five years. After having on the 24th of March, 1920, guaranteed the heirs L. against all losses and expenses, G. and S. obtained from them, on the 8th of April, 1920, a lease similar to the one given by St. D. to the respondent. On the 24th of April, 1920, G. and S. brought an action against St. D. as defendant and against the heirs L. and the respondent as mis-en-cause, asking for a lease on terms similar to those obtained by the respondent and for the annulment of the lease given to the latter; and on the same day, an action was instituted by the heirs L. against St. D. and the respondent attacking the lease which St. D. had granted in their name to the respondent. On the 14th of May, 1920, the respondent took the present action against St. D., the heirs L., and G. and S., asking to be put into possession of the hotel premises which were not vacated by G. and S. The three

*PRESENT:—Idington, Duff, Anglin and Mignault JJ. and Bernier J. *ad hoc.*

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actions were united for *enquête;* but three different judgments were delivered, the first two actions being dismissed and the third maintained. In the first action, the judgment, though not dealing with the lease given to respondent, declared that G. and S. had no status as lessees by virtue of the lease given to them by the heirs L.; in the second action, it was held that, St. D. being the authorized agent of the heirs L., the lease to the respondent was valid; and the third judgment gave the respondent the right to obtain possession of the hotel. These three judgments were inscribed in appeal before the Court of King's Bench; but later on, a declaration of discontinuance (*désistement*) was fyled in the first two actions. The respondent presented a motion before the appellate court to quash the appeal on the ground of *chose jugée;* and a similar motion was made before this court.

Held, that it is *chose jugée* against all the appellants that G. and S. had no rights as lessees of the hotel, and against the heirs L. that the lease given by St. D. to the respondent was valid.

Held, also, that the respondent, a subsequent tenant, had the right to maintain an action to eject G. and S., former tenants, as the respondent was thus exercising the rights of his lessors under Article 1031 C.C.

Per Anglin J.—The right to have the lease given to respondent declared invalid for want of authority in St. D. belonging solely to the heirs L., the effect of *chose jugée* on that point against them is equivalent to ratification of the lease by them before this action was begun; such lease thus became valid as against everybody who had not theretofore acquired an interest in the property inconsistent with its enforcement; and as it is *chose jugée* against G. and S. that they have no such interest, the lease is valid against them.

Per Mignault and Bernier JJ.—Though the validity of the lease given to respondent is not *chose jugée* as to G. and S., they cannot, for alleged want of concurrence by the heirs L., attack that lease which was declared valid as against the co-owners of the property, the general rule being that no one can set up a right belonging to another—"*nul ne peut exciper du droit d'autrui.*"

Judgment of the Court of King's Bench (Q.R. 31 K.B. 256) affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1), affirming the judgment of the trial court, Maclennan J. and maintaining the respondent's action with costs.

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.

(1) [1921] Q. R. 31 K. B. 256.

Thibaudeau Rinfret K.C. for the appellants.—The lease given by St. Denis to Gariépy is not valid because St. Denis had no authority from the heirs Laferrière: art. 1730 C.C. The respondent is not entitled to take an action to eject Samson and Gervais as exercising rights of his lessors under article 1031 C.C.; such right of action is not in the nature of those contemplated in this article and would come rather within the exception mentioned in the article as it is a right "attached to the person."

Aimé Geofrion K.C. and *J. A. Prud'homme K.C.* for the respondent.—The judgment in the two first actions not having been appealed from, there is *res judicata* as to the entirety of the contract or relation among all the parties. Article 1241 C.C.

The respondent has a direct action to get possession of the hotel against Gervais and Samson who must be held to be trespassers unwilling to deliver; if a tenant has a right to sue a trespasser subsequently to delivery by the lessor under art. 1616 C.C., he must have the same right before delivery. Alternatively, the respondent has the right to take the present action under article 1031 C.C.

IDINGTON J.—I am not entirely satisfied with the evidence of any authority empowering St. Denis to make the lease in question so far as respects the fractional part of the title not his own, and would prefer resting upon the *res judicata* invoked and relied upon in the opinion of my brother Mignault, and hence would prefer resting thereon in dismissing this appeal.

My only difficulty in doing so is that it has not by way of a plea been made part of this record upon which we have to pass.

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I think it might well have been allowed to be pleaded by the Court of King's Bench and thus rendered a foundation for the judgment appealed from. And our judgment dismissing the appeal may well proceed upon such possibility as within our jurisdiction to pronounce the judgment the court below should have pronounced.

I agree with the judgment of the majority that this appeal should be dismissed with costs.

DUFF J.—Mr. Geoffrion has, I think, succeeded in establishing his contention that *res judicata* in substance is an answer to this appeal.

I assume, because it is a point of procedure upon which there was no question in the Court of King's Bench, that it was open to the respondent on the appeal to the King's Bench to bring before that court, in answer to the appeal, matters arising contemporaneously with or subsequent to the judgment appealed from, matters, that is to say, which by reason of the time when they arose could not form an element amongst those constituting the basis upon which the judgment of the trial court rested. I assume, in other words, that the judgments upon which Mr. Geoffrion now basis his averment of *res judicata* might properly have been brought before the Court of King's Bench for that purpose and might properly be considered by that court in passing upon the appeal; that is a point of procedure upon which I accept without hesitation the concurrent views of the judges in the court below.

That being so the judgments invoked are in the language of Art. 1241 C.C. conclusive as to all matters comprised within the "object of the judgment". Accordingly there are two questions upon which the

appellants cannot be heard; the question of agency and the question of *pacte de préférence*. As to the point raised respecting the identity of parties, that is to say, identity of quality—it seems clear that in so far as the respondent's action is based upon article 1031 C.C. he seeks to enforce the rights of his debtors.

There is, I think, no substance in the contention that there is no identity of object because the judgments relied upon by the respondent were given in actions for a declaration of right while the action out of which the appeal arises claims executory relief. In substance the objects are identical and the form, I think, is therefore not material.

ANGLIN J.—I have had the advantage of reading the carefully prepared opinion of my brother Mignault. As the material facts of this case are very fully stated by him it is unnecessary that I should repeat them.

I agree with the views expressed by my learned brother on the issues of *res adjudicata*, which I think our broad powers of amendment allow us to entertain whatever may have been the jurisdiction of the Court of King's Bench in regard to the respondent's motion before that court to dismiss the appeal to it on the ground of *chose jugée*. It is now *chose jugée* as against all the appellants that, when this action was begun, Gervais and Samson had no rights either as lessees or under the "*pacte de préférence*" which they invoke—that their occupation of the Hôtel Riendeau was merely that of overholding tenants under an expired lease. It is also *chose jugée* as to the appellants, the Laferrières, though not as against Gervais

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and Samson, that the lease under which the respondent claims was then valid and effectual. There remains the question whether, giving due effect to these premises, Gervais and Samson, who are themselves without any colour of right to retain possession, should be heard to challenge the validity of the respondent's title to recover possession, which, as against all the owners of the property, is no longer disputable.

That the respondent, if he is the holder of a valid lease, has the right to maintain this action exercising the rights of his lessors under Art. 1031 C.C. is demonstrated in the opinion of my brother Mignault. Although the validity of this lease be not *chose jugée* as against the appellants, Gervais and Samson, if they are no longer in a position to challenge it, the respondent's status under Art. 1031 C.C. is, I think, equally established.

The right, if it ever existed, to have the Gariépy lease declared invalid and set aside for want of authority in St. Denis to make it, belonged solely to the Laferrières. If they saw fit to ratify or acquiesce in that lease nobody else could attack it. As against them its validity is now conclusively established. It is therefore in the same position as if they had in fact so ratified it at the time the action was begun in which it became *chose jugée* that they were bound by it.

While, assuming for the moment that St. Denis lacked authority to execute the Gariépy lease on behalf of the Laferrières, that fact might have afforded a defence to Gervais and Samson so long as the Laferrières were in a position to take advantage of it, that in my opinion would not be the case in an action to recover possession begun by Gariépy against Gervais

and Samson after the Laferrières had lost their right to contest the authority of St. Denis. Since it became binding upon them the Gariépy lease is good as against everybody who had not theretofore acquired an interest in the property inconsistent with its enforcement. It is *res adjudicata* as against Gervais and Samson that they have no such interest. Therefore an action brought now by Gariépy to recover possession from them should succeed. Is the court bound, unless the evidence in the record before us affirmatively establishes the authority of St. Denis to bind the Laferrières, to refuse that relief in the present suit and put the respondent to the expense and delay of taking fresh proceedings to enforce his now undoubted right to obtain possession of the leased premises because the right of the Laferrières to contest that authority had not been actually judicially negatived when this action was begun? I think not. Gariépy is now in a position to exercise the "right of action" of the Laferrières as well as of St. Denis (Art. 1031 C.C.). There can be no question of their right, acting together, to eject Gervais and Samson. That is the consequence of their ownership of the property and the determination that Gervais and Samson have no right to continue in occupation either as lessees or under the "*pacte de préférence*," which is *chose jugée* as against them. Under these circumstances, giving due effect to the fact that the other actions were begun before this one and that judgments in them were retroactive to the respective dates of the writs, I think Gervais and Samson should no longer be heard to question the plaintiff-respondent's status to exercise in this action the right of his lessors.

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If it were clear that the finding of the learned trial judge, affirmed by two of the learned judges of the King's Bench, that the evidence in the present case sufficiently establishes the authority of St. Denis to bind the Laferrières, could not be supported, and if that question should be entered upon merely to deal with a matter of costs, it may be that the appellants Gervais and Samson would be entitled to some relief in regard to costs incurred before the judgment in the Superior Court by which St. Denis's authority was established as against the Laferrières. But I am not convinced that the finding of tacit mandate made by the learned trial judge and affirmed by Mr. Justice Martin and Mr. Justice Flynn in the Court of King's Bench was so clearly wrong that we should disturb it. Having regard to the jurisprudence of this court, I would question the propriety of our entering upon such a question merely to adjudicate upon a matter of costs.

MIGNAULT J.—Les conclusions que je crois devoir adopter en cette cause seront plus intelligibles si je commence par un exposé aussi court que possible des faits saillants que constate le volumineux dossier.

Monsieur A. J. H. St. Denis, notaire de Montréal, et feu Philippe Laferrière étaient, en l'année 1904, copropriétaires par indivis et par égales parts de l'immeuble situé sur la Place Jacques Cartier à Montréal, et connu sous le nom d'Hôtel Riendeau, et, par bail en date du 3 mai, 1904, ils l'avaient loué, pour dix années, au nommé J. Arthur Tanguay.

Pendant le cours de ce bail Philippe Laferrière est décédé, laissant une veuve, depuis mariée en secondes noces avec M. Pierre D'Auteuil, avocat de La Malbaie, et douze enfants dont trois seulement étaient alors majeurs. St.-Denis a acheté de plusieurs des

héritiers Laferrière leurs parts dans l'Hôtel Riendeau, à tel point que lors du bail signé par lui en faveur de l'intimé, il était propriétaire de cet immeuble pour les sept-huitièmes, l'autre huitième appartenant à trois des héritiers Laferrière, dont deux mineurs, qui n'avaient pas disposé de leurs parts.

Le 30 mars, 1914, St.-Denis, déclarant agir tant pour lui que comme administrateur des intérêts des héritiers de feu Philippe Laferrière, avait loué cet immeuble aux appelants Gervais et Samson, le bail, consenti pour six années, devant expirer le 30 avril, 1920. Dans ce bail, il était dit que si le bailleur décidait de vendre l'hôtel, il donnerait la préférence aux locataires sur tout autre acquéreur.

Au mois de février, 1920, St. Denis, qui administrait cette propriété, était mécontent des locataires Gervais et Samson, qui devaient des arrérages de loyer et qui avaient subi des condamnations pour infractions à la loi des licences, et il cherchait un autre locataire. C'est dans ces circonstances qu'il s'aboucha avec l'intimé Gariépy, et, le 20 février, 1920, il lui donna un bail pour cinq ans de l'Hôtel Riendeau, déclarant agir, comme dans le bail à Gervais et Samson, tant personnellement que comme administrateur autorisé de la succession Philippe Laferrière. Le même jour St. Denis consentit en faveur de l'intimé une promesse de vente de l'hôtel pour $60,000. Cette promesse de vente était synallagmatique, l'intimé promettant acheter, mais ce n'était que cinq ans plus tard, et après avoir fait certains paiements, que l'intimé pouvait exiger un contrat de vente.

Ce bail et les agissements des parties à sa suite ont donné lieu à trois procès. Il est évident que les

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locataires Gervais et Samson, dont le bail expirait le 30 avril 1920, ne voulaient pas livrer à un autre locataire la possession de l'hôtel. Ils prétendaient que le bail donné à l'intimé était nul parce qu'il aurait été consenti par St. Denis sans l'autorisation de ceux des héritiers Laferrière qui étaient encore intéressés dans l'immeuble. Pour amener ceux-ci à attaquer le bail de l'intimé, ils leur garantissaient, le 24 mars 1920, le remboursement de tous frais et dépenses et commençaient par déposer en banque une somme de $1,000.00 devant servir aux déboursés. Le 8 avril, 1920, sachant très bien qu'une part minime seulement de la propriété restait encore aux Laferrière, ils se faisaient donner, aux mêmes conditions que celles stipulées au bail et à la promesse de vente de l'intimé, un bail et une promesse de vente de l'immeuble par André Laferrière, étudiant en droit, agissant comme procureur de Paul Laferrière, majeur, et de Louis Laferrière, tuteur de Marthe et Madeleine Laferrière, mineures. Ils prenaient, le 24 avril 1920, une action contre St. Denis, comme défendeur, et contre l'intimé et les héritiers Laferrière qui avaient encore des intérêts dans l'immeuble, comme mis-en-cause, réclamant, vu le bail et la promesse de vente obtenus par l'intimé, un bail et une promesse de vente semblables, et demandant l'annulation du bail de l'intimé et la radiation de son enregistrement. Et le même jour, 24 avril 1920, une action fut intentée par les héritiers Laferrière contre l'intimé et St. Denis pour faire annuler le bail et la promesse de vente obtenus par l'intimé. Il est assez clair que, sans la garantie donnée par Gervais et Samson aux Laferrière, cette action n'aurait pas été instituée, de sorte qu'il est difficile de croire que Gervais et Samson n'en étaient pas les instigateurs, comme du reste la cour supérieure

l'a décidé. Enfin, lorsque l'intimé voulut prendre possession de l'immeuble en vertu de son bail, Gervais et Samson, qui n'avaient aucun droit de l'occuper eux-mêmes, s'y opposèrent, et l'intimé dut intenter, le 14 mai 1920, une action (qui seule a été portée en appel) contre St. Denis, les héritiers Laferrière et Gervais et Samson pour obtenir cette possession. Grâce à leur résistance à cette action—qui est encore pendante et à laquelle, il faut l'espérer, notre jugement mettra fin—Gervais et Samson ont gardé pendant dix-huit mois un immeuble auquel ils n'ont certainement aucun droit. Les délais de la procédure judiciaire leur ont été aussi profitables qu'ils ont été nuisibles à l'intimé.

De ces trois procès un seul, celui que nous sommes appelés à juger, a dépassé la cour supérieure. Les trois actions avaient été réunies pour l'enquête, mais elles ont été jugées par trois jugements séparés. L'action de Gervais et Samson contre St. Denis, Gariépy et les héritiers Laferrière et celle des héritiers Laferrière contre St. Denis et Gariépy ont été renvoyées, et l'action de Gariépy contre St. Denis, les Laferrière et Gervais et Samson a été maintenue. Les appelants Laferrière et Gervais et Samson ont porté les trois jugements en cour d'appel, mais, dans les deux premières actions, se trouvant, nous dit-on, dans l'impossibilité de fournir le cautionnement requis, ils se sont désistés de leur inscription en appel. Il n'y a maintenant que la troisième action, celle où Gariépy est demandeur, qui ne soit pas définitivement jugée.

La première question qui doive nous occuper, c'est celle de savoir si le bail consenti par St. Denis à l'intimé lie les héritiers Laferrière qui ont encore des intérêts dans l'hôtel Riendeau.

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A cet égard, après une longue enquête, le savant juge de première instance a fait les constatations de fait suivantes que je cite de son jugement:

> At the date of the execution of said lease and for many years prior thereto the defendant St. Denis was the administrator of said property, being himself sole owner of a portion of said immoveable and the owner of seven-eighths of the remainder of said property, the other one-eighth belonging to certain of the heirs of the late Philippe Laferrière, and defendant was then and had been for many years the duly authorized agent of the said heirs and with their consent and on their behalf administered their interest in said property and the said heirs, by reason of their having allowed defendant St. Denis to manage and administer their interest in said property, gave reasonable cause for the belief that the said St. Denis was their agent in connection with said property, and the plaintiff in this case entered into said lease of 20th February, 1920, in good faith, believing that the said St. Denis was in fact the agent and representative of the said heirs of the estate of the said Philippe Laferrière.

Le jugement de la cour d'appel déclare qu'il n'y a pas d'erreur dans le jugement de la cour supérieure et il en confirme le dispositif. Deux des juges qui formaient la majorité de la cour (les honorables juges Martin et Flynn) ont formellement reconnu l'existence d'un mandat au moins tacite des Laferrière à St. Denis, autorisant celui-ci à louer l'hôtel à Gariépy; le troisième juge (l'honorable juge Tellier) s'est basé sur la chose jugée pour se prononcer en faveur de l'intimé.

Devant cette cour l'intimé a produit une motion soulevant la question de chose jugée. Il prétend qu'il y a maintenant chose jugée en sa faveur quant à la validité de son bail, cette validité ayant été affirmée, dit-il, par la cour supérieure sans appel ultérieur dans les deux actions instituées le 24 avril, 1920, et dont il a été question plus haut.

L'intimé peut-il soulever cette question devant nous? Je le crois. L'appel met tout en question et il n'y aura jugement final que lorsque cette cour aura rendu sa décision. Le code de procédure de la pro-

vince de Québec, art. 199, permet de faire valoir par plaidoyer supplémentaire, avec l'autorisation du juge, des faits essentiels arrivés depuis la contestation. Du reste, les pouvoirs d'amendement que possède cette cour (règle de pratique 54) nous donnent une discrétion absolue à ce sujet, et dans les circonstances de cette cause je suis d'avis d'exercer cette discrétion et de traiter la motion de l'intimé comme un plaidoyer supplémentaire.

Reste à savoir si ce plaidoyer est bien fondé.

La doctrine de la chose jugée repose sur une présomption *juris et de jure* et même d'ordre public que le fait constaté par le juge est vrai: *res judicata pro veritate habetur*. Elle a pour fondement non pas l'acquiescement de la partie, acquiescement qui découlerait de la circonstance qu'elle n'a pas appelé du jugement qui la condamne, mais la vérité irrécusable du fait que constate ce jugement, lequel, quand il est devenu définitif, ne peut plus être mis en question. Et cette présomption de vérité a été admise pour empêcher de nouveaux procès entre les mêmes parties sur la même question et pour rendre impossible que les parties puissent obtenir des arrêts contradictoires.

Il faut pour cela que ce qu'on a appelé les trois identités se rencontrent: identité d'objet en ce sens, dit l'article 1241 C.C., que la demande soit "pour la même chose que dans l'instance jugée"; identité de cause, c'est-à-dire, pour citer le même article, "lorsque la demande est fondée sur la même cause:" et identité de personnes, soit une demande "entre les mêmes parties agissant dans les mêmes qualités."

Ici, dans les deux actions qui se trouvent jugées définitivement, les demandeurs concluaient à l'annulation du bail consenti à l'intimé, alléguant que St. Denis, en le signant, avait agi sans l'autorisation de

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ses copropriétaires, les héritiers Laferrière. Le jugement dans l'action des Laferrière contre St. Denis et Gariépy—Gervais et Samson n'y étaient pas parties—décide que, lors du bail Gariépy, St. Denis était l'administrateur de l'immeuble en question et des intérêts de ses copropriétaires, les Laferrière, et l'agent dûment autorisé de ces derniers. Dans l'action de Gervais et Samson contre St. Denis, dans laquelle les Laferrière et Gariépy étaient parties, le jugement ne se prononce pas sur la validité du bail Gariépy, mais se contente d'annuler celui que les Laferrière avaient donné à Gervais et Samson et de décider que ceux-ci n'ont pas droit à un bail et une promesse de vente de l'Hôtel Riendeau. Je crois donc que l'identité d'objet se rencontre dans l'espèce, eu égard aux allégations et conclusions de ces actions.

J'en dirais autant de l'identité de cause, car dans toutes ces actions on attaquait le bail Gariépy pour le motif qu'il était signé par l'un des copropriétaires sans l'assentiment des autres. Et ce bail fut déclaré valable dans l'action des Laferrière contre St. Denis et Gariépy.

J'ai plus de difficulté à l'égard de l'identité de personnes, car nous ne trouvons toutes les parties qui sont devant nous que dans l'action de Gervais et Samson contre St. Denis, comme défendeur, et Gariépy et les Laferrière, comme mis-en-cause, et ce n'est que dans l'action des Laferrière contre St. Denis et Gariépy, où Gervais et Samson n'étaient pas parties, que la cour supérieure a formellement décidé que St. Denis était l'agent dûment autorisé des Laferrière en consentant le bail Gariépy.

Je conclus donc qu'entre les Laferrière et l'intimé Gariépy il y a chose jugée sur la validité du bail que St. Denis accorda à celui-ci. A l'égard de Gervais et

Samson, il n'y a chose jugée que quant à la nullité de leur propre bail consenti par les Laferrière. Ce point cependant est important, car il en résulte que Gervais et Samson n'ont aucun titre à l'occupation de l'immeuble.

J'écarte comme mal fondée la prétention soutenue avec beaucoup de talent par M. Rinfret que Gariépy n'agit pas dans cette action dans la même qualité que dans les deux autres, car outre que l'intimé prétend exercer en vertu de l'article 1031 C.C. un droit que St. Denis refuse ou néglige de faire valoir, l'expulsion de Gervais et Samson, il demande de son propre chef contre St. Denis et Gervais et Samson la possession de cet immeuble.

S'il y a maintenant chose jugée à l'égard de tous les propriétaires de l'Hôtel Riendeau sur la validité du bail Gariépy, et à l'égard de Gervais et Samson seulement sur la nullité de leur propre bail, doit-on permettre à ces derniers—ce point n'étant pas chose jugée quant à eux—de soutenir que l'intimé n'a pas un bail liant tous les propriétaires de l'hôtel Riendeau?

Je suis d'avis que non. C'est un principe élémentaire qu'on ne peut exciper du droit d'autrui. Le jugement de la cour supérieure, dans l'action des Laferrière contre Gariépy et St. Denis, a jugé que le bail de l'intimé est valable vis-à-vis tous les copropriétaires de l'hôtel, et a ainsi tranché cette question de validité à l'égard de toutes les parties qui pouvaient la soulever. Permettre maintenant à Gervais et Samson de renouveler le débat, quand tous les copropriétaires de l'immeuble sont liés par le bail donné à l'intimé, serait non-seulement les autoriser à exciper du droit d'autrui, mais aussi à exciper d'un droit que les Laferrière ne peuvent maintenant faire valoir. Je suis donc d'avis que la validité du bail de l'intimé ne peut plus être contestée.

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Cette question étant mise hors du débat, il reste à voir si Gariépy pouvait, étant donné qu'il a un bail valide de l'Hôtel Riendeau, et que les appelants Gervais et Samson n'ont aucun droit de l'occuper à l'encontre de son bail, prendre cette action et demander vis-à-vis de St. Denis sa mise en possession de l'immeuble, et, à l'égard de Gervais et Samson, leur expulsion.

Tous les auteurs enseignent que le preneur, vis-à-vis de son bailleur, peut obtenir, *manu militari* s'il le faut, la possession de la chose louée. Voy. Baudry-Lacantinerie et Wahl, *Louage*, tome 1er, n° 308, où un grand nombre d'auteurs sont cités à l'appui de cette solution que je considère certaine.

Maintenant Gervais et Samson étant en possession de l'immeuble sans droit, Gariépy peut-il les en faire expulser?

Pour le faire, Gariépy invoque l'article 1031 du code civil permettant au créancier d'exercer les droits et actions de son débiteur, à l'exception de ceux qui sont exclusivement attachés à sa personne, lorsqu'à son préjudice il refuse ou néglige de le faire.

On prétend que cet article ne s'applique que pour les intérêts purement pécuniaires, que c'est un droit analogue à celui que consacre l'article 1032 quant à l'action paulienne, et que le but de l'article 1031 est de faire rentrer dans le patrimoine du débiteur une somme d'argent ou une valeur qui en est sortie par fraude.

A ne considérer que les termes très généraux de l'article 1031, il comprendrait tous les "droits et actions" du débiteur à la seule exception de ceux qui sont exclusivement attachés à sa personne. Et il suffit de dire *lex non distinguit.*

Mais les commentateurs de l'article 1166 du code Napoléon, qui correspond à notre article 1031, enseignent que sa formule est trop large. Ils disent que pour que le créancier soit admis à exercer les droits de son débiteur, il faut qu'il s'agisse de droits compris dans le patrimoine du débiteur. Et ils ajoutent, ce qui paraît clair, que l'article 1166 est étranger à tous les droits relatifs soit à l'état des personnes, soit aux rapports de famille, alors même que l'exercice d'un droit de cette nature devrait avoir pour conséquence indirecte d'augmenter le patrimoine du débiteur ou d'en prévenir la diminution. (Baudry-Lacantinerie et Barde, *Obligations*, tome 1er, n° 590).

On distingue encore selon qu'il s'agit d'un intérêt pécuniaire ou d'un intérêt purement moral, le premier entrant dans la règle de l'article 1166, l'autre dans son exception. Quant aux droits mixtes, c'est-à-dire les droits ayant leur fondement dans un intérêt moral et un intérêt pécuniaire tout à la fois, si l'intérêt pécuniaire domine, le créancier pourra exercer l'action qui en résulte. (Mêmes auteurs, n° 591).

J'avoue que je suis assez peu touché par l'objection que la formule de l'article 1031 serait trop large, car alors qu'on peut très bien critiquer la loi, il faut l'appliquer, quand son sens n'est pas douteux, quelque large que soit sa formule, puisqu'elle est l'expression de la volonté souveraine du législateur. Du reste, même en adoptant le criterium que j'ai emprunté à la doctrine française, le droit d'action de St. Denis pour l'expulsion de Gervais et Samson n'est certainement pas fondé sur un intérêt moral, et, partant, ne tombe pas dans la catégorie des droits qui sont exclusivement attachés à la personne du débiteur. L'intérêt pécuniaire de St. Denis d'intenter cette

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action est très visible, car autrement il aurait à payer de forts dommages à l'intimé, et en l'exercant il empêche que son patrimoine ne soit notablement diminué par l'indemnité qu'il aurait à donner au locataire à qui il a promis la paisible jouissance de l'hôtel.

Mais ce qui me paraît décisif, outre les termes formels de l'article 1031, c'est qu'on juge en France que le bailleur peut céder à son locataire son droit d'action tendant à l'expulsion d'un autre locataire qui refuse d'abandonner la possession de la chose louée, bien que son bail soit expiré (Dalloz 1895,1. 367; 1894.2.53; 1876.1.27). Si ce droit d'action peut être cédé, si le bailleur peut en accorder la subrogation à son locataire, et si la seule stipulation que le locataire se fera mettre en possession à ses risques et périls comporte cette subrogation, ainsi qu'il a été jugé dans l'arrêt rapporté par Dalloz, 1876.1.27, on pourrait difficilement soutenir que ce droit ne forme pas partie du patrimoine du débiteur. Et il paraîtrait peu logique de décider que le locataire peut, contre le bailleur, se faire mettre en possession de la chose louée *manu militari*, et de lui refuser, malgré la généralité des termes de l'article 1031, le droit d'exercer l'action en expulsion du bailleur quand celui-ci refuse ou néglige de l'intenter lui-même.

Je suis donc d'avis que le droit que l'intimé veut exercer rentre dans l'interprétation raisonnable de l'article 1031. Et j'ajoute que le texte de cet article suffit, sans autre argument, pour justifier le jugement dont on appelle.

A l'audition, le savant avocat des appelants Gervais et Samson a prétendu que ceux-ci, à défaut d'autre bail, avaient un bail par tacite reconduction. Il suffit de répondre que Gervais et Samson se basent uniquement dans la plaidoirie écrite sur le bail que

les Laferrière leur ont donné et demandent un bail à St. Denis. D'ailleurs on ne peut dire qu'ils aient gardé la possession de l'hôtel du consentement du bailleur quand St. Denis leur a signifié par protêt d'avoir à en déguerpir le 1er mai 1920. Ce moyen, invoqué pour la première fois devant cette cour, doit donc être écarté.

Je suis d'opinion de renvoyer l'appel de tous les appelants avec dépens.

BERNIER J.—Je concours dans les opinions exprimées par Monsieur le juge Mignault dans ses notes de jugement en cette cause, et je ne vois rien qui puisse y être ajouté.

L'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitor for the appellants: *Clovis Laporte.*

Solicitors for the respondent: *Geoffrion, Geoffrion & Prud'homme.*

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*Feb. 17.
*Mar. 11.

THE BRITISH WHIG PUBLISHING COMPANY (PLAINTIFF)..... APPELLANT;

AND

THE E. B. EDDY COMPANY (DEFENDANT)..... RESPONDENT.

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

Contract—Construction—Paper supply—Annual supply—Yearly requirements.

A contract between a publishing company and a company manufacturing paper provided that "the company agrees to sell and the purchasers (publishers) to purchase, during the period commencing on the 1st day of January, 1916, and ending on the 31st day of December, 1918, for use in the publication of the British Whig newspaper * * * one hundred and fifty tons approximately of paper per year (being the whole of the purchasers' requirements) * * *

Held that this was not a contract for the supply of 450 tons but one calling for an annual supply of approximately 150 tons.

Held, also, Idington and Duff JJ. dissenting, that the governing words were "one hundred and fifty tons approximately of paper per year" and not the expression between parentheses which only referred to 150 tons as an estimate of the yearly requirements; that the obligation of the manufacturer was to supply "about" 150 tons each year; and that the fact that in each of the first two years the publisher was furnished with 50% more than 150 tons did not affect this construction.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment for the plaintiff at the trial (2) and dismissing the latter's cross-appeal.

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

(1) 19 Ont. W.N. 279. (2) 18 Ont. W. N. 378.

The only question for decision on the appeal is the construction to be placed on the portion of a contract between the parties which is set out in the head-note.

Christopher C. Robinson for the appellant.

G. F. Henderson K.C. and *M. G. Powell* for the respondent.

THE CHIEF JUSTICE.—At the conclusion of the argument in this case I entertained no reasonable doubt that the appeal failed and should be dismissed.

A careful perusal of the agreement in question and further consideration of the facts as proved satisfied me that the reasons for judgment of the trial judge, Middleton J., and of Chief Justice Mulock and Mr. Justice Riddell of the Appellate Division were sound and that their construction of the contract in question was the correct one.

I have had the advantage of reading the reasons for judgment prepared by my brother Anglin and as these reasons embody my own views fully I do not deem it necessary to add anything to them, and I would, therefore, for the reasons stated by him, dismiss the main appeal as well as the defendant's cross-appeal, both with costs, reducing the amount awarded plaintiff, on Mr. Robinson's admission, by the sum of $249.42.

IDINGTON J. (dissenting).—The appellant is a newspaper publisher and the respondent a manufacturer of paper. They entered into a contract of which the most important clause is as follows:—

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The company agree to sell and the purchasers to purchase during the period commencing on the 1st day of January, 1916, and ending on the 31st day of December, 1918, for use in the publication of the British Whig newspaper published in the city of Kingston, one hundred and fifty tons approximately of paper per year (being the whole of the purchasers' requirements) on the following terms and conditions

The questions raised relate to the interpretation and construction of this clause.

The learned trial judge held that the words

one hundred and fifty tons approximately of paper per year

were the essential dominating part of the clause and contract, and consequently, that the damages for breach thereof by failure on the part of respondent in the third year of the term to deliver the quantity thus called for, must be assessed on the basis of one hundred and sixty-five tons, less the quantity delivered in that year.

Why one hundred and sixty-five tons instead of one hundred and thirty-five tons should be taken as such basis would be puzzling but for the fact that the parties concerned had some discussion in a friendly way in anticipation of the breach, and respondent then proposed to add 10% to the approximate amount named in the contract.

Even so, I submit with great respect, such an estimate of the approximate amount might as well have been put at 10% below as 10% above that.

However, in my view of what the parties were contending for, which I am about to state, this new suggestion of mine is only to illustrate how far apart it was possible for the parties to have been in making such an elastic contract.

It seems to me quite clear that the approximate amount of one hundred and fifty tons a year was, in the minds of those concerned, nothing but an estimate

of the possibilities and that the actual goods the appellant was contracting to buy and the respondent contracting to supply, was the paper required for use, in the publication of the newspaper published by appellant in Kingston, during each year of the currency of the contract, and that was intended by both parties to be the whole of the appellant purchaser's requirements for said purposes.

The actual requirements for the purpose so specified doubtless would be found in the result reduced to an absolute certainty, yet must in the course of business events necessarily be given some flexible meaning to which business common sense would have to be applied to avoid quarrelling over details in the last year of the currency of the contract.

No one on either side of such a contract would expect a definite stock-taking at the beginning or ending of such a term as contracted for. Hence they had to make reasonable allowances in estimates of requirements in giving and supplying the last order under the contract.

And in approaching the making of such a contract to the due execution of which reasonable conduct and fair dealing must be applied, it was quite natural they should begin by a guess of what was the possible or probable quantity to be needed.

I can easily see how such a form of a long contract such as before us grew, and bit by bit was amended in accordance with past experience not only in relation to appellant's business but that of very many others carrying on the business of newspaper publishing.

In doing so the important clause now in question seems to have become rather ambiguous. Yet I have no manner of doubt that if the appellant had improperly undertaken a re-selling of the goods so

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supplied, to the detriment of the respondent, the latter could have had the doing so restrained; or that if the appellant had improperly bought any part of its requirements elsewhere than from respondent, the latter could, and no doubt would have claimed damages for such a breach, and that the basis for the measure thereof must necessarily in such case have been the quantity of the requirements of appellant having due regard to what I have adverted to above as to reasonable allowance in the possibly final orders for the year.

In such an action for damages the court or jury trying it would be bound to consider, if having any regard to the intention of the parties, what was the probable amount of the paper necessary to supply the requirements of the appellant in its specified business.

The jury in such a case would be asked to consider what was within the reasonable contemplation of the parties.

And the true basis therefor would not, I submit, be the estimate or guess of what was presented as the approximate quantity when coupled up with something much more specific as herein, but that which would, in a business way, as result of experience, be quite capable of being demonstrated to be a substantially larger quantity than the original guess.

I submit this test of the realities in order to get away from what seems to me rather an illusory way of selecting arbitrarily some words of a contract and discarding others, and forgetting to realize what the parties actually were trying to do by means of the contract they were framing. In other words, the subject matter of the contract was not the estimated, but the actual requirements of a specified business.

The contract certainly is ambiguous and in all such cases the acts, conduct and course of dealing of the parties before and at the time they entered into it, may be looked at in order to ascertain what they had in contemplation and what they did immediately after in pursuance thereof.

It is clear that the experience of the three years' contract which preceded this one demonstrated that a hundred and fifty tons was far below the probable requirements yet the parties acted in dealing with each other on the basis I suggest and for the first two years of this contract, acted on same basis.

The appellant's business seemed to be growing and that was mutually advantageous until an unfortunate condition of affairs arose in the third year of the contract which rendered it otherwise for respondent.

Neither was to blame for the unexpected condition in question, nor could it excuse the breach of contract.

I am of the opinion that the appeal should be allowed; the judgments of the courts below reversed with costs here and in the Court of Appeal, and the damages be assessed on the basis of the quantity required for the appellant's business specified in the contract, and that alone.

If the parties cannot agree of course a reference must determine the amount.

I suspect it can be determined between themselves as matter of business better than any referee can do it.

DUFF J. (dissenting).—I concur in the view expressed by Mr. Justice Ferguson with which Mr. Justice Masten agreed.

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Duff J.

My reasons for this conclusion are quite sufficiently stated in the judgment of Ferguson J. and consequently it is unnecessary to do more than summarize them in a sentence or two.

The phrase "being the whole of the purchaser's requirements" and the word "approximately" must be construed by reference to one another and by reference to the fact explicitly stated in the contract that the purchase is a purchase of paper for a particular use. I think the more reasonable construction is that which treats the first mentioned phrase as the governing one and the quantity named as an estimate only.

I think also that the contract being one which is susceptible of more than one necessarily exclusive meaning, the course of dealing between the parties prior to the contract as well as the course of dealing under the contract itself are relevant facts for the purpose of deciding what is the right construction. I concur with Mr. Justice Ferguson in the opinion that the fact proved by the invoices that shipments were made and expressed to be made under this very contract in the years 1916 and 1917 in excess of 150 tons, is an important and weighty fact pointing to the conclusion to which the learned judge arrived.

ANGLIN J.—I am of the opinion that the plaintiff's appeal should be dismissed for the reasons stated by Mr. Justice Middleton (1), and by the Chief Justice of the Exchequer Division and Mr. Justice Riddell (2).

The contract to be construed expressly provides that it "is to be read and interpreted as made at * *

(1) 18 Ont. W. N. 378. (2) 19 Ont. W. N. 279.

the City of Hull, Quebec." But, as was determined in *McConnel* v. *Murphy* (1), cited by Mr. Robinson, the governing principle in Quebec as in the provinces where the English common law prevails

must be to ascertain the intention of the parties through the words they have used. This principle is one of universal application.

Their Lordships proceed to point out that there is no technical or artificial rule in the law of Quebec which bears upon the construction of a mercantile contract such as that before us.

The question is really as to the meaning of language and that must be the same everywhere.

See, however, Art. 1019 C.C.

The contract was in my opinion absolute for the sale of

one hundred and fifty tons (150 tons) approximately of paper per year.

I read "approximately" as the equivalent of "about" and regard it as having been inserted

only for providing against accidental variations arising from slight and unimportant excesses or deficiencies.

Brawley v. *United States* (2).

This qualifying word is not

supplemented by other stipulations or conditions which (might) give it a broader scope or more exclusive significancy

as the words "more or less" were in Brawley's contract.

The words immediately succeeding—

or at that proportionate rate for any shorter broken period covered by this contract

(1) L.R. 5 P.C. 203, 219. (2) 96 U.S.R. 168, 172.

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further indicate that a quantitative definition of the subject matter was uppermost in the minds of the parties. What that subject matter was to be having been thus defined, it seems to me that proper and adequate effect is given to the words "(being the whole of the purchasers' requirements)" by treating them as a statement of expectation. The converse case was thus dealt with by Mr. Justice Atkin in *In re Harrison and Micks, Lambert & Co.* (1), approved by the Court of Appeal in *Tibbits Brothers* v. *Smith* (2). No case has been cited—no doubt because none can be found—where a contractual provision for the sale of a defined quantity of goods has been held to be overridden by a subsequent *ex facie* parenthetical clause such as that now under consideration. The words "(being the whole of the purchaser's requirements)", as Sir Wm. Mulock says

> do not form any controlling part of the contract but are merely an intimation as to the purchaser's expected requirements.

The English authorities relied on by the appellant, which with others are collected in 25 Hals. Laws of England, page 214, note (f) to paragraph No. 366 and the 1920 supplement at page 1365, are all cases in which the statement as to quantity was obviously introduced merely as an estimate, the contracts having provided for the sale of a particular lot of goods specified by description or otherwise designated. *Bourne* v. *Seymour* (3), cited by Mr. Justice Riddell, is certainly more closely in point than any of them and is about as helpful as a decision on the construction of one contract can well be on that of another not drawn in identical terms.

(1) [1917] 1 K.B. 755, 761. (2) 33 Times L.R. 508.
(3) 16 C.B. 337.

The problem is purely one of construction—to ascertain what are the governing words in the document before us which determine the subject matter of the contract. Those words, in my opinion, are

one hundred and fifty tons (150 tons) approximately, of paper per year.

The construction for which the appellant contends, on the other hand, gives no effect to this specification of the quantity of the subject matter.

The ambiguity or uncertainty necessary to justify resort to evidence of conduct to assist in ascertaining the intention of the parties, in my opinion is not found in this contract.

I agree with the learned trial judge and the Appellate Divisional Court that "each year stands by itself"—that the contract is not for 450 tons to be delivered during a three year period but for one hundred and fifty tons a year.

Mr. Robinson's assent to the contention that the basis for computing the damages should be an obligation to supply 150 tons instead of 165 tons for the year 1918 involves a reduction of the amount awarded by the sum of $249.42 as I make the computation. I would dismiss the defendants' cross-appeal as well as the main appeal—both with costs.

BRODEUR J.—The question in this case is whether the defendant company agreed to supply all the paper required for the publication of the two newspapers of the appellant company or simply the approximate quantity of 150 tons a year.

It seems to me that if the parties intended that all the requirements of the newspapers should be provided for by the respondent company the contract would have been drafted in a different way.

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Brodeur J.

Instead of stipulating that the Eddy Company would sell approximately 150 tons of paper and then adding within parentheses (being the whole of the purchaser's requirements) if the parties had put the latter words at first and stated that the Eddy Company would supply the whole quantity of paper required for the publication of the newspapers in question with the addition after that of the words "about 150 tons" it would not have altered the exact meaning of the agreement and of the extent of the obligation. It would have meant that the supply of all the paper required for the publication of these two papers should be made by the vendor.

It should not be forgotten also that this contract is on a printed form. The words in parentheses which the appellant seeks to be the ruling words of the agreement are printed and the words "150 tons" are typewritten.

Where there are formal and general words which are the usual terms used in a contract and there are other special and peculiar words, and the question is which are to have most weight, the terms that a man has thought of for himself and written into the contract, if they conflict and cannot be reconciled with the printed words, ought to have most weight. *Desrosiers* v. *Lamb* (1).

Besides, I cannot read this contract as meaning by its own expressions a right on the part of the purchaser to get from his vendor all the paper he required for his newspapers because he simply stipulated that 150 tons was all the purchaser's requirements, remaining free to purchase elsewhere if he wanted a larger quantity at a better price.

(1) M.L.R. 4 Q.B. 45.

As to the cross-appeal, I would dismiss it. The defendant company has no right under the contract to apply to the last year the surplus quantity which it delivered in the previous year. Each year stood by itself.

The appeal and the cross-appeal should be dismissed with costs.

MIGNAULT J.—This case should be dealt with on no higher basis than as involving the construction of quite a usual form of contract. It is noticeable that the contract says:

> This contract is to be read and interpreted as made at the Head Office of the company at the City of Hull.

Therefore the question of its construction falls to be determined in this case according to Quebec law, of which, although it was not proved as a fact before the courts below, this court is bound to take judicial notice: *Logan* v. *Lee* (1); *John Morrow Screw & Nut Co.* v. *Hankin* (2).

The portion of the contract in respect of which the dispute has arisen is the following:—

> 1. The Company agree to sell, and the purchasers to purchase. during the period commencing on the first day of January, A.D 1916, and ending on the thirty-first day of December, A.D. 1918, for use in the publication of "The British Whig" newspaper or newspapers published in the City of Kingston, Ont., one hundred and fifty (150) tons approximately of paper per year, or at that proportionate rate for any shorter broken period covered by this contract, (being the whole of the purchasers' requirements), on the following terms and conditions:—

Does this mean that the purchaser is entitled to a quantity of paper sufficient in each year to satisfy its requirements irrespective of the quantity mentioned, or does it signify that this quantity alone, whether or not it satisfies these requirements, is to be delivered under the contract?

(1) 39 Can. S.C.R. 311. (2) 58 Can. S.C.R. 74.

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THE BRITISH WHIG PUBLISHING CO. v. THE E. B. EDDY CO.

Mignault J.

This is the whole question to be decided, and in order to solve it the parties have made a diligent search in the books for similar cases and perhaps naturally, because the case was brought before the Ontario courts, they refer us to English or Canadian decisions exclusively. I think, however, that in a matter of this kind, where the only inquiry is as to the meaning of a contract, decided cases, unless they interpret an absolutely identical clause, are of very little assistance. In all such cases, the paramount rule is to give effect to the intention of the parties and as to this intention the language of the contract, and if it be ambiguous the course of dealing of the parties, are the best guides.

The Quebec Civil Code (Arts. 1013 *et seq.*) has laid down, for the interpretation of contracts, certain general rules which it will be useful to follow in this case.

Thus when a clause is susceptible of two meanings, it must be understood in that in which it may have some effect rather than in that in which it can produce none (Art. 1014).

All the clauses of a contract are interpreted the one by the other, giving to each the meaning derived from the entire Act (Art. 1018).

In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation (Art. 1019).

However general the terms may be in which a contract is expressed, they extend only to the things concerning which it appears that the parties intended to contract (Art. 1020).

Applying these rules, the obligation to sell paper was contracted by the respondent, so the clause in question, if it be of doubtful meaning, should be

construed in favour of the respondent. Care must be taken however to so interpret the contract that effect may be given to all its terms.

Such evidence as there is here is not of much assistance. The contract is on a printed form furnished by the respondent. The blanks were filled in by means of a typewriter Thus the words "one hundred and fifty (150)" are typed. The remainder of clause 1 is printed, including, of course, the parenthetical phrase. Before this contract the parties had entered into other similar contracts specifying also 150 tons, but notwithstanding this specification, the respondent, without objection, furnished quantities in excess of 150 tons per year. Similarly, during 1916 and 1917, the respondent, without objection, supplied paper as ordered and in excess of 150 tons. It is true that, in this action, it seeks to have this excess credited to 1918, but as to that it is clearly wrong. The whole difficulty comes from the fact that the price of paper rose sharply in 1918 and the respondent claimed that if it were bound to furnish up to the requirements of the appellant in that year it could only do so at a loss.

Prima facie I would say that the sale here is of a specified quantity of paper, to wit 150 tons "approximately," the latter word having the meaning of "more or less." The difficulty, however, is to give some effect to the words "being the whole of the purchaser's requirements." To say that the respondent contracted to sell paper to the extent of the appellant's requirements, whatever they might be, would deprive of any useful effect the specification of 150 tons. A more natural meaning can be given to the parenthetical phrase, without rendering this specification meaningless, by saying that it was a representation by the appellant that the whole of its requirements

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would be 150 tons approximately, and that is the way the contract reads. The respondent may conceivably have had good reasons for insisting that the specification of a quantity should be accompanied by a representation that the quantity specified was the whole of the purchaser's requirements. At all events, while we cannot disregard these words, if they can be given a natural meaning by taking them as a representation or estimate of the purchaser's requirements, I would not hesitate to do so, the more so that if I adopt the appellant's construction, I would deprive of any useful effect the specification of the quantity.

The course of dealing of the parties may of course be taken into consideration, if a contract be ambiguous, but it can be here explained by the fact that the price of paper had not appreciably varied at the time when the excess deliveries were made.

On the whole I have come to the conclusion not to disturb the judgment below and this involves dismissing both the main and the cross-appeal.

Appeal and cross-appeal dismissed with costs.

Solicitors for the appellant: *Cunningham & Smith.*

Solicitors for the respondent: *Powell, Snowdon & Bishop.*

BRITISH EMPIRE UNDERWRITERS AGENCY OF THE BRITISH AMERICA ASSURANCE COMPANY (DEFENDANT)..... APPELLANT;

1921

*Nov. 3, 4.
*Dec. 9.

AND

PAUL WAMPLER (PLAINTIFF)..... RESPONDENT.

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

Insurance—Automobile policy—Construction—Conveyance on ferry—Special risk.

A policy insuring an automobile provided that "this policy is extended to cover the insured" while on a "ferry or inland steamer" subject to the condition "while being transported in any conveyance by land or water—stranding, sinking, collision, burning or derailment of such conveyance, including the general average and salvage charges for which the insured is legally liable."

Held, reversing the judgment of the Appellate Division (48 Ont. L. R. 428) Davies C. J. and Idington J. dissenting, that the liability of the insurer only attached in the case of loss or injury from one of the specified causes, stranding, sinking, etc., and did not extend to the case where the automobile was damaged by falling into the water between the end of a ferry-boat and the wharf.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment on the trial (2), in favour of the appellant.

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

(1) 48 Ont. L.R. 428.

(2) 48 Ont. L.R. 13.

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The main question raised on this appeal is the construction of the condition of the policy set out in the head-note. The appellant claims that its liability was limited to loss from the causes specified in that condition. The respondent that there was a general liability including a liability in special cases. There is a subsidiary question as to the power of the adjuster sent to settle the loss to bind the company by directing that the automobile be repaired and the salvage expenses ascertained.

Heighington K.C. for the appellant.

Tilley K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—This is an appeal from the Appellate Division of the Supreme Court of Ontario reversing a judgment of the trial judge (who had dismissed the action) and holding that the plaintiff respondent was entitled to recover from the appellant herein $1,781.47 on his policy of insurance covering his automobile.

The judgment of the Appellate Division was delivered by Mr. Justice Masten speaking for the whole court.

The circumstances under which the loss was sustained are fully set out in the judgment of Mr. Justice Orde, the trial judge, and need not here be repeated.

The question to be determined in this appeal is whether the loss is or is not covered by the terms of the policy of insurance.

I may say that I agree generally with the reasons stated by Mr. Justice Masten for holding that this question should be answered in the affirmative.

This question must be determined under the opening words of the policy which are as follows:—

Automobile.

In consideration of twenty-eight and five cents dollars ($28.05) premium and the declaration of the insured, it is hereby understood and agreed that this policy is intended to cover the insured to an amount not exceeding seventeen hundred dollars ($1,700.00) on the body, machinery and equipment, while within the limits of the Dominion of Canada and the United States (exclusive of Alaska, the Hawaiian Islands and Porto Rico) including while in building, on road, on railroad car, or other conveyance, ferry or inland steamer, or coastwise steamer between ports within the said limits, subject to the conditions before mentioned and as follows:

(A) Fire, arising from any cause whatsoever and lightning.

(B) While being transported in any conveyance by land or water—stranding, sinking, collision, burning or derailment of such conveyance including the general average and salvage charges for which the insured is legally liable.

It appears to me that the answer to the question of defendant appellant's liability turns upon the proper construction of condition "(B)". Does this condition mean that defendant's liability, by the insertion after the dash (—) of the words "stranding, sinking, collision, burning or derailment of such conveyance," is strictly limited to damages caused by one or more of these specified facts of "stranding, etc.," or are they stated merely as examples of that liability? In other language do these words following the dash (—) mean including damages caused by "stranding, etc.," or must they be read as defining and limiting the company's liability to accidents arising from any of these facts.

I think these causes of possible damage explicitly enumerated are only given as examples of the company's liability, but do not exclude other causes, and that the fair and reasonable way of construing the clause is to read in after the dash (—) the word "including" or the words "such as," but not the words "but only in case of" or "or only if caused by" as contended by the company.

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At the very worst these words seem to be ambiguous and should therefore, in case of doubt as to their meaning, be construed against the company if capable of such construction.

For the reasons, therefore, stated by Mr. Justice Masten in delivering the unanimous judgment of the Appellate Division, and the additional reason above stated by me, I would dismiss the appeal with costs.

IDINGTON J. (dissenting).—This is an appeal from the unanimous judgment of the Appellate Division of the Supreme Court of Ontario reversing the judgment of the learned trial judge, and turns only upon the construction of an insurance policy issued by appellant to respondent covering risks of loss by the latter arising from his ownership of an automobile.

I agree with the reasoning of the said court of appeal unless in the minor suggestion therein that the contract prepared by the appellant is not ambiguous. I find it so ambiguous that we are entitled to construe it most strongly against appellant.

And if we do so there is ample ground for holding that if the company ever intended to limit its liability in the way contended for on its behalf its limitation thereof should have been so expressed as to take it clearly out of the risk its general terms had clearly expressed.

This it clearly did not do and therefore is bound by the general terms used.

It rather clearly intended to extend its liability to contribute to general average marine terms used.

The appellants' factum appeals to our general knowledge of such a subject. My limited share of such general knowledge clearly shews that such an ambiguously worded contract is not universal and that some other companies do not use such ambiguous language.

Indeed it looks rather like a trap for the unwary compared with what I know.

I conclude that the general comprehensive terms of the contract cover just such a loss as in question and that the pretended limitation does not effectively except the loss in question therefrom.

There is another ground of appeal claimed and that is from the exercise of discretion on the part of the courts below which clearly falls within those questions of practice and procedure with which this court has uniformly refused to interfere.

A point was taken by counsel for the respondent that the acts of the adjuster for appellant were such and so reasonably relied upon by respondent that appellant cannot now be heard to set up its present pretensions.

I am unable to take that view but the extent to which the adjuster, presumably well acquainted with his business and the facts he had to deal with, went shewed that those directing him certainly never imagined the policy was so limited and restricted as now contended for but acted upon the construction which has been upheld by the Appellate Division.

It is illuminating to find that the appellant never considered its contract otherwise than as the Appellate Division finds it.

It certainly is the view which any one presented with such a contract would take of his rights if acting thereon.

Beyond that I do not think the contention of respondent arising out of that incident is of any value.

I would dismiss the appeal with costs.

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Duff J.

DUFF J.—I find myself unable to accept the view of the court below as to the construction of this policy. I concur in the view of the trial judge and mainly for his reasons. There is not, I think, any satisfactory evidence of authority reposed in the adjuster to enter into a contract to pay and it appears to me to be more than doubtful whether the facts relied upon establish a contract even assuming such authority. As to the construction of the policy, with great respect to the court below, I confess I am unable to read sub-paragraph B otherwise than as describing the conditions out of which liability is to arise when the automobile is in course of transport "in any conveyance by land or water." These conditions include and are limited to "stranding, sinking, collision, burning or derailment" and it is undeniable that on this construction the respondent must fail. The word "extended" which was the subject of some discussion during the course of the argument is no doubt used in a not uncommon sense of the word "extend"—to "write out (in legal instruments) in proper form." Oxford Dict.

ANGLIN J.—For the reasons stated by Mr. Justice Orde in giving judgment dismissing this action after the trial I am of the opinion that the cause of loss sustained by the plaintiff was not within the risk covered by the insurance policy which he held with the defendant company. While the restriction upon the risk assumed during transit certainly might have been better expressed, it is stated in terms which I think admit of no doubt and seem sufficiently clear to preclude misunderstanding of its scope by an ordinary person taking insurance.

The form of policy is one intended for general use to cover risks of many different kinds. The nature and the extent of the risk under each individual policy is intended to be defined by an indorsement or indorsements attached to it. The policy on its face says so. The insurance is expressed to be

> as respects loss * * * covered by indorsement or indorsements attached hereto.

through

> fire, theft and transit * * * while in building, on road, or railroad car or other conveyance, ferry or inland steamer, subject * * * as follows:
>
> * * * * *
>
> (B) While being transported in any conveyance by land or water—stranding, sinking, collision, burning or derailment of such conveyance, including general average and salvage charges for which the insured is legally liable.

If every case of loss during transit was meant to be covered, the first phrase of (B), just quoted, would have been left unqualified. The only possible office of the words following the dash is to restrict this otherwise general risk by particularizing and defining what the insurer means shall be the limitation of its responsibility. I am, with great respect, unable to accept the construction put upon this clause in the Appellate Division.

In the absence of any proof that the insured was misled, or that he did not get precisely the insurance for which he bargained and paid, I can see no ground for extending the company's responsibility beyond the limits which the policy, in my opinion, evidences its intention to set.

Nor do I find anything in what the adjuster Marsh did that should estop the defendant from raising the defence that the plaintiff's loss was not covered

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Anglin J.

by his policy. In the absence of express authority enabling an employee such as Marsh was to commit the company to a liability not covered by its policy I cannot conceive that it is within the scope of his powers to do so. *Atlas Assurance Co.* v. *Brownell* (1); *Commercial Union Assurance Co.* v. *Margeson* (2). There is nothing to shew that any such authority was in fact given to Marsh. Nor does it appear that any action was taken by the company's directors or executive officers or by any general agent representing them after the circumstances of the loss were known at all inconsistent with their present defence. The policy expressly provides that no acts or proceedings of the company relating to appraisal or any examination shall operate as a waiver of any provision or condition of the policy. Marsh's duties as I view them, were confined to investigating and appraising the amount of the plaintiff's loss. The company when apprised of all the material circumstances appears promptly to have repudiated liability and advised the insured that it would be useless for him to put in proofs of loss.

I would allow the appeal with costs here and in the Appellate Division and would restore the judgment of the learned trial judge.

MIGNAULT J. concurs.

Appeal allowed with costs.

Solicitors for the appellant: *Symons, Heighington & Shaver.*

Solicitors for the respondent: *Kerr, McNevin & Kerr.*

(1) [1899] 29 Can. S.C.R. 537. (2) 29 Can. S.C.R. 601.

A. A. BARTHELMES (PLAINTIFF) . . APPELLANT;

AND

JOHN P. BICKELL AND OTHERS (DEFENDANTS) . . . . . RESPONDENTS.

1921
*Nov. 4.
*Dec. 9.

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

Broker—Speculation in foreign stocks—Adverse rate of exchange—Dealing in margins—Profit to customer—Right to exchange profit.

In the absence of any agreement to the contrary, or of a custom of the stock market of which he is, or is presumed to be, aware, the customer of a Canadian broker who buys and sells for him, through an agent in New York, United States stocks on margin is entitled to have his profits paid in American currency and so get the benefit of the adverse rate of exchange between the two countries.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment on the trial in favour of the appellant.

In Jan. 1918, the appellant employed Bickell & Co., Toronto brokers, to buy and sell stocks for him on margin. He dealt only in United States securities and carried on transactions for two years through the agents of Bickell & Co. in New York. At the end of that time he ceased operating and his account showed a balance in his favour of some $60,000 which he claimed should be paid in United States currency, the rate of exchange being then 17 per cent against Canada. The claim was refused and the balance was paid, his right to claim the further sum being reserved and he brought action for the amount.

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

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BARTHELMES v. BICKELL.

The Chief Justice.

Slaght K.C. for the appellant, referred to *Robertson* v. *Mollett* (1), at page 829.

Tilley K.C. for the respondent.

THE CHIEF JUSTICE—The question involved in this action is the right of the defendant firm of brokers carrying on business in Toronto, and in New York through their agents there, to discharge itself from liability to the plaintiff who had engaged the firm's services in the purchase and sale of stocks in New York by paying him, when their dealings ended, the balance due to him in Canadian funds without any allowance for exchange upon the admitted balance upon New York where the transactions all took place.

The dealings between the parties were those of principal and agent requiring full accounting and were not in any sense those of vendor and purchaser which might give rise to the presumption of local currency being contemplated by the parties in the discharge of the agent's accountability.

I cannot think, therefore, that it would be possible for the broker's company, in the absence of any special agreement permitting it to do so, to reserve to itself and to withold from its customer the plaintiff the premiums of exchange upon New York upon the admitted balance due such customer. The benefit of such exchange it seems to me legally belonged to the broker's principals and should not, on any principle I know of, be retained by the brokers or agents in addition to their ordinary charges.

The learned trial judge so found and awarded the plaintiff the sum of $10,103.35.

(1) [1874] L. R. 7 H. L. 802.

There is no dispute about the correctness of the amount allowed if the right of the plaintiff to be paid in the equivalent of American currency on the balance due him is correct.

The Appellate Division by a majority of three to two allowed the appeal and dismissed the action. The learned Chief Justice of Ontario with whom Maclaren J. concurred, seems to have based his judgment upon what he held to be "not an unfair inference" under the facts as proved, that the plaintiff, the now appellant, had acquiesced in foregoing his claim to exchange as to the transactions before July 1919, in consideration of his broker's promise to allow the premiums in regard to future transactions.

I am quite unable to draw or to accept any such inference or acquiescence, or that any such compromise ever was reached between the parties. The learned justice of appeal, Hodgins, who concurred in allowing the appeal and dismissing the action did so, however, upon an entirely distinct ground of an agreement or arrangement between the defendants and their New York agents, to which he assumed the plaintiff was a party and bound by, under which

> Canadian speculators might deal in New York market in stocks on margin under circumstances which would obviate the necessity of their remitting money between Toronto and New York or *vice versa*.
>
> * * * * *
>
> That method consisted in the maintaining by Miller and Co. of a deposit in the Standard Bank in Toronto consisting of a large amount of money. The results of the purchases and sale of stock in New York were communicated by Miller and Co. to the appellants, who were then authorized by Miller and Co. to draw for the benefit of their clients upon the funds in the Standard Bank, paying in this way their Canadian customers any profits that had been made in trade in New York. This also involved the advantage of enabling buying and selling to be done by clients in Toronto upon the credits of the appellants in New York and not upon their own individual credit, and also

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upon the basis of Canadian dollars, any losses being charged to the appellants. When this arrangement was made, apparently the difference in exchange was nil or trifling. It is said to have been 1 per cent when the respondent's transactions began.

I am quite unable to see how a private arrangement made between the Toronto brokers and the defendants and their New York agents, Miller & Co., can be invoked to prejudice the plaintiff in his dealings with the brokers in Toronto unless indeed there was proof of his knowledge of such an agreement and acquiescence in it. Of such proof, however, I found none and in its absence I cannot see how the private agreement between the Toronto brokers and their New York agents could affect plaintiff's rights in his dealings with his agents or brokers in Toronto.

I am in full accord with the dissenting judgments of Magee and Ferguson JJ. and for the reasons given by them which to me are perfectly satisfactory and convincing I would allow this appeal with costs here and in the Appellate Division and would restore the judgment of Middleton J., the trial judge.

IDINGTON J.—This appeal raises the question of whether or not a man employing a Toronto broker to operate for him in New York and make such investments there as the investor may from time to time direct to be made, is entitled to demand and receive in New York the net profits made therefrom less usual commission the broker is entitled to.

The learned trial judge, Mr. Justice Middleton, held that the appellant having been a very successful investor in that way was entitled to recover from the respondents, who were his brokers, acting through New York agents, his full measure of profits and to a

New York cheque therefor, if payment to be made by cheque, and could not be deprived of his exact measure of profits in New York where earned and held when the account was closed.

The respondents tried to substitute for the New York cheque or draft, to which the appellant was entitled, a cheque on a Canadian bank nominally for the same sum but leaving over ten thousand dollars of said profits in the hands of respondents' New York agents.

Respondents tried an appeal to the Appellate Division of the Supreme Court of Ontario and were successful in obtaining by a majority of three to two a reversal of the learned trial judge's judgment. Hence this appeal here.

I am so clearly of the opinion that the learned trial judge was, upon his finding of facts, right in his law that I fear to prolong the discussion lest I add to the confusion of thought.

Yet I may say that the appellant, a stranger at the time to the respondents, opened his operations by expressly directing an investment to be got in New York and giving a three thousand dollar cheque by way of security for the venture.

Because that cheque was on a Canadian bank, though not a word passed as to the rate of exchange or cost of cashing the cheque or its proceeds in New York, it is contended that the basis was in law thus laid for returning it, and the profits of many dealings with which it had only a remote connection, in depreciated Canadian paper currency and justifying the retention of ten thousand dollars of legitimate profits lying in the hands of respondents' New York agents.

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Idington J.

I cannot assent to any such proposition as being based on law.

I can conceive of such a system as the respondents and their New York agents adopted being the basis of a contract with clients when adopted by them, or any of them choosing to be bound by the operations of such terms of agency.

But any such exceptional system would not bind their clients unless clearly brought home to the minds of such as retained them, and their assent, either expressly or impliedly, got thereto.

So far from that being the case herein it is exceedingly doubtful from the evidence when this system was first adopted by the respondents, and clearly never had been brought home to the mind of appellant until July, 1919, when first set up to him.

As to the question of fact resting thereon I am bound by the judgment of the learned trial judge unless I can find some substantial fact entitling me to rest a dissenting conclusion upon, which I confess I cannot.

Indeed I am, after a perusal of the evidence of the witnesses for respondents thus brought in question, decidedly of the opinion that the learned trial judge correctly appreciated the value thereof.

But for that finding, and my concurrence therein, I might be bound to accept and act upon another appreciation of the facts so far as bearing upon the later transactions.

The result is that in my view of the facts throughout there never existed any basis for the pretensions of the respondents to appropriate the profits of the appellant, or any part thereof, to meet the risks incidental to the operation of its peculiar system.

It is stated in argument that many Toronto brokers acted upon the same system but proof thereof is very scant and, as a universal well-known custom of the market binding on all dealing therein, is very far from being proven.

And when we turn from the abstract to the concrete there is an illustration given in the offer through other agents to claim specific delivery in New York of the securities in question therein refused by the respondents and its agents which I assume was intended as a means of testing the actual contentions of the respondents.

That refusal was unjustifiable. Indeed it is attempted to be met by an explanation which may be correct that the refusal was the result of a mistake.

But if respondents' contentions be correct there was no need for such an explanation for it was part of its rights flowing from the contention set up, if well founded, that any return of New York profits must be answered only by a return of Canadian paper currency, nominally of the same number of dollars as held in New York agents' hands.

In line with such a mode of thought it is rather curious to find in respondents' factum reliance placed upon sub-section 3 of section 15 of the Currency Act, 9-10 Edw. VII., Canada, dealing with the coinage in circulation in Canada.

If this had been taken as the basis of what is in question instead of the depreciated paper currency we might have found something to rest upon for another view than I take.

If the depreciated nominal value of a dollar had been in fact the converse of what it is and very acutely so at the time in question in favour of Canada as

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Idington J.

against that in New York, I suspect the respondent would stoutly have resisted what it now contends for herein, as being most unjust and quite properly so.

In other words if the American dollar had been worth only seventeen per cent less than the Canadian in paper currency and the present appellant had demanded profits based on such a depreciated American dollar and demanded such Canadian dollars worth so much more, I fancy we would have heard a very justifiable outcry against such an unreasonable demand, even if the business had begun as this is said to have begun.

I think this appeal should be allowed and the judgment of the learned trial judge restored with costs here and below.

DUFF J.—*Prima facie* the appellant is entitled to call upon his agents, the respondents, to account for all profits arising through the employment of funds placed by him in their hands for the purpose of trading in shares on his account. This presumptive right of the appellant could only be displaced by proving either an agreement to the contrary or a custom governing the relations of the parties and modifying that presumptive right.

Express agreement to the contrary was negatived by the learned trial judge and that hypothesis may be discarded. The facts from which we are asked to infer such an agreement by conduct are, in my opinion, altogether too meagre to support that conclusion. As to custom I agree with Ferguson J. that a custom such as that relied upon as between brokers in Toronto and New York, assuming it proved, could not affect the appellant's right unless at least he had knowledge of it and this is not asserted.

ANGLIN J.—For the reasons assigned by the learned trial judge and by Magee and Ferguson JJ. A. in the Appellate Divisional Court I am, with respect, of the opinion that this appeal should be allowed and the judgment of Mr. Justice Middleton restored.

The relationship of the parties—that of broker and client—*prima facie* entitles the plaintiff to recover the moneys for which he sues. The broker cannot profit from his client's transactions beyond the usual brokerage commission unless he establishes some special agreement, express or implied, or some custom of the market on which he is employed to deal for the client, so well defined and established that the latter may properly be taken to have contracted subject to it, which entitles him to whatever additional gain he claims. The evidence in this record, in my opinion, does not establish anything of the kind.

The admitted balance of over $62,000 standing to the plaintiff's credit in February, 1920, when his account with the defendant was closed, was the outcome of transactions on the New York market in American stocks. The plaintiff's profits were all earned in New York and were received there by the defendants' correspondents in United States currency. No reason has been shown why he should not receive the full benefit of the moneys thus obtained on his behalf.

The evidence credited by the learned trial judge—and in my opinion the more credible—is that if Barthelmes wished at any time during the period of his dealings with the defendants to obtain delivery of shares in which he was "long" he would have been required to pay for them in United States funds. Why should he be denied the corresponding right of

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being paid on the same basis? The matter in issue has been so fully discussed however in the judgments in which I have already expressed my concurrence that I cannot usefully add to them.

The only circumstance in evidence that would seem to be at all inconsistent with the plaintiff's claim is that although he made his original deposit of $3,000 with the defendants in Canadian funds he was given credit for that entire amount in the first account rendered by them to him of the transactions carried on in his behalf on the New York market. The New York discount on Canadian funds at that time is said to have been one per cent. It is quite possible, however, that the defendants were willing to waive their right to debit the plaintiff with the amount of this comparatively small discount, $30.00, in order to secure his custom. Indeed I am not at all certain that at that time the difference in exchange was not generally ignored in business transactions in Canada. I do not find in this single circumstance—and there is nothing else in the evidence pointing in that direction—enough to warrant the defendants asserting a right to retain exchange amounting to 17 per cent on upwards of $62,000.00 profits made in New York on the plaintiff's account at a time when such exchange was certainly taken into account in other business transactions.

MIGNAULT J.—The appellant claims that he is entitled to be paid in United States money a substantial balance standing to his credit on certain purchases and sales of United States securities made for him on the New York Stock Exchange by the respondents who were his brokers in Toronto, and who, through their agents, Miller & Co., stock brokers and members

of the New York Stock Exchange, purchased and sold these securities on behalf of the appellant. When the account, which had lasted some two years, was closed on February 7th, 1920, the balance to the appellant's credit was $62,445.62. The appellant contended that this sum being really United States money, he was entitled to the value of the exchange which was then 17 per cent. The respondents paid him this $62,445.62 in Canadian money under reserve of his right to claim the value of the exchange. This action was taken to recover this exchange, and the learned trial judge, Middleton J., gave the appellant judgment for $10,105.73, deducting from the appellant's balance the sum of $3,000.00 which he had paid in Canadian money as a margin when he opened his account in January, 1918. In the Appellate Division this judgment was reversed by Meredith C. J. O., and Maclaren and Hodgins JJ., and the appellant's action was dismissed, Magee and Ferguson JJ. dissenting. From the latter judgment the appellant appeals.

The main facts of the case were thus stated by the learned trial judge:—

> The defendants are brokers carrying on business at Toronto. In January, 1918, the plaintiff began trading with them as his brokers, in the purchase and sale of stock, the transactions being almost entirely on the New York Stock Exchange. At this time he deposited with the defendants, as security by way of margin, the sum of $3,000 Canadian currency. The trading continued until February, 1920, when the account was closed by the payment of the amount admitted to be due by the brokers and the handing over of a few shares, the only stock purchased then remaining unrealized, reserving to the plaintiff the right to put forward this claim for exchange.
>
> During this period many transactions had taken place, and the course of dealing had generally been profitable to Barthelmes, although on individual transactions he had made a loss. His $3,000 had grown to approximately $60,000.
>
> The way in which the business was carried on by Bickell & Co. was that they had an arrangement with Miller and Company, of New York, to purchase and sell for them upon their instructions An

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account was kept with the Standard Bank at Toronto, and when Bickell desired to make a purchase, a deposit was made to the credit of this account. On a sale being made, Miller would instruct the transfer to Bickell's credit of any balance that might be payable. No money was sent to New York for the individual purchases, and no money was sent from New York for individual sales, and it was arranged that exchange should not be payable as between Miller and Bickell with respect to any of their transactions. The amount involved would not be great because, while the volume of trade would no doubt be very large, the balance ultimately payable either by Miller to Bickell or *vice versa* would be comparatively small. The effect of this arrangement, however, was that the profit which might be made by one customer in respect to his individual trading would be set off against the loss payable by another, and the result would be that an arrangement, perfectly fair as between Miller and Bickell, might be exceedingly unfair as between the Toronto brokers and an individual customer. If the individual customer lost on the transaction so that money would have to be sent to New York, I can see no reason why that customer should not be called upon to pay the exchange incident to the remitting of funds to New York to pay his loss. On the other hand, if a customer made on a transaction, I can see no reason why he should not receive the New York funds, with the incidental advantage by reason of the depreciation of Canadian currency.

In my opinion the arrangements between the respondents and Miller & Co., which were entered into for their mutual convenience, are without effect on any rights which the appellant may have against the respondents. The evidence is that the respondents transmitted by wire the appellant's orders to Miller & Co. in New York, where they were attended to by the latter. But these orders were not ear-marked, so to say, no mention being made of any particular client, but they were sent on with others, and no doubt Miller & Co., in dealing with gains and losses, off-set the one against the other, any settlement with the respondents being of the difference one way or another in the day's trading. It is evident that with the large volume of transactions between the two firms, and the settlement of differences which of course varied from the credit to the debit side, the question of exchange was not important. No doubt also the

respondents required fresh margins from unsuccessful customers, but naturally did not demand any margin outside of the original one from those who, like the appellant, were fortunate in their speculations. If the transactions in question were real ones they were merged into a large number of other transactions, the respondents of course keeping track of those effected by each of their customers. Miller & Co. made the purchases and sales on the stock market in New York and used the stock certificates, all the purchases being on margin, to finance the transactions with their bankers.

No special bargain was entered into between these parties when the account was opened, and the appellant, when he made the first purchase of one hundred shares of United States Steel, paid the respondent $3,000.00 in Canadian money as margin. In July, 1919, there was some conversation between the appellant and Mr. Cashman, one of the respondents, the appellant claiming that he was entitled to the value of the exchange, which Mr. Cashman disputed, but apparently he offered to allow exchange on future transactions, if the account was closed and a new one opened, and if the appellant accepted his then balance, some $40,000.00, in Canadian funds, which he refused to do. The learned trial judge found that this conversation was followed by a continuance of trading without any change in the rights of the parties, the delay being a mere truce and not an abandoning of any right.

The evidence would have been much more complete and satisfactory if the testimony of the member of the firm of Miller & Co., with whom the respondents dealt had been obtained. As the record stands, the different transactions entered into and which involve a very large amount, are shewn by the monthly statements, seventeen in number, which were produced at the trial.

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When the account opened, New York exchange was only 1 per cent. On December 1st, 1919, it was 4¾ per cent and it rapidly increased so that, when the account was closed, it stood at 17 per cent. By reason of this rapid rise, the arrangement between the respondents and Miller & Co. was cancelled early in January, 1920, and subsequently exchange was exacted on money sent to New York. Whether or not the appellant was aware of this new arrangement is one of the facts in dispute.

Generally, the course of dealing between the appellant and the respondents, as demonstrated by the monthly statements, shewed an apparent adverse balance against the former. But inasmuch as the appellant was "long" as to a considerable amount of securities which stood to his credit in the respondents' or their New York agents' hands, but on which a margin only had been paid, the sale of these securities at the market price then prevailing would change this adverse balance into a substantial profit. Or the appellant could, if he preferred, say at the end of any month, pay the balance due on the purchase price of these securities—that is to say the adverse balance mentioned in the monthly statement—and demand delivery of the stock certificates. Whether he would be required to pay this adverse balance in Canadian or United States funds is a point on which Mr. Cashman made two diametrically opposed statements. The learned trial judge preferred Mr. Cashman's first answer to the plain question put to him, that the payment of the balance of the purchase price would have to be made in New York funds. It is hard to believe that any sane broker would have accepted Canadian money at par to be sent to New York. If he had done so, he would have been obliged

to make up himself the amount of exchange, for obviously New York money would have to be provided. What had already been paid, to wit the margin furnished, came out of moneys which the appellant had to his credit in New York, for otherwise he would have been called upon to supply the necessary margin, which never happened after he had furnished the initial margin of $3,000.00.

It is not necessary to examine the monthly statements in detail, and it will suffice to consider the two last ones. Looking at the statement for December, 1919, it begins by an apparent adverse balance carried over from November of $168,330.94, which, with a charge of $932.86 for interest, made the debit amount on December 31st, $169,263.80. On the credit side is the sum of $60,367.50, sale price of five hundred shares of U. S. Rubber at 121, so that the apparent net adverse balance for the month was $108,896.30. However, the appellant was "long" on 1,200 shares of rubber, 100 shares of U. S. Steel, and the amount of $250.00 in liberty bonds. Of course, the apparent adverse balance would be more than wiped out by the sale of these securities as shewn by the statement for January, when they were all sold with the exception of the liberty bonds. Or, if the appellant had desired, on December 31st, to take delivery of these securities, the balance payable in New York, in New York funds, I take it, would be the above adverse balance of $108,896.30.

Examining now the statement for January, 1920, we find the appellant charged with the purchase of 100 shares of rubber at 125 and 100 shares of the same stock at 124, to wit $12,530.00 and $12,422.50. These sums, with the adverse balance of $108,896.30 from

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December, make the total sum of $133,848.80 on the debit side. During January the appellant sold 1,400 shares of rubber and 100 shares of steel, the sale price of which, with a dividend of $125.00 on his steel stock, netted him the total sum of $200,997.50, so that, after wiping out the amount standing to his debit, the appellant had a balance in his favour of $67,148.70, and was "long" with $250.00 in liberty bonds.

The appellant closed his account on February 7th, 1920. He had purchased, on February 3rd, 400 shares of steel and 100 shares of rubber. These he sold, on February 6th, at a loss, so that, as he was charged a New York premium of $623.08 on $3,748.00, his net loss, there was, on the debit side, $54,893.08, and, on the credit side, with $72.50 for adjustments for September, the sum of $117,338.70, leaving a balance in his favour of $62,445.62, which the respondents paid him in Canadian funds, under reserve of his right to claim the premium on New York funds if he was legally entitled to it.

Now it appears by all the monthly statements that the appellant never took delivery of any of the stocks said to have been actually purchased for him (he asserts that at the end he was refused delivery), but settled on the basis of the difference between the purchase and sale prices, being fortunate enough to realize a very handsome profit.

If we could take the appellant as being a speculator on an expected rise of the market after the purchases said to have been actually made for him, but of which he had no serious intention of taking delivery, his profit or loss being the difference between the purchase and sale prices, inasmuch as his speculation was made in Toronto, although the respondents say it was carried out in New York by actual purchases and sales, it

seemed to me on my first consideration of the case that, as it is not shewn that the respondents made any profit on the exchange—which profit they of course could not keep—their only obligation was to pay the appellant the ultimate difference in his favour in Canadian money.

My difficulty, however, on further consideration, is that although, like the learned trial judge, I have very serious doubts whether any real purchases and sales were made, still I must decide this case on the basis that it is common ground with both parties, who no doubt wished to bring themselves within the rule laid down in *Forget* v. *Ostigny* (1), that all these transactions were actually carried out by the respondents, and their agents, Miller & Co., on the New York market. After the initial advance of $3,000.00 in Canadian money, all the purchases were financed in New York by means of moneys standing to the appellant's credit in New York, so that the amount charged as paid on account of the purchases was paid in New York funds, notwithstanding the respondents' assertion that Miller & Co. were credited with it in their bank account in Toronto. The final balance due to the appellant when he closed his account was a balance remaining to his credit in New York where the sale price of his stocks was paid, and not in Toronto. This being the case, the appellant is entitled to this balance in New York funds, just as he would have received New York money, and exactly the same amount of it, had he taken delivery of these stocks in New York, after paying in New York funds what was necessary to complete their

(1) [1895] A. C. 318.

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purchase, and had then sold them in New York on the dates when they were sold for him on the instructions of the respondents. And if it is true, as asserted by the respondents, that Miller & Co. received in Toronto and in Canadian money the margin paid on account of stocks bought for the respondent's clients—but the facts here shew that they must have used moneys standing to the appellant's credit in New York to make purchases for the latter—they would profit to an easily calculable extent by the exchange, if they could pay in Canadian money what they had received in New York funds for the sale of the appellant's securities.

As a consequence I have come to the conclusion that, on the state of facts admitted and indeed asserted by the respondents, the appellant is right in contending that the balance due to him should be paid in New York funds. I would therefore allow the appeal with costs here and in the Appellate Division, and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitors for the appellant: *Barton & Henderson.*

Solicitors for the respondents: *Tilley, Johnston, Thomson & Parmenter.*

THE MONTREAL TRUST COMPANY (PLAINTIFF)..... APPELLANT;

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*Nov. 2, 3.
*Dec. 9.

AND

JAMES RICHARDSON, EXECUTOR OF GEORGE T. RICHARDSON DECEASED (DEFENDANT)..... RESPONDENT.

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

Contract—Subscription for stock—"Underwriting"—Assignment of subscription agreement—Rights of assignee.

In a letter sent to R. requesting him to take stock in a newly formed company and enclosing a form of subscription the writer, who not long after became president of the company, stated that M. & Co., financial agents, had undertaken to sell $150,000 worth of the stock. R. signed the form thereby agreeing to purchase from M. & Co. 100 shares and that "this underwriting may be pledged or hypothecated with any banking institution as security for advances." He never paid for the stock which eventually was pledged by M. and Co. with the appellant as security for advances. In an action by appellant to recover the price of the 100 shares:—

Held, affirming the judgment of the Appellate Division (48 Ont. L. R. 61) which reversed that rendered at the trial (46 Ont. L.R. 598) that R.'s contract was an underwriting of the undertaking of M. & Co. and a purchase of stock only if the latter failed to dispose of the whole 1,500 shares; as these were all sold the obligation of R. no longer existed.

Held, also, that the contract signed by R. was, *ex facie*, such as to put the appellant on inquiry; the contract was not negotiable and the agreement that it could be pledged or hypothecated could not give the assignee any rights higher than those of its assignor.

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

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APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment on the trial (2), in favour of the appellant. The point in issue on the appeal is whether or not the respondent Richardson was a subscriber for shares in a newly formed company, The Canadian Jewellers, Ltd., unconditionally and without limitation. The material facts are sufficiently stated in the head-note.

Hellmuth K.C. and *Chipman K.C.* for the appellant. The provision in the contract that it could be pledged or hypothecated intimated to the appellant that it could safely be accepted as security and estopped respondent from alleging that the writing did not contain the whole agreement. *Carlill* v. *Carbolic Smoke Ball Co.* (3).

It was assigned without being subject to the equities between Richardson and Mackay & Co. *In re Agra and Masterman's Bank* (4).

Tilley K.C. and *Cunningham K.C.* for the respondent, referred to *Re Schwabacher* (5); *Hutchinson* v. *London and Provincial Exchange* (6).

THE CHIEF JUSTICE.—I am, after much consideration, of the opinion that the document or agreement on which the action is based was not an absolute and unconditional agreement to purchase and pay for the one hundred shares subscribed for by Richardson but was an underwriting or a conditional agreement to do so if the $150,000 worth of the shares of Canadian Jewellers, Limited, which Mackay & Co.,

(1) 48 Ont. L.R. 61.
(2) 46 Ont. L. R. 598.
(3) [1893] 1 Q. B. 256.
(4) [1867] 2 Ch. App. 391.
(5) [1908] 98 L. T. 127.
(6) [1910] 45 L. J. 238.

Ltd., had subscribed for and were about to put on the market were not taken up by the public, and only to the extent that they were not so taken up.

The contentions of the appellant Trust Company with which the agreement or underwriting was pledged or hypothecated by Mackay & Co., Ltd., for advances made, were that it was not limited to the $150,000 worth of the stock of Canadian Jewellers, Ltd., which Mackay & Co. had subscribed for and were putting on the market, and further that even if defendant respondent's contention as to the limited construction of the agreement was correct, and it was so limited, they as pledgees or hypothecatees nevertheless are entitled to recover because they had no notice or knowledge of the conditional nature of the agreement which contained the express provision that the

> underwriting may be pledged or hypothecated with any banking institution as security for advances.

I am of the opinion that the Trust Company appellants may fairly be said to come within the phrase "Banking Institution" in the underwriting agreement mentioned.

I am also of the opinion that the document was merely an underwriting. It is on its face expressly called so and the Trust Company must be taken, when making advances upon it when it was pledged with them, to have so understood it. The duty of inquiring and finding out what extent and what amount of shares the "underwriting" covered devolved upon them. If they had discharged that duty they must have learned that the underwriting agreement was a conditional one binding upon Richardson only to the extent that Mackay & Company's subscription to the shares of Canadian Jewellers, Ltd., which they were offering to the public for sale, were not taken up by the public.

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The letter which Timmis, the co-promoter with Mackay & Company, of the Canadian Jewellers, Ltd., sent to Richardson, a letter enclosing the "underwriting form" to be signed by him in case he decided to take any shares, expressly stated that $150,000 worth of stock was the amount which MacKay & Co. had "undertaken to sell to their clients." The appellant Trust Company would have learned by further prosecuting their inquiries that the underwriting had reference to and only covered that amount of stock. They would thus have found the limited nature of the underwriting and have only themselves to blame if they, neglecting their duty, failed to make the inquiries which they should have made.

It appears by the evidence that Mackay & Co. had sold to the public the full amount of their undertaking of $150,000 and that Richardson's obligation under his indemnity was at an end.

On the whole I am of the opinion that the appeal should be dismissed with costs.

IDINGTON J—The Canadian Jewellers, Limited, was incorporated by letters patent dated the 11th August, 1911, according to a minute of the first meeting of the provisional directors, on 30th of said month of August, under and by virtue of the Companies Act, c. 79 of R. S. C. 1906.

There would seem to have been only five subscribers, each subscribing for a single share, and they were declared provisional directors who met as such on said 30th August and elected themselves directors, and passed by-laws of which No. 18 provided as follows:—

25,000 shares of the unsubscribed and unissued capital stock of the Company, of the par value of $100 each share, are hereby created and shall be issued as preference shares having priority both as to capital and as to dividends over the ordinary shares, which dividends shall be at the rate of 7 per cent per annum, and shall be cumulative.

It was moved by Mr. O'Brien, seconded by Mr. Gilmor and resolved: That the Montreal Trust Company be and is hereby appointed transfer agent of the shares of the company for such considerations and upon such terms and conditions as may be arranged by the president of the company; and that the president and secretary of the company be and they are hereby authorized to sign and execute in the name of the company the necessary agreement with the said trust company.

This helps to shew the business relation of the appellant to said company and is suggestive that the appellant probably had a better chance than deceased Richardson of knowing a good deal he should have been told and thus it was put on the inquiry.

One Timmis and the firm of J. A. Mackay & Co. both being brokers in Montreal which was to be the business home of said new company, had an agreement between them whereby they undertook the promotion of the company and sales of its stock and to divide the profits between them on a stated basis. Each took a large part of the stock—Timmis to the amount of $100,000.00 and J. A. Mackay & Co. to the amount of $150,000.00 intending, of course, to resell same to the public.

The scheme promoted was the merger of certain named companies engaged in the jewellery business and the business of others likewise so engaged.

Timmis wrote the late George T. Richardson as follows:—

Montreal, 8th Sept. 1911.

George T. Richardson, Esq.,

Messrs. James Richardson & Sons, Ltd., Kingston.

Dear Mr. Richardson:—I enclose herewith an outline of the Canadian Jewellers, Limited, an amalgamation which has been originated by myself, and which is being financed by J. A. Mackay & Co., Ltd., financial agents of this city. I also enclose an underwriting form. Mr. J. W. McConnell, Mr. R. J. Dale and Mr. James Playfair have taken $15,000 each. The money which we will receive from the sale of surplus merchandise when the different factories have been concentrated, with the $150,000 of stock which Messrs. Mackay & Co. have

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undertaken to sell to their clients, will give the new concern ample cash capital, so that it is exceedingly improbable that any payment whatever will ever be called on the underwriting. The underwriters will get 50 per cent of common stock as compensation for their underwriting services. It was my intention to have offered this to Mr. H. W. Richardson, but as he is now in the west, I am submitting it to you. We do not desire to have names for less than $10,000 or more than $15,000. I shall be very glad indeed to have you in on it if you care to come, but feel perfectly free to decline if it is not entirely acceptable to you. I only wish to give you the same opportunity as my other "Missisquoi" friends.

With kind regards, yours faithfully.

(Sgd.) Henry Timmis.

The outline enclosed, so referred to, set forth in the first part thereof, as follows:—

Canadian Jewellers, Limited.

To be incorporated under the Companies Act of the Dominion of Canada.

Capital.....$5,000,000.00
Consisting of: 25,000 shares of seven per cent (7 per cent) Cumulative Stock, and 25,000 shares of Common Stock

The Company is being organized for the purpose of acquiring, coordinating and extending the business at present carried on by a number of the leading and most successful wholesale manufacturing and import jewellery houses of Montreal, Toronto and elsewhere, among others being:

William Bramley,
The Hemming Mfg. Company,
The Hemsley Mfg. Company,
J. E. Brown & Company,
Caron Bros. and others.

These concerns have gross assets approximating one million of dollars, all of which has been practically acquired from the profits of the respective businesses.

It then proceeded to set forth the rosy future to be expected from such an amalgamation.

The late Mr. Richardson replied by letter of the 12th Sept., 1911, enclosing the underwriting agreement asked for which is said to have been identical in all its terms save the date of payment with the following:—

Subscription for Stock.

Canadian Jewellers, Limited.

Authorized Capital:	To be issued:
Preferred shares.....$2,500,000	$600,000
Common shares.....$2,500,000	$450,000 Approx.

All shares of the par value of $100 each.

We, the undersigned, severally subscribe for and agree to purchase from J. A. Mackay & Co., Limited, preferred shares of the above company to the number and amounts set opposite our respective names. The price to be paid for said shares is 95 per cent of the par value thereof with 50 per cent of the par value thereof in bonus common stock of the company. The purchase price to be paid on the 15th day of January, 1913.

This underwriting may be pledged or hypothecated with any banking institution as security for advances.

This agreement may be signed in counterpart, and all counterparts taken together shall be deemed to be one original instrument.

Name of subscriber.	Address.	No. of shares subscribed.	Total amount of subscription.
G. T. Richardson,	Kingston, Ont.	100.	$10,000.

Witness A. W. Brown.

This is called a renewal of the original and substitutes 25th January, 1913, for the date of payment therein which was 15th September, 1912.

On the 30th October, 1914, by an agreement in writing between the appellant and the said J. A. Mackay & Company, Limited, the latter acknowledged an indebtedness to the former of $138,141.15 and interest at 7 per cent from 1st October, 1914, payable monthly and then assigns as follows:—

2. As collateral security for the payment of the said indebtedness and any interest which may accrue thereon the borrower hereby acknowledges to have assigned, transferred and made over to the lender all its right, title, claim and interest in and to the subscription made by G. Richardson, of Kingston, Ontario, for one hundred (100) shares of the preferred capital stock of Canadian Jewellers, Limited, at a price of ninety-five per cent (95%) of the par value thereof, with fifty per cent (50%) of the par value of such subscription in bonus common stock of the company, the purchase price of which stock was to be paid on the fifteenth day of January, one thousand nine hundred and thirteen (1913), as more fully appears from the copy of the said subscription hereto annexed to form part of these presents.

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Then followed an acknowledgement by appellant of the borrower having theretofore delivered to it stock certificates of the Canadian Jewellers to be delivered to the subscriber at the time of payment of the said subscription.

The appellant never tendered such certificates of stock to said Richardson who had enlisted in one of the first Canadian Expeditionary Forces and gone to Valcartier, and thence overseas to France where he was killed in the late war in 1916.

Indeed any correspondence, on the subject of what is in question herein, had with him before his departure was either with Timmis or Mackay or latter's firm.

The appellant claims to have sent the late Mr. Richardson at Kingston something in the end of December, 1914, but no proof given of his having got it or heard of it and the appellant must have known he was not there.

Prior to bringing this action there was a demand made on the executor of deceased's estate in Winnipeg for payment. This action is brought against said executor to recover the sum of $9,500.00 with interest thereon at 7 per cent and is founded upon the foregoing subscription, not, it is to be observed, to take stock in the company, but to buy from J. A. Mackay & Company shares thereof held by them.

The court appealed from held, and I think rightly, having regard to all the surrounding facts and circumstances which must be considered to interpret and construe what is a most ambiguously worded contract, that the condition of his so contracting had been fulfilled by the sale of stock to the public by Mackay.

Indeed, the whole of the contract as finally developed and executed is not before us but only one part which, if justice is to be done, should have been supplemented by whatever is included in the cryptic term at the end thereof, as follows:—

> This agreement may be signed in counterpart and all counterparts taken together shall be deemed to be one original instrument.

What does that mean? Where are these counterparts? How much has been realized from them by J. A. Mackay & Co. or the appellant?

Preceding that we have the following:—

> This underwriting may be pledged or hypothecated with any banking institution as security for advances.

What is meant by "this underwriting?"

I find assistance in the case of *In re Licensed Victuallers' Mutual Trading Association; Ex parte Audain* (1), at page 7. Such an able court as there seized of that case and such an authoritative expert, if I may be permitted the term, as Lindley L. J., relative to the branch of the law in question, found it necessary to bring in evidence to help to the meaning of the term "underwriter."

I think that example might well have been followed by those conducting this case instead of leaving us to guess which of the variety of meanings the term may have is to be applied in the peculiar connection in which it was used herein.

Let us never forget this is not the common case of an issue of stock by a company in which men calling themselves for the moment underwriters do in fact undertake the management of the floating on the market a particular issue of stock or debentures by a company desiring their services.

(1) [1889] 42 Ch. D. 1.

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It seems to have been in regard to what is herein in question a device copied therefrom by two men who owned a certain amount of stock in a company.

Indeed the term as used herein has given rise to several different interpretations according to the side counsel happened to be on and even these not always consistently adhered to.

I think I have said enough to shew in what sense I think this contract is most ambiguous and why the surrounding facts and circumstances must be looked at.

And I repeat that when so looked at and considered it was not a flotation of the entire preferred stock issued and offered by the company, but that held by J. A. Mackay & Co., and so issued and offered.

Clearly they disposed of more than they then had or offered and the obligation arising from signing such a counterpart as this now in question ended.

There is, however, another and graver point raised and that is the charge that the contract was induced by fraud or by unjustifiable misrepresentation of fact.

The learned trial judge found expressly that there was fraud so inducing the contract and going to the very root of the matter as would have rendered it void in the hands of J. A. Mackay & Co.

He did not give effect thereto for the reasons he gave, resting upon the decision of the case of *In re Agra and Masterman's Bank* (1), to which I will presently refer.

The learned trial judge's statement of fact upon which he rested his finding is challenged in appellant's factum before us.

(1) 2 Ch. App. 391.

The statement the learned trial judge made is verified by the evidence given in answer to the questions 75 to 85 referred to by him.

The full import thereof did not in his view of the law call for an expanded argument and we are not to take his reference as more than an indication of much else.

The actual facts are that of the five companies set forth in the outline above quoted from, one known as the Caron Company, never had agreed as represented to come into the merger, and of the four others one was in the hands of a receiver.

And the company was induced, by means I need not enlarge upon, to accept the representation of Timmis and, in September, almost concurrently with the signing by the late Mr. Richardson of the first subscription by him now in question, to take over some of these others from Timmis at such a gross over estimate of the value of their assets that later on, under threat of a lawsuit, he was induced to reduce their valuation to an aggregate of less than one-third of that he had induced the company to agree to.

His representations to the late Mr. Richardson were not, however, revised but, on the contrary, long after he had been so compelled by the company to accept that reduction, he continued in his correspondence with him, in answering his inquiries, to maintain the rosy side of things instead of telling him the truth.

Mackay was appealed to and responded in like fashion.

If he had told Richardson the actual facts of the disastrous change I venture to think he never would have got the renewal subscription now sued upon.

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Either Timmis knew that the representations he was making to Richardson were false, or he made them recklessly not caring whether true or false, and thus the contract was founded on fraud, and null.

Or there may have been in law an alternative view of possibly mere misrepresentation which entitled Richardson, on its coming to his knowledge, to repudiate the contract.

I am of the opinion that in law the appellant has no higher right than J. A. Mackay & Co., with whom the contract was made. And I have no doubt that the learned trial judge, while having ample ground in the evidence that was before him in the whole case, and not confined to one or more sentences thereof, to say and hold that the contract had been induced by fraud, erred in holding that the *Agra Case* (1), above cited, prevented his applying the facts as against appellant.

That case seems to me quite distinguishable. It proceeded on a promise, as in principle the court found, to honour drafts provided for in a letter of credit there in question.

Here there is nothing but a contract, non-assignable in law, to buy from J. A. Mackay & Co. a number of shares. And there is added thereto a consent to its being used in a specified manner without any promise express or implied that there was or could not be anything vitiating it.

Moreover there was nothing involved in the *Agra Case* (1), but the liability to answer for a recognized breach of contract to the creditors of the bank in liquidation, no charge of fraud or the like being involved.

(1) 2 Ch. App. 391.

I have looked at all the cases cited in appellant's factum and fail to find in any of them anything to support appellant's contention on this point.

Indeed most of them relate to transfers of negotiable bonds or debentures. One other case cited seems to rest upon estoppel which does not help here.

The point taken by the respondent that the appellant is not a banking institution within the meaning of the term as used in this contract is, I think, well founded.

In view of section 156 of the Bank Act, R.S.C. 1906, c. 29, prohibiting appellant from calling itself a banking institution, I prefer that to the Century Dictionary as my guide to the meaning of such a term when used in such a document as in question herein.

Indeed the objection seems fatal to the right asserted by appellant that it has any higher title than J. A. Mackay & Co. would have if suing.

And the case of *Crouch* v. *The Crédit Foncier of England* (1), is much more in point than any of the bond and debenture cases cited by appellant, for it shews how little may take away from these usually negotiable instruments the quality of negotiability.

In quitting this branch of the case I may say I have endeavoured to find something on the curious question of what exact meaning may be attached to the words "this underwriting" but found nothing more instructive than the *Ex parte Audain Case* (2) cited above.

And I presume industrious counsel on either side citing so many decisions have failed also or we should have had some results worth while.

I, for the foregoing reasons, have come to the conclusion that this appeal should be dismissed with costs.

(1) [1873] L.R. 8 Q.B. 374. (2) 42 Ch. D. 1.

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DUFF J.—The agreement sued upon is an underwriting agreement. This is sufficiently clear from the form of the document. It is true that there is an undertaking to accept and pay for shares but the undertaking is declared in explicit terms to be of the nature of an underwriting. In essence, therefore, the obligation is an obligation to indemnify J. A. Mackay & Co. against failure to dispose of the underwritten shares. In any action to enforce this undertaking the onus is of course on the plaintiff to shew that the circumstances have arisen making absolute the conditional obligation to accept the shares and pay for them and this proof is lacking.

Mr. Hellmuth's principal contention was that the clause

> this undertaking may be pledged or hypothecated with any banking institution as security for advances

constituted an authority to the lender to make advances as upon the security of an absolute obligation to pay. I cannot find any evidence of such authority in this document; on the contrary the obligation upon which the lender is invited to advance is described in express words as "this underwriting."

Mr. Hellmuth relies upon the judgment of Lord Cairns in *In re Agra and Masterman's Bank* (1), at pp. 396 and 397. The substance of Lord Cairns' judgment in this case, in so far as now pertinent, is that the letter there in question was an invitation to bankers to advance money upon the faith of a promise contained in that letter to accept bills drawn upon the writers of it and that this virtually constituted an undertaking to pay such bills irrespective of the equities between the writers and the persons to whom the letter was

(1) 2 Ch. App. 391.

addressed *propriis nominibus*. The letter contained an unqualified promise to honour the drafts of the addressees and was expressed in terms plainly constituting an invitation to third persons to negotiate such drafts in reliance upon that promise. The letter was either a promise to pay such drafts in disregard of equities or it was a mere trap, which of course the writers of it could not be allowed to aver. I find at most only a superficial resemblance between that letter and the document now under consideration. Here there is no unqualified undertaking and indeed no undertaking of any description by the subscribers to repay advances made upon a pledge or hypothecation of the agreement.

The appeal should be dismissed with costs.

ANGLIN J.—After giving to all the circumstances of this case most careful consideration I have reached the conclusion that the plaintiff's appeal should not succeed.

I have no doubt that the Trust Company took the obligation of the late G. T. Richardson subject to whatever equities and conditions affected it in the hands of J. A. Mackay & Co., of which its *ex facie* designation as an "underwriting" in my opinion gave them constructive notice. I cannot accept the view that the mere statement that the non-negotiable document signed by Richardson might be pledged or hypothecated as security for advances enables the assignee of it to assert rights higher than those held by its assignor.

I think it is also reasonably clear that the liability assumed by Richardson towards J. A. Mackay & Co. was not absolute but conditional and in the nature of

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an underwriting. I am not so well satisfied however as to the terms of the condition on the happening of which Richardson's liability on the document sued upon was intended to cease. In view of the facts that this document is an underwriting of J. A. Mackay & Co. and that Mackay himself tells us that "the amount to be underwritten (by his firm) was to be $150,000," I am not convinced that the conclusion of the learned Chief Justice of Ontario that Richardson

> was to pay only in the event of the $150,000 (to be underwritten by J. A. Mackay & Co.) not being taken up by the public.

is wrong. The evidence taken as a whole leaves little room for doubt that J. A. Mackay & Co. did in fact dispose to the public of more than the original $150,000 worth of preferred stock for which they undertook to obtain purchasers. Therefore, while not entirely satisfied that the condition of the underwriting sued upon was what the Appellate Divisional Court has found it to be, since the evidence, oral and documentary, does not enable me to say that it was something different and was unfulfilled, a reversal of the judgment *a quo* would not, in my opinion, be justified.

MIGNAULT J.—The document on which the appellant's action is based is an undertaking signed by the late George T. Richardson, represented by the respondent, his executor, to subscribe for and purchase from J. A. Mackay & Co., one hundred preferred shares of Canadian Jewellers, Limited, at the price of 95 per cent of the par value thereof, with 50 per cent of the par value thereof in bonus common stock of the company, the purchase price to be paid on the 15th day of January, 1913. This undertaking replaced a former one not produced, but said to have been similar in tenor and states:—

This underwriting may be pledged or hypothecated with any banking institution as security for advances.

It is very important to observe that this document is not a negotiable instrument. And I fear that many of the appellant's contentions are based upon a negotiability which it certainly does not possess.

The appellant however relies upon the clause stating that this *underwriting* may be pledged or hypothecated with any banking institution as security for advances, and the learned trial judge, on the authority of the judgment of Lord Cairns (then Sir H. M. Cairns L. J.) in *In re Agra and Masterman's Bank, ex parte Asiatic Banking Corporation* (1), at page 397, decided that under this clause the appellant took Richardson's undertaking free from any equities it might have in the hands of J. A. Mackay & Co., Limited.

In my opinion the case cited does not help the appellant. It was the case of a letter of credit issued by a bank in favour of one of its clients, authorizing the client to draw upon the bank to the extent of £15,000, and undertaking to honour on presentation drafts drawn thereunder. Lord Cairns said:

> The essence of this letter is, as it seems to me, that the person taking bills on the faith of it is to have the absolute benefit of the undertaking in the letter and to have it in order to obtain the acceptance of the bills which are negotiable instruments payable according to their tenor and without reference to any collateral or cross claims.

There is nothing similar here. The stipulation that the "underwriting" might be pledged or hypothecated did not add anything to it as a contract,

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nor did it, in my opinion, give the assignee any greater right than is conferred by the assignment of a contract or chose in action, the more so as the very clause permitting its pledge or hypothecation gave notice to the pledgee that it was an "underwriting," that is to say, as I will show, a conditional contract. And surely a conditional contract can only be assigned subject to the condition expressed in it or consequent on its nature.

The other cases referred to by the learned trial judge are bond cases to which very different principles apply.

I have said that Richardson's undertaking, being an "underwriting", is a conditional contract.

Bouvier, Law Dictionary, Vol. 3, p. 3352, defines "underwriting" and "underwriting contract" as follows:—

Underwriting. An agreement, made in forming a company and offering its stocks or bonds to the public, that if they are not all taken up the underwriter will take what remains. An underwriter is held liable in England on the stock subscribed by him. See 42 Ch. D. 1.

Underwriting contract. An agreement to take shares in a company forming, so far as the same are not subscribed to by the public.

An underwriting is therefore essentially a conditional contract, and whatever rights J. A. Mackay & Co., Limited, or the appellant as its assignee, had were subject to this condition.

It follows that the appellant took this undertaking subject to any equities and conditions which affected it in the hands of J. A. Mackay & Co., Limited. In other words it acquired no higher rights than J. A. Mackay & Co., Limited, itself had to exact performance of Richardson's undertaking.

There is some difficulty in determining here what was the preferred stock which had to be taken up to free Richardson from liability under his contract.

The heading of the document signed by Richardson represents the preferred shares as being $2,500,000, of which shares to the amount of $600,000.00 were to be issued. Is the amount of shares underwritten by Richardson the whole $600,000.00, or, as found by the Appellate Division, only the $150,000.00 which J. A. Mackay & Co., Limited, had undertaken to sell to its clients?

It is to be observed that Richardson's contract to underwrite shares was made with J. A. Mackay & Co., Limited. The form signed by Richardson, or a similar form, was enclosed in the letter which one Henry Timmis, promoter of the company, wrote to Richardson on the 8th of September, 1911, whereby he sought to induce Richardson to enter into an underwriting contract with Mackay & Co. This letter represented that Mackay & Co., who were financing the company, had undertaken to sell $150,000 worth of stock to their clients, and the document signed by Richardson being an underwriting contract made with Mackay & Co., this letter would shew that the stock to be underwritten was the $150,000 worth of stock which Mackay & Co. had undertaken to sell to their clients. There is no suggestion in this letter that Mackay & Co. were seeking subscriptions for a greater amount of the preferred stock.

Timmis, in his evidence, stated that Mackay & Co. and he himself had sold to the public 4,760 shares. I do not think therefore that there can be any serious doubt that the whole $150,000 of stock had been sold by Mackay & Co. to the public.

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This being the case Richardson's obligation to subscribe the stock underwritten by him came to an end, and Mackay & Co. would have no action against Richardson to force him to take the stock. The appellant, not being in a better position than Mackay & Co., cannot therefore assert any rights under Richardson's contract.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. B. Walkem.*

Solicitors for the respondent: *Cunningham & Smith.*

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CASES—*Concluded.*

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