REPORTS

OF THE

SUPREME COURT

OF

CANADA

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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

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

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

" John Idington J.

" Lyman Poore Duff J.

" Francis Alexander Anglin J.

" Louis Philippe Brodeur J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA :

The Hon. Charles Joseph Doherty K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA :

The Hon. Arthur Meighen K.C.

ERRATA ET ADDENDA.

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

MEMORANDUM RESPECTING APPEALS FROM JUDGMENTS OF THE SUPREME COURT OF CANADA TO THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL SINCE THE ISSUE OF VOLUME 51 OF THE REPORTS OF THE SUPREME COURT OF CANADA.

Attorney-General for Canada et al. v. *Ritchie Contracting and Supply Co.* (52 Can. S.C.R. 78). Leave to appeal to Privy Council granted, 20 Dec., 1915.

Bonanza Creek Gold Mining Co. v. *The King* (50 Can. S.C.R. 534). Appeal to Privy Council allowed, 24 Feb., 1916. ((1916) 1 A.C. 566.)

Canadian Northern Ontario Rway. Co. v. *Holditch* (50 Can. S.C.R. 265). Appeal to Privy Council dismissed with costs, 7 Feb., 1916. ((1916) 1 A.C. 536).

Companies, in re (48 Can. S.C.R. 331). On appeal to Privy Council, answers were given to the questions submitted to the Supreme Court of Canada. ((1916) 1 A.C. 598.)

Heinze, re; Fleitmann v. *The King* (52 Can. S.C.R. 15). Leave to appeal to Privy Council refused, 3 Feb., 1916.

"Insurance Act, 1910," in re, (48 Can. S.C.R. 260.) On appeal to Privy Council the answers to questions submitted to Supreme Court of Canada were approved. ((1916) 1 A.C. 588.)

Kohler et al. v. *Thorold Natural Gas Co.* (52 Can. S.C.R. 514). Leave to appeal to Privy Council refused, 2 June, 1916.

McGillivray v. *Kimber et al.* (52 Can. S.C.R. 146). Leave to appeal to Privy Council granted, 14 April, 1916.

Ontario Asphalt Block Co. v. *Montreuil* (52 Can. S.C.R. 541). Leave to appeal to Privy Council refused, 26 May, 1916.

Vancouver Lumber Co. v. *The King* (unreported). Leave to Appeal to Privy Council granted, Dec., 1915.

Vandry et al. v. *Quebec Railway, Light, Heat and Power Co.* (53 Can. S.C.R. 72). Leave to appeal to Privy Council granted, 9 May, 1916.

Volcanic Oil and Gas Co. v. *Chaplin* (unreported). Leave to appeal to Privy Council refused with costs, 20 Dec. 1915.

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OF THE

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IN THIS VOLUME.

TABLE OF CASES CITED.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

MOISE LEROUX (DEFENDANT).....APPELLANT;

AND

ARCHIBALD McINTOSH (PLAINTIFF).....RESPONDENT.

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*Feb. 19, 22, 23.

*May 20.

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

Substitution—Registration—Sheriff's sale—Right of institute—Effect of sale under execution—Arts. 938-941, 950, 953, 2090, 2091, *C.C.—Art.* 781, *C.P.Q.*

The judgment appealed from (19 R.L.N.S. 444), affirming the judgment of the Superior Court, which maintained the plaintiff's action to recover certain substituted lands on the ground that the rights of the substitute had not been purged by a sheriff's sale thereof, was affirmed with a variation in regard to the *expertise* ordered respecting the amounts to be allowed to the purchaser at the sheriff's sale for improvements made thereon and as to accounts for rents, issues and profits. Brodeur J. dissented.

Per Duff and Anglin JJ.—The provisions of the Civil Code in regard to the registration of unopened substitutions do not contemplate

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

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registration affecting immovables, as such, but refer merely to registration necessary to the operation of the instrument creating the substitution; consequently articles 2090 and 2091 of the Civil Code have no application.

Per Duff J., Brodeur J. *contra.*—Article 781 of the Code of Civil Procedure deals primarily with procedure and should be construed in connection with article 953 of the Civil Code so as to effectuate rights resting upon the provisions of the Civil Code relating to substantive law. *Vadeboncœur* v. *City of Montreal* (29 Can. S.C.R. 9), distinguished.

Per Duff and Anglin JJ.—The registration of an instrument creating a substitution is effective from the date upon which it is registered and protects the rights of the substitute against the right acquired by a purchaser under a subsequent sale in execution made by the sheriff. *Trudel* v. *Parent* (Q.R. 2 Q.B. 578), referred to.

Per Anglin J.—In the case of a sale under execution against an institute, subsequent to the registration of the substitution, the purchaser at sheriff's sale acquires merely the personal interest of the institute subject to the substitution; such a title cannot defeat the claim of the substitute.

Per Brodeur J., dissenting.—Inasmuch as the claim of the execution creditor was for a debt due and exigible prior to the date when the instrument creating the substitution was registered, the effect of the sale by the sheriff was to discharge the immovable sold from the claim of the substitute and to give the purchaser at that sale an absolute title to the land having priority over that of the substitute.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), affirming the judgment of the Superior Court, District of Montreal, maintaining the plaintiff's action with costs.

The circumstances of the case are stated in the judgments now reported.

The action was instituted by Madame E. Coulombe, in her capacity of tutrix to her minor child, the present plaintiff, issue of her marriage with the late Donald J. McIntosh, deceased, for the recovery of the

(1) 19 R.L.N.S. 444.

lands in question. By the judgments rendered in the courts below, the appellant, defendant, was ordered to deliver up possession of the said lands, reserving to him, however, the right of retention, under article 419 of the Civil Code, until reimbursement of amounts expended in necessary improvements, etc., and it was ordered that experts should be appointed to ascertain the extent of such improvements and to establish the amount to be accounted for by the defendant for rents, issues and profits during the time he had been in possession.

A. Geoffrion K.C. and *G. St. Pierre* for the appellant.

Migneault K.C. and *Erroll Languedoc* for the respondent.

THE CHIEF JUSTICE (oral).—This appeal is dismissed with costs subject to a modification of the judgment appealed from directing that all questions as to amounts to be allowed the appellant for improvements and whether he is chargeable with rents, issues and profits from the 19th September, 1907, or some later date, shall be disposed of in the Superior Court after the *expertise*.

IDINGTON J.—This case has been argued twice and as result of due consideration of all that has been urged in the somewhat varying arguments I think this appeal should be dismissed with costs.

DUFF J.—The registration referred to in each of the articles 938, 939, 940, 941 and 950 of the Civil Code

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is, in my judgment, the same registration; that is to say, registration at the registry office of the domicile. It is not registration affecting immovables as such, but registration necessary to make operative an instrument creating a substitution which is unopened. I think the effect of articles 950 and 953 of the Civil Code and 781 of the Code of Civil Procedure is that an unopened substitution registered in the sense mentioned, that is to say, pursuant to article 941, C.C., is not affected by a sale under execution except in those cases provided for in article 953, C.C. I think that is the effect of the explicit provisions of these two articles; and I think the reasonable conclusion is that to apply article 2090, C.C. (relating to immovables as such), in such a way as to prejudice rights otherwise arising from such registration would be opposed to the policy of the law. Article 781, C.P.Q., it may be observed, is an article dealing primarily with procedure and it ought to be construed as far as reasonably possible so as to effectuate rights resting upon the provisions of the Civil Code relating to substantive law. It must be read with article 953, C.C., when the effect of a sale under execution upon an unopened substitution is in question and with article 1447, C.C., when it is a question of customary dower. *Vadeboncœur* v. *City of Montreal*(1), as I read it, does not proceed upon a construction of article 781, C.P.Q., alone, but chiefly on the provisions of the Special Act upon which the respondent in that case relied.

ANGLIN J.—The defendant attacks the judgment against him rendered by the trial judge, and confirmed

(1) 29 Can. S.C.R. 9.

on appeal with a slight modification, on several distinct grounds with which I propose to deal. I shall, however, first state the material facts.

It is admitted that by the will of Donald McIntosh, who died in 1846, a substitution of the property in question was created, of which the testator's son Archibald McIntosh, who died in 1866, was the institute and first *grevé,* Donald J. McIntosh, who died in 1907, was the second *grevé,* and his son, Archibald McIntosh, the younger, now of age, is the ultimate substitute. A demand of abandonment was made on Donald J. McIntosh prior to the 17th of January, 1891. Curators of his estate were appointed on the 24th of January, 1891. On the same day the will of Donald McIntosh was first registered. Subsequently, in 1896, the defendant became a judgment creditor of Donald J. McIntosh and under his judgment procured a sale of the land in question by the sheriff at which he became its purchaser. Before paying his purchase money, however, he obtained an order that the other creditors of Donald J. McIntosh should give him security against disturbance of his possession of the property by any person taking title under the substitution of which he then had full notice; and he received such security.

The appellant now claims that because the will of Donald McIntosh was not registered before the abandonment by Donald J. McIntosh, the right of Archibald McIntosh as ultimate substitute is defeated by the provisions of articles 2090 and 2091 of the Civil Code, which read as follows:—

2090. The registration of a title conferring real rights in or upon the immovable property of a person, made within the thirty days previous to his bankruptcy, is without effect; saving the case

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in which the delay given for the registration of such title, as mentioned in the following chapter, has not yet expired.

2091. The same rule applies to the registration effected after the seizure of an immovable when such seizure is followed by judicial expropriation.

In my opinion these articles have no application. The title with which they deal is a title in or upon the immovable property of the bankrupt. The title of Archibald McIntosh the younger as ultimate substitute is in no wise derived from Donald J. McIntosh. Neither is it "in or upon his immovable property." It is a title which comes directly from the testator who created the substitution, and it confers real rights in and upon his property. It is not as the property of Donald J. McIntosh that Archibald McIntosh the younger receives the land in question (from him only possession is taken), but as the property of his great-grandfather. (Art. 962, C.C.)

Moreover, the title asserted by the appellant is under the sheriff's sale. He is not claiming in this proceeding under the abandonment or the bankruptcy; and I incline to think it is only persons claiming under the abandonment in bankruptcy and who have actually demonstrated by a judgment of distribution or other equivalent legal procedure that they have sustained prejudice or loss in consequence of the registration, who can attack it under article 2090, C.C. *Trudel* v. *Parent*(1). The registration of the substitution was not a nullity. It was effectual from the date at which it was made. (Art. 941, C.C.) That was long before the defendant acquired his interest under the sheriff's sale.

While the claims of creditors of the institute,

(1) Q.R. 2 Q.B. 578.

which antedated the registration of the substitution, may, when duly preferred, prevail against the interest of the substitute (arts. 938 to 942; 2086-7, and 2109-10, C.C.), it does not follow that upon the sale under an execution issued upon a personal judgment, such as was that obtained by the appellant against Donald J. McIntosh, in a proceeding in which the substitute or his representative was not impleaded (art. 959, C.C.), and there was no question before the court of his interest, the title which passed to the purchaser included that interest. On the contrary it is provided by article 781 of the Code of Civil Procedure that a sheriff's sale does not discharge the property from rights of substitution not yet opened, and article 950, C.C., states that—

> Forced sales under execution * * * are likewise dissolved in favour of the substitute by the opening of the substitution, if it have been registered.

This obviously means "if it have been registered" before the sale takes place or, at all events, before delivery of judgment by which the sale is authorized. The registration of the substitution was effectual from the date at which it was made. (Art. 941, C.C.) It would therefore seem that all that was acquired by the appellant under the sheriff's sale (no attack having been made up to that time on the substitution or on the interest of the substitute, which had then been registered for several years) was the personal interest of the institute subject to the substitution. The purchaser under the title thus acquired cannot defeat the claim of the substitute.

The next contention of the appellant was that the substitution is void because it was not published as re-

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quired by article 57 of the "Ordonnance de Moulins" of 1566. He contends that the modifying declaration of the 17th of November, 1690, was never registered by the Superior Council of Quebec and is therefore not in force in that province. In 1855 registration was substituted for publication, 18 Vict., ch. 101. The decision in *Bulmer* v. *Dufresne*(1), at page 92; Cass. Dig. (2 ed.) 873(2), is conclusive on this point against the appellant. Article 941, C.C., which is not new law (*Meloche* v. *Simpson*(3)), embodies the former provisions as to publication and registration and declares the effect of compliance with its requirements.

The appellant next charges that the registration of the will was defective because in the declaration the testator's death is stated to have occurred in 1866 instead of 1846. That mistake was a mere clerical error. It could have mislead nobody because the same declaration gave the date of probate of the will as the 20th of January, 1846. Such a mistake did not affect the validity of the registration.

Counsel for the appellant further contends that as the plaintiff's declaration in this action shews Archibald McIntosh the younger to be the heir of Donald J. McIntosh and no renunciation by him of the inheritance is alleged or proved, Archibald McIntosh must be deemed to have assumed the burden of his father's debts. It is not in his quality of heir to his father that Archibald McIntosh takes the property in substitution. The plaintiff's declaration alleges only the facts material to establish his title as substitute. It is true that those same facts would establish his heirship to

(1) 3 Dor. Q.B. 90. (2) Cout. Dig. 1380.
(3) 29 Can. S.C.R. 375, at p. 385.

his father. But they are not alleged for that purpose and he is not, merely because he claims and takes his great-grandfather's property as ultimate substitute, to be deemed burdened with his father's debts in default of shewing that he had made a renunciation of his father's estate. Moreover, as a minor he would have taken with benefit of inventory.

The appellant finally maintains that he has been wrongfully held accountable for the revenue of the property—by the Superior Court from the date when he acquired it; and by the court of appeal from the date of the death of Donald J. McIntosh. He asserts that his liability to account is only from the date of the commencement of this action, because he was then first notified of the death of Donald J. McIntosh by proceedings at law. (Arts. 411 and 412, C.C.) This question may well be left open to be disposed of in the Superior Court after the report is made on the *expertise* directed. The judgment should be modified accordingly. With this modification the appeal should be dismissed with costs, the appellant having failed on all his principal grounds of attack. No adequate cause has been shewn for disturbing the order of the Court of King's Bench as to costs—a thing which is very rarely done in this court when we dismiss an appeal on the merits.

BRODEUR J. (dissident).—Il s'agit d'une action pétitoire instituée par un appelé contre le détenteur d'un immeuble substitué.

Leroux, le détenteur de cet immeuble, a soulevé un grand nombre de moyens de defense à l'encontre de cette action pétitoire, mais devant cette cour il n'en a discuté que deux, savoir:—

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1°. Qu'en se rendent adjudicataire de l'immeuble vendu par le shérif pour une créance antérieure à l'enregistrement de la substitution il est devenu propriétaire absolu. En second lieu, il allègue que l'enrégistrement de la substitution ayant été fait dans un moment ou le grevé de substitution était en faillite est sans effet.

Vu la conclusion à laquelle j'en suis arrivé sur le premier point, il ne sera pas nécessaire pour moi d'éxaminer la seconde objection soulevée par le défendeur appelant, Leroux.

Les faits qui ont donné lieu à cette cause sont les suivants. En 1845, Donald McIntosh aurait crée par son testament une substitution fidéé commissaire pour l'immeuble en question dans cette cause-ci. Par ce legs, son fils, Archibald McIntosh, était grevé de substitution et au décès de ce dernier la propriété passait à son fils, Donald J. McIntosh, comme deuxième grevé, et le fils de ce dernier, l'intimé dans la presénte cause, était appelé à la substitution.

Le testament d'Archibald McIntosh ne fut pas enrégistré du vivant du premier grevé.

Le deuxième grevé, Donald J. McIntosh, faisait cession de ses biens le 17 janvier, 1891, et sept jours après, savoir le 24 janvier, 1891, il faisait enrégistrer la substitution. La preuve ne demontre pas les procédures qui ont été faites sur cette cession après la nomination des curateurs; mais l'intimé, Moïse Leroux, qui était porteur d'une créance due par le second grevé et antérieure à l'enrégistrement de la substitution, fit saisir l'immeuble en question; et sur décrèt, en date du 17 mai, 1897, il s'est porté acquereur de cet immeuble. Après le décès du second grevé, l'appelé a

la substitution a revendiqué cet immeuble et a institué la présente poursuite.

M. Mignault, dans sa plaidoirie devant cette cour, a prétendu que la preuve ne demontrait pas que la créance invoquée par Leroux existait antérieurèment à l'enrégistrement de la substitution.

Je crois, au contraire, que la preuve est aussi satisfaisante que possible et qu'elle resulte de la déclaration dans la cause, de la plaidoirie et du jugement rendu dans l'action instituée par Leroux contre McIntosh.

Dans ce jugement, en effet, il est mentionné que la créance réclamée par Leroux contre Donald J. McIntosh existait depuis 1889 en vertu du contrat de mariage de Donald J. McIntosh avec son épouse, Dame E. Coulombe, que cette créance avait été plus tard transportée, en 1891, à Leroux et que ce dernier avait le droit d'en réclamer le montant.

L'intimé prétend que les allégations de ce jugement ne font pas de preuve contre lui parce qu'elles sont *res inter alios acta.*

Cet argument, dans un cas ordinaire, aurait certainement beaucoup de force; mais saurait-il en avoir dans le cas actuel, quand l'intimé lui-même dans son action invoque ce jugement et en fait mention ?

Si toutefois il y avait quelque allégation dans ce jugement qui ne serait pas exacte, si toutefois la créance qui y était mentionnée n'était pas due par le grevé, il aurait été temps alors pour l'appelé d'invoquer ces moyens pour rendre nul et de nul effet ce jugement.

Mais il n'en dit rien. Au contraire, il allègue ce jugement dans sa déclaration et le défendeur dans

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son plaidoyer dit qu'il est vrai que ce jugement-là a été rendu et qu'il a été rendu pour une dette qui existait depuis 1889.

En outre de cela, un certificat du régistrateur, qui a été produit dans cette cause-ci et qui a dû également être produit lors du jugement de distribution dans la cause de Leroux contre McIntosh, c'est à dire dans la cause où le décrèt a eu lieu, démontre que la créance reclamée par Leroux existait en vertu de ce contrat de mariage, qu'elle était antérieure à l'enrégistrement de la substitution.

Cette question de savoir si cette créance était antérieure à l'enrégistrement de la substitution ou non ne parait pas avoir été contestée par les parties en cour inférieure. Au contraire, comme je viens de le dire, le demandeur en faisait même mention dans son action. Alors il me semble qu'il est trop tard maintenant pour venir dire que la preuve est imparfaite et incomplète, quand il est si evident par la preuve, peut-être secondaire, qui a été faite que la créance due par le second grevé était bien antérieure à l'enrégistrement de la substitution.

L'appelé à la substitution pour réclamer est obligé de démontrer que le testament en vertu duquel il reclame a été enrégistré.

L'article 938 dit que les actes qui portent substitution doivent être enrégistrés dans l'intérèt des appelés et dans celui des tiers et que ce défaut d'enrégistrement opère en faveur des tiers au préjudice des appelés même mineurs.

Les articles 939 et 940 du Code Civil disent que les créanciers du grevé peuvent se prevaloir du défaut d'enrégistrement. Il faut cependant que leur créance soit antérieure à l'enrégistrement de la substitution.

Il n'est pas nécessaire cependant qu'elle soit enrégistrée. Les créanciers ordinaires et les créanciers chirographaires ont le droit de se plaindre du défaut d'enrégistrement. Mignault, vol. 5, p. 46.

Leroux, en sa qualité de cessionnaire de la créance de Mde. McIntosh, était donc créancier au moment de l'enrégistrement de la substitution et cet enrégistrement ne pouvait pas prévaloir ni contre son cédant ni contre lui-même.

Il est en preuve, en outre, que McIntosh, le grevé, à fait cession de ses biens le 17 janvier, 1891. Ses biens ont alors été mis sous séquestre judiciaire. Du moment que cette cession-là était faite aucun enrégistrement ne pouvait être fait sur les immeubles, même les immeubles dont il était grevé de substitution, de manière à affecter les droits des créanciers.

Le dossier ne nous revèle pas si l'immeuble en question était encore sous la main de la justice quand il a été saisi et vendu à l'appellant, Leroux, en 1897.

La vente judiciaire a eu lieu le 17 mai, 1897.

A cette époque les immeubles cédés en justice ne pouvaient être vendus qu'à la demande du créancier du failli.

Plus tard, le 1er septembre, 1897, le code de procédure civile a été amendé et maintenant les biens immeubles cédés peuvent être vendus à la demande du curateur.

Il a été décidé cependant que le code de procédure civile en autorisant le curateur à vendre les immeubles cédés n'empèchait pas le créancier du failli qui avait un jugement de procéder lui-même à la vente des immeubles en exécution de son jugement.

Leroux en faisant exécuter son jugement a pu procéder par conséquent contre des biens qui étaient en-

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core dans les mains de la justice et le décret qui est intervenu a eu pour effet de purger la substitution. Art. 781, C.P.Q.

Comme je l'ai plus haut, le créancier qui a fait vendre ces biens avait une créance antérieure et préferable à celle du grevé de substitution et, par conséquent, sous l'autorité de l'article 781, C.C., la substitution se trouve purgée.

Mais on dit: l'article 953, C.C., mentionne spécifiquement le cas dans lesquels le décret purge les substitutions.

Je ne crois pas cependant que l'article 953, C.C., doive être interprété différèmment de l'article 781, C.P.C. Tous les deux doivent être interprétés l'un par l'autre et je considère que l'article 953, C.C., n'est pas limitatif ainsi que cette cour l'a décidé dans *Vadeboncœur* v. *Cité de Montréal*(1).

J'en suis donc venu à la conclusion que la substitution a été purgée par la vente dans la cause de *Leroux* v. *McIntosh,* et que l'adjudicataire, l'intimé dans la présente cause, a un titre farfait et qu'il peut l'opposer à l'action pétitoire instituée par l'appelé à la substitution.

Le jugement *a quo* devrait être renversé et l'action de l'appelé à la substitution devrait être renvoyée avec dépens tant de cette cour que des cours inférièures.

Appeal dismissed with costs; judgment appealed from varied.

Solicitors for the appellant: *Pelissier, Wilson & St. Pierre.*

Solicitors for the respondent: *Greenshields, Greenshields & Languedoc.*

(1) 29 Can. S.C.R. 9.

IN THE MATTER OF THE BRITISH COLUMBIA "TAXATION ACT," AND OF A SPECIAL COURT OF REVISION APPOINTED BY THE LIEUTENANT-GOVERNOR IN COUNCIL, AND OF THE APPEAL BY F. AUGUST HEINZE FROM AN ASSESSMENT OF CERTAIN LANDS FOR TAXATION.

1915

*Feb. 3. 4.
*May 4.

LIDA M. FLEITMANN, ADMINISTRATRIX OF F. AUGUST HEINZE, DECEASED ..... APPELLANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Assessment and taxation—Interest in land—Recitals in agreement—Validation by statute—Legislative declarations—Construction of contract—R.S.B.C., 1911, *c.* 222, *s.* 47—2 *Geo. V., c.* 37 (*B.C.*)—3 *Geo. V., c.* 71, *s.* 5 (*B.C.*)

By an agreement, executed in 1898, H. agreed to sell to A. and S. certain subsidy lands of a railway company and it was therein provided that the moiety of the lands should be subsequently conveyed to H. but no formal instrument was ever executed for the purpose of vesting this interest in him. In 1912, an agreement was entered into by all the persons interested in the lands and the Crown for the re-purchase by the Government of British Columbia of the unsold portions of the lands and this latter agreement was validated by the "Railway Subsidy Lands Re-purchase Act," 2 Geo. V., ch. 37 (B.C.) (to which it was annexed as a schedule), which declared that the provisions of the agreement were to be construed as if expressly thereby enacted. The agreement so validated declared, in recitals therein,

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

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that H. was entitled to an undivided one-half interest in the lands in virtue of the agreement executed in 1898, that the portions thereof conveyed to the Crown were subject thereto, and that the title should pass to the Crown subject to such estate or interest.

Held, affirming the judgment appealed from (20 B.C. Rep. 99), that, by the effect of the validated agreement as supplemented by the legislative declarations in the "Railway Subsidy Lands Repurhase Act," 2 Geo. V., ch. 37, an interest in the lands became vested in H. which was liable to assessment and taxation under the British Columbia "Taxation Act," R.S.B.C., 1911, ch. 222, sec. 47, as amended by 3 Geo. V., ch. 71, sec. 5. *Angus* v. *Heinze* (42 Can. S.C.R. 416), referred to.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of a special Court of Revision by which the assessment of the appellant's interest in certain lands was confirmed.

In the year 1913, the Government of British Columbia assessed the appellant for the purpose of taxation in respect of a one-half interest in certain lands alleged to have been acquired by him in the manner mentioned in the head-note. On an appeal to a special Court of Revision appointed by the Lieutenant-Governor in Council this assessment was confirmed and the judgment of that court was affirmed by the judgment now appealed from by the Court of Appeal for British Columbia.

The circumstances of the case are stated in the judgments now reported.

Wallace Nesbitt K.C., and *Wallace K.C.*, for the appellant.

E. Lafleur K.C. for the respondent.

(1) 20 B.C. Rep. 99.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed for the reasons given in the notes of Mr. Justice Idington.

DAVIES J. concurred with Duff J.

IDINGTON J.—This is an appeal resting upon section 41 of the "Supreme Court Act" relative to the assessment for taxation of a certain interest which the original appellant was alleged to have had, in 1913, in certain lands in British Columbia.

The original appellant, now dead and represented by present appellant, owned the entire stock of the Columbia and Western Railway Company which had earned a large land subsidy under 59 Vict., ch. 8, of the Statutes of British Columbia and also owned a number of other properties. He, in February, 1898, entered into an agreement with Messrs. Angus and Shaughnessy to sell them these other properties and said stock of said company for the price or consideration of eight hundred thousand dollars and their agreement that the moiety of said land subsidy should be conveyed to him, Heinze, when and how he should direct and the other moiety should be the property of the said company.

The agreement provided by many details for securing the payment of the liabilities of the company and the charges against the said other properties.

The agreement was so framed that the other properties and stock should be acquired free from liability and without being in any way complicated by the provisions dealing with the land subsidy and division thereof. That land subsidy was free from taxes

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in the hands of the company for ten years, which did not expire till October, 1911, and the original appellant, for that very obvious reason, did not desire to have them sooner transferred to him than he desired.

For some reason or other Angus and Shaughnessy, who it is alleged (and the sequel shews) represented the Canadian Pacific Railway Co. did not desire to keep the matter open so long. And they attempted to bring about a partition, by a partition suit, and therein amongst other things to terminate their trust. The Court of Appeal for British Columbia held that neither form of relief could thus be granted under the said agreement against the will of the said Heinze.

This court, on appeal thereto, in 1909 (*Angus* v. *Heinze*(1)), maintained that position.

Because of what, I respectfully submit, was either an unfortunate expression of the reasons given by the only judge in this court assigning reasons for the dismissal of the said appeal, or misapprehension of these by the courts below, it was when the time came that these lands, or any interest therein, might properly be taxed, alleged that this court had declared that said original appellant had no equitable interest in the moiety of the undivided land subsidy.

The courts below apparently accepted that interpretation put upon said judgment and assumed that he had none but such as depended upon the legislative enactment I am about to refer to.

Said Angus and Shaughnessy having failed in said partition suit, the said railway company and the Canadian Pacific Railway Company, which Angus and Shaughnessy seem to have represented, and the British

(1) 42 Can. S.C.R. 416.

Columbia Southern Railway Company, on the 31st January, 1912, entered into an agreement with respondent whereby, amongst other things, the unsold part of said lands earned as subsidy by the Columbia and Western Railway Company, which had been granted to said company should be, pursuant to a statutory option relative thereto, reconveyed to the respondent for the price or sum of forty cents an acre to be computed on the basis of one-half of the total area so reconveyed but subject nevertheless to the rights of said Heinze in the other moiety of said lands.

The Crown by virtue of said agreement, and an Act of the Legislature of British Columbia confirming same, acquired said lands subject to the interest of said Heinze therein under the said agreement first mentioned.

It is the said interest of said Heinze in said lands which has been assessed by virtue of an Act passed by said legislature and known as "Taxation Act Amendment Act, 1913," and from that assessment this appeal has been taken.

The judgment of the Court of Appeal for British Columbia on appeal to it from the Court of Revision, maintained the assessment.

The section providing for that assessment is as follows:—

(2) Where the title of any land has become vested in His Majesty in right of the province, subject to any estate or interest therein of any person, or where the title to any lands is vested in His Majesty and it appears that any person had, prior to the vesting of such title in His Majesty, acquired or had such a right, whether legal or equitable, to an interest in such lands as would be enforceable against a private individual if such title were vested in a private individual, and such person has such right though he may not have actually acquired such interest, it shall be lawful for the as-

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sessor to assess the interest of such person or the right of such person to an interest in such lands by estimating the value of the whole of said lands at their cash value per acre, and the proportion thereof representing the value of the interest or of the right to an interest of such person shall be set down by the assessor upon his roll.

This seems to have been designed to meet the very case of Heinze's interest in the lands in question.

There never could have been a doubt of Heinze having acquired or rather retained an equitable interest in the said lands under the first mentioned agreement, but for the possibly arguable question of the capacity of the company to become bound in such way as sought to be accomplished thereby.

I should, however, feel inclined to hold that the absolute owner of a company might, where no other claims of any kind existed in or against the company, and no one in existence to be injured by or to complain of such a mode of dealing, stipulate with his vendees for the reservation to himself of part of the lands of the company and that a court of equity could and would so long as no third party had acquired any right against the company hold the vendees had thereby become his trustees and enforce the agreement accordingly.

It is the constant habit of courts of equity in looking at the ordinary transactions and relations of vendors and vendees to treat the vendee as the equitable owner and the vendor or other possessor of the legal estate as trustee for him.

The owner of such an equity can so long as he discharges his own obligations depend upon the courts of equity protecting him without his being driven to an action for damages as his only remedy.

But to put that beyond peradventure it is admitted,

as part of this case, that in April, 1906, the said company and the said Angus and Shaughnessy signed a notice to Heinze expressly acknowledging that said lands had been then granted by the Crown to said company and recognizing the right and interest therein of said Heinze under the said agreement of 1898, and that he was entitled to a moiety of said lands as provided therein and proposing a partition of said land so as to give him his said moiety.

His reply thereto, also made part of the admissions in the case, shews that his only objection to acceding thereto was the possibility of his being taxable therefor in case of a division; whereas the company could not be so taxable.

I am, therefore, unable to understand how it ever could have been supposed that Heinze had no equitable interest in said lands.

Such an interest I conceive may become the subject of taxation and of direct taxation of land within the province.

I can understand how by reason of their having been no joint interest either legal or equitable and no clear right in Angus and Shaughnessy or any one else to insist on the termination of the relationship created by the agreement till, within the terms thereof, he, Heinze, had expressed how and when it should terminate and its determination might have been to his detriment any such right could not be asserted by way of a partition suit.

The denial of that relief by way of partition was all that was involved in the decision relied upon save the minor question of the trustee passing his accounts.

I may reiterate once more that a decision of any

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court relative to what is before it for judicial determination is what binds as authority and not the possibly irrelevant reasons assigned for coming to such decision.

In justice to myself I may be permitted to add that the report of the case does not correctly represent me. The records shew I filed no opinion or concurrence and only one other judge than he writing appears of record to have concurred therein, in the usual mode when intending to agree in the reasons as well as result.

The result is, I am sure, a misapprehension for which I may not be blameless in failing to file a memorandum expressing how I desired to treat the opinion in question.

I have no doubt of the legislative power to declare, as I think the confirming Act does, Heinze entitled or to declare him assessable in the manner the later Act sets forth.

His non-residence might prevent steps being taken to collect the rates abroad, but that cannot affect the undoubted right of the legislature to limit his rights in claiming from the Crown the recognition by grant or otherwise of his interest and charging it with the amount of the taxes as provided by the statute.

I think the appeal should be dismissed with costs.

DUFF J.—I have come to the conclusion that the appellant's rights originating in the agreement of the 11th of February, 1891, are now assessable as constituting an interest in land under the British Columbia Statute, 1913, ch. 71, sec. 2.

By chapter 8 of the statutes of British Columbia

for 1896, the Lieutenant-Governor in Council was empowered to aid the construction of the Columbia and Western Railway by a land grant. Section 8 of that chapter exempted this land grant from taxation until the expiration of ten years from the date of the acquisition of it by the company or until alienated by lease, agreement for sale or otherwise by the company.

The Columbia and Western Railway was divided into six sections. Sections one, three and four were constructed, but there was no construction on sections two, five and six. In respect of sections one and three the company earned 1,603,312 acres, of which 794,440 acres were granted on or about the 17th day of April, 1908. To these lands the exemption applies.

The residue of the subsidy earned, namely, 808,872 acres, could not be granted under the Act of 1896 as the lands were not designated and surveyed within seven years from the passing of the Act, as required by section 5.

This state of affairs led to the passing of chapter 9 of the statutes of 1906 whereby the Lieutenant-Governor in Council was empowered to grant and did grant to the company this residue of 808,872 acres. By section 3 of that statute the exemption of these lands from taxation expired on the 3rd October, 1911.

In February, 1898, F. August Heinze, owned or controlled the capital stock of the Columbia and Western Railway Company. Messrs. Angus and Shaughnessy, acting in the interests of the Canadian Pacific Railway Company, acquired this property from Heinze under an agreement executed in that month.

It was part of the arrangement between the parties that the benefit of an undivided half of the land sub-

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sidy earned at the date of the transfer should be secured to Heinze. The stipulations for securing this are a little complicated and in some respects perhaps not easy to comprehend; but while Heinze no doubt had in view the condition imposed by the subsidy Act that the exemption from taxation should cease upon alienation in any manner of the subsidy lands by the company, still the agreement provided clearly enough that either the company or Heinze should be entitled to a partition of any portion of the subsidy lands affected by the agreement as soon as such portion should be granted to the company by the Crown. The Columbia and Western Railway Co. was not a party to the agreement. In *Angus* v. *Heinze*(1), an action by Messrs. Angus and Shaughnessy for a partition was dismissed, this court taking the view that under the agreement of February, 1898, alone, Heinze had acquired neither a legal nor an equitable interest in the lands in question.

It would, I think, not be open to doubt that Heinze's rights under the agreement constituted an interest in the lands if it had appeared that they had been vested in Messrs. Angus and Shaughnessy for the purpose of enabling them to carry out the agreement. We are not informed whether this was done and it may be assumed that, when the agreement of 1912 was executed, Heinze was not in possession of any "interest" within the meaning of the statute of 1913.

The agreement of 1912 was made a schedule to chapter 37 of the statutes of that year; and to ascertain the effect of them they must be read together. I

(1) 42 Can. S.C.R. 416.

reproduce the statute in full and the material parts of the agreement:—

STATUTES OF BRITISH COLUMBIA, 1912.

Chapter 37.

An Act Respecting the Repurchase by the Crown of Certain Railway Subsidy Lands.

(27th February, 1912.)

Whereas by the "Railway Subsidy Lands Re-purchase Act," being chapter 198 of the "Revised Statutes of British Columbia, 1911," the Lieutenant-Governor in Council was empowered to enter into conditional agreements to acquire for the province, by re-purchase, exchange, or otherwise, any lands theretofore or thereafter granted by the Crown in the right of British Columbia in aid of the construction of railways:

And whereas, pursuant to the provisions of the said statute, a conditional agreement has been entered into between His Majesty's Government and the Canadian Pacific, British Columbia Southern, and the Columbia and Western Railway Companies for the re-purchase by the Crown of certain unsold portions of the lands granted in aid of the construction of the British Columbia Southern and the Columbia and Western Railways:

And whereas it is expedient to ratify the said agreement pursuant to the provisions of the said "Railway Subsidy Lands Re-purchase Act":

Therefore, His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

1. The agreement, a copy of which forms the schedule to this Act, made between His Majesty the King, represented by the Honourable the Premier of British Columbia and the Canadian Pacific Railway Company, the British Columbia Southern Railway Company and the Columbia and Western Railway Company is hereby ratified and confirmed and declared to be legally binding, according to the tenor thereof, upon the parties thereto; and the said parties to the said agreement are hereby authorized and empowered to do whatever is necessary to give full effect to the said agreement, the provisions of which are to be taken as if they had been expressly enacted hereby and formed an integral part of this Act.

SCHEDULE.

* * * * *

And whereas, by agreement bearing date the 11th day of February, 1898, and made between F. August Heinze of the one part, and Richard B. Angus and Thomas G. Shaughnessy of the other part,

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the said Heinze became entitled to an undivided one-half interest in certain portions of the said Crown grants to the Columbia and Western Ralway Company, containing approximately 615,600 acres, and detailed in the document hereunto annexed, marked "Schedule B" hereto, and signed by the parties hereto.

* * * * *

2. The Columbia and Western Railway Company agrees to sell and convey to the Crown in right of the Province of British Columbia, and the Crown in right of the Province of British Columbia agrees to purchase, all those portions of the lands of which the Columbia and Western Railway Company has obtained Crown grants or of which it is entitled to Crown grants, as set out in the recitals hereto, and which the said company has not sold or contracted to sell at the date of this agreement, reserving, however, to the said company all timber upon the lands covered by timber permits in force at the date of this agreement and during the existence of each respective timber permit, particulars of which are shewn in the statement hereto attached, marked "Schedule C" hereto, and signed by the parties hereto, but so that, with the expiration of each respective timber permit, the timber remaining upon the land in such permit comprised shall revert to the Crown in right of the Province of British Columbia; and subject to the estate and interest held by F. August Heinze under the agreement bearing date the 11th day of February, 1898, hereinbefore mentioned, in portions of the said lands containing approximately 615,600 acres, the details whereof are shewn in Schedule B hereto. The lands to be conveyed under this paragraph being estimated to contain approximately 1,514,832.66 acres.

* * * * *

4. The Crown in right of the Province of British Columbia agrees to pay to the said Columbia and Western Railway Company compensation at the rate of forty cents per acre for all the lands to be sold and conveyed by the said company to the Crown pursuant to paragraph 2 hereof, excepting from the computation of the amount payable under this paragraph one-half of the total area in which the said F. August Heinze is entitled to an undivided one-half interest, as detailed in Schedule B hereto, under the terms of the agreement hereinbefore mentioned; the said compensation to be payable on the execution and delivery of conveyances of the said lands, subject to the interest of the said F. August Heinze therein, and otherwise free from encumbrances.

* * * * *

6. The Crown in right of the Province of British Columbia agrees to accept the conveyance of the lands mentioned in paragraph 2 hereof, subject to the estate and interest of the said F. August Heinze, his heirs and assigns, therein; and so that the estate and

interest of the said F. August Heinze, his heirs and assigns, in the said lands and his right to a conveyance or partition thereof shall not be impaired by the execution and delivery of this agreement, and the Crown will not refuse or neglect to grant, convey or partition the interest of the said Heinze in the said lands upon proof of right, title and interest.

If Heinze had been a party to this agreement of 1912 it would hardly be susceptible of dispute that his rights in relation to the lands in question under the agreement of February, 1898, had become binding on the Crown or that they constituted an "interest" in those lands in the sense of the Act of 1913. It is argued and this argument raises the substantial point for decision that the declarations touching Heinze's rights and the stipulations contained in the clauses quoted above must be read as contractual stipulations in an agreement *inter partes* and intended to have no other effect; and that it is only as contractual stipulations that the statute recognizes and sanctions them. It follows, of course, if this be accepted, unless it could be argued that the Canadian Pacific Railway Company or the Columbia and Western Railway Company were trustees for Heinze in entering into the contract (of which there is no evidence) that these provisions having legal effect only as contractual stipulations *inter partes* confer no rights upon Heinze who was not a party to them.

Read literally the words

> the provisions of which (of the agreement) are to be taken as if they had been expressly enacted hereby and formed an integral part of this Act

would seem to give the force of statutory declarations to the recitals,

> the said Heinze became entitled to an undivided one-half interest in certain portions of the said Crown grants;

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and to import a declaration that portions of the lands conveyed to the Crown were "subject to" an estate or interest

held by F. August Heinze under the agreement bearing date the 11th February, 1898,

as well as a further declaration that the title passed to the Crown

subject to the estate and interest of the said F. August Heinze, his heirs and assigns therein.

And the words quoted from the statute, literally read and applied to paragraph 6 of the schedule, involve a declaration that Heinze had at the time of the passing of the statute an interest in the lands in question. It is urged, however, that, treating the agreement as an integral part of the statute and as "expressly enacted" thereby, it still must be read as an agreement and the various provisions of it interpreted and given effect to as the provisions of an agreement.

The argument has considerable force. But this construction does, I think, deprive the words of the Act of some part of their literal effect and when the statute is read, as it must be read, in light of the documents and the other facts mentioned in the statute and the agreement themselves, I think it is a construction which cannot be accepted.

We must assume that the parties to the agreement had in view the protection of the interests, on the one hand of Heinze and on the other of Messrs. Angus and Shaughnessy. These last mentioned gentlemen had entered into covenants with Heinze by which they were personally bound, but concerning the fulfilment of which there could, of course, be no doubt so long as the lands remained under control of the Canadian

Pacific Railway Company. These lands were now to be transferred to the Provincial Government. An effectual way of protecting at one and the same time the interests of these gentlemen as well as the interests of Heinze was to provide that the title acquired by the Crown should be charged with the obligations that had been entered into by Messrs. Angus and Shaughnessy.

I think the passages quoted above from the agreement of 1912 do sufficiently declare that the title of the Crown is burdened with these obligations and that paragraph 6 is intended to be a specific declaration that the Crown assumes that burden. The purpose of the parties being to protect the interests mentioned it would be a singular thing if they had set about doing it by means of contractual declarations and stipulations of which neither Heinze on the one hand nor Messrs. Angus and Shaughnessy on the other, not being parties to the contract, could avail themselves.

I think the proper inference is that the statute is intended to take effect according to the literal meaning of the words used.

ANGLIN J.—I concur in the judgment of Mr. Justice Duff.

Appeal dismissed with costs.

Solicitors for the appellant: *Hamilton & Wragge.*

Solicitors for the respondent: *Elliott, Maclean & Shandley.*

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*May 26, 27.
*Oct. 12.

DONALD ROBERTSON (PLAINTIFF) . . APPELLANT;

AND

THE CITY OF MONTREAL AND THE CANADIAN AUTOBUS COMPANY (DEFENDANTS) . . . . . RESPONDENTS.

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

Municipal corporation—Powers of council—Highways—Exclusive privilege—Necessity of by-law—Validity of contract—Right of action—Status of plaintiff—Shareholder in joint-stock company—Ratepayer — Special injury — Public interest — Prosecution by Attorney-General—Practice—Art. 978, C.P.Q.

Assuming to act under authority of an existing by-law regulating traffic by autobusses and in virtue of a special statute (2 Geo. V., ch. 56 (Que.)), and the general powers conferred by the city charter the municipal council passed a resolution authorizing the corporation of the municipality to enter into a contract granting a joint stock company the exclusive privilege of operating autobus lines on certain streets in the city and charging fares for the carriage of passengers. An action was brought by a shareholder in a tramway company (which held similar privileges), who was also a municipal ratepayer attacking the validity of the by-law and of a contract made by the municipal corporation in pursuance of the resolution on the grounds that there was no authority for the granting of such exclusive privileges, that such powers, if they existed, could only be exercised by means of a by-law, and that a provision in the contract whereby the municipality became entitled to certain shares in the stock of the autobus company was *ultra vires* of the municipal corporation.

Held, affirming the judgment appealed from (Q.R. 23 K.B. 338), Idington and Anglin JJ. dissenting, that in the absence of evi-

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

NOTE.—Leave to appeal to the Privy Council was refused on the 18th of December, 1915.

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dence of special injury sustained by the plaintiff, he had no status entitling him to bring the action.

Per Idington J., dissenting.—The plaintiff was entitled to institute the action by virtue either of his quality as a shareholder in the tramway company, the privileges of which might be injuriously affected, or as a ratepayer of the municipality.

Per Anglin J., dissenting.—The plaintiff could bring the action in his capacity as a ratepayer of the municipality.

Per Fitzpatrick C.J. and Duff and Brodeur JJ.—An appropriate remedy in such a case would be by action prosecuted by the Attorney-General of the province under article 978 of the Code of Civil Procedure.

Per Duff J.—Such an action might be prosecuted either by the municipal corporation itself or by an authority representing the general public.

Validity of the by-law, resolution and contract in question discussed by Idington, Duff and Anglin JJ.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of Demers J., in the Superior Court, District of Montreal, dismissing the plaintiff's action with costs.

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

Lafleur K.C. and *R. Taschereau K.C.* for the appellant.

Atwater K.C., Bisaillon K.C. and *J. A. Archambault K.C.* for the respondents.

THE CHIEF JUSTICE.—In my opinion, the appellant is not qualified to bring suit. A ratepayer who has not suffered any special injury, but only such as is public in its nature and affects all the inhabitants alike, has no interest entitling him to bring action against the city. It is against public policy that he should be permitted to do so.

(1) Q.R. 23 K.B. 338.

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It is undoubtedly the law in England that such a suit can only be brought with the permission and in the name of the Attorney-General representing the Sovereign, the *parens patriæ*. Apart from any presumption to which this fact may give rise in favour of the principle the grounds on which it is based seem clear. Rule in France, Garsonnet, vol. I., No. 376.

It would be difficult for public business to be carried on at all if every individual in a city with a population of half a million persons could sit in judgment on all the actions of the civic authorities and any crank were at liberty to drag them at any time before the courts. The city would never be free from litigation with its attendant expense when, as would probably be often the case, the complainants were men of straw.

But there is more than this. That which is for the general benefit of all the ratepayers may cause an injury to the private interests of any particular ratepayer which would far outweigh any advantage which he might gain simply as one of the body of ratepayers. This injury may or may not be actionable. If, for instance, his property is taken for the common purposes he will have a right of action, but if it is merely in his capacity as a rival trader that he suffers loss this may well give rise to no cause of action.

The appellant is the private secretary of the Montreal Tramways Co. and, as found by the trial judge, is only the *"prête-nom"* of a rival company. He originally claimed qualification as holder of a few shares in the company transferred to him for the purpose of the action. This clearly gave him no title to sue and in the course of the proceedings he abandoned the claim. His claim as a ratepayer is not *bonâ fide* as

such. The contract is not against the interest of the ratepayers generally, but in their favour and the appellant is using his interest as a ratepayer not for the benefit of the whole body of ratepayers, but in the interests of his private business. This claim as a ratepayer is an attempt to do indirectly what he cannot do directly.

Nevertheless, it is necessary to consider carefully what is the law, since if it permits the bringing of such actions, the courts have to give effect to it whatever inconvenience may result from such a course.

Article 77 of the Code of Civil Procedure provides that

> no person can bring an action at law unless he has an interest therein.

This is merely a formal statement of a rule that is elementary in every system of law. The difficulty that may arise is in determining what is an interest in the particular case.

In a Scotch case recently before the House of Lords (*Dundee Harbour Trustees* v. *Nicol*(1)), Lord Dunedin in his judgment said:—

> By the law of Scotland a litigant must always qualify title and interest. * * * I am not aware that any one of authority has risked a definition of what constitutes title to sue. I am not disposed to do so.

There is, I think, similarity as to this between the Quebec and the Scotch law and I do not myself propose to attempt any definition of what constitutes an interest within the meaning of article 77, C.P.Q.

It seems clear that there must be some limitation placed upon the word. Farmers in the west of Can-

(1) (1915) A.C. 550.

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ada whose produce is all sent to be shipped from the Port of Montreal must certainly have an interest of a kind in the affairs of the city. Indeed, every Canadian might be said to have an interest in the good government of the commercial metropolis of the country.

When the interest which the individual has is no greater or other than that of the rest of the public he has not, in my opinion, an interest in the action within the meaning of article 77, C.P.Q.

But no one is on this account without remedy. An individual can always inform the Attorney-General who can, and, in a proper case, must, take action thereon (art. 978, C.P.Q.). If the Attorney-General does not consider the case a proper one for him to intervene in he can permit the complainant to use his name and the action is then brought in the name of the Attorney-General on the relation of the individual informant. There is in this practice the advantage that the Attorney-General can impose such terms for security for costs being given as in the circumstances of the case he may deem proper.

Then it must not be forgotten that section 304 of the charter of the City of Montreal (62 Vict. ch. 58) provides a special remedy in favour of any individual ratepayer. In the manner provided in this section

tout contribuable peut, par requête libellée, en son nom, présentée à la cour supérieure, demander l'annulation d'un règlement pour le motif d'illégalité.

This provision does not necessarily imply either that there would be otherwise no remedy or that any previous right of action is superseded. There might, however, be some presumption that the latter alternative was the intention of the legislature. It is com-

mon where the intention is otherwise for the legislature to state explicitly that the remedy it provides is to be in addition to, and not in lieu of, any existing remedies. I do not doubt, however, that but for this provision individual ratepayers would have had no right to take action such as this section expressly confers upon them.

When we come to examine the jurisprudence on the subject, I think it is doubtful whether the courts have given any decisions that conflict with the principle under consideration.

I do not wish to enter at tedious length into a discussion of any that may be supposed to do so; most of them, at any rate, can, I think, be distinguished. There is, however, one class to which the majority probably belong to which I must call attention. There are cases in which property is involved on which the courts fastening a trust have held that fiduciary relations existed between the parties. It is on this ground that a corporation in the capacity of a trustee is allowed to be sued by an individual inhabitant as one of the *cestuis que trust.*

In the United States this right and the doctrine on which it is based are distinctly recognized. Thus, in Dillon, on Municipal Corporations (5 ed.), vol. IV., p. 2763, sec. 1579, it is said that in the United States the right of property holders or taxable inhabitants to resort to equity to restrain municipal corporations under such circumstances is established; the origin of the equitable doctrine is explained in the following sections. In the much quoted judgment of the United States Supreme Court in the case of *Crampton* v. *Zabriskie*(1), it was said:—

(1) 101 U.S.R. 601, at p. 609.

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Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question.

It will be observed that in the United States the proceeding is one in equity. Whether the courts in this country would in like cases assume to exercise a similar equitable jurisdiction need not be too closely inquired into. The present case offers no occasion for the raising of any trust or the jurisdiction flowing therefrom.

To this class of cases belongs the case to which I have already referred, of the *Dundee Harbour Trustees* v. *Nicol*(1), though the principle on which it depends may not be so expressly recognized. In that case the appellants had been constituted by statute a body of trustees to be elected in part by the shipowners and harbour ratepayers of Dundee, and the Act vested in them certain property and rights. They made a use of part of their property for purposes not authorized by the Act and which involved the risk of its loss. It was held that they could be restrained from so doing and that the respondents, who were shipowners and harbour ratepayers, had a good title to maintain the proceedings. The Lord Chancellor said:—

> Reading the sections together I think that the effect of the statute is to establish a trust comprising a fund made up of rates, ferry dues and other sources of income as well as of sums authorized to be borrowed. * * * It appears to me that the respondents have an interest as beneficiaries in the fund so constituted and in the undertaking. * * * I see no reason in point of principle to doubt that this beneficial interest in the trust funds and undertaking, which are vested in the appellants as a corporation with limited

(1) (1915) A.C. 550.

powers, is sufficient to enable the respondents individually to claim to restrain dealings which are *ultra vires* with the trust funds and undertaking.

And, after referring to the usual and proper practice in England to invoke in such a case the assistance of the Attorney-General, he said that he thought it probable that even in England a harbour ratepayer in such a case

whose interest in the undertaking and funds is apparent ought to be treated as within the analogy of the principle, which enables a single shareholder to sue in his own name to restrain an *ultra vires* action.

Lord Dunedin, who delivered the principal judgment on the point, insists on the argument that the respondents being persons for whose benefit the harbour is kept up have a title to prevent an *ultra vires* act of the appellants which directly affects the property under their care.

So that it was really as trustees of the property to which the respondents had contributed and in which they were beneficially interested that the appellants were sued, and it was to prevent the loss of that property through their improper acts.

There can be no analogy between such a case and that of a ratepaper suing to prevent acts which neither involve any property in which the ratepayers are interested as *cestuis que trust*, nor impose any taxation or burdens upon them, but on the contrary are for their common advantage.

If I have dealt more fully with this case than its concern with the present case calls for, it is because it is the most recent case on the subject and has the authority of the final Court of Appeal for the United Kingdom. It illustrates well, moreover, the character

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of the class of cases in which a single individual can sue as one amongst a number of beneficiaries a corporation in whom property is vested in trust for all such beneficiaries.

As regards cases in the Canadian courts, particularly those of the Province of Quebec, I do not desire to say more than that I think the foregoing remarks apply with force to them. Perhaps, however, it must be admitted that there is difficulty in reconciling all the decisions in the Quebec courts.

Under these circumstances I think the matter must be treated as one that, in view of its importance, has not yet been sufficiently discussed and, at any rate, not conclusively decided. I think on all grounds it is open to this court to give a clear and final decision upon this point.

Since for the above reasons I consider that the appellant was not qualified to bring suit I express no opinion upon the merits of the questions raised in the suit.

The appeal is dismissed with costs.

IDINGTON J. (dissenting).—The respondent, the City of Montreal, a municipal corporation, entered into a contract with the other respondent whereby an exclusive franchise was attempted to be given the latter to establish and operate lines of autobusses to be operated over certain streets of said city in the way of carrying passengers for hire for the period of ten years.

The contract rests upon a by-law of the city, which it is said delegates the power to the city council to enter by way of resolution into such a contract, and upon such a resolution passed by the said council.

The contract is dated 22nd August, 1912, and is expressly made in virtue of the authority conferred upon the city by 2 Geo. V., ch. 56, sec. 12, sub-sec. 137, as well as all the municipal regulations of said city which can relate to the exploitation of autobus lines of the company.

The appellant is a ratepayer of the city and claims that the whole proceeding is illegal.

The questions thus raised must be determined by the consideration of a few sections of the city charter as amended by some of the numerous amendments that exist and of a few elementary principles of municipal law.

The amending sub-section 137, being that alone upon which the parties could have proceeded and must have supposed their proceedings rested, is as follows:—

137. To permit, under such conditions and restrictions as the city may impose, the circulation of autobusses and the establishment, maintenance and operation of autobus lines in the City of Montreal; to prescribe on which streets they may circulate and be established and from what streets they may be excluded; subject to the provisions of arts. 1388 to 1435 of the Revised Statutes, 1909, governing motor vehicles, respecting speed limits, the registration of vehicles and the licences of owners and chauffeurs.

To understand this we must observe in what connection it is used and how intended by the amendment to be applied. We find in tracing back the matter thus that it is made supplementary to sections 299 and 300 of the charter as consolidated in A.D. 1899 by 62 Vict., ch. 58, which enabled the city council to enact by-laws for the purposes defined and specified.

In the schedule of subjects contained in section 299 there is specified item, No. 17, which is as follows:—

The granting of franchises and privileges to persons or companies.

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Section 300, so far as bearing upon this subject, is as follows:—

> 300. And the city council, for the purposes and objects included in the foregoing article, but without limitation of its powers and authority thereunder, as well as for the purposes and objects detailed in the present article shall have authority: * * * 74. To regulate and control, in a manner not contrary to any specific provisions on the subject contained in this charter, the exercise, by any person or corporation, or any public franchise or privilege in any of the streets or public places in the city, whether such franchise or privilege has been granted by the city or by the legislature.

Let us read sub-section 137, introduced and put in connection with the foregoing by 2 Geo. V., ch. 56, above referred to and quoted, as if it followed this, and we see what gives it vitality, and upon and subject to what conditions the power which it contains is given.

It is a power to enact a by-law and nothing less and does not authorize the council to act by a mere resolution.

Surely, it is elementary that any one given a power to do a particular thing, in a strictly specified way, must follow the allotted path and is not at liberty to try to accomplish what he believes to be the same result by some other method, and then claim he is exercising the powers given.

I find, therefore, that the power given to do that contemplated by the amendment quoted above, whatever may be the scope and purpose thereof, must be exercised by by-law.

There was no by-law adopting the contract in question and, hence, it cannot rest upon this amending section; for the mere resolution of the council cannot maintain anything dependent thereupon.

It is argued that the amended powers of the com-

missioners enable this contract to be entered into by a resolution of the council. Sub-section 3 of section 21, enacted by 1 Geo. V., ch. 48, as follows:—

> It shall devolve upon the council, on the commissioners' report, to grant franchises and privileges, by by-laws, resolutions or contracts, as the case may be; to issue debentures and to effect loans,

is relied upon.

With great respect I cannot see how such an interpretation can be placed upon this sub-section.

It clearly indicates that where "as the case may be" a by-law is the appropriate method, then a by-law must be adopted, and where a resolution is a suitable mode of executing the proposals of the commissioners, that may be adopted.

It would surprise some people to be offered debentures resting merely upon a resolution of the council even if the commissioners had recommended such an issue.

Again, it has been argued that, as there may be a general power given municipalities relative to franchises for running cars for the conveyance of passengers, and, as clause 4650(*a*) and following sections, restraining the like grants beyond ten years, unless sanctioned by a vote of the municipal electors, use the phrase "by-law or resolution" in dealing therewith, it may be implied first, that an exclusive franchise for the ten years can be granted and that when the term of any such contract is less than ten years, then the use of a resolution may be resorted to.

Such far-fetched reason for resting an implication of any kind upon, hardly deserves serious consideration in relation to the matter now in hand.

These general provisions are intended to be comprehensive and to cover not only the actual, but also

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the possible by virtue of any existing, or by way of anticipation of any future regulation, enabling the use of either by-law or resolution in the cases referred to. How can the suggested implication rest thereupon unless and until legislative authority had been given to use resolutions as such basis of action?

Moreover, I venture to think that a municipal corporation has only such powers as are expressly given it by statute or as may arise from the necessary implication involved in the obligation to discharge some statutory duty imposed upon the corporation. And in the discharge of any such duty the usual methods appropriate to the execution of such business must be adopted.

When such corporations find they cannot, by acting within these limitations, efficiently promote the supposed purposes had in view in their creation, they usually apply to their legislative creators to confer further powers.

Such, I take it, was the origin of the amendment above quoted and relied upon. It never was, I imagine, supposed that there existed any such implication till the hard exigencies of arguing to maintain this contract suggested a resort thereto.

Starting out in any direction to solve the problems involved herein we are always driven back to the realization of the hard legal facts that the only semblance of power ever given in relation thereto was to enact a by-law relative to

> the circulation of autobusses and the establishment, maintenance and operation of autobus lines in the City of Montreal.

And this has not been adhered to.

Again, the contract proposed was to constitute an exclusion of others than the respondent company from

operating upon the streets selected. No such power is given in this section or elsewhere.

To begin with the streets are open to use by everyone for travelling over with suitable vehicles and whether carrying either passengers or freight for hire, or only for private business or comfort. An express enactment is required to take away any part of this public right.

In the next place the mere regulation of the traffic on the streets which is vested by the charter of the city in its authorities seems to have been the purpose of, and at least is clearly the nature of, what this amendment is provided for, and it cannot be extended by by-law, or otherwise, to the creation of an exclusive right in any man or firm or corporation to use the streets for any specific purpose. All must be treated alike unless by virtue of some express legislation taking away such right.

The section enables the council to prescribe the streets on which autobus lines may circulate, but does not enable the preference of one line over another.

I think it may be well, respectfully, to point out that those depending upon the argument of implication in legislation, would do well to consider the chapters in Hardcastle on Statutes dealing with implications and enabling statutes, and the many authorities collected therein.

The respondent being a ratepayer and constituted by the city charter a member of the corporation is entitled to take this action. It is one sort of security the law gives (as it does to each member of a corporate body) for keeping the municipal authorities in their acts

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within the limitations of the law, or often municipal government would be quite intolerable.

The statute gives, it is true, a summary method for attacking by-laws, but that is not inconsistent with the right each member of a corporate body has by law. And the provision does not purport to exclude any other remedy, though giving a summary method.

The appeal should be allowed with costs throughout, the contract declared illegal and void, and the by-law and resolution also, so far as designed and, if possibly valid, capable of being applied to support such a contract.

There are a number of the paragraphs in the by-law which are general and in themselves complete and inoffensive as they trench upon no man's right.

I had written the foregoing opinion before the re-argument, which recently took place, touching the right of the appellant to institute such proceedings as presented herein, was directed.

That right of appellant must depend upon whether or not he falls within article 77 of the Code of Civil Procedure for Quebec, which is as follows:—

77. No person can bring an action at law unless he has an interest therein.

Such interest, except where it is otherwise provided, may be merely eventual.

The new part indicates (whatever else it may have been intended for) as fairly arguable the proposition that the shareholders of the Montreal Tramways Company having an eventual interest in the decision of such a question as agitated herein, may be qualified to sue. The value of the interest is immaterial. It might happen to be, in any case, either that of the

owners of almost the entire shareholding property, or of only a single share.

The probably tenable answer is that generally speaking the shareholders are not as such entitled to apply to the courts unless and until shewing that by reason of the existing conditions of the company or its directorate, who should act but will not, there is no means left to any number of shareholders to obtain justice, or that the company is doing, or attempting to do, that which is *ultra vires*.

That brings the matter back to the other ground taken in this action by the appellant as an inhabitant and ratepayer, in other words as a corporator, that the contract he attacks is *ultra vires* of the corporation of which he is a member and that in having it so declared he has an interest entitling him to sue. English practice might suggest or require the suit to be on behalf of all the ratepayers. Passing that minor point not raised in argument, I return to the proposition just enunciated, which I maintained in what I have already written, and still maintain (more confidently) as result of the re-argument.

"The inhabitants and ratepayers of the City of Montreal and their successors" were, by section 4 of the charter, incorporated.

The charter, by section 304, specifically recognizes a ratepayer as having the right to apply to the Superior Court to annul any by-law. And a similar provision is made in the "Cities and Towns Act," para. 5623 of the Revised Statutes of Quebec, and article 698 of the Municipal Code.

All these provisions indicate that the legislature considered ratepayers to be in fact persons interested.

I think these enactments merely provide a sum-

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mary remedy by petition, in addition to such remedies as already were existent, for the enforcement of the legal right thus, apparently as matter of course, assumed to exist and to be grounded upon obvious interest.

And the almost entire abstention on the part of the Attorney-General from interference in such matters would seem to indicate that reliance is not to be placed as in England upon such officer, but upon the vigilance of the ratepayers for the purpose of protecting the members of municipal corporations against attempts on the part of those in authority to act *ultra vires.*

Then why should we assume under such a condition of things that an article of faith, as it were, which anciently existed in England must prevail in Quebec ?

Surely in the absence of English faith and practice there, and where reason alone is our guide, it is expressive of our common sense to hold that every "inhabitant and ratepayer" has a direct interest in keeping his municipal rulers within their legal boundaries. It is not a question of every such man having a right to interfere with the acts of the class of men whom the legislature has designated, and from whom the people have chosen those to transact the business of the corporation. It is simply the question of restraining such men from misrepresenting those who put them there going beyond the line of their authority that is now in question.

Why, for example, should shareholders of a corporate company impliedly have this right and it be denied to the municipal corporator ?

Why should a shareholder be told, as he was by

Bacon V.C. in *Hope* v. *The International Financial Society*(1), at page 332:—

> But he is a shareholder also, and, as a shareholder, it is his right, and it is also his duty, to see that the moneys of the company are applied to their legitimate purpose.

This seems to me sound law and sense and so was upheld in appeal. The plaintiff there had an interest as a creditor, but that was expressly discarded. The case is cited in Buckley on Companies, etc. (9 ed.), at page 613, where the legal distinctions applicable to cases in which a shareholder may, and those in which he may not, have a right to invoke the action of the courts to control a company, are dealt with.

Or take the doctrine as laid down by Sir George Jessell in *Russell* v. *Wakefield Waterworks Co.*(2), at pages 479 and 480, and especially foot of latter page, when quoting with approbation the language of Sir J. Wigram in *Foss* v. *Harbottle*(3), where he ends by attributing to Lord Cottenham the saying that

> the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.

What is dealt with there is not exactly what we have to deal with here, but the mode of thought and speech touches what may well have been had in mind by those amending the article 77 of the Code of Civil Procedure already quoted.

It all comes back to what that article covers and enables or impliedly denies.

If the attitude taken in England towards the supposed needs of resorting to the Attorney-General as

(1) 4 Ch. D. 327.
(2) L.R. 20 Eq. 474.
(3) 2 Hare 461.

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sole repository of the right and duty to invoke the powers of the court to restrain corporations from transgressing the limits of their powers, has been correctly reflected in these dicta as what obtained half a century ago, can we rely much upon the merely technical doctrine transmitted thence as a guide to interpret said article 77 ?

The Attorney-General of Quebec has, by article 978 of the Code of Civil Procedure, imposed upon him the respective duties, therein expressed, either absolutely or conditionally, as the case may be. Does that take away from the interest, right or duty of the "inhabitant and ratepayer"?

I do not find therein any such necessary implication.

Then in articles 713, 714, 715, and 716 of the Revised Statutes of Quebec, 1909, there is defined his legal functions, duties and powers.

Amongst these article 716 gives him the functions and powers which belong to the office of Attorney-General and Solicitor-General of England, in so far as the same are applicable to this province, etc.

When we fail to find an active use of such powers in relation to such subject matters, should we not conclude that the same have not been found in that respect applicable to the province ?

If he is supposed to act only upon the application of some one indemnifying against costs under article 978, then who has the right to so demand ?

If the ratepayer or inhabitant has no interest, how can he demand such action ? It seems over refinement to say he has an interest which entitles him to set the law in motion, yet no interest entitling him to sue.

Let us turn to article 50 of the Code of Civil Procedure, which reads as follows:—

50. Excepting the Court of King's Bench, all courts, circuit judges and magistrates, and all other persons and bodies politic and corporate, within the province, are subject to the superintending and reforming power, order and control of the Superior Court and of the judges thereof in such manner and form as by law provided.

Who is to move the court to invoke the exercise of this visitorial power? If intended to limit it to those moving by and through the Attorney-General, the article likely would have said so. We do know that such has not been the interpretation given it in many cases. Even before this legislation the power was exercised apparently as if inherent in the court, though not as accurately defined.

The courts have continually acted upon the application of those interested and the only difference of opinion has been as to the interest a ratepayer, merely as such, may have. We find many cases in which the objection has been taken that he applying had no interest, and that often answered by shewing he had some possible financial interest more or less remote. From this counsel for the company seems to ask us to infer those cases are the limit. I fail to find in the very numerous cases of that sort any such doctrine as he argues for to be necessarily implied.

I do find, however, something to warrant the inference that a confusion of thought has often existed in the minds of those pressing such objections, between the right of a member of the corporation to restrain it acting *ultra vires* and that of a member of the general public in such cases as arise out of what is *intra vires* the municipal authority.

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For example, some obstruction may exist on a highway, obnoxious to the safety or general sense of propriety, and a member of the public may complain. Unless, however, he is able to shew he suffers particularly beyond the rest of the public some injury therefrom, he is held not entitled to bring a suit therefor. The subject is within the administrative powers of the municipal authorities. No private right is invaded is the answer to the action. I do not think the cases are at all analogous in law.

We find, however, a line of cases where the suitor had obviously no interest but that of a ratepayer or other member of the corporate body.

The following cases have been cited to us by counsel for appellant, in the recent argument, as some of those in which the element of interest other than simply as a ratepayer or otherwise, as member of the corporation, clearly did not exist, or was in effect eliminated, by the view taken by the court, as to such right and interest.

The case of *Allard* v. *La Ville de Saint-Pierre et al.* (1), is one where the question arose of the right of a ratepayer to bring an action before the Superior Court to have a by-law quashed which had been passed *ultra vires* which was maintained in appeal. All the questions involved herein relative to the right of a ratepayer to sue in the Superior Court instead of proceeding by way of petition as an elector were dealt with therein.

Then in the case of *Aubertin* v. *La Ville de Maisonneuve* (2), it was first decided by Mr. Justice Curran that the action should be dismissed purely on the

(1) Q.R. 36 S.C. 408. (2) 7 Q.P.R. 305.

ground that there was no right in the plaintiff to sue in his quality of proprietor of immovables situated within the limits of the municipality defendant, and that he did not shew any grievance not suffered by other proprietors and electors. In appeal to the court of appeal the judgment was reversed, the majority of the court holding distinctly that there was error in the said holding of Mr. Justice Curran. Many cases are cited in the notes thereto; some relevant to the point in question, others not so relevant.

In the case of *Lennon* v. *La Cité de Westmount* (1), the exception was taken that the plaintiff should have proceeded by way of petition and it was held that where the by-law was *ultra vires* the ratepayer need not proceed by way of petition.

In the case of *Corporation of Arthabasca* v. *Patoine* (2), the right seems to have been recognized although the Chief Justice, Sir A. Dorion, dissented from the result, holding that in that case proceedings were not open to be taken by anybody, because it was a matter for the administration of the municipality in which there might be a mere irregularity. He expressly distinguishes that case from the case where the council has acted beyond its jurisdiction and seems to have recognized that then any party injured could proceed in virtue of the provisions of the Code, or, in certain cases, by direct action in the ordinary form. Unfortunately the exact question of whether the individual ratepayer would in such a case necessarily be injured, was not by him touched upon. The case is valuable for the consideration given therein to the general principles which ought to govern those manag-

(1) 10 Q.P.R. 410. (2) 9 L.N. 82.

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ing municipal affairs, and govern the court in supervising their conduct and rectifying wrong, if any.

In *Guay* v. *The Corporation of Malbaie*(1), the court seemed to recognize the right of an elector or ratepayer as having sufficient interest in certain cases.

In *Jacob* v. *La Cité de St. Henri*(2), Judge Pagnuelo clearly holds the ratepayer had sufficient interest.

The case of *Tremblay* v. *The City of Montreal*(3) proceeds on article 304 of the charter, but St. Pierre J. distinguishes between that which is *intra vires* and that which is *ultra vires,* as to the extent of this remedy.

In *Trudel* v. *Cité de Hull*(4), the right of a ratepayer to have a mandamus to compel the corporation to observe the law was clearly recognized. That case concerned the finances of the city, but turned on the question of the plaintiff having an interest to bring the suit therefor. The plaintiff clearly had no such right as where given expressly the power as in the last mentioned case. Yet he was held entitled to sue. The form thereof or kind of relief sought or got cannot affect the question of his right or interest. If he had no interest he could not sue in any form.

The case of *Farwell* v. *Corporation of Sherbrooke* (5) clearly lays down the law that the ratepayer is not confined as to his right to relief to the provisions contained in specific articles enabling him to sue, but may have a by-law passed *ultra vires* quashed by tak-

(1) 11 Rev. de Jur. 29.
(2) Q.R. 6 S.C. 488.
(3) Q.R. 28 S.C. 411.
(4) Q.R. 24 S.C. 285.
(5) Q.R. 24 S.C. 350.

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ing the proceeding in an ordinary action. Many of the leading cases in Quebec are discussed in the judgment.

I may also refer to the case of *Piché* v. *La Corporation de Portneuf*(1), where the Court of Review confirmed, for the reasons given by Routhier J., the judgment given by him granting relief against the action of the council in regard to roads, where he relied upon article 2329 of Revised Statutes of Quebec, 1888, which gives very wide powers over all courts, magistrates and judges, and circuit courts and corporations in the province, and now appears as article 3085 of the Revised Statutes of Quebec, 1909.

I do not think we should discard and overrule such a mass of authority simply because we find in some other cases a different rule has been observed.

I have examined all such cited and many others, for the subject is an interesting one. I think, however, when we have under consideration any branch of the law where there has been a development, indicating a process of discarding that which is no longer serviceable, and substituting therefor that which tends to the furtherance of justice and judicial control over those who are determined to exceed the limits of their authority, we should at least lend a sympathetic ear to such decisions as tend to aid and promote such beneficent development.

In this instance it turns upon the meaning to be given the "interest" of him who, if he has regard to what is going on about him, must be most deeply interested in seeing that the bounds of authority in his local rulers are not exceeded.

It does not occur to me that the term can only re-

(1) Q.R. 17 S.C. 589.

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late to financial interests. In the ultimate result, assuredly, misgovernment always tends to affect even those interests. In this case there are financial provisions dealt with in the contract proposed. If the contract is *ultra vires* it is void and the corporation may run many merely financial risks of which the end may be difficult to see. Is such a thing to be tolerated ?

In the case of *Paterson* v. *Bowes*(1), the Court of Chancery in Upper Canada held a ratepayer entitled to sue as plaintiff therein did, and we in this court in the case of *MacIlreith* v. *Hart*(2), followed that and other like cases.

The principle involved in the latter was the *ultra vires* nature of the act of payment complained of. Here it involves money and much else that concerns the right and duty of the citizen.

There is nothing peculiar to French law in the doctrine that a man who has no interest in the subject matter giving rise to litigation shall have no right to bring an action. That doctrine is common to all legal systems. It has been unduly pressed by its application to a condition of things arising out of the development of corporate activities, both of an industrial and municipal character.

Those fond of technicalities may approve of so doing. Those caring less for technicalities, seeing the trend of events and having more regard for the useful application of the principles of law than the form or mode of such application, should find no difficulty in discovering that he who has as the result of such development a very real interest in restraining

(1) 4 Gr. 170.

(2) 39 Can. S.C.R. 657.

those he has placed in power from exceeding the limits thereof.

Counsel for the city urged that the business of the city would be hampered by permitting the exercise of such a right. The contrary seems to me to be the correct way of looking at it. If the municipal authorities keep within their powers they have nothing to fear. If they exceed them the sooner it is so determined the better. For what is done by such excess leads only to confusion and loss of efficiency and money.

An *obiter dictum* of Lord Watson in the judgment of the Judicial Committee of the Privy Council in *Déchène* v. *City of Montreal*(1), at middle of page 642, was referred to in argument. He said there, referring to some legislative provisions enabling any municipal elector to attack by-laws:—

> They confer upon each and every municipal elector the right, which he had not at common law, to challenge, on the score of illegality, any corporate appropriation of money to meet the expenses of the current year, subject to the condition that the right shall prescribe, if not exercised within three months from the time when the appropriation comes into force.

What he had in mind is made to appear at foot of page 643, where he says:—

> To begin with the first of these pleas, it is true that an incompetent resolution must be illegal; but it does not follow that an illegal resolution must be beyond the competence of the council. In this case, the resolution sought to be impeached was plainly within their competence, seeing that it exclusively relates to matters committed to the council by statute. Even if it had been incompetent, that circumstance could not enable the appellant to bring a petition for its annulment after the expiry of the three months. After the lapse of that period, the right conferred upon a municipal elector by 42 & 43 Vict. ch. 53, sec. 12, is at an end; though the incompetent resolution remains open to challenge, at the instance of persons who have a proper title.

(1) [1894] A.C. 640.

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Who the persons having a proper title might be is not stated. An elector might be a corporator or not according to the statute incorporating.

As against this dictum we have the recent decision (in 1915) in the case of *Dundee Harbour Trustees* v. *Nicol* and others(1), holding that appellants, who were constituted a board of trustees under the "Dundee Harbour and Tay Ferries Consolidation Act," 1911, to be elected in part by the shipowners and harbour ratepayers of Dundee, were liable to be restrained by proceedings taken at the suit of shipowners and ratepayers, from acting *ultra vires*. And the neat point was raised as to the right of those parties to complain without the necessity of the Lord Advocate being made a party to take the proceeding.

Lord Haldane, mindful of the analogy according to English practice which might suggest the single shareholders's right upon which I have relied alone, instead of the Attorney-General who, in a like English case might be a proper party to so act, said:—

> In England it may well be that it would be in accordance with the usual and proper practice to invoke, in a case such as this, the assistance of the Attorney-General, who, as representative of the Sovereign the *parens patriæ*, has the capacity to interfere. But even without invoking the Attorney-General I think it probable that, in a case such as the present, a harbour ratepayer in the position of the respondents, whose interest in the undertaking and funds is apparent, ought to be treated as within the analogy of the principle which enables a single shareholder to sue in his own name to restrain an *ultra vires* act.
>
> It is not necessary to decide this question of English law, and the judgment in the present case will leave it open; yet I have thought it right to say what I have said in order to shew that I do not overlook the analogy. But whatever would be the position in England, the case for recognition of the individual title to sue of a person in the situation of the respondents is materially

(1) (1915) A.C. 550.

stronger in Scotland, inasmuch as the Lord Advocate does not, under the law and practice which obtain there, usually intervene as representing the *parens patriæ* excepting when some statute casts on him the duty of doing so. I have come to the conclusion that the respondents had a good title to maintain these proceedings.

Then in the same case we have (if I might be permitted to say so) a most instructive judgment by Lord Dunedin citing many cases and shewing the development of judicial thought in regard to the very question we have in hand.

If the ratepayers can be upheld by the House of Lords in maintaining such a right as involved herein in Scotland, where so much of the mode of legal thought depends on the principles of the civil law, surely the Province of Quebec need not dread the adoption of what, as shewn by the cases cited above, so many of their able judges have held to be law.

In the United States opinion seems to have been much affected by the local condition of things relative to the exercise of the powers of supervision by the Attorney-General. Where by statute or otherwise that officer continuously undertook to see to the enforcement of law and order, he often was looked to as the proper party to bring the action, but in states where that officer has ceased to act, the tendency seems to have been to hold the ratepayer had the right, in other words, the interest, qualifying him to act.

In the case of *Crampton* v. *Zabriskie*(1), at page 609, the Supreme Court of the United States held that at that day (1879), no serious question existed of the right.

Of course, all this is predicated upon the hypothesis that the contract in question is *ultra vires* and the

(1) 101 U.S.R. 601.

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mode or condition of doing anything like thereunto has not been adopted.

If I am mistaken in the opinion of its being *ultra vires,* this supplementary opinion has no bearing on the appeal.

DUFF J.—On the 10th of June, 1912, the council of the City of Montreal passed a by-law containing the following provisions:—

Sec. 2. Les autobus destinés à transporter des "passagers" seront exclus de toutes les rues, avenues et autres voies publiques qui ne sont pas mentionnés dans la cédule ci-annexée.

Sec. 16. Aucune personne ou compagnie ne devra faire circuler des autobus ou établir, maintenir ou exploiter des lignes d'autobus dans la Cité de Montréal, dans les rues mentionnées dans le présent règlement, sans avoir préalablement obtenu un permis à cet effet de la cité.

On the 22nd of August of the same year the mayor on behalf of the municipality made a contract with the Canadian Autobus Co. Ltd. in pursuance of a resolution passed by the council on the 14th of the same month, by which (*inter alia*) the Autobus Co. was given the right to run autobusses for the transportation of passengers for hire on certain parts of the public highways mentioned in these two sections. The contract contains the following provisions:—

La Cité de Montréal s'engage durant une période de dix années à compter de la mise en exploitation des lignes désignées dans les articles 1, 26, et 27, du présent contrat, à n'accorder aucun autre permis pour l'établissement, le maintien et l'exploitation de lignes d'autobus sur ces dites lignes,

the effect of this contract, if valid, being that for the period of ten years following "la mise en exploitation" the Autobus Co. acquires the right to run its vehicles as above mentioned, while the municipality disables itself from granting permits under the by-law of the

10th of August to possible competitors for any of the same routes. On the same assumption it is also probable that the council is disabled from abrogating the regulation contained in the 16th section of the by-law. It is not necessary, however, in the view I take, to consider that point.

The validity of the contract is attacked upon three grounds:—

(1) That the City of Montreal has no authority to grant an exclusive right to run autobusses in the city streets.

(2) That assuming such a power to be vested in the municipality it is a power which can only be exercised under the authority of a by-law and admittedly no by-law was passed authorizing the contract of the 24th of August.

(3) That the contract provides for a transfer to the municipality of shares in the Autobus Co., and the taking shares in such a company is *ultra vires* of the municipality.

The first ground raises, among others, the important question of how far the council can by contract bind its successors in respect of regulating the use of the city streets; *Ayr Harbour Trustees* v. *Oswald* (1); *Staffordshire and Worcestershire Canal Proprietors* v. *Proprietors of Birmingham Canal*(2), but I think the appellant has no title to impeach the resolution of the council or the contract upon either the first or the second of these grounds. I shall state my reasons for this as briefly as possible, but a summary reference is unavoidable to the powers and authorities

(1) 8 App. Cas. 623. (2) L.R. 1 H.L. 254.

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with which the municipal corporation of the City of Montreal is invested by its present charter — of the year 1899 (62 Vict., ch. 58). By section 4 it is provided (*inter alia*) that the inhabitants and ratepayers of the City of Montreal and their successors shall continue to be a municipal corporation under the name of the City of Montreal,

> and as such shall have * * * *all the powers of legislation* control and administration commonly possessed by municipal corporations and in addition thereto all the powers specially granted to the said city by law and by the provisions of this Act.

The description of these "powers of legislation" and "control," in so far as they are material for the present purpose is found in sections 299 and 300 of the charter and in an enactment, passed in 2 Geo. V., and specially referred to in the contract by section 12, subsec. 137, ch. 56, of the statutes of that year. Section 299 of the charter which is the general provision on the subject of "powers of legislation" had better be quoted substantially in full, and is as follows:—

> 299. It shall be lawful for the city council to enact, repeal or amend, and enforce by-laws for the peace, order, good government and general welfare of the City of Montreal, and for all matters and things whatsoever that concern and effect, or that may hereafter concern and effect the City of Montreal as a city and body politic and corporate, provided always that such by-laws be not repugnant to the laws of this province or of Canada, nor contrary to any special provisions of this charter.
>
> And for greater certainty, but not so as to restrict the scope of the foregoing provision or of any power otherwise conferred by this charter, nor to exceed the provisos herein above mentioned, it is hereby declared that the authority and jurisdiction of the said city council extends, and shall hereafter extend to all matters coming within and affecting or affected by the classes of subjects next hereinafter mentioned, that is to say:—
>
> 3. *Streets, lanes, and highways, and the right of passage above, across, along or beneath the same;*
> 6. *Licenses for trading and peddling;*

8. *Health and sanitation;*
12. *Nuisances;*
14. *Decency and good morals;*
17. *The granting of franchises and privileges to persons or companies.*

The provisions of section 300 are more specific; sub-sections 1, 29, and 74 have some bearing upon the question before us. They are as follows:—

300. And the city council, for the purposes and objects included in the foregoing article, but without limitation of its powers and authority thereunder, as well as for the purposes and objects detailed in the present article, shall have authority:—

1. To regulate the use of and prevent and remove encroachments into, upon or over streets, alleys, avenues, public grounds and public places, municipal streams and waters, and to prevent injury thereto and prohibit the improper use thereof;

29. To license and regulate hackmen, draymen, expressmen, porters, and all other persons or corporations, including street railway companies, engaged in carrying passengers, baggage or freight in the city, and to regulate their charges therefor, and to prescribe standing places or stations within the streets or near railway stations, where the same may remain while waiting for business, and to prohibit the same from standing or waiting at any other places than the places so prescribed;

74. To regulate and control, in a manner not contrary to any specific provisions on the subject contained in this charter, the exercise, by any person or corporation, of any public franchise or privilege in any of the streets or public places in the city, whether such franchise or privilege has been granted by the city or by the Legislature.

The statute of 2 Geo. V. is in these terms:—

137. To permit under such conditions and restrictions as the city may impose, the circulation of autobusses and the establishment, maintenance and operation of autobus lines in the City of Montreal; to prescribe on which streets they may circulate and be established and from what streets they may be excluded; subject to the provisions of arts. 1388 to 1435 of the Revised Statutes, 1909, governing motor vehicles, respecting speed limits, the registration of vehicles and the licences of owners and chauffeurs.

It is evident that in passing the by-law of the 10th of June and the resolution of the 14th of August the council was attempting to exercise one or more of the

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"powers of legislation" and "control" described in these enactments. The soil of highways within the municipality is declared, it is true, by another enactment to be vested in the municipality (Municipal Code, art. 752); but as highways they are dedicated to a public use and the municipality holds its title subject to the public right. The municipal council in professing to regulate the exercise of the public right (as in prohibiting the running of autobusses for hire without licence) is not acting as proprietor in the administration of the private property of the corporation. In Mr. Dicey's phrase, it acts herein as a "subordinate law-making body" in a matter which concerns not only the ratepayers or the inhabitants, but all persons who as the subjects of His Majesty are *primâ facie* entitled to use the highways. And the "law-making" function it thus exercises may be assumed to have been committed to it in the interests of the whole public understood in that sense.

I have been unable to convince myself that, apart from special enactment, the relation between the municipality and a ratepayer or an inhabitant as such imports in itself the possession by each of them of an "interest" within the meaning of article 77, Code of Civil Procedure, entitling each of them as an individual to call the council of the municipality to account in a court of law for excess or abuse of authority in the exercise or professed exercise of functions of this description.

Although the phrase has perhaps countenance from the highest judicial authority (see *Bowes* v. *City of Toronto*(1), at p. 524), it is only in a broad sense that

(1) 11 Moore P.C. 463.

a municipal council exercising such powers can be said to act as "trustee" for the inhabitants or for the ratepayers as individuals. Between them as individuals, and the council, there is no fiduciary relation in the legal sense; but it is urged that since the inhabitants and ratepayers are constituted the Corporation of the City of Montreal by section 4 of the charter the law confers upon each of them a status to maintain such an action as this as a member of the corporation and the analogy of the shareholder in a joint stock company and his right to attack *ultra vires* acts of the corporation is invoked. I think that is straining the analogy. The governing body of a municipal corporation exercising law-making powers affecting the rights of all His Majesty's subjects presents a very different hypothesis from a corporation administering private property only. For excess of power in the first case (which is a wrong against the corporation or against the public as a whole) the appropriate remedy seems to be by way of some proceeding at the instance either of the corporation itself or of an authority representing the public. The law of Quebec provides the machinery. Article 978, C.P.Q.

What I have said has, of course, no necessary bearing upon any right a ratepayer might be supposed to have to impeach proceedings of the council to impose a tax or rate exigible from such ratepayer.

The decisions relied upon give little help to the appellant. The ratio of *Dundee Trustees* v. *Nicols* (1) is stated in this passage of the judgment of Lord Dunedin, at pages 568 and 569:—

> I now turn to the circumstances of this case. As I said at the outset, I do not think any general pronouncement can be made as to

(1) (1915) A.C. 550.

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when there is title and when there is not. But when I find that the *respondents in the capacity of harbour ratepayers are members of the constituency erected by the Act of Parliament to elect the trustees,* and *as such, are also persons for whose benefit the harbour is kept up,* I cannot doubt that they have a title to prevent an *ultra vires* act of the appellants, *which ultra vires act directly affects the property under their care.* It is not only that loss of that property through improper acting may have the effect of imposing heavier rates on the respondents in the future, but, in the words of Lord Johnston in the *Stirling County Council Case*(1), at p. 1293, as they have contributed to the funds which bought the property, "they have an interest in the administration of a * * * fund to which they have contributed," and a title flowing from that position and interest.

This passage, of course, has no application to the present case. The Lord Chancellor, at page 558, suggests an analogy between the ratepayers whose rights were being considered and that of a shareholder in a joint stock company under the English law. His Lordship's language makes it plain that he has in mind a case where the right which is being asserted is in the nature of a "beneficial interest in trust funds"; and I think I am not misreading his Lordship's judgment in interpreting it as giving no countenance to the proposition that the analogy of the shareholder in a joint stock company extends to a case in which the act complained of is not an act dealing with or directly affecting corporate property, but an act done in professed exercise of law-making powers exercisable in the interests of the public as a whole. In *Bowes* v. *The City of Toronto*(2) the action in the form in which it ultimately succeeded was an action by the municipality and the complaint was that certain city officials had made a profit out of business transacted for the municipality and for this they were

(1) (1912) Sess. Cas. 1281. (2) 11 Moore P.C. 463.

compelled to account. *McIlreith* v. *Hart*(1) was a case of *ultra vires* payments to members of the council. I concurred in the judgment of Mr. Justice Davies, but I must admit I have always had my doubts about the decision.

There is, moreover, the observation of Lord Watson in *Dechène* v. *City of Montreal*(2), which, as I read it, affords an argument of considerable weight in favour of the respondents. In that case the appellant sought to attack the annual appropriation as illegal. The charter of Montreal as it then stood (37 Vict., ch. 51, amended by 42 & 43 Vict., ch. 53), gave a right to any municipal elector in his own name to impugn by-laws, resolutions and appropriations on the ground of illegality within a delay of three months. At pages 642 and 643, Lord Watson explicitly says for the Judicial Committee that in his view a municipal elector, as such, would have no title to atack the resolution even if incompetent except under the authority of this provision. The provisions of the charter then in force in relation to the qualification of voters seem to shew that all classes of persons qualified to vote would fall within the category of "ratepayers" as that term is used in the charter of 1899. It would not be easy to reconcile the positions (1) that a voter (necessarily a ratepayer) has no status to attack even an incompetent resolution or by-law authorizing an appropriation except by special enactment, and (2) that a ratepayer as such has such a status even where the resolution or by-law does not directly affect the municipal property or impose a tax or rate.

It should be noted that this observation by Lord

(1) 39 Can. S.C.R. 657. (2) [1894] A.C. 640.

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Watson was made in 1894 and that the present charter which is a revision and consolidation of the statutes relating to the City of Montreal was passed five years later. A comparison of the enactment under review by the Privy Council in 1894 in *Dechêne's Case*(1), with section 304, which was substituted for it in the present charter, would hardly support a suggestion that the law as stated by Lord Watson had been intentionally changed. There is, therefore, some ground for saying that, having regard to the course of legislation and the discussion in the judgment referred to, section 304 ought not to be read as a regulation or a limitation of an existing right, but as conferring a new right which would not otherwise have existed even as regards incompetent resolutions dealing directly with corporate property.

As to the second ground, namely, that the council proceeded by resolution and not by by-law. If a by-law was strictly required, the objection, assuming as it does the power to act by by-law, must, I think, be rejected on the additional ground that as the council may be assumed to have been ready to pass a by-law had they been advised that a by-law was necessary, and as the corporation itself as represented by the council stands by the resolution and the contract entered into pursuant to it the nature of the procedure followed by the council is not a matter in which the courts ought to interfere at the suit of an individual ratepayer. The resolution on this same assumption is not *ultra vires* in the sense of the rule which enables an individual shareholder to attack the *ultra vires* acts of a joint stock company. If the analogy of the

(1) [1894] A.C. 640

shareholder is to be appealed to I can see no good reason why the principle of *Foss* v. *Harbottle*(1) should not be put into effect.

I have had more difficulty with the third ground of objection, but I have come to the conclusion that, assuming the transaction otherwise competent, section 4 read together with these words of section 299, namely:—

> It shall be lawful to enact by-laws for all matters and things whatsoever that concern and effect or that may hereafter concern and effect the City of Montreal as a body politic and corporate

and with the statute of 2 Geo. V., are sufficient to invest the municipality with authority to take shares in such a company as that in question here which are fully paid up and in respect of which the municipality can incur no liability on account of the conduct of the company's affairs. If it be said there is no by-law then that objection has just been answered. I reserve my opinion on the question whether assuming the taking of such shares to be *ultra vires*, the transaction would on that ground be open to attack at the instance of a ratepayer after the expiration of the delay prescribed by section 304.

ANGLIN J. (dissenting).—I am, with great respect, of the opinion that this appeal must be allowed.

Under the alleged authority of a by-law and of a subsequent resolution of its council, the corporation of the City of Montreal entered into a contract purporting to give to its co-defendant the Canadian Autobus Company, Ltd., an exclusive privilege to operate lines of autobusses on certain named streets in the

(1) 2 Hare 461.

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city. The by-law prohibited the operation of lines of autobusses on any other of the city's streets on the ground that they were not suitable for such traffic. The effect, if the contract were valid, would be to confer a monopoly upon the respondent company.

The appellant, a ratepayer of the city, attacks the by-law, resolution and contract on the grounds that

(1) The defendant corporation has not the power to grant such an exclusive privilege;

(2) If the defendant corporation has that power, it can only be exercised by by-law;

(3) The by-law in question does not purport to authorize a contract conferring such an exclusive privilege.

The status of the plaintiff to maintain this action as a ratepayer has been the subject of much controversy. The numerous authorities cited to us indicate some uncertainty on this question in the jurisprudence of Quebec. The proceedings of the municipal corporation are attacked in the present action not merely as being illegal, but as beyond its competence. I do not think that section 304 of the city charter (62 Vict., ch. 58), excludes any common law right of action which a ratepayer may have to prevent abuse of its powers by the municipal corporation of Montreal. (Compare 42 & 43 Vict., ch. 53, sec. 12; and see *Dechêne* v. *City of Montreal*(1); *Comté d'Athabasca* v. *Patoine*(2); *Coriveau* v. *St. Valier*(3); *Aubertin* v. *Ville de Maisonneuve*(4); *Lennon* v. *Cité de Westmount*(5); and *Farwell* v. *Corporation of Sherbrooke*(6).) The weight of authority seems to

(1) [1894] A.C. 640.
(2) 9 L.N. 82.
(3) 15 Q.L.R. 87.
(4) 7 Q.P.R. 305.
(5) 10 Q.P.R. 410.
(6) Q.R. 24 S.C. 350.

me rather to favour the view that the ratepayer's interest is sufficient under article 77, C.P.Q.; *Allard* v. *Ville de Saint-Pierre*(1); *Tremblay* v. *City of Montreal*(2); *Guay* v. *Corporation of Malbaie*(3); *Jacob* v. *Cité de St. Henri*(4); and *Trudel* v. *City of Hull*(5). No doubt there are not a few cases in which the contrary opinion has been expressed. Although the contract in question does not involve a direct expenditure of municipal funds, it deals with and ties up municipal property and the control of the city streets in a manner that may result in serious loss of revenue to the municipality in future years, and may thus materially affect to their detriment the interests of the ratepayers in the finances of the city. The case would, therefore, seem to fall within the ratio of the judgment in *Paterson* v. *Bowes*(6), and of the decision of this court in *MacIlreith* v. *Hart* (7), as stated in the judgment of Maclennan J.A., concurred in by my Lord, the Chief Justice, although it would have been more clearly within these authorities had the plaintiff sued on behalf of himself and all the other ratepayers and inhabitants of the city. See, too, *Black* v. *Ellis*(8). But this objection to the form of action was not taken in the courts below or at bar in this court and should not at this stage be allowed to defeat the plaintiff's claim. I express this opinion in favour of the plaintiff's status with some hesitation induced by respect for my learned colleagues from the Province of Quebec, who hold the contrary view. I should, however, deem it a misfortune if such an

(1) Q.R. 36 S.C. 408.
(2) Q.R. 28 S.C. 411.
(3) 11 Rev. de Jur. 29.
(4) Q.R. 6 S.C. 488.
(5) Q.R. 24 S.C. 285.
(6) 4 Gr. 170; 11 Moo. P.C. 463, 524.
(7) 39 Can. S.C.R. 657.
(8) 12 Ont. L.R. 403.

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action as this could not be maintained by a ratepayer. Having regard to the many difficulties in the way of securing intervention by Attorneys-General, a very useful, if not in many instances, the only practical safeguard in this country against improper exercise of their powers by municipal corporations would be taken away.

A careful examination of the provisions of the charter of Montreal has not disclosed to me anything in them which empowers the municipal council to confer such an exclusive privilege as that here in question. In this country the power to grant exclusive privileges on its public streets does not exist in a municipal corporation unless it is conferred by legislative authority, either expressly, or by necessary implication. Dillon on Municipal Corporations (5 ed.), pars. 1215-8, 1234, 1308; 28 Cyc. 874; see, also, *Ottawa Electric Co.* v. *Hull Electric Co.*(1). This restriction is due to the public interest in the user of the streets and exists whether the ownership of the land they occupy is vested in the Crown, the riparian proprietors, or the municipality itself.

The subject of the licensing of autobus lines (art. 300, sub-sec. 137) and the granting of franchises and privileges (art. 299, item No. 17) having been expressly provided for in the charter of the City of Montreal, I rather incline to the view that art. 4650 (*a*) of the Revised Statutes of Quebec (7 Edw. VII., ch. 48), relied on by the respondents, is not applicable to such matters in that municipality. But, if it is, I fail to find in its terms warrant for the implication that the municipal corporation has the power to grant

(1) Q.R. 10 K.B. 34; [1902] A.C. 237.

an exclusive privilege such as that under consideration, assuming it to be, as I think it may be deemed (*ut res magis valeat quam pereat*), limited in duration to ten years notwithstanding the provisions of the seventeenth clause of the contract and their apparent conflict with the first clause.

By sub-section 137 of article 300 of the charter, the municipal council is empowered to license and regulate autobus traffic in the streets of the city. The impeached by-law was passed under that provision as appears upon its face. The by-law is general in its provisions. It provides for the licensing and regulating of autobus lines. Nothing in it purports to authorize the granting of any exclusive privilege. The subsequent resolution approving of the contract made between the respondents, in so far as that contract purports to bind the municipal corporation not to grant autobus privileges to any other autobus proprietor, is not based upon and cannot be supported by the by-law. Having regard to the provisions of articles 299 and 300 of the chapter, I have no doubt that, if the municipal corporation had power to grant such an exclusive privilege as the contract in question purports to confer, it could exercise that power only by by-law. There is nothing in the statutory provisions creating the Board of Control and defining its powers which dispenses with the necessity of a by-law in such a case. On the contrary, as I read those provisions, by article 21 of the Act of 62 Vict., ch. 51, as replaced by the statute 1 Geo. V., ch. 48, the requirement of a by-law in such a case is expressly continued.

It follows that, in my opinion, although the by-law is unobjectionable, the subsequent resolution author-

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izing the contract in question and that contract itself are *ultra vires* of the defendant corporation and should be set aside and vacated.

The appellant is entitled to his costs throughout.

BRODEUR J.—Deux questions se présentent dans cette cause-ci: la première est de savoir si le demandeur a un intérêt suffisant pour lui permettre d'instituer la présente poursuite; et par la seconde on soulève la validité de certaines ordonnances municipales et d'un certain contrat.

La conclusion à laquelle j'en suis venu sur la première question, c'est-à-dire sur le droit de poursuite du demandeur, me dispense de discuter la seconde.

Le demandeur veut faire annuler par action directe:

1°. Un réglement de la cité de Montréal permettant la circulation des autobus;

2°. La résolution qui déterminait les conditions auxquelles la compagnie intimée pouvait s'établir à Montréal;

3°. Le contrat fait entre la cité et cette compagnie en exécution de ce règlement et de cette résolution.

La cité de Montréal est régie par une loi spéciale adoptée en 1899 (62 Vict. ch. 58).

En vertu de cette loi (article 304) les règlements municipaux peuvent être attaqués par un contribuable par voie de requête qui devra être présentée à la Cour Supérieure dans les trois mois de leur mise en vigueur.

Il n'y est dit nulle part que les résolutions du conseil municipal ou que les contrats exécutés par la corporation peuvent être attaqués par un contribuable.

Dans la cause actuelle le demandeur aurait pu procéder par la voie expéditive de la requête en cassation (motion to quash); mais il a préféré avoir recours à l'action directe afin de contester en même temps la résolution et le contrat.

Je considère qu'il n'a pas prouvé avoir un intérêt suffisant pour lui permettre de réussir dans sa poursuite.

Il ne démontre pas qu'il soit personnellement affecté par le règlement, la résolution ou le contrat en question.

Il avait d'abord allégué qu'il était actionnaire dans une compagnie rivale de celle qui a eu le privilège de faire circuler ses autobus mais lors de l'audition devant nous il a abandonné ce point.

Son intérêt est celui de tous les contribuables de la municipalité.

Cette question d'intérêt a fait l'objet de plusieurs décisions.

Nous avons d'abord le Conseil Privé qui, dans les causes de *Brown* v. *Gugy*(1), et de *Bell* v. *Cité de Quebec*(2), a décidé que le droit d'un propriétaire riverain de poursuivre pour des obstructions placées dans une rivière ne pourrait être exercé qu'au cas où il souffrirait des dommages spéciaux.

Il est bien vrai qu'il ne s'agissait pas d'une affaire municipale; mais la distinction est tout de même faite entre l'intérêt personel et l'intérêt général.

En 1879, dans une cause de *Bourdon* v. *Benard* (3), la cour d'appel a déclaré que le droit de faire disparaître des obstructions et empiètements sur les

(1) 2 Moore P.C. (N.S.) 341 at p. 363.
(2) 7 Q.L.R. 103.
(3) 15 L.C. Jur. 60.

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chemins appartient exclusivement aux municipalités et que les particuliers ne possèdent pas ce droit d'action à moins qu'il ne leur en résulte des dommages réels et spéciaux.

In 1892, 1893 et 1894, le même principle a été suivi par l'Honorable juge Doherty, aujourd'hui ministre de la justice, dans les causes de *Sénécal* v. *Edison Electric Co.*(1), et de *Bélair* v. *Maisonneuve*(2), et par l'honorable juge-en-chef suppléant Archibald dans la cause de *Bird* v. *Merchants Telephone Co.*(3).

En 1907, la Cour de Revision, composée des Honorables juges Tellier, Lafontaine et Hutchison, a confirmé le jugement de l'Honorable juge Mathieu dans la cause de *Emard* v. *Village du Boulevard St. Paul*(4), qui avait décidé que l'action en nullité d'une résolution du conseil municipal ne peut être intentée trente jours après la mise en force de cette résolution que par un contribuable ayant un intérêt direct et spécial.

En 1909, dans la cause de *Allard* v. *Ville de Saint-Pierre*(5), quatre honorables juges de la Cour Supérieure se sont également divisés sur cette question, la majorité de la Cour de Revision étant d'opinion que tout contribuable peut demander par action directe la cassation d'un règlement *ultra vires* nonobstant le recours spécial par voie de requête prévu dans l'acte.

Dans une cause de *Aubertin* v. *La ville de Maisonneuve,* décidé en 1905(6), les juges se sont aussi là également divisés sur la question de savoir si l'action directe pouvait être exercée par un contribuable qui n'avait pas d'intérêt spécial.

(1) Q.R. 2 S.C. 299.
(2) Q.R. 1 S.C. 181.
(3) Q.R. 5 S.C. 445.
(4) Q.R. 33 S.C. 155.
(5) Q.R. 36 S.C. 408.
(6) 7 Q.P.R. 305.

Enfin dans la cause actuelle l'hon. juge Lavergne, qui a rendu le jugement de la cour, dit dans ses notes que—

Robertson ne pouvait faire maintenir son action sans démontrer un préjudice personnel et spécial. Les moyens de nullité au d'illégalité qu'il pourrait peut-être faire valoir comme requérant ne peuvent être invoqués par lui dans une instance ordinaire où il se porte demandeur.

La jurisprudence des cours provinciales dans ces dernières années est donc assez incertaine.

Les décisions du Conseil Privé, que j'ai mentionnées plus haut, et de la cour d'appel dans la cause de *Bourdon* v. *Benard*(1), démontrent clairement que les droits d'un particulier de poursuivre n'existent en vertu de la loi que s'il est personnellement et directement intéressé.

C'ést la principe suivi en France et je relève dans Dalloz, Répertoire Pratique, les passages suivants: Vo. action:—

No. 39. C'est un principe fondamental qu'on ne peut exercer une action qu'en autant qu'on y a intérêt. * * * L'absence d'intérêt exclut la recevabilité de l'action.

Vo. Commune,

No. 505. Pendant longtemps le Conseil d'Etat a décidé en termes généraux qu'un contribuable n'a pas en l'absence de tout intérêt direct et personnel qualité pour demander au préfet de déclarer la nullité d'une délibération.

Dalloz, 1887-3-72; Dalloz, 1889-3-68; Dalloz, 1892-5-128; Dalloz, 1902-3-33.

Mais des arrêts plus récents ont décidé qu'un contribuable d'une commune a intérêt en cette qualité de faire déclarer la nullité d'une délibération par laquelle le conseil a inscrit une dépense au budget de la commune.

Je comprends la raison de ces arrêts récents dont parle Dalloz. Le contribuable a un intérêt personnel à ce que le budget d'une municipalité ne soit pas il-

(1) 15 L.C. Jur. 60.

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légalement augmenté parce qu'alors il sera appelé à payer un plus fort montant de taxes.

Au No. 506 Dalloz, vo. Commune, ajoute qu':—

Un contribuable n'est pas recevable à demander que les délibérations relatives à l'érection d'une statue et à la dénomination d'une rue soient déclarées nulles alors qu'il ne justifie d'aucun intérêt personnel et que les délibérations attaquées n'engagent pas les finances municipales.

Le droit pour un contribuable de demander l'annulation d'ordonnances municipales sort des bornes ordinaires de la loi commune.

On ne peut avoir recours aux tribunaux en principe général que pour la conservation de nos droits personnels. Mais dans le cas d'une demande en cassation de règlements municipaux, le contribuable exerce une action populaire et s'il réussit ils seront cassés et annulés non-seulement quant à lui mais aussi quant à tous les autres contribuables. On plaide alors non-seulement pour soi-même mais aussi pour autrui. Il est d'ordre public que ce droit de poursuite ne soit exercé que conformément aux règles prescrites par la loi qui l'a créé.

On dira peut-être que ces restrictions pourraient avoir pour effet de faire perdre aux tribunaux le contrôle que l'art. 50 du Code de Procédure leur donne sur les corps municipaux.

Cette objection ne saurait être fondée car si une corporation municipale adoptait une résolution ou exécutait un contrat entièrement *ultra vires* le contribuable pourrait alors avoir recours au Procureur-Général sous l'article 978, C.P.Q., pour avoir un redressement de ses griefs.

Pour toutes ces raisons j'en suis venu à la conclusion que le demandeur n'avait pas le droit dans les cir-

constances de prendre une action directe. Son appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Perron, Taschereau, Rinfret, Genest, Billette & Plimsol.*

Solicitors for the City of Montreal, respondent: *Laurendeau, Archambault, Lavallée, Damphousse, Jarry, Butler & Saint-Pierre.*

Solicitors for the Canadian Autobus Co., respondent: *Bisaillon, Bisaillon & Pepin.*

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*May 4, 5.
*Nov. 2.

THE ATTORNEY-GENERAL FOR CANADA AND THE VANCOUVER HARBOUR COMMISSIONERS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE RITCHIE CONTRACTING AND SUPPLY COMPANY AND THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Constitutional law—Canadian waters—Sea coasts—Property in foreshores—Harbours—Havens—Roadsteads—Ownership of beds—Construction of statute—"B.N.A. Act, 1867," ss. 108, 109.

The terms "public harbours" in item 2 of the third schedule of the "British North America Act, 1867," is not intended to describe or include portions of the sea coast of Canada having merely a natural conformation which may render them susceptible of use as harbours for shipping; such potential harbours or havens of refuge are not property of the class transferred to the Dominion of Canada by section 108 of the "British North America Act, 1867." The term used refers only to public harbours existing as such at the time when the provinces became part of the Dominion of Canada.

Per Davies, Idington, Anglin and Brodeur JJ.—As that part of Burrard Inlet, on the coast of British Columbia, known as "English Bay," was not in use as a harbour at the time of the admission of British Columbia into the Dominion of Canada, in

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

NOTE.—Leave to appeal to the Privy Council was granted, 20th December, 1915.

1871, it did not become the property of the Dominion as a "public harbour" within the meaning of section 108 and the third schedule of the "British North America Act, 1867"; consequently, the Province of British Columbia retained the property in the bed and foreshore thereof and could validly grant the right of removing sand therefrom.

Per Davies, Idington and Anglin JJ.—Inasmuch as the proclamation, by the Dominion Government, on the 3rd of December, 1912, and the Dominion statute, chapter 54 of 3 & 4 Geo. V., deal merely with the establishment of the port and the incorporation of the Vancouver Harbour Commissioners, they had not the effect of transferring English Bay from the control of the Provincial Government to that of the Dominion Government nor of giving to the Dominion Government any right of property in the bed or foreshore of that bay.

Per Duff J.—The transfer effected by section 108 of the "British North America Act, 1867," of the subjects described in the third schedule of that Act was a transfer of property operative upon the passing of the Act and such subjects were necessarily ascertainable at the passing of the Act by the application of the descriptions to the facts then existing, and, consequently, the question of "public harbour" or no "public harbour" must be determined according to the circumstances as they were at the date of the Union.

Per Duff J.—The term "public harbour" implies public user as a harbour for commercial purposes as distinguished from purposes of navigation simply, or some recognition, formal or otherwise, of the locality in dispute by the proper public authority as a harbour for such purposes, but the question of "public harbour" or no "public harbour" is a question of fact depending largely upon the particular circumstances.

Per Duff J.—If the question of "public harbour" or no "public harbour" were to be decided according to the circumstances existing when the dispute arose, English Bay must be held to be now a "public harbour" within the meaning of item 2 of the third schedule of the "British North America Act, 1867."

Judgment appealed from (20 B.C. Rep. 333) affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the judgment of Macdonald J. in the Supreme Court of British Columbia(2), by which the action was dismissed with costs.

(1) 20 B.C. Rep. 333. (2) 20 B.C. Rep. at p. 334.

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The action was brought in the Supreme Court of British Columbia for the purposes of preventing the dredging out and removal of "Spanish Bank," one of the natural confines of the harbour of English Bay, on the sea coast of British Columbia; of obtaining a judicial declaration that the bed and foreshore of "English Bay" (inside and east of a straight line drawn from the west tangent of Point Grey to Point Atkinson Light House; (see Proclamation of 3rd Dec., 1912, Can. Gaz., vol. XLVI., p. 2077)) are the property of the Crown in the right of the Dominion of Canada; for an injunction to restrain the defendants from trespassing upon the bed and foreshore of English Bay and removing sand, gravel or other material therefrom, and for damages.

At the trial before Macdonald J. the action was dismissed with costs and, on appeal, that judgment was affirmed by the judgment now appealed from.

Newcombe K.C., Deputy-Minister of Justice, for the appellants. British Columbia entered the Dominion of Canada under an Imperial order-in-council, dated the 16th day of May, 1871, called the "Terms of Union," and section 10 thereof provided that "the 'British North America Act, 1867,' should (except certain parts thereof) be applicable to British Columbia in the same way and to the like extent as they apply to the other provinces of the Dominion, and as if British Columbia had been one of the provinces originally united by the said Act." By section 108 of the "B.N.A. Act" it is provided that the public works and property of each province, enumerated in the third schedule, shall be the property of Canada, and

that schedule begins as follows: "Provincial Public Works and Property to be the Property of Canada. (1) Canals with lands and water-power connected therewith. (2) Public harbours."

The Dominion of Canada claims that "English Bay" was a "public harbour" or part of a public harbour in May, 1871, and, being such, was included in the schedule above referred to, and that its bed and foreshore became and still are the property of the Crown in the right of the Dominion of Canada and not in the right of the Province of British Columbia. The Province of British Columbia disputes the right of the Dominion to interfere, and intervened, and was added, through its Attorney-General, as a party defendant.

The learned trial judge erred (1) in rejecting the evidence of reputation (*a*) as to such body of water being used as a harbour both before and after the Province of British Columbia entered the Union, (*b*) as to the said body of water being known, called, used and recognized as a public harbour by mariners; (2) in rejecting evidence as to the physical features of other well known and generally recognized harbours of the world to prove what constitutes a public harbour by way of comparison; (3) in finding that the facts existing in May, 1871, alone are to govern as to whether or not "English Bay" is a public harbour within the "British North America Act" and the "Terms of Union"; (4) in refusing to admit in evidence the "British Columbia Pilots" of the years 1888 and 1913, published by order of the Lords Commissioners of the Admiralty and portions thereof dealing with Vancouver Harbour, Burrard Inlet and anchor-

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age therein, and an authentic history entitled "British Columbia Coast Names, their Origin and History," published by order of the Minister of Marine and Fisheries of Canada; (5) in holding that the onus of proof rested upon the plaintiffs to shew that the land in question did not remain the property of the Province of British Columbia; (6) in not properly defining the meaning of the word "harbour" and in not properly defining the meaning of the words "public harbour"; (7) in not finding upon the evidence and law that the waters, bed of the sea and foreshore in question in this action are a public harbour or part of one within the meaning of the "British North America Act" and the "Terms of Union" and that the bed of the said harbour, as well as the foreshore thereof, is and has been since British Columbia became a part of Canada the property of the Crown in the right of the Dominion of Canada; and (8) in misdirecting himself in estimating the weight of the evidence of the witnesses for the plaintiffs in determining as to whether or not their evidence justified him in finding that the areas in question in this action constitute a harbour.

The Court of Appeal erred (1) in finding that the "Navigable Waters Protection Act," ch. 115, R.S.C., 1906, does not cover an interference with the bed or shore of the sea as the one complained of in this action; (2) in finding that the Dominion officers of the Crown have no authority to interfere with or invoke the assistance of the courts to enjoin the taking of sand in question; (3) in finding that the good anchorage relied upon by the plaintiff was not shewn to exist anywhere in the immediate vicinity of the "Spanish Bank"; (4) in finding that it was unnecessary to ex-

press an opinion concerning the appellants' alternative contention that not only those harbours which were public harbours at the time of the Union passed to the Dominion but those which afterwards became public harbours also passed—this was not only necessary but should have been found in favour of the appellants; (5) in finding that the width of the mouth of "English Bay," having regard to its area, prevents it falling within the definition of harbour; (6) in finding that the future adaptability and use "in the course of time" of the locus for harbour purposes should be considered as a test of whether it at present is in fact a harbour is erroneous and should not be followed; (7) in finding that the area in question has not become a public harbour since 1871; (8) in finding that "English Bay" was not one of the recognized harbours of the Colony of British Columbia; (9) in finding that "English Bay" is not part of Burrard Inlet which was afterwards called Vancouver Harbour; (10) in finding that the name "English Bay" is *primâ facie* evidence that it is not a harbour; (11) in finding that the onus is upon plaintiffs as to whether or not "English Bay" is to be included in the words "public harbour"; (12) in finding that the Province of British Columbia granted the right of removal of sand and gravel from the area in question; (13) in finding that only harbours in use by the public and recognized as such at the time of the Union were transferred to the Dominion.

Definitions of "public harbour" are to be found in vol. 5 of the Oxford Dictionary; Worcester's Dictionary; Wester's International Dictionary; Gould on Waters (2 ed.), p. xi.; Coulson and Forbes on Waters

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(3 ed.), p. 464; Farnham on Waters, p. 27; Cyc. vol. 21, p. 360. The following statutory definitions are referred to: 34 & 35 Vict., ch. 105, sec. 2; "Explosives Act, 1875" (Imp.), 38 & 39 Vict., ch. 17, sec. 108; "Shannon Act, 1885" (Imp.), 48 & 49 Vict., ch. 41, sec. 17; "Fisheries Regulation Act, 1888," 51 & 52 Vict., ch. 54, sec. 14 (Imp.); "Forged Transfer Act, 1891," 54 & 55 Vict., ch. 43, sec. 4(2) (Imp.)

Reference may also be made to *The Queen* v. *Hannam*(1), *per* Esher M.R., at p. 235; *Kennelly* v. *Dominion Coal Co.*(2), *per* Townshend J.; *Town of Huntington* v. *Lowndes*(3), *per* Lacombe J., at p. 629.

The evidence shews that the area in question was used as a harbour before the Union—ships anchored there for safety, and found shelter and anchorage; that it is a natural harbour and has been and now is used as a harbour and affords good anchorage and shelter for ships; that it is called and classed as a harbour in all old records containing matters of general geographical notoriety before the Union and, hence, was, within the minds and intentions of those who drafted the Act, a "harbour." See "Vancouver's Voyage of Discovery to the Pacific Ocean," at pages 248 and 249; "Vancouver Island Pilot, 1864" (published by the Lords Commissioners of the Admiralty), pages 244 and 245; "British Columbia Coast Names, their Origin and History" (by Captain George P. Walbran), published by order of the Minister of Marine and Fisheries of Canada for the Geographical Board of Canada, pages 478 and 507. Throughout the above records Burrard Inlet is called and classed as

(1) 2 Times L.R. 234. (2) 36 N.S. Rep. 495.
(3) 40 Fed. R. 625.

a harbour and "English Bay" is part of Burrard Inlet. The area in question is a natural harbour and all such, without exception, were intended to be transferred to the Dominion by the terms of Union. Vancouver Island, to the west, together with other islands, protect it admirably from the rough seas of the Pacific Ocean. The distance of 21 miles from Vancouver Island to Burrard Inlet is not sufficient for a heavy sea to develop.

"English Bay" is surrounded by land on three sides, and is only exposed to westerly winds to the extent of one point out of 32 points of the compass.

At no time since the Union, forty years ago, has the province declared or exercised any proprietary right or control over the body and foreshore of "English Bay" or in any way disputed the claims of the Dominion thereto until after the commencement of this action, though the Dominion Government had from time to time granted leases and quit claims of water lots and foreshore in "English Bay." Neither the public nor the defendants had the right to take away sand from "English Bay," be or be it not a public harbour. Coulson & Forbes on Waters (3 ed.), p. 62; *Hamilton* v. *Attorney-General*(1); *Musselburg Real Estate Co.* v. *Provost of Musselburg*(2); *Attorney-General* v. *Tomline*(3).

Reference is also made to *Holman* v. *Green*(4); Chitty on Prerogatives of the Crown, p. 307; *Fisheries Case*(5); *Attorney-General (Australia)* v. *Colonial Sugar Refinery*(6); *Attorney-General for British*

(1) 5 L.R. Ir. 555.
(2) [1905] A.C. 491.
(3) 14 Ch. D. 58.
(4) 6 Can. S.C.R. 707, at 711.
(5) [1898] A.C. 700.
(6) [1914] A.C. 237, at p. 253.

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Columbia v. *Attorney-General for Canada*(1); *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.*(2); *Fader* v. *Smith*(3); *Attorney-General for British Columbia* v. *Esquimalt and Nanaimo Railway Co.*(4); *Nash* v. *Newton*(5); *Lake Simcoe Ice and Cold Storage Co.* v. *McDonald*(6); *Rowe* v. *Smith* (7); *Nicholson* v. *Williams*(8); *Hudson* v. *Tabor* (9).

L. G. McPhillips K.C. and *J. A. Ritchie* for the respondents. The claim that the province has not and never had any right to authorize the removal of sand from the bed or foreshore, nor any interference therewith, as the waters were navigable waters of the sea, but was obliged to maintain the bed and foreshore in their natural state and prevent waste, in other words, to see that the duties of the Dominion Government in regard to navigable waters were carried out locally, is untenable and must be disregarded inasmuch as there is no remedy disclosed for its enforcement. Even if it were open to the plaintiffs to contend that the jurisdiction over navigation and shipping which is vested in the Dominion Government would entitle it to stop interference with the bed of the sea, although it was the actual property of the province, this claim must be dismissed for the reasons both that it was really dropped at the trial and that there was no evidence to support it.

(1) [1914] A.C. 153 at p. 174.
(2) [1906] A.C. 204.
(3) 18 N.S. Rep. 433.
(4) 7 B.C.R. 221, at pp. 240, 241.
(5) 30 N.B. Rep. 610, at pp. 620, 626.
(6) 29 O.R. 247; 26 Ont. App. R. 411; 31 Can. S.C.R. 130.
(7) 51 Conn. 266.
(8) L.R. 6 Q.B. 632, at p. 641.
(9) 2 Q.B.D. 290.

The right of the Dominion over navigation is only legislative and as no legislation has been passed enabling the Dominion to prohibit interference by other owners, with the soil of their lands when underneath navigable waters, the claim that the province must be enjoined from authorizing the removal of sand, cannot succeed. Even if special legislation were not necessary, the plaintiffs cannot succeed because no injury to navigation has been shewn. *Central Vermont Railway Co.* v. *Town of St. Johns*(1), at page 297; *In re Provincial Fisheries*(2), at page 575; *The Queen* v. *Fisher*(3); *The Queen* v. *St. John Gas Light Co.*(4), at page 346; *Lake Simcoe Ice and Cold Storage Co.* v. *McDonald*(5).

With regard to this being a public harbour, the question whether or not the Dominion has any right to interfere with the taking away of sand depends upon whether the point at which the sand was taken was the bed or foreshore of a public harbour, and was also used in some sense for harbour purposes prior to the Union. "English Bay" was not a harbour at the time of Union and, under the terms of the "British North America Act," no harbour became the property of the Dominion except such as were public harbours at the time of the Union. Even if "English Bay" were a harbour, there is absolutely no evidence that the bed or foreshore at the points in question were ever used for any harbour purposes. *The Fisheries Case*(6), at pages 711 and 712; *Attorney-General for*

(1) 14 Can. S.C.R. 288.
(2) 26 Can. S.C.R. 444.
(3) 2 Ex. C.R. 365.
(4) 4 Ex. C.R. 326.
(5) 29 O.R. 247; 26 Ont. App. R. 411; 31 Can. S.C.R. 130.
(6) [1898] A.C. 700.

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British Columbia v. *Canadian Pacific Railway Co.*(1), at the foot of page 209; *Pickels* v. *The King*(2), at p. 702; *McDonald* v. *Lake Simcoe Ice and Cold Storage Co.*(3), at pages 415 and 422; *The Queen* v. *Hannam* (4); *Foreman* v. *Free Fisheries and Dredgers of Whitstable*(5); *The "Aurania" and the "Republic"*(6), at page 103.

A harbour must afford safe anchorage and shelter to vessels from all winds and at all times of the year, and it must also be provided with quays or wharves for the loading and unloading of goods. It does not include all that would be included in a port, which is a district defined for customs purposes, nor does it include a roadstead, which is a place of temporary anchorage for vessels waiting to enter the harbour. "English Bay" does not satisfy these requirements of the above definitions, as it is exposed to winds which have often caused tugs and scows to break adrift and go ashore, and logs to be lost from booms. The seas, in a westerly wind, get up to 12 and 14 feet, and "Spanish Bank," is no protection at high tide, and only a very limited one at low tide. There are no public wharves for loading and unloading goods, in fact, it is merely a roadstead, lying outside the Harbour of Vancouver. The Bay was certainly not used as a harbour prior to 1871; there were no settlers there then, and the sand was taken from a point outside the anchorage described by the plaintiff's witnesses.

No Dominion order-in-council, statute or proclama-

(1) [1906] A.C. 204.
(2) 7 D.L.R. 698.
(3) 26 Ont. App. R. 411.
(4) 2 Times L.R. 234.
(5) L.R. 4 H.L. 266.
(6) 29 Fed. R. 98.

tion subsequent to the Union can make this bay a "public harbour" under the "British North America Act." If it could, then any sheet of water of whatever nature could now be taken by the Dominion under the designation of a "public harbour." No order-in-council prior to the Union could have that effect. Even if it could, there is no evidence that there ever was such an order-in-council. We rely on the statement of the law on this point set out by McPhillips J.A., in his judgment in the court below.

THE CHIEF JUSTICE.—The substantial claim in this case is for a declaration that English Bay forms part of the Harbour of Vancouver and as such is the property of the Dominion of Canada under the terms of the "British North America Act, 1867." Section 108 of this statute provides that

> the public works and property of each province enumerated in the third schedule to this Act shall be the property of Canada.

I do not think it is necessary for the decision of the present case to refer to the other public works and property enumerated in this third schedule, although for certain purposes it might be desirable to make a comparison with the nature of the other public works and property so enumerated and passing to the Dominion of Canada.

The constitution of this country was established by the "British North America Act, 1867" (Haldane, in *Australia Case*). It is, comparatively speaking, a short statute and it is obvious that many matters with which it deals could only be provided for in general terms. It is the business of the courts, when occasion arises, to say what interpretation is to be put

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on any of its provisions so far as these govern the particular case. It is not the business of the court to expand or supplement the legislation.

The Judicial Committee of the Privy Council accordingly, in the *Fisheries Case*(1), declined to give any general definition of what constituted a "public harbour" within the meaning of the above provisions of the "British North America Act." At pages 711-712 of the judgment it was said:—

> Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question what falls within the description "public harbour." They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would, in their judgment, be likely to prove misleading and dangerous. It must depend, to some extent at all events, upon the circumstances of each particular harbour what forms a part of that harbour. It is only possible to deal with definite issues which have been raised. It appears to have been thought by the Supreme Court in the case of *Holman* v. *Green*(2), that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water-mark, being also Crown property, likewise passed to the Dominion.
>
> Their Lordships are of opinion that it does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would no doubt, form part of the harbour; but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it: (Fol. *British Columbia* v. *Canadian Pacific Railway Co.*(3), at p. 629.)

A large body of evidence has been taken and, at the argument before this court, a wealth of research was offered us in the form of dictionary definitions, descriptions of the principal harbours of the world and other interesting information.

(1) [1898] A.C. 700. (2) 6 Can. S.C.R. 707.

(3)

Into any of these considerations it is unnecessary for me to enter holding as I must do that English Bay is in no sense of the word a harbour; it is in my opinion wanting in every distinctive mark that would render it possible to describe it as such. It is, indeed, admitted that, except as a possible harbour in the future, it can now only be considered as an outer harbour or part of the Harbour of Vancouver.

It matters nothing, I think, that some one, in the year 1855, may have described this then scarcely explored part of the coast as suitable for a harbour, or that the Dominion Government should have proclaimed it as being a harbour or part of a harbour. What we have to do is to decide whether at the present time it is a harbour within the meaning of the "British North America Act" so that the property in it is vested in the Dominion Government. As I have said I cannot find anything present either of usage, works or requirements which would render it possible to describe this open bay as fulfilling any of the conditions essential to bring it within any definition or description of a harbour.

I do not desire to express any opinion on the questions which have been discussed during the hearing as to whether a harbour must necessarily have been such at the date of the Union or whether it is sufficient that it was then a potential harbour; or whether, though the property remained in the province at the Union, it could by subsequent events be divested and become the property of the Dominion. None of these questions, in my opinion, need to be answered for the decision of the present case.

There is one point calling for consideration. The

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statement of claim was by leave amended to include the claim put forward in paragraph 11 to the effect that whether English Bay be or be not a "public harbour," the defendants had no right to interfere with the bed of the foreshore thereof, the same being navigable waters of the sea.

This point, though pleaded was not relied on at the hearing in the courts below and does not appear to have been referred to in the argument; no attempt to deal with it is made in the appellant's factum. The practice of raising a substantial claim for the first time at the hearing of an appeal before this court is most objectionable and should be discouraged in every possible way. The inconvenience of such a course and its unfairness to the opposite side are obvious. This view has been strongly upheld by the Judicial Committee of the Privy Council in the recent case of *City of Vancouver* v. *Vancouver Lumber Company* (1), at page 720 (foot).

This claim is, of course, advanced under section 91 of the "British North America Act, 1867," which gives to the Parliament of Canada exclusive legislative authority over (amongst other matters therein enumerated) "10. Navigation and Shipping." It is to be observed that it is simply legislative authority over the subject which is given to Parliament and we have not been referred to any legislation by Parliament under which the claim in question could be supported; it follows, of course, that no contravention can be alleged of any legislative provisions made by Parliament.

As presented by counsel in argument at the bar of

(1) [1911] A.C. 711.

this court, the claim is an abstract one, since there are no facts established on which it can be based. It is not shewn that there is any navigation to be interfered with or that, if there were, it would be interfered with by any action of the respondents. The contrary would indeed appear to be the case. Neither is it shewn that the removal of sand as taken by the defendant company could cause any injury to the coast; the contrary would again appear to be the case. The practice of the removal of such natural products of the shore as sand, shells and seaweed spoken of in Coulson & Forbes, in the extract quoted in the appellant's factum, at page 14, is a common one and as therein stated the right belongs to the Crown or its grantees; if, however, the shore is the property of the Crown in right of the province, this does not assist the claim of the Dominion Government. Even if English Bay were a harbour, the foreshore might be the property of the province and it has not been shewn that it is the property of the Dominion. The province might have the right to take sand from the foreshore even if English Bay were a harbour and, *a fortiori,* if it were merely a part of the coast of the province.

The appeal should be dismissed with costs.

DAVIES J.—The substantial questions to be determined on this appeal are, first, whether English Bay or harbour lying outside the entrance to the Harbour of Vancouver was a "public harbour" within the meaning of the term as used in the third schedule of the "British North America Act, 1867," and became, under section 108 of that Act, "the property of Canada" — and, secondly, whether, if it was not such a

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"public harbour" the Dominion Government had the right to restrain parties from removing gravel from a bar or bank running out from the coast into the bay and alleged to be necessary for the protection of shipping resorting to and anchoring in that bay as a harbour of refuge from storms.

As to the first question whether English Bay was, at the time British Columbia entered into the Union with Canada, in 1871, a "public harbour" within the meaning of the "British North America Act" I feel I need not say more than that I fully concur with the courts below and with my colleagues in answering that question in the negative.

Mr. Newcombe, however, contended that even if English Bay was not, in 1871, when British Columbia became part of Canada, a public harbour it was at least a potential one and has since then become a public harbour by reason of the use made of it by shipping and for shipping and harbour purposes and by the proclamation of 1912 proclaiming it as a port and defining its limits.

I am quite unable to accede to this contention. I do not think the 108th section enacting that

> the public works and property of each province enumerated in the 3rd schedule to this Act shall be the property of Canada

was ever intended to cover more or can fairly be construed as covering more than public works and property existing at the time the Union took place. That section passed the property in these enumerated works from the provinces to Canada. It was a then present transfer of existing public works and property and had no relation to potential works or possibilities, such as harbours, which, in the future, settlement by population and expenditure of money might create.

If subsequently to Confederation from any cause potential harbours became *de facto* harbours and it became necessary for the Dominion to acquire the rights or property on their foreshores either vested in the Crown in right of the province or in private individuals there were obvious methods by which the Dominion could acquire such property or rights.

Then as to the right claimed on the part of the Dominion, if English Bay was a harbour of refuge for shipping only, and not a "public harbour" within the meaning of the Act, to restrain any one from removing gravel from a bar or bank forming, as contended, one of the protecting arms of the alleged harbour of refuge for shipping and so destroying or impairing the protection its presence gave to the harbour, I have only to say that the amendment to the statement of claim, par. 11, did not claim that there had been any such removal of the sand or gravel from the bar in question as was destructive or prejudicial to the harbour or bay as a harbour or port of refuge. Nor did the evidence shew or prove that to be the case.

If, under its legislative power over navigation and shipping, the Dominion had created and defined any special place as a port or harbour of refuge it might well be that it would be entitled to prevent its destruction as such by the removal of one of its protecting arms by exercising its power of expropriation and awarding compensation to the owner of the foreshore, whoever he might be. The trial judge has found that the bay does not, except under the special circumstances and to the limited extent he mentions, afford for ships a haven of safety and I do not think that the evidence shews a removal of gravel or sand from the

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bar which can be said prejudicially to affect that bay as a harbour of refuge.

The claim advanced was an absolute one challenging the right of the Attorney-General of British Columbia

to authorize the removal of any part of the said bed or foreshore or interference therewith.

It does not claim that the removal of the sand or gravel complained of prejudicially affected that bay as a harbour of refuge, but simply puts forward the claim on the ground

that the waters of English Bay, being navigable waters, it was the duty of the Crown in so far as it was represented locally to maintain the bed and foreshores of the said waters in their natural states.

It seems to me that, as made, the claim was based upon the contention that English Bay was a public harbour within the "British North America Act" and that its foreshore as such had passed to the Dominion.

I have already dealt with this part of the case, but giving the very widest construction to the claim as made and assuming that it was intended as an assertion of a right to protect to the fullest necessary extent a harbour of refuge created by the proclamation of 1912 I fail to find evidence to support the contention that the removal of the sand or gravel proved did prejudicially affect or destroy such harbour or might be reasonably feared to have that effect.

The complainant has failed in proving the facts essential to the maintenance of his case and I would, therefore, dismiss the appeal.

IDINGTON J.—The claim of appellants that English Bay now in question was a public harbour or part

thereof within the meaning of the "British North America Act," I think must rest upon the meaning to be given the term "public harbour" as used in said Act and the relevant facts demonstrating the conditions and use made of such bay, in 1871, when British Columbia became one of the provinces of Canada.

If we have regard either to the language used by the late Lord Herschell in *The Attorney-General for Canada* v. *The Attorney-General for Ontario, etc.*(1), at pages 711 and 712, when dealing with the term "public harbour" as used in said Act or, I submit, to the plain ordinary meaning of the words, it seems quite clear that at said date there had not been any such use made of any part of said bay as to constitute it or any part of it a public harbour or part thereof.

It has been argued, however, that the said bay together with the protecting conformation of the adjoining and adjacent land fitted it by nature for use as a harbour and hence, as part of the Crown domain, was in fact a public harbour at the time in question.

The language I use is mine, but, as I understand the argument put forward, it represents fairly the substance thereof without expanding its details.

It seems to me almost such "an exhaustive definition of the term applicable to all cases" as their Lordships declined to attempt.

Indeed, the argument seems in direct conflict with what their Lordships had in mind, else I suspect the few additional words needed to cover, what the hand of man in the service of the Crown may have done to aid nature, and thus have completed all that was

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

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needed to frame the desired exhaustive definition, would surely have been supplied.

Nay more, the framers of the legislation by which British Columbia became part of Canada, could, at that stage of things (in British Columbia's development) so easily, instead of using the round-about language they did, have framed a suitable definition that would have made plain all now contended for if they really intended as is argued.

For these and other considerations needless to dwell upon it seems to me the argument is not well founded and that using the old method of resorting to the facts, as their Lordships suggested in the case just referred to, destroys appellants' case.

And as to what has been called the other branch of the case so far as designed to protect a harbour, that must also fail for want of a "public harbour" to be protected.

Then neither does the proclamation nor the Act of 1913, constituting the Harbour Commission, which have been, tentatively as it were, put forward, seem when clearly examined to found any claim such as made.

The Dominion Parliament may have the power by legislation to lay a foundation for such a claim. Why, indeed, the easy path of legislation has not been chosen instead of the thorny and difficult one of litigation, seems inexplicable.

The proclamation deals only with the constitution of a port and the Act of 1913, by section 11 thereof, only gives the commission such property as the Dominion, at the enactment, may have had within the limits defined therein.

Moreover, if the marking on Exhibit No. 3 of where the sand in question was taken be correct, that taking was outside said limits. And I suspect the Act was passed later than the alleged commission of the trespass.

It would seem as if the property in the foreshore was vested in the province; possibly subject to legislation of the Dominion in virtue of its powers over navigation and shipping. In the absence of such legislation it is not worth while forming a definite opinion as to the powers each may have relative thereto. And even if there is, upon which I express no opinion, an inherent power in the Dominion to take, against any one impeding navigation, proceedings to restrain the same, the facts in evidence do not seem to fit or lay a foundation therefor.

And if the province has the right to the soil and minerals therein, what of the sand?

I think the appeal should be dismissed with costs.

DUFF J.—The principal question must be decided by the application of those provisions of the "British North America Act," which effected a distribution between the provinces and the Dominion of the property of the Crown within the territorial limits of the several provinces. As Lord Watson observed in the *Precious Metals Case*(1):—

> The title to the public lands of British Columbia has all along been and still is vested in the Crown; but the right to administer and to dispose of these lands to settlers together with all royal and territorial revenues arising therefrom, had been transferred to the province, before its admission into the Federal Union.

(1) *Attorney-General B.C.* v. *Attorney-General of Canada*, 14 App. Cas. 295, at p. 301.

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And I think it is not unimportant to keep in view the difference between the provisions of the "British North America Act" dealing with public proprietary rights and those of section 91 conferring general legislative jurisdiction. It is true, as has been frequently pointed out, that when public property is spoken of in the Act as being "the property of" or "belonging to" the Dominion or a province these expressions import that the right to its beneficial use or the proceeds of it is within the exclusive disposition of the Dominion or of the provincial legislature as the case may be, the property itself remaining in the "Sovereign as the Supreme Head of the State" (see [1892] A.C. p. 443); and it may be an admissible form of expression to say that the question whether a given item of public property is vested in the Dominion or in the province is strictly a question of legislative control over its administration as property. Nevertheless this legislative control over Crown property as property whether transferred to the Dominion Legislature or reserved to the Provincial Legislatures is treated in the "British North America Act" as ownership, and their Lordships of the Privy Council have more than once held that the provisions of the Act dealing with this subject of ownership in relation to public property must be construed and applied independently of the provisions dealing with general legislative jurisdiction.

In *St. Catherine's Milling and Lumber Co.* v. *The Queen*(1), it was said:—

Their Lordships are, however, unable to assent to the argument for the Dominion founded on section 92(24). There can be no *a*

(1) 14 App. Cas. 46, at p. 59.

priori probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the provinces of rights which are expressly given them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved for their use has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

In *The Attorney-General of the Dominion* v. *The Attorney-General of Ontario*(1), at pages 709 and 710:—

It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament rights were transferred to it. The Dominion of Canada was called into existence by the "British North America Act, 1867." Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada.

And, at page 713:—

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

The question, therefore, whether Spanish Bank has passed to the Dominion is a question which must be determined by reference to the provisions of the Act relating to the distribution of the public assets

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

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and as it is not disputed that the property in question was vested in the province at the time of Confederation, the point to be determined is whether or not it has by one of the "express enactments" of the "British North America Act" been transferred to the Dominion. The Dominion contends that it has been so transferred, by force of section 108, as part of a "public harbour" within the meaning of item two of the third schedule.

The Dominion contention is twofold.

(1) That English Bay was a public harbour within the meaning of item two at the time of the admission of British Columbia into the Canadian Union and Spanish Bank was part of that harbour.

If these propositions be established the property indisputably passed to the Dominion.

(2) That English Bay, being at the time mentioned, an arm of the sea having the physical qualities necessary to fit it for use as a public harbour and having since become in fact a public harbour of which Spanish Bank is a part, the public harbour with Spanish Bank as one of its constitutent parts has consequently passed to the Dominion.

First, then, was Spanish Bank part of a public harbour at the time of the admision of British Columbia into the Canadian Federation within the meaning of the second item of the third schedule ?

Lord Herschell, speaking for the Judicial Committee in the *Fisheries Case*(1), says it would be extremely inconvenient that a determination should be sought of the abstract question: "What falls within the description of a public harbour ?" And he adds

(1) [1898] A.C. 700, at p. 711.

that it would be likely to prove misleading and dangerous to attempt an exhaustive definition of the term applicable to all cases.

Nevertheless, it must be difficult to apply oneself intelligently to the question of fact whether a particular locality does or does not fall within item 2 of the third schedule without first having arrived at some conclusions as to the attributes connoted by the phrase "public harbour." In *Regina* v. *Hannam*(1), Lord Esher said:—

> A harbour in its ordinary sense was a place to shelter ships from the violence of the sea and where ships are brought for commercial purposes to load and unload goods.

And he added "the quays were a necessary part of the harbour." During the argument on the *Fisheries Case* (2) the opinion was expressed more than once by Lord Herschell and Lord Watson and it does not appear to have been disputed on behalf of the Dominion, that to constitute a "public harbour" within the meaning of item two it would not be sufficient to have simply an arm of the sea affording shelter to ships in certain states of the wind and that the phrase employed connotes in addition something in the nature of public user for loading or discharging ships. The observations made repeatedly by their Lordships during the argument are, of course, not authoritative, but I think one is justified in appealing to them as evidence of the meaning of the phrase "public harbour" according to the common understanding. See stenographer's note of the argument at pages 198, 199 and 201. In *Attorney-General* v. *Canadian Pacific Railway Co.*(3) it was assumed that it was necessary to

(1) 2 Times L.R. 235. (2) [1898] A.C. 700.
(3) [1906] A.C. 204.

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shew user for commercial purposes as distinguished from purposes of navigation merely. Generally speaking, I think such user must be shewn in the absence of some evidence of recognition by competent public authority of the locality in controversy as a harbour in the commercial sense. *The King* v. *Bradburn*(1), at pages 429 and 430. As to the extent of the commercial user necessary to bring a given locality within the description "public harbour" a variety of circumstances may no doubt affect the determination of that question.

In British Columbia there was passed, in 1867, and in force at the time of Confederation an ordinance known as the "Harbour Ordinance," an ordinance respecting harbour and tonnage dues and to regulate the licences on the vessels engaged in the coasting and inland navigation trade, which provided for the proclamation of "ports, inland places and waters" as "harbours," the effect of the proclamation being to bring the proclaimed locality under the Act for the purpose of applying the regulations and prohibitions enacted by it. There is no evidence in this case and, as I pointed out, in giving judgment at the trial in *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.*(2), there was in that case no evidence of any proclamation having been issued under that ordinance or under the ordinances passed some years before in which the legislation had its origin. Had it been shewn that such proclamations had issued with respect to other localities, while the locality in controversy had never been proclaimed, that would have been of considerable weight in favour

(1) 14 Ex. C.R. 419. (2) 11 B.C. Rep. 289.

of the province; while, on the other hand, the fact that the locality had been proclaimed would establish a case in favour of the Dominion which it might be difficult if not impossible for the province to repel. Again, the expenditure of public money or the absence of such expenditure may be a circumstance of some importance. None of these elements is present in this case. The evidence shews that the physical character of English Bay is such as to make it capable of being used as a harbour. It is capable of being used, that is to say, in its natural state, not merely as a shelter for ships, but as a harbour for commercial purposes; but the evidence as to the state of affairs at the date of the Union does not really carry us beyond this. There is no evidence that it was then in use or had ever been in use as a harbour in the commercial sense and the probabilities are against it; and there is no evidence that there ever had been any public money spent upon it or any other recognition of it as a harbour by any competent public authority. My conclusion is on this question of fact that the decision must be against the Dominion.

Even on the assumption that the Dominion had sufficiently shewn English Bay to have been a public harbour at the date mentioned there would still remain the question whether Spanish Bank was a part of that harbour; there is, as I have said, no evidence of user, but I am not sure that, given a public harbour, their Lordships' observations in the *Fisheries Case*(1) as to the evidence of user by landing goods or anchoring ships can properly be read as intended to lay down a single exclusive test for determining

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

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whether the foreshore or solum is or is not part of it. To me, at all events, it is not quite obvious that a ledge or sandspit, the property of the Crown, affording protection necessary for the maintenance of a public harbour, that is to say, protection necessary to enable it to be used for that purpose, can in no circumstance be regarded as part of the harbour within the meaning of item two unless it is shewn to have been used for discharging or mooring ships. That Spanish Bank, however, is such a necessary protection is not satisfactorily proved.

The second question remains. If the question of public harbour or no public harbour, for the purpose of applying section 108, had to be decided by reference to the circumstances existing at the time the controversy arises and not by reference to the state of circumstances existing at the date of Confederation, I should have no difficulty in holding that English Bay is now a "public harbour."

The additional question — whether or not Spanish Bank is a part of that harbour is one which would probably have to be answered in the negative by reason of the absence of satisfactory evidence either of user or that it serves the office of protection.

I think, moreover, that the Dominion fails in its main contention on this branch of the argument. The language of sections 108 and 109 and of the third schedule when read with section 117 seems to me to shew that subjects of the third schedule were intended to be transferred to the Dominion as subjects which, when the Act came into force, were the property of the province and at that time answered the descriptions found in the schedule. In other words, as the

transfer was to be operative upon the passing of the Act, the subjects transferred were necessarily subjects ascertainable at the time by the application of those descriptions to the existing facts. The other construction would lead to results little short of absurdity.

The third schedule is in the following words:—

Provincial public works and property to be the property of Canada.

1. Canals, with lands and water power connected therewith.
2. Public harbours.
3. Lighthouses and piers, and Sable Island.
4. Steamboats, dredges and public vessels.
5. Rivers and lake improvements.
6. Railways and railway stocks, mortgages, and other debts due by railway companies.
7. Military roads.
8. Custom houses, post offices, and all other public buildings, except such as the Government of Canada appropriate for the use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as Ordinance Property.
10. Armouries, drill sheds, military clothing, and munitions of war, and land set apart for general public purposes.

It could hardly have been within the contemplation of the Act that the roadbed of a provincial government railway, for example, constructed after Confederation should pass to the Dominion as soon as it should be a completed railway or that a ship acquired for provincial government purposes should forthwith become the property of the Dominion. One can hardly distinguish between such subjects (which, if existing at the date of the Act, would, of course, fall within the third schedule) and a pier or an artificial harbour constructed as a provincial government work.

A reference to the language of the judgments in which the effect of sections 108, 109 and 117 has been discussed seems to indicate that it has generally been

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assumed that the subjects which passed under section 108 were subjects ascertainable at the time of the transfer. In the *Vancouver Street Ends Case* (*Attorney-General* v. *Canadian Pacific Railway Co.*) (1), it was assumed in all the courts that the question of public harbour or no public harbour and whether the foreshore was one of the constituents of the harbour must be decided by reference to the facts existing in 1871.

In the litigation that is generally known as the *Fisheries Case* (2), the first question submitted by the Dominion and the provinces in relation to the beds of public waters and public harbours was in this form in part:

> Did the beds of the lakes, rivers, public harbours * * * situate within the territorial limits of the several provinces not granted before Confederation become under the "British North America Act" the property of the Dominion ? (See (3).)

The formal answer given by their Lordships to the first question is as follows:—

> 1. In answer to the first and fourth questions, that under the "British North America Act, 1867," the improvements only in lakes and rivers within the provinces *became* the property of the Dominion of Canada; that under the same Act, whatever is properly comprised in the term "public harbour" *became* the property of the Dominion of Canada; and the answer to the question, what is properly so comprised, must depend, to *some extent*, upon the circumstances of each particular harbour.

All this points to a transfer operative at the passing of the Act; and on the argument it was assumed that the date of Confederation was the decisive date. See report of the argument at page 202. As to the point of view from which the subject was considered

(1) [1906] A.C. 204; 11 B.C. Rep. 289.

(2) [1898] A.C. 700.

(3) [1898] A.C. at page 701.

in the Supreme Court of Canada, see judgment of Strong C.J.(1), at page 515. The questions submitted in that case were framed after a good deal of consideration and with the object of setting at rest as far as possible such points as that now raised by the Dominion. I think there is sufficient evidence in the arguments and in the judgments to shew that there was a general consensus of view that the position now taken by the Dominion was not sustainable.

It was also contended on behalf of the Dominion in this court that the acts complained of, removing sand from the bank in question, constituted in some way an infringement of the *jus publicum* of which the Attorney-General for the Dominion is the proper public authority to make complaint. I have no doubt that the Attorney-General of the Dominion has a *status*, acting for the Crown on behalf of the public, to invoke the aid of the courts to restrain, in a proper case, any substantial infringement of the public right of navigation or of the rights incidental thereto. But counsel for the Attorney-General of Canada at the trial took an attitude which precludes the appellant from raising at this stage any contention that what is now complained of was in fact an interference with any of those rights; and that ground of relief cannot be considered in this court.

It seems necessary to add a word upon the suggestion that the Dominion Parliament may in the exercise of its legislative powers under section 91 against the will of a province acquire the title to provincial Crown lands for the purpose of constituting a harbour. To say the least, that, I think, is gravely

(1) 26 Can. S.C.R. 444.

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questionable, it would be going far beyond anything decided or any opinion expressed in the *Attorney-General* v. *Canadian Pacific Railway Co.*(1), where the courts had to deal with an Act passed in exercise not only of its authority derived from section 91 but also of powers arising from the Terms of Union under which British Columbia entered Confederation and with a case, moreover, in which the assent of the province was abundantly proved; it would not be easy to reconcile such a proposition with Lord Herschell's language quoted above from the judgment in the *Fisheries Case*(2), or with section 117 of the "British North America Act." I do not, however, enter upon a discussion of the subject. Reference may be had to, Clement's Canadian Constitution, at pp. 388 and 389; the *Burrard Power Co.* v. *The King*(3), at page 52; and the *Indian Treaty Case; Province of Ontario* v. *Dominion of Canada*(4), at page 127.

ANGLIN J.—I cannot believe that it was intended that every indentation of the uninhabited sea and lake coasts of Canada which had a natural conformation that rendered it susceptible of use as a harbour should pass under section 108 of the "British North America Act" from provincial to Dominion control. In my opinion "public harbours" in the third schedule means harbours in use as such, and not mere potential harbours.

The purpose and operation of section 108 was to effect an immediate transfer of property from the provinces to the Dominion.

(1) [1906] A.C. 204; 11 B.C. Rep. 289.
(2) [1898] A.C. 700.
(3) 43 Can. S.C.R. 27.
(4) 42 Can. S.C.R. 1.

I strongly incline to the view that it does not apply to harbours which have only come into use as such after the Union. There are other means by which the Dominion can acquire jurisdiction over such harbours and title to the property in the land under and adjacent to them requisite for their proper control and administration, whether that title is vested in the Crown in right of the province (*Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.* (1)), or in private individuals.

But it is not necessary to determine this question because I heard nothing in the course of the argument of this appeal, and have found nothing in the record which would warrant interference with the findings of the provincial courts that neither at the date of the entry of the Province of British Columbia into Confederation (1871), nor at the time when this action was begun was English Bay in fact a "public harbour" within the meaning of that term as used in the schedule 3 to the "British North America Act."

Neither the proclamation nor the statute of 1913, relied on by Mr. Newcombe, in my opinion, effected a transfer of the property in question from provincial to Dominion control. The proclamation deals with a port, not with a "public harbour," and is apparently based on an assumption that English Bay formed part of the Harbour of Vancouver. The statute provides powers of expropriation which, so far as the evidence shews, have not yet been exercised.

The record contains neither allegation nor evidence that the removal of sand by the respondent company had affected, or was likely to affect, prejudicially any interest over which legislative jurisdiction

(1) [1906] A.C. 204.

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is vested in the Dominion under the heading, "Navigation and Shipping."

I would dismiss the appeal.

BRODEUR J.—This is an appeal from the courts of British Columbia which dismissed the action of the appellant.

By the "British North America Act," section 108, and the third schedule, the public harbours of each province have become the property of Canada.

By the order-in-council, passed by the Imperial Government in 1871, British Columbia was admitted into the Dominion of Canada and it was stipulated that the provisions of the "British North America Act" should be applicable to British Columbia.

Vancouver Harbour was, on the 3rd of December, 1912, proclaimed as such by the Governor in Council under the provisions of the "Canadian Shipping Act" and according to that proclamation English Bay was declared to be a part of the harbour.

In the year following, a statute was passed by the Federal Parliament vesting the administration of the harbour in the Vancouver Harbour Commissioners, one of the appellants in the present case.

We have to examine, at first, whether this English Bay was a public harbour in 1871. As it has been decided in the *Fisheries Case*(1), the question as to whether a piece of property is a harbour or not is a question of fact which has to be determined according to the circumstances of each case.

The courts below unanimously found that English Bay was not, in 1871, a public harbour and nothing has been brought before us which could convince me that this finding was erroneous.

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

It is even very much to be doubted whether this part of Burrard Inlet which is called English Bay was ever considered, before the proclamation of 1912, as part of the Harbour of Vancouver, or was ever considered a harbour by itself. We find by a chart of Burrard Inlet, issued in 1891 by order of the Canadian Government, that Vancouver Harbour did not include the part of Burrard Inlet where English Bay is situate; and that chart then proves conclusively that even the Dominion authorities, before 1891, did not consider English Bay as a part of the Harbour of Vancouver.

By the proclamation of 1912 and by the statute passed in the following year the Dominion authorities, of course, assume control over all Burrard Inlet, including English Bay. But that proclamation did not give them the ownership of the bed of the bay. It remained vested in the provincial authorities and the Dominion Government could not assume any right of ownership with regard to that bed without taking the necessary expropriation proceedings. It was a very easy thing to do, but it was not done, and until this is done the provincial authorities may assume to be the owners of the bed of English Bay.

The action of the appellant was properly dismissed and I see no reason why we should interfere with the judgment of the courts below.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Maitland, Hunter & Maitland.*

Solicitors for the respondents: *McPhillips & Wood.*

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*June 16.
*Nov. 2.

THE TRUSTS AND GUARANTEE COMPANY ..... } APPELLANTS;

AND

CLARENCE ARTHUR RUNDLE AND OTHERS ..... } RESPONDENTS.

IN THE MATTER OF THE ESTATE OF LILLY RUNDLE, DECEASED.

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

Appeal—Probate Court—Surrogate Court—R.S.C. [1906] *c.* 139, *s.* 37(*d*).

Under the terms of section 37(*d*) of the "Supreme Court Act" an appeal lies to the Supreme Court of Canada from the judgment of the Appellate Division of the Supreme Court of Ontario in a case originating in a Surrogate Court of that province. Idington J. dubitante.

On the merits the judgment of the Appellate Division (32 Ont. L.R. 312) was affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), varying an order of a Surrogate Judge on the passing of accounts.

The only substantial question decided on this appeal was one of jurisdiction, namely, whether or not the Surrogate Court of Ontario is within the terms of section 37(*d*) of the "Supreme Court Act," which provides for an appeal "from any judgment in appeal

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

(1) 32 Ont. L.R. 312, *sub nom. Re Rundle.*

in a case or proceeding instituted in any Court of Probate." The same question was raised but not decided in the case of *In re Muir Estate*(1).

The proceedings originated in the Surrogate Court when the Trusts and Guarantee Company, administrators of the estate of Lilly Rundle, applied to the Surrogate Judge of the County of York to have the accounts of the estate passed. An appeal was taken from the judge's order to the Appellate Division by which it was varied and the administrators then appealed to the Supreme Court of Canada.

The appellants applied to the registrar of the Supreme Court of Canada to have the security approved, which application was granted for the following reasons.

THE REGISTRAR.—This is an appeal from the judgment of the Supreme Court of Ontario, Second Appellate Division, in an action instituted in the Surrogate Court of the County of York. The appellant, pursuant to the "Supreme Court Act," applies to have a bond as security for his appeal allowed. No objection is taken to the form of the bond, but the sole question is whether or not the Supreme Court has jurisdiction to hear the appeal. The appellant relies upon section 37, sub-section (*d*) of the "Supreme Court Act," which provides as follows:—

37. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest court of final resort now or hereafter established in any province of Canada, whether such court is a court of appeal or of original jurisdiction, where the action, suit, cause, matter or other judicial proceeding has not originated in a superior court, in the following cases. * * *

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

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(*d*) From any judgment on appeal in a case or proceeding instituted in any court of probate in any province of Canada other than the Province of Quebec, unless the matter in controversy does not exceed five hundred dollars.

I am called upon first to determine whether the words "Court of Probate" used in this section include the Surrogate Court of the County of York. This provision of the "Supreme Court Act" is a consolidation of an amendment made by 52 Vict., ch. 37. The legislation probably was passed to meet the objections raised by the Supreme Court in the case of *Beamish* v. *Kaulback*(1), where it was held that the Court of Probate of Nova Scotia was not a superior court and, therefore, an appeal taken from such court to the Supreme Court of Nova Scotia was not the subject of a further appeal to the Supreme Court of Canada. At that time the "Supreme Court Act" only gave an appeal in cases originating in a superior court.

The "Ontario Surrogate Court Act," R.S.O. 1914, ch. 62, provides by section 21 as follows.

21. Subject to the provisions herein contained, every such court shall also have the same powers and the grants and orders of such court shall have the same effect throughout Ontario, as the former Court of Probate for Upper Canada, and its grants and orders respectively had in relation to the personal estate of deceased persons and to causes testamentary within its jurisdiction; and all duties which, by statute or otherwise, were imposed on or exercised by such Court of Probate or the judge thereof in respect of probates, administrations and matters and causes testamentary, and the appointment of guardians and otherwise, shall be performed by the Surrogate Courts and the judges thereof, within their respective jurisdictions.

The origin of the Upper Canada Court of Probate is to be found in an Act passed 33 Geo. III., ch. 8 (1793), which constituted a

(1) 3 Can. S.C.R. 704.

Court of Probate with full power and authority to issue process and hold cognizance of all matters relating to the granting of probates and committing letters of administration and to grant probates of wills and commit letters of administration of the goods of persons dying intestate having personal estates, rights and credits within this province, to be called and known by the name of the Court of Probate of the Province of Upper Canada.

The Governor, Lieutenant-Governor, or person administering the government, presided over the said court and he was given power to appoint an official principal of the court together with a Registrar and necessary officers. By the second section of the same Act, for the convenience of the inhabitants of the province, the Governor, etc., was authorized to appoint a Surrogate Court in each district for the purpose of granting probates and letters of administration presided over by a Surrogate judge. By the 16th section an appeal lay from the Surrogate Court to the judge of the Court of Probate.

In 1858 by 22 Vict., ch. 93, the Probate Court was abolished and the jurisdiction in relation to the granting and revocation of probates and wills and letters of administration was vested in the Surrogate Courts of the province and this has continued the law down to the present time.

At the time *Beamish* v. *Kaulback* (1) was decided, the Court of Probate in the Province of Nova Scotia was substantially identical with the Surrogate Court in the Province of Ontario (R.S.N.S., ch. 395). There was a judge and a Registrar of Probate in each county and the jurisdiction of these judges covered all matters relating to the probate of wills and administration of intestate estates. I am, therefore, of the

(1) 3 Can. S.C.R. 704.

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opinion that the words "Court of Probate" used in the "Supreme Court Act," are not to be limited to courts bearing the name of Probate Courts, but apply to Surrogate Courts in other provinces, having similar jurisdiction.

The second point I have to determine is whether this is "an action, suit, cause, matter or other judicial proceeding" or a "case or proceeding" within the meaning of section 37 of the "Supreme Court Act." Mr. Raney contends that it does not fall within that expression; that what the judge has done, has been simply to make an audit of the administrators' accounts and that his action was in no sense judicial. I cannot accede to his argument. The Century Dictionary defines "judicial" as follows:—

> Pertaining to the administration of justice, proper to a court of law; consisting of or resulting from legal inquiry or judgment as judicial power or proceedings.

Webster defines "judicial" as

> practiced or employed in the administration of justice as judicial proceeding.

See also the judgment of this court in *Turgeon* v. *St. Charles* (1).

The facts of this case as disclosed by the judgment of the Court of Appeal, reported in 32 Ont. L.R. p. 312, would appear to be that a dispute arose between the plaintiff and the trust company with regard to an item of $1,100 advanced by the trust company to the infant Rundle out of the corpus of his estate. When the boy became of age, he executed a release to the company for what they had undoubtedly done without warrant or authority, and the administrators'

(1) 48 Can. S.C.R. 473.

accounts were duly audited and passed by the Surrogate Court of the County of York. An action was taken in the High Court to set aside this release and I understand a consent judgment was made by the Honourable Mr. Justice Latchford as follows:—

1. This court doth declare that the order made by Edward Morgan, Esquire, acting judge of the Surrogate Court of the County of York, on the 22nd day of December, 1909, on the auditing and passing of the accounts of the defendants, as administrators of the estate of Lily Rundle, and as guardian of the said Clarence Arthur Rundle, is not binding upon the plaintiffs and that the plaintiffs are entitled to have the said accounts re-taken and re-audited in the said Surrogate Court.

2. And this court doth order that the costs in this action be paid as the judge of the Surrogate Court of the County of York shall determine on the re-taking and re-auditing of the said accounts.

Proceedings were thereupon taken *de novo* by the administrators to pass their accounts before His Honour Judge Winchester, Judge of the Surrogate Court of the County of York. The proceedings are regulated by the Surrogate rules and the petition and affidavits supporting the same and all the subsequent proceedings were carried on under the style of cause "in the Surrogate Court of the County of York." The judge of that court, after reciting the proceedings before him, made an order on the 29th May, 1914, which is the subject of this appeal, in which he made a finding as to the receipts and expenditures of the administrators and directed that the costs which had been referred to him in the judgment of Mr. Justice Latchford, should be paid out of the estate as well as the costs of the administrators in connection with the auditing and passing of accounts.

The "Surrogate Act," R.S.O., ch. 62, sec. 34, provides by sub-section 1 as follows:—

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Any person who deems himself aggrieved by an order, determination or judgment of a Surrogate Court, in any matter or cause, may appeal therefrom to a Divisional Court.

Sub-section 5 provides that:—

An appeal shall also lie from any order, decision or determination of the judge of a Surrogate Court on the taking of accounts in like manner as from the report of a Master under a reference directed by the Supreme Court, and the practice and procedure, upon and in relation to the appeal, shall be the same as upon an appeal from such a report.

I would interpret these provisions for appeal to be that sub-section 1 has reference to an appeal from the final order, determination or judgment of the court, while sub-section 5 is an interlocutory appeal which may be taken during the course of the audit before the judge. Mr. Raney contends that the order made by the Surrogate judge was an order made under sub-section 5 and that sub-section 1 has reference only to contestations between plaintiff and defendant in such cases as a proceeding in proof of a will in solemn form or where a will is attacked on the ground of undue influence or want of capacity. I do not think this distinction is sound and I hold that the order in this instance made by the Surrogate judge is an order within the provisions of subsection 1 of section 34 of the "Surrogate Act" and is a judgment in a "judicial proceeding" and "is a case or proceeding instituted in a Court of Probate" within the meaning of section 37 of the "Supreme Court Act."

It is to be noted that the appeal under sub-section 5 would be to a judge of the Supreme Court of Ontario, whereas the appeal under sub-section 1 is to the full Court and that in the present case Mr. Raney's clients (so far as the papers and proceedings before me disclose) treated the judgment in question as one

under sub-section 1 because the appeal was taken direct to the Court of Appeal, which has by the new "Judicature Act" been substituted for the Divisional Court instead of being taken to a single judge.

This point being determined in favour of the appellants no further question remains as to the amount involved as admittedly it is over $500. The security is, therefore, allowed with costs.

(Sgd.) E. R. CAMERON.

Rowell K.C. for the appellant.
Hales for the respondents.

THE CHIEF JUSTICE.—An important question of jurisdiction is raised on this appeal, which I think should be determined, although I am of opinion that the appeal should be dismissed on the merits.

The "Supreme Court Act," section 37(*d*), provides for an appeal to this court

from any judgment on appeal in a case or proceeding instituted in any Court of Probate in any province of Canada other than the Province of Quebec unless the matter in controversy does not exceed $500.

It is true that this legislation originated by reason of a decision of this court in *Beamish* v. *Kaulbach* (1), where it was held that the Court of Probate in Nova Scotia was not a superior court, but the language of the amending statute shews that it was not intended to apply solely to the Maritime Provinces where alone the term "Court of Probate" is used for courts having jurisdiction over estates of deceased persons, the language of the statute being

any Court of Probate in *any* province of Canada.

(1) 3 Can. S.C.R. 704.

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In the Province of Ontario prior to 1858, the court having jurisdiction over the estates of deceased persons was called *eo nomine* "the Court of Probate," but after that date its name was changed to the Surrogate Court, and to-day the Revised Statutes of Ontario by ch. 62, sec. 21, in conferring jurisdiction upon the Surrogate Court provide that such court shall have the same powers as the former Court of Probate for Upper Canada.

I am, therefore, of opinion that the Surrogate Court in Ontario is included in the expression "Court of Probate" in the "Supreme Court Act."

DAVIES J.—The judgment of Chief Justice Mulock speaking for the Second Appellate Division of the Supreme Court of Ontario in this case is quite satisfactory to me and I agree in the disposition of the appeal made by that court. I am more glad to find myself in accord with the judgment appealed from because of the ever increasing appointments of trust companies as trustees and executors of the wills of deceased persons and administrators of their estates and the great necessity which exists for impressing upon these companies that while there may be pecuniary advantages arising out of such appointments, there are also necessary liabilities calling for the exercise of reasonable prudence, skill and attention on their part.

On the argument of the appeal a very important question was raised as to our jurisdiction to hear appeals in actions originating in the Surrogate Court of Ontario.

The same point was raised before the Registrar of this court who, after hearing argument on the

point by counsel, affirmed our jurisdiction. I have read his reasons for judgment and agree with them.

The jurisdiction of this Court is to be found in the 37th section, sub-section (*d*), of the "Supreme Court Act," which provides for an appeal to this court

> from any judgment on appeal in a case or proceeding instituted in any Court of Probate in any province of Canada other than the Province of Quebec unless the matter in controversy does not exceed $500.

This sub-section (*d*) was no doubt enacted in consequence of the judgment of this court in *Beamish* v. *Kaulbach*(1), which held that the Probate Court of Nova Scotia was not a Superior Court and, therefore, an appeal did not lie here from a judgment of the Supreme Court of Nova Scotia in a matter or controversy originating in the Probate Court.

In the Province of Ontario there is no court called the Probate Court. The court which formerly existed there under that name was abolished in 1858 and its jurisdiction with respect to the granting and revocation of probates of wills and letters of administration, etc., was vested in the Surrogate Courts of the province. That jurisdiction still continues and is to be found in the Revised Statutes of Ontario, 1914, ch. 62, secs. 19, 20 and 21.

The latter section expressly provides that every such surrogate court shall have the same powers, etc., and its grants and orders the same effect as the former Court of Probate for Upper Canada had in relation to the personal estate of deceased persons and to causes testamentary within its jurisdiction, and that all duties which by statute or otherwise were exercised

(1) 3 Can. S.C.R. 704.

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by such Court of Probate or the judge thereof in respect of probates, administration and matters and causes testamentary and the appointment of guardians and otherwise should be performed by the Surrogate Courts.

These latter courts were substantially the same courts as the probate courts, though under another name, and if the legislature has somewhat added to their jurisdiction, such addition cannot, in my opinion, affect the right of appeal under the "Supreme Court Act."

I think the section of the "Supreme Court Act" quoted above applies to these surrogate courts of Ontario (so called) and are not to be limited to those courts in some of the provinces such as Nova Scotia exercising the same jurisdiction and called "probate courts."

It is a mere question of name only, not of substance. The courts are the same courts: their jurisdiction covers the same subject matters. The only difference lies in the name given to the courts, and in Ontario it is expressly enacted that their powers and duties shall embrace all those of the old probate courts.

I would dismiss the appeal with costs.

IDINGTON J.—This appeal is from the judgment of the Appellate Division of the Supreme Court of Ontario reversing an order of the judge of the Surrogate Court of the County of York made as a result of his passing the accounts of the appellant as an administrator and guardian appointed by the said court.

The first question to be considered is our jurisdic-

tion to hear such an appeal. Any we have must rest on section 37, sub-section (*d*), as follows:—

(*d*) From any judgment on appeal in a case or proceeding instituted in any Court of Probate in any province of Canada other than the Province of Quebec unless the matter in controversy does not exceed five hundred dollars,

first enacted in 1887 by 50-51 Vict. ch. 16, and probably as result of the decision of this court in the case of *Beamish* v. *Kaulbach*(1), where it was held no appeal would lie to this court from a Court of Probate of Nova Scotia, inasmuch as it was not a superior court within the meaning of the "Supreme and Exchequer Court Act." The issue in that case was the validity of a will.

The meaning of this enactment came in question in the recent case of *In re Muir Estate*(2). In that case as the parties were evidently on their way to the Judicial Committee of the Privy Council and only calling here as at a half-way house, neither side cared to have the question raised, for they desired and got the opinion of this court on the main issues raised in appeal without any very express decision being reached by the court on the question of jurisdiction.

I, however, then examined that question in its bearing upon that case and set forth my views to which I may be permitted to refer without repeating them at length here.

This case is, however, essentially different from what was involved therein. That went to the question of the jurisdiction of the Surrogate Court in Manitoba granting probate before or until the succession duties were provided for.

(1) 3 Can. S.C.R. 704. (2) 51 Can. S.C.R. 428.

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Idington J.

This, however, is of an entirely different character. The issues raised herein have nothing to do with the grant of administration.

It is assumed that grant was rightfully made and is no way in question.

In Ontario the judges of the surrogate courts have, as results partly of the development of practice and partly of statutes passed since the above quoted amendment to the "Supreme Court Act," obtained very extensive powers over the administration of estates concurrently with what still exists in the Supreme Court and formerly existed almost entirely in the Court of Chancery, and later, after the passing of the "Judicature Act," in the High Court of Justice in virtue of its equity jurisdiction.

The outline of the story of how that has come about is somewhat thus:—

Administrators were always required to give a bond with sureties for the due administration of the estates entrusted to them and to exhibit an inventory of the estate and make, or cause to be made, a true and just account of the administration when required.

Any one aggrieved by misconduct in any such regard might apply to the surrogate judge to obtain an assignment of the bond in order to bring an action upon it.

Incidentally thereto the judge might have to examine the accounts of the administrator to ascertain if there was reason to believe there had been such a breach of the condition of the bond as entitled the applicant to its assignment. There was no final adjudication upon the rights of the parties arising out of the accounting in such a proceeding. All it in-

volved might be whether a *primâ facie* case had been made out. Or possibly the rights had been determined by the Court of Chancery in the course of an administration suit and the establishment therein of what constituted a breach of the condition of the bond which the sureties were then called upon to make good.

Ever since 1859 the surrogate judges had power to make allowances to the administrator, executor or trustee in the way of compensation for his services upon his passing his accounts.

These provisions tended to the development of a practice of passing accounts, but, if my memory serves me correctly, there was nothing final therein in the way of determining the rights or liabilities of the administrator till comparatively recent legislation, of which 10 Edw. VII., ch. 31, sec. 71, is now, in R.S.O. 1914, ch. 62, sec 71, the outcome.

I may, in passing, point out that the administration of estates, originally part of the exclusive jurisdiction of the Court of Chancery, and later, after law and equity courts were consolidated by the Judicature Acts, of the High Court, has in practice, without depriving the higher courts of jurisdiction, largely passed by virtue of a few minor, but growing, powers, aided by numerous statutes, into the surrogate courts of Ontario.

These statutory provisions promoted a less expensive mode of administration than had prevailed in the Court of Chancery or the High Court of Justice.

I doubt if the legislature of the province ever desired that in aiding such development as a means of the economical administration of justice, in that regard, it desired an appeal to exist to this court as part of the system.

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Idington J.

Of course it matters little what they desired if the legal result of a correct interpretation of the above quoted amendment brings that about.

I may suggest, however, that I hardly think Parliament would have intended to bring about any such undesired and undesirable result.

The local Legislatures can remove many subjects of litigation from the jurisdiction of this court by providing, through inferior courts, for the judicial determination of matters which formerly were and still are subject matters to be dealt with in superior courts.

Important litigation finds its way to the superior courts in any case where the parties so desire.

Now are we, by a side wind as it were, to gather in appeals originating in the inferior courts as well as those originating in the superior courts ?

This appeal is a very good illustration of the probable result of such a development.

I cannot think it ever was the intention of Parliament to bring about such a result.

I think all that was intended by the amendment in question was to give an appeal in cases that belonged, properly speaking, to the courts of probate as such.

The validity of a will must always be an important question and trials of issues which involved that in cases, where as in Ontario the amount of the estate in controversy must exceed a thousand dollars, probably was all the amendment extended to.

If, for example, the judges of the county courts, who are generally judges of surrogate in their respective counties, were called only judges of surrogate and

their jurisdiction as judges of county courts by process of consolidation were transferred to them as judges of surrogate, would that enable appeals in all cases now within county court jurisdiction to be brought here ?

The case of *Daly* v. *Brown*(1) was referred to in the argument herein and if the point had been raised therein and decided I should feel bound to follow it. No such question, however, was raised. A question was raised of the jurisdiction of the provincial court, but none as to the competence of this court.

For my own part I confess I was, until the question was raised in *In re Muir Estate*(2), under a vague impression that the amendment was intended only to apply where, as in the Maritime Provinces, the courts were designated "Probate Courts."

The fact that the amendment stood so long without any litigant, in a province where the courts of probate are called "Surrogate Courts," attempting to come here by virtue of it, seemed to lend *primâ facie* a colour to this idle notion.

My examination of the question in that case convinced me for reasons I therein assigned that such a construction was untenable.

To say the least the jurisdiction in such cases as this must be exceedingly doubtful; and it has ever been the rule of this court where the jurisdiction was doubtful not to exercise it.

I conclude, therefore, for the foregoing reasons this appeal should be dismissed, but without costs as the point was not taken by appellant and hence not argued as it might otherwise have been.

(1) 39 Can. S.C.R. 122.

(2) 51 Can. S.C.R. 428.

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Duff J.

DUFF J.—I think the Appellate Division has drawn the line a little more narrowly than I should have done. The Ontario courts, however, appear to have found from experience that the practice of requiring guardians to obtain antecedent sanction with regard to extraordinary expenditures must be strictly insisted upon for the protection of the property of infants on pain as a rule of the guardian establishing to a demonstration and entirely satisfying the conscience of the court as to the propriety of the payments not so sanctioned; and although this practice cannot be strictly said to be enjoined by law, yet if followed with reasonable regard to special circumstances, it is not necessarily out of harmony with the law and this court ought not to interfere with a judgment pronounced in the spirit of this settled practice unless it appears that some injustice has been done. I concur in dismissing the appeal.

As to jurisdiction I think "Court of Probate" in section 37(*d*) denotes any court exercising a general probate jurisdiction.

It does not follow that every judgment or order of such a court is appealable; but the judgment now before us is, I think, well within the purview of the sub-section.

ANGLIN J.—For the reasons which I stated in *Standard Trusts Company* v. *Treasurer of Manitoba* (1), during the argument of this appeal I doubted our jurisdiction to entertain it. I cannot yet believe that Parliament intended by the amendment now embodied in clause (*d*) of section 37 of the "Supreme

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

Court Act" to confer a right of appeal from the provincial Appellate Court to this court in cases originating in the surrogate courts of Ontario whenever the matter in controversy amounts to or exceeds $500. Cases originating in other inferior courts in that province cannot be brought here whatever the amount involved; and where the right of appeal in proceedings originating in the Supreme Court of the province is dependent upon the amount in controversy it must exceed $1,000. To allow costly appeals to this court in mere matters of summary accounting in the Ontario Surrogate Courts is destructive of the purpose for which this jurisdiction was given to those courts. It seems to me deplorable that the allowance or disallowance of an item of $500 by a surrogate judge auditing the accounts of an executor, administrator or guardian may be made the subject of an appeal to this court. Yet, upon mature consideration, I am unable to say that an Ontario surrogate court is not a "court of probate," or to find any sufficient ground for denying a right of appeal which clause (*d*) of section 37 purports in explicit terms to give.

Upon the merits, except in regard to two items, I think the appeal cannot succeed. It would be most unfortunate were anything that we might do to encourage a departure from the wholesome practice which requires guardians of infants to obtain the prior sanction of the court to any encroachment on the capital of the estates of their wards, or a relaxation of the tacit rule prescribing that when such prior sanction has not been obtained guardians seeking to have expenditure made out of capital allowed must establish by the clearest and most convincing proof

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that an order sanctioning it would have been made had it been applied for in advance. The appellants failed to satisfy the judges of the Appellate Division that they would have obtained such an order in regard to a large part of their expenditures in the present case, and in the disallowance by that court of all the items in question except two I have not been convinced that there has been any error.

One of the two excepted items is a sum of $100 deducted from the commission of $500 allowed by the Surrogate Court judge to the appellants, who were administrators of the estate of Lilly Rundle and guardians of the estate of her son, as he says in recompense for their services

> in dealing with the estate and handing the balance over to the plaintiffs.

The deduction was made by the Appellate Division on the assumption that of the $500 commission allowed $100 was for the services of Mr. Warren as guardian of the person of the infant. With respect, I find nothing whatever in the record to warrant that assumption and I think it should not have been made.

The other item is the allowance by the judge of the Surrogate Court to the appellants of the costs of an action brought by Clarence A. Rundle against them to set aside a release which they had obtained from him. The appellants acceded to this claim and judgment was pronounced by consent setting aside the release, and, presumably, to avoid the necessity of any consideration of the merits of the action in the High Court Division, referring the question of the costs of it to the judge of the Surrogate Court to whom the taking of the accounts was remitted. In

dealing with these costs of proceedings in another court I think the Surrogate Court judge acted as *persona designata* and that his disposition of them, however erroneous it may be deemed, was not subject to appeal. Both these items should be allowed to the appellants. Subject to this modification I think the appeal fails and should be dismissed. But in view of the result there should be no costs to either party.

BRODEUR J.—I am of opinion that the judgment *a quo* should be confirmed.

It has been found, it is true, that the minor, Charles A. Rundle, deceived the company appellant; but it was also the duty of the company, as guardian of his property, to look after his proper maintenance according to his position in life.

If the expenditure for the maintenance had not exceeded the income of the infant's property, no serious blame perhaps could be made to the guardian. But the expenditure exceeded largely the income; it was not made according to the position in life which the minor occupied before his mother's death and it developed in the young boy very bad habits which have perhaps affected his future.

Besides, that money was expended without the guidance and the authorization of the court.

Appeal dismissed with costs.

Solicitors for the appellant: *Rowell, Reid, Wood & Wright.*

Solicitors for the respondents: *Mills, Raney, Hales & Irwin.*

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*Oct. 15.
*Nov. 2.

THE VANCOUVER BREWERIES, LIMITED (DEFENDANTS) ..... } APPELLANTS;

AND

A. J. DANA AND J. A. FULLERTON (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Landlord and tenant—Lease—Licensed hotel — Accommodation required by regulations—Covenant by lessor—Repairs and improvements—Loss of liquor licence—Determination of lease—Implied condition.

In a lease of property, upon which was situated a hotel licensed to sell liquors, the lessor covenanted to repair and improve the premises in compliance with municipal regulations which might be made from time to time in respect to hotels for which liquor licences should be granted. During the term of the lease a regulation was made, requiring licensed hotel premises to be enlarged and improved in certain respects, with which the lessor did not comply and, in consequence, the renewal of the liquor licence was refused at the end of the licence year then current.

Held, that neither the circumstances in which the lease was entered into nor the lessor's covenant to make repairs and improvements gave rise to an implied condition to the effect that the obligation of the tenant to pay the rent reserved should terminate upon the hotel, through no fault attributable to the lessee, ceasing to be licensed premises. *Grimsdick* v. *Sweetman* ([1909] 2 K.B. 740) followed.

Judgment appealed from (21 B.C. Rep. 19) affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the judgment of

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

(1) 21 B.C. Rep. 19.

Morrison J., at the trial(1), by which the plaintiffs' action was maintained with costs.

In the circumstances mentioned in the head-note, the defendants refused to pay the rent reserved in the lease of the premises and the plaintiffs brought the action to recover the rent claimed by them. The defendants counterclaimed for damages alleged to have been sustained in consequence of the loss of the licence for want of compliance by the plaintiffs with the requirements of the municipal regulations. At the trial, Morrison J. held that the parties had not contracted on the basis of the continued existence of a liquor licence for the premises in question and maintained the plaintiffs' action with costs. This judgment was affirmed by the judgment now appealed from.

Lafleur K.C. and *Harvey K.C.* for the appellants.

Wallace Nesbitt K.C. for the respondents.

THE CHIEF JUSTICE.—This is an action by the respondents (plaintiffs) to recover the rent of certain hotel property. The defence was that by certain covenants in the lease the plaintiffs or their assigns undertook to enlarge the premises so as to comply with the by-laws and regulations of the city governing places for which liquor licenses were granted. Their defence alleges that by those regulations an enlargement of the premises and certain structural changes with respect to heating, lighting, etc., were required. The plaintiffs refused to make the necessary improvements and as a result the appellants lost their licence. They

(1) 21 B.C. Rep. at p. 20.

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thereupon gave up possession and refused to pay rent and counterclaimed for damages. The trial judge gave judgment for the plaintiffs (respondents) and dismissed the counterclaim. The appellants (defendants) thereupon appealed to the full court and their appeal was dismissed.

I am of opinion that the judgment below should be confirmed on the very short ground that the land and house, and not the licence, were the subject matter of the lease and the right of the tenant to occupy the house for any other purpose continued after the cancellation of the licence.

The appeal should be dismissed with costs.

DAVIES J.—I think this appeal must fail, being concluded by the decisions in the case of *Hart's Trustees* v. *Arrol*(1), and *Grimsdick* v. *Sweetman*(2). In the latter of these cases it was expressly held that in the case of premises leased and described

as a beer house and premises with bakehouse in the rear

with covenants on tenants' part to continue the premises as a beer house at all times during the term of the lease, the non-renewal of the licence has not the effect of putting an end to the lease and the defendant was, therefore, liable for the rent.

In the former (a Scotch case) the same principle was affirmed. That was the case of the lease of a shop for ten and one-half years for the purpose of the tenants

carrying on therein the business of wine and spirit merchants.

It was held that the lease was not brought to an end

(1) [1903] 6 Sess. Cas. 36. (2) [1909] 2 K.B. 740.

by the loss of the licence and the consequent failure of the purpose for which the shop was let.

The reasoning upon which the conclusions of the courts were reached in both cases was that it could not be said there was a total failure of consideration for the tenants' covenant to pay the rent or that the leases had come to an end by the non-renewal or cancellation of the licences. The tenant's obligation to pay rent stands unless it can be shewn against the landlord that he has failed to do something that he has undertaken and so disabled himself from enforcing the obligation.

In the case at bar it seems clear that the landlord has undertaken no obligation whatever as to the continuance of the licence. He therefore has not disabled himself from enforcing the obligation of the tenant to pay the rent.

The lease continues and the premises may be used by the tenant for other and different purposes than those evidently intended when the lease was entered upon.

Mr. Lafleur's contention was that if the licence was cancelled, for any cause except the lessee's fault, the lease ended and the lessee ceased to be liable for rent under it, but that contention is at variance with the principle on which the cases above referred to were decided and which commends itself to me as sound.

Appeal should be dismissed with costs.

IDINGTON J.—The respondents, as lessors, recovered judgment against appellant upon the covenant to pay rent, contained in a lease dated 15th November, 1905, whereby the lessors demised certain

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lands, described by metes and bounds, in Vancouver, for a term of years.

The premises so demised had then a building thereon used as a hotel duly licensed, until 1st July, 1913, from year to year, to sell intoxicating liquors therein. At the expiration of the year ending upon said date the duly constituted authorities in that behalf refused to grant any such licence thereafter for said hotel. The appellant contends that thereby the lease was terminated and it as lessee was not to be further liable upon the covenant to pay rent. It insists that the original parties to said lease, in contracting therefor, contemplated that the premises so demised should be used only as a hotel so licensed. Counsel for it points out that in beginning the description of the land demised, the words, "all and singular the hotel and building situate," etc., and after giving the metes and bounds of the property, uses the words, "which premises are now known as 'The Royal Hotel,' and formerly known as the 'Gambrinus Hotel,' together with the appurtenances thereto belonging," and that, coupling those and other like expressions with the covenants which follow relative to the licence and the possible requirements which the retention of this house on the list of licensed hotels might involve, there is clearly implied a condition that upon the lessee's failure to obtain a licence the lease should end.

It was easy to have expressed that intention, if existent, relative to its termination and quite as obviously a necessary thing to have expressed as was the possibility of destruction by fire and what was to happen in that event.

This express provision for the contingency of de-

struction by fire and absence of a like provision relative to the contingency of loss of licence, seems to exclude the possibility of finding in the instrument any implied condition such as contended for.

It is further to be observed that the law never recognized the lessor as entitled to obtain a licence. It is only the lessee who can be licensed. He is licensed to sell intoxicating liquors in the building in which he is the lessee. And as a condition precedent to his obtaining such a licence he must be the lessee or owner of a property whereon are buildings which conform with the requirements of the law in that regard.

There was no lease of the licence at all possible and none such existed, though mutual covenants were framed and entered into whereby the lessor might possibly assert a claim to the licence at the expiration of the term or forfeiture of the lease, or prevent a transfer of the licence against his will. The like devices have long been resorted to by those who unhappily are proprietors of hotel property, but, whether effective or not, they neither expressly nor impliedly have any relation to the determination of the term of the demise unless expressly made so.

The licence only issues for a year. It may be lost —as has happened—one year and be renewed the following. The hotel business proper can go on without a licence. It might be argued that a tenant under a lease worded as this, must continue to carry on a hotel whether it paid to do so or not. Without an obligation relative thereto, I should think there was no such condition or covenant implied by mere words of description such as these parties have used. In

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this case words are used binding the lessee to obtain if he can, a licence to be paid for by the lessor.

It is the land which is demised and in absence of stipulation to the contrary, it would be competent for the tenant to use it for a residence or for the purpose of carrying on any business neither expressly nor impliedly prohibited.

As to cases cited they are for the most part entirely inapplicable to the question raised.

The expression of Blackburn J. in *Taylor* v. *Caldwell*(1), at page 832, relied upon by Mr. Harvey, of counsel for the appellant, as intimating that the words "letting" and "rent" were of no consequence, must be read in connection with the whole of what he says and in light of what he concludes. It is, as was usual with him, the very substance of the thing he looked at and into, as it were, and he concluded there was in that case no demise.

The broad distinction in our law between a demise and a mere licence has to be borne in mind in looking at many such like authorities and the point of view taken by Lord Blackburn cannot be safely discarded in doing so.

I think the appeal should be dismissed with costs.

DUFF J.—The appellants' contention, reduced to its simplest terms, is that the covenant to pay rent was subject to an implied condition having the effect of putting an end to the obligation to pay rent on the premises ceasing to be licensed premises owing to causes not arising from the fault of the lessor or lessee. It is not disputed that such a condition, if it

(1) 3 B. & S. 826.

can be implied, must be a condition affecting the existence of the term itself, that is to say, extinguishing the term upon the lapse of the licence. There might have been a good deal of force in the appellants' contention if the lease had expressly or impliedly required the lessee to use the demised property only as a licensed hotel; but no such restriction is expressed in the lease and there is nothing, I think, from which such a restriction can be implied.

It may be assumed that the parties did contract, both of them, in the expectation that the premises would continue to be licensed to the end of the term, but that is not a sufficient ground upon which to rest the implication of a condition such as that suggested. I find it impossible myself to say that the lessor and the lessee if they had contemplated the possibility of the licence being cancelled during the term, must necessarily, as reasonable business men, have made such a condition a part of their contract. Having regard to the decisions in analogous questions as between lessor and lessee, I think I cannot say that judicially; *e.g.*, *Paradine* v. *Jane*(1).

The appellants rely upon the principle of *Taylor* v. *Caldwell*(2) and *Appleby* v. *Meyers*(3) which principle was applied a few years ago in a number of cases; *Krell* v. *Henry*(4); *Chandler* v. *Webster*(5); *Herne Bay Steam Boat Co.* v. *Hutton*(6); and the effect of these cases has been stated in a book which has a high reputation for accuracy, in the following words:—

(1) Aleyn 26.
(2) 3 B. & S. 826.
(3) L.R. 2 C.P. 651.
(4) [1903] 2 K.B. 740.
(5) [1904] 1 K.B. 493.
(6) [1903] 2 K.B. 683.

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(*n*) Where from the nature of the contract it is clear that the contract is based upon the assumption by both parties to it that the subject matter will, when the time for the fulfilment of the contract arrives, still exist, or that some condition or state of things going to the root of the contract and essential to its performance will be in existence, the non-existence of such subject matter or of such condition or state of things when the time for the fulfilment of the contract has arrived, affords, in general, an answer to the claim for any further fulfilment of the contract, and also to one for damages for the failure to further carry out the contract.

Bullen & Leake's Precedents of Pleadings, at page 494,

This principle is not sufficient for the appellants because it cannot be contended that the continuance of the licence is essential to the performance of the contract.

The principle has not hitherto, moreover, been applied in the case of a demise of land under which possession has been taken and a term has become vested in the tenant.

ANGLIN J.—If, as is undoubtedly the case, under English law, *Belfour* v. *Weston*(1); *Holtzapffel* v. *Baker*(2); *Counter* v. *MacPherson*(3), the destruction by fire or tempest of property demised does not terminate the lease or afford a defence to the tenant in an action for rent, I cannot understand how the mere refusal of the authorities to renew a licence to sell liquor upon premises leased for the purposes of a hotel can, in the absence of an express condition in the lease, have that effect. *Krell* v. *Henry*(4), and cases like it are distinguishable on the ground that in them the right of the tenants to possession of the premises was conditional upon the existence of a state of

(1) 1 T.R. 310.
(2) 18 Ves. 115.
(3) 5 Moo. P.C. 83, at pp. 104-5.
(4) [1903] 2 K.B. 740.

things which became impossible. Although, no doubt, different in some of its circumstances, the case of *Grimsdick* v. *Sweetman*(1), relied upon in the Court of Appeal, appears to be in point, and the Scotch case of *Hart's Trustees* v. *Arrol*(2), there cited and specially referred to by Mr. Nesbitt, is, I think, indistinguishable. There has not been a total destruction of the subject-matter of the lease—the land and the house upon it remain—and the authorities do not warrant the implication of a condition that if the licence should be taken away the lease should terminate. I agree in the view of Jelf J. (*Grimsdick* v. *Sweetman* (1), at page 747), that:—

> It would to my mind be a most extraordinary thing to say that because the licence has been taken away the tenant has no right to continue to live in the house.

Yet that would be the result if the cancellation of the licence were to terminate the lease. I prefer not to rest the disposition of this case upon the ground that because the non-renewal of the licence was something which the tenant should have anticipated and provided against, he cannot treat it as entitling him to cancellation of the lease. This test, formulated in *Baily* v. *De Crespigny*(3), and referred to in *Krell* v. *Henry*(4), seems to me unsatisfactory—at least I am unable to understand why it should not have been applied in such a case as *Nickoll & Knight* v. *Ashton Edridge & Co.*(5), if it is decisive.

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

(1) [1909] 2 K.B. 740.
(2) [1903] 6 Sess. Cas. 36.
(3) L.R. 4 Q.B. 180.
(4) [1903] 2 K.B. 740.
(5) [1901] 2 K.B. 126.

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BRODEUR J.—The relations of the parties are those of lessor and lessee.

The question is whether the non-renewal of the licence of the hotel entitled the appellants to repudiate the lease and refuse to pay rent.

It had been stated in the defence that the non-renewal of the licence has been caused by the fault of the lessor. But the case remains now to be considered only upon the construction of the contract.

It seems to me clear that the parties had not contracted on the basis of the existence of a liquor licence.

If a warranty had been stipulated on the part of the lessor against the non-renewal of the licence, then he might be liable, but the parties did not so stipulate and no such covenant could be implied; for in the case of damage by fire a suspension of rent was stipulated. If the contracting parties had also desired that in the case where the licence would not be granted the rent should not be paid, then they would have mentioned it.

I am unable to distinguish this case from the *Grimsdick* v. *Sweetman*(1) case decided in 1909 in England.

By an indenture of lease, certain premises described as "all that beer house and premises" were demised. The house had been licensed as a beer house for a great number of years. But the renewal of the licence was refused under the "Licensing Act." In an action to recover rent due, it was held that the non-renewal of the licence had not the effect of putting an

(1) [1909] 2 K.B. 740.

end to the lease and that the defendant was, therefore, liable for the rent.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Taylor, Harvey, Grant, Stockton & Smith.*

Solicitors for the respondents: *Davis, Marshall, MacNeill & Pugh.*

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*May 11, 12.
*Nov. 5.

JOHN B. McGILLIVRAY (PLAINTIFF) ..... } APPELLANT;

AND

F. C. KIMBER AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Pilotage authority—Compulsory retirement of pilot—Judicial functions—Liability to action.

The pilotage authority in a pilotage district of Canada has not absolute and arbitrary power to cancel a pilot's licence, but can only do so after complaint and inquiry and proof on oath of incapacity.

If a pilotage authority, by resolution alone, without complaint, notice or investigation, declares a pilot to be dismissed "for neglect and incapacity" and thus prevents him from performing a pilot's duties, inasmuch as it failed to observe the statutory requirements respecting the proceedings for such dismissal it has not exercised judicial functions and is not protected from liability to an action by the pilot for damages. Fitzpatrick C.J. and Davies J. dissenting.

Per Duff J.—A by-law of a pilotage authority purporting to provide for the forfeiture of pilot's licences for incapacity could only have the effect, if at all, subject to the condition exacted by 433(*j*) of the "Shipping Act" that such incapacity should be "proved on oath before the pilotage authority" and a resolution of a pilotage authority pretending to dismiss a licensed pilot for incapacity without such proof on oath was legally inoperative; but as the resolution was intended to have and had the effect of preventing the pilot exercising his calling and since it was an act without justification or excuse it was actionable within the principle laid down by Bowen L.J. in *Mogul Steam Ship Co.* v. *McGregor* (23 Q.B.D. 598).

Per Duff J.—Section 433(*e*) of the "Shipping Act" does not empower a pilotage authority to limit the term of a pilot's licence to a period of one year.

Judgment of the Supreme Court of Nova Scotia (48 N.S. Rep. 280) reversed.

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

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

The questions raised for decision on this appeal are stated in the above head-note.

Mellish K.C., and *Finlay Macdonald K.C.* for the appellant. In passing the resolution for dismissal of the appellant the respondents were not acting judicially. See *Royal Aquarium, etc., Soc.* v. *Parkinson* (2); *Baird* v. *Wells*(3).

Even if they were acting as a quasi-judicial body they were not protected as they did not observe the formalities required by statute. Pollock on Torts (6 ed.), p. 120.

The record contains evidence of malice. See *Ferguson* v. *Earl of Kinnoull*(4), at p. 303.

Rogers K.C. for the respondents. The respondents were acting judicially. *Harman* v. *Tappenden*(5); *East River Gas-Light Co.* v. *Donnelly*(6).

THE CHIEF JUSTICE (dissenting).—In my opinion the judgment appealed from is right. There can, I think, be no doubt that in discharging the pilot the respondents were acting in a quasi-judicial capacity, and it is settled law that those acting in a judicial or quasi-judicial capacity incur no liability for acts performed within their jurisdiction unless actuated by malice. Many American cases indeed go so far as to hold that even malice will not affect the immunity of

(1) 48 N.S. Rep. 280.
(2) [1892] 1 Q.B. 431.
(3) 44 Ch. D. 661.
(4) 9 Cl. & F. 251.
(5) 1 East 555.
(6) 93 N.Y. 557, at p. 560.

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those performing such functions. It is unnecessary to consider this in the present instance as malice has not been charged.

This freedom from liability of those discharging quasi-judicial functions does not, of course, in any way prevent the courts interfering to review the proceedings. The courts do so in every variety of cases, quashing convictions, setting aside awards, granting mandamus such as would undoubtedly have been done on application in the present case. The proceedings by the Pilotage Authority were clearly irregular and the mandamus would have directed them to hear and determine the matter in a proper manner. Freedom from liability for the consequences of such acts is, however, precisely the protection which the law gives to those discharging such duties. Were it otherwise no one could venture to undertake the discharge of the duties of many public positions.

The appeal should be dismissed with costs.

DAVIES J. (dissenting).—I am of opinion that this appeal should be dismissed with costs. I accept the reasons for the judgment of the Supreme Court of Nova Scotia as delivered by Chief (then Mr.) Justice Graham allowing the appeal from the judgment of the trial judge and dismissing the plaintiff's action.

The gist or pith of the decision is that the acts of licensing and of withdrawing a licence of a pilot are quasi-judicial, that there is no contract of hiring, and that in the absence of proof of malice in the withdrawal of a licence no action will lie against the Pilot Commissioners.

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IDINGTON J.—This is an action by appellant who was duly qualified as a pilot and licensed as such in 1888, under the Pilotage Act, chapter 80 of the Revised Statutes of Canada, 1886, now, so far as amended and in force, forming part of the Canada Shipping Act, Revised Statutes of Canada, 1906, against respondents, who were appointed 13th May, 1912, the pilotage authority for the Port of Sydney.

The respondents constituted an entirely new Board. Mr. Kimber, their secretary, testifies as follows:—

Q. You know the plaintiff here, John B. McGillivray ?

A. I do.

Q. Were you present at the meeting where it was decided to dispense with his services ?

A. Yes.

Q. When was that ?

A. June 13th, 1912.

Q. Who were present at that meeting ?

A. Vincent Mullins.

Q. He was chairman ?

A. He was elected chairman. There were present Commissioners Vooght, Desmond, Barrington and myself.

Q. Was that the first meeting you had ?

A. Yes, the first meeting.

Q. It was at that meeting you undertook to dispense with the services of the plaintiff ?

A. He was dropped from the list of pilots.

Q. Was that the meeting he was dismissed from the service ?

A. Yes.

Q. Is there a resolution there ?

A. Yes. "Moved by Com. Barrington, seconded by Com. Vooght that the following pilots should be dismissed from the service. Carried." John B. McGillivray is the first name.

Q. Is that all there is to it ?

A. Yes.

Q. And that resolution was carried ?

A. Yes.

Q. And Mr. McGillivray was dismissed ?

A. He was.

This resolution so read from the minute book is further evidenced by what I presume was intended

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for a certified copy filed as an exhibit. And apparently from that, after the motion was declared carried, there was added a note as follows: "P.S. Neglect and incompetency were the reasons for the above dismissal."

When this was done or how it came to be entered, we have no evidence of. And the book is not in the record. Appellant says he was notified to quit, that his services were no longer required and that he quit accordingly after seeing Mr. Kimber and Mr. Mullins, and being unable to get any information from either of them why he was dismissed.

There was no pretence of any accusation and inquiry in respect thereof, or of hearing the appellant, or calling upon him to answer for anything.

It seems later to have dawned upon some of these men that their proceedings were illegal. In August of the next year, in the absence of some of the more relentless members of the Board, the appellant was reinstated and acted as a pilot for some two or three months. The matter was again taken up pending such service, at a meeting on the 8th of October, 1913, when the following resolution was passed:—

Whereas after a meeting of the Board of Pilot Commissioners for the Port of Sydney held on August 4th, 1913, two only of the Commissioners being present, a resolution was irregularly introduced and adopted by the said two Commissioners and entry made of the same on the minutes of the doings of this Board, reappointing John B. McGillivray, George Spencer and Peter Rigby as Pilots for the Port of Sydney, although at a prior meeting of the Board, the said persons, having previously been pilots, had their commissions cancelled by an unanimous vote.

Be it therefore resolved that this Board declares itself in no way bound by the resolution irregularly introduced and purporting to have been adopted after said meeting of August 4th, and that it does not, and will not recognize the said John B. McGillivray,

George Spencer and Peter Rigby as pilots acting under the authority of this Board.

Be it further resolved that the Secretary be instructed to forthwith notify the said parties that the Board does not, and will not recognize them as pilots having any authority whatsoever from this Board. Carried.

The secretary accordingly notified the appellant that he would not be recognized as a pilot.

Later, on the 18th October, 1913, the secretary wrote the following letters:—

Sydney, N.S., October 18th, 1913.

D. A. McInnis, Esq.,
Member of Pilots' Finance Committee.

Dear Sir,—On the 7th inst. I notified John B. McGillivray and Peter Rigby, under instructions given me by a meeting of the Board of Commissioners held the previous day at North Sydney, that the Pilotage Authority did not and would not recognize them as pilots having any authority whatever from the Board.

I understand that both these men have reported for duty since receiving this notice, and I, therefore, give your Committee formal notice that neither of these men are clothed with any licence or authority from the Board to act as pilots of this port.

Yours truly,
F. C. KIMBER, *Secretary.*

It is upon these acts, done or brought about by the respondents, that appellant founds this action.

The learned trial judge maintained the action and assessed the damages at $1,800. The Appellate Court of Nova Scotia reversed this judgment on the ground that the respondents in so acting were discharging a quasi-judicial duty and hence not liable to any action for damages therefor, unless shewn to have been moved by malice.

It is necessary in order to understand and correctly appreciate the relations between the Board and the appellant to ascertain what his legal position was and the degree of authority they had over him.

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The "Pilotage Act" provided that before a man can act or be licensed as a pilot he must have served an apprenticeship. And then the Board had power to license him. Having done so he must register his licence with the collector of customs.

Section 28 of that Act under which appellant obtained his licence, after serving apprenticeship, is as follows:—

> Every pilot who had received a licence from a duly constituted authority in that behalf, before the commencement of this Act, may retain the same under and subject to the provisions of this Act, and shall, for the purposes of this Act, be a pilot licensed by the pilotage authority of the district to which his licence extends.

This section in substantially the same terms, and doubtless intended to be a continuation in force of said section, appears in section 448 of the "Canada Shipping Act" above referred to.

It seems quite clear from said section and the other sections bearing upon the question, that so long as a licensed pilot conformed to the regulations and had not been duly condemned for any of the offences for which the Board might try him, and suspend or dismiss him, he was (until sixty-five years of age) quite independent of the Board and entitled to follow his chosen calling and earn his livelihood thereby and as provided in section 38 of the "Pilotage Act," now section 459 of the "Shipping Act" secure the provisions he would be entitled, upon retirement, to claim thereunder for himself, his widow or child.

There is no claim set up or pretended that he failed to conform to the regulations such as requiring payment of the annual licence fee and getting a renewal so called of the licence.

The Board had no arbitrary authority to interfere

with that tenure of appellant's office or rights as a licensee. It is quite clear that they imagined they had such arbitrary authority and acted accordingly. They never dreamed of anything else. They never for a moment supposed they had a judicial duty to discharge. Indeed, it never occurred to them to imagine such a thing in pleading their defence herein or presenting their case at the trial.

It seems some one suggested a possibility of such a defence in the appellate court, but I can find no leave given or asked to amend the statement of defence. I am unable to see how under the law and facts they can claim such a defence as matter of course. Their defence on the pleadings was one of absolute authority and nothing else but what fell within the scope thereof.

I cannot say that a state of pleading, such as before us, with a glimpse into some of the vicious, and hence in law malicious, motives which impelled the mover of the resolution, can be properly remodelled at this stage in such a way as to import therein the defence of acting in quasi-judicial capacity and exclude the consideration of malice as being unproven.

Even if Mr. Justice Graham's holding that, where a quasi-judicial act is involved, malice must be pleaded and proved, be correct, it surely devolved on defendants to set up the claim of quasi-judicial authority instead of the absolute authority set up by the statement of defence. In that case it might have been incumbent on the appellant to have replied malice and proven it.

The mover of the resolution so far as he is concerned puts himself out of court in assigning, as follows, his reasons for acting:—

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Q. Why was John McGillivray dismissed ?

A. Well, I can give you my own reasons. I had two. One was political and I considered him a disgrace to the service.

Q. What was the political reason ?

A. I got it in the neck myself once and I thought I would return the compliment when I got the chance.

Q. You had been dismissed when the Liberals were in office and you thought you would return the compliment to him ?

A. That was one reason and one was just as strong as the other.

Although Mr. Kimber disclaims personal knowledge of appellant's politics he indicates some of the Board seemed incidentally moved by considerations relative thereto. The surprising thing is that on the issues presented we should find accidentally disclosed so much evidence of those indirect motives of action which constitute malice. If the issue had been raised on the pleadings we may, from this sample so disclosed, well imagine there may have been much more which the trial of such an issue might have brought forth.

Indeed, it is hard to understand how, unless moved by improper motives, any one in such a position looking at this part of the statute (of which a copy was to be given every pilot and of which every commissioner presumably knew something) could have conceived it his right or duty to dismiss a man unheard.

I cannot find it incumbent upon us to impute to the respondents a quasi-judicial character which they never supposed they had, or were required to have and have not pleaded.

The appeal should be allowed for these reasons alone.

But, in deference to the judgment appealed from and the chief argument presented here, let us examine the claim that what was done was of a quasi-judicial nature. To appreciate it correctly, there is nothing in

the statute, which gave the Board any power or authority it had, supporting the defence of absolute authority as pleaded. It is admitted, in argument, that the Board is not a corporation. It is, however, given power to frame by-laws subject to the provisions of the Act. That power is now contained in section 433, which in its first or operative clause is as follows:—

433. Subject to the provisions of this part, or of any Act for the time being in force in its pilotage district, every pilotage authority shall, within its district, have power, from time to time, by by-law confirmed by the Governor-in-Council, to, * * *

This is followed by sub-sections numbered from (*a*) to (*n*) defining such enumerated subjects as therein appear, over which the Board is given merely the initiative faculty of framing by-laws to be adopted by the Governor-in-Council, but nothing therein gives the Board any absolute or indeed any control.

I fail to see how anything done or supposed to be done under that section can by any chance be supposed to be a quasi-judicial exercise of power.

In sub-section (*j*), which is as follows:—

(*j*) Provide for the compulsory retirement of licensed pilots who have not attained the age of sixty-five years, proved on oath before the pilotage authority to be incapacitated by mental or bodily infirmity or by habits of drunkenness,

they are thus given power to frame by-laws in respect of the incapacities and offences which are most prominently put forward by defendants as palliating their conduct relative to appellant.

This section 433 and its sub-sections for the most part are identical with and taken from section 15 of the "Pilotage Act," which again was consolidated from the Act of 1873.

Under that Act there were in 1906 re-enacted and

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amended prior by-laws which contain all that is in evidence before us relative to the powers and duties of respondents under said section of the Act. So far as they had any judicial or quasi-judicial powers such must rest in said statutes and the by-laws so far as enacted within same.

These furnish no ground for the assertion of any judicial or quasi-judicial powers such as would in the remotest degree warrant the procedure adopted in the passing of the resolution quoted above or in the steps taken either in accord therewith or legitimately consequent thereupon.

I conclude, therefore, that all these steps so taken were without any colour of jurisdiction for such acts.

As the resolution in its terms fails to assign any cause for its passage, that should end such contention as set up.

If heed is to be paid to the postscript in way of assigning any cause "neglect and incompetency" are the only ones assigned for consideration. The said by-laws contain the following:—

> By-law No. 9.—Any pilot or apprentice incapacitated by mental or bodily infirmity, or by habits of drunkenness, shall forfeit his license, and not be at liberty to serve in the capacity of a licensed pilot, and any pilot or apprentice guilty of drunkenness and incapacity while on duty shall be suspended for three months.

It is not pretended in argument or apparent in evidence that there was any neglect save in occurrences at least two years old and those were at the time dealt with by the then Board.

In regard to the charge of drunkenness that seems answered in the same manner.

But habitual drunkenness though not assigned in the postscript to the resolution, is alleged in some of

the evidence. But how is that in law or in fact in any way so connected with the resolution and other acts of respondents complained of herein as to furnish ground for saying that the respondents were so acting in relation thereto as to maintain the pretence of quasi-judicial action ?

That as a ground of compulsory retirement is specifically provided for by the statute in section 433, sub-section (*j*) as hereinbefore quoted and in No. 9 by-law also quoted which must be read therewith.

Section 433, with sub-section (*j*) only enables the enactment of a by-law adapted to cases proved on oath before the pilotage authority.

The by-law No. 9 so enacted and apparently intended to be within said power of enactment cannot in law be extended beyond the powers given to enact it.

It might be treated as null by reason of being in excess of the power given. But I think the more reasonable interpretation of it is to presume it is intended to operate within the statute and to be resorted to conditionally upon proof, as required by the statute, under oath of the offence or incapacity from the causes assigned or habitual drunkenness.

So interpreted I fail to see how the respondents were given any semblance of jurisdiction to deal with such matters unless upon the production of proof upon oath, or in the trying of some of the specific cases for which the Act provides and, upon a finding thereby, prescribes dismissal or forfeiture of licence.

In every way one may look at the matter the respondents were acting entirely without jurisdiction and so acting must be held liable.

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In *The Marshalsea Case*(1), at page 76*a*, the case of one so acting is clearly distinguished from that where the person acting might have had jurisdiction over the subject matter or person, but erred in the mode of proceeding.

From that down to the present date the distinction has been observed. Many statutes have been enacted to protect magistrates who have acted in good faith, yet that protection has often failed.

The case of *Clark* v. *Woods*(2) is an illustration. But perhaps as curious as any is the case of *Jones* v. *Gurdon*(3), where, though there existed evidently good faith, yet from failure to comply with the conditions giving a right to act, the magistrate was held liable and the protecting Act held not to cover his case.

Foster v. *Dodd*(4) is of another type. Needless to multiply authorities of this kind extending in principle to every kind of inferior and domestic jurisdiction.

The error (beyond the apprehension of the pleading and issue raised) into which I respectfully submit the court below fell, in relying upon the cases cited there, was in not observing the distinction I have just pointed out.

There is another line of cases from *Ashby* v. *White*, fully set out in (5) (where note is made of the many cases illustrative of what is involved in the question therein decided), down to the present time, shewing that where the officer is seized of the business to be done, indeed, has it forced upon him to decide and

(1) 10 Coke 68*b*.
(2) 2 Ex. 395.
(3) 2 Q.B. 600.
(4) L.R. 3 Q.B. 67.
(5) 1 Smith's L.C. (12 ed.) 266.

manifestly has a discretion or judgment to be exercised, he is, if acting without malice, free though mistaken.

These respondents never were seized of any business to be done in the doing of which they were discharging any duty relative to the appellant's tenure of his licence.

It occurs to me also that even if the resolution could by any stretch of the imagination be called a judgment of any kind, it was as such invalid for want of jurisdiction and all the acts which the respondents persisted in later, in way of executing their purpose, were mere ministerial acts, which had no valid judgment or order to justify acting thereupon, and hence rendered them liable to an action for damages.

They by these mere ministerial acts without a valid order to support them deprived appellant of the share he otherwise would have got in the funds distributed as well as of direct earnings.

Again it was suggested in argument as well as in the judgment appealed from that a mandamus was the only remedy. The doubt I expressed in the argument if such a remedy could be successfully sought as against those serving the Crown in the capacity the respondents were appointed for, has, as result of a very casual examination, increased, but I express no opinion in regard thereto.

The right to bring this action if, as I hold, the respondents acted without any jurisdiction, seems clear even if the remedy by way of mandamus was also open to appellant.

The many cases cited and others which though not cited I have looked at, seem to me to make it abundantly clear that we must have regard in considering

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such cases to the particular terms of the respective statutes in force bearing upon any such like question; and above all to the general purview of the statute in question, and the general principles of law such as I have adverted to.

So looking at the matter in question I have, for the reasons I have given, no doubt of the appellant's right of action herein. Indeed, there seems to have been such an entire absence of regard for and observation of the principles of natural justice that I am not surprised at the failure to find any exact precedent to guide us.

I was on the argument impressed with the possibility of the damages being excessive, and still am not free from doubt. But the details bearing thereon seemed to counsel to be irrelevant. The action was framed in error and all seemed agreed on the rectification that was made in that regard. Hence I assume the changes that took place, as I now find in the second year of the new Board, are not to be considered of any consequence. That change, however, might have made an arguable difference of view as to the amount of the damages. Appellant seems to have been restored to the list and probably this detail is of no consequence.

I think the appeal should be allowed with costs here and below and the judgment of the trial judge be restored.

DUFF J.—The appellant after a service of twenty-five years as a pilot in Sydney Harbour was summarily retired by the respondents, the "Sydney Pilotage Authority" constituted under the "Shipping Act," ch. 113, R.S.C., sec. 429. The appellant contends that the

proceedings of the respondents by which they professed to retire him from the list of pilots licensed to serve as such in Sydney Harbour was wrongful and inoperative in point of legal effect, but that the respondents by these proceedings in fact effectually prevented him serving as and earning the remuneration of a licensed pilot. The respondents in their defence alleged (in paragraph 6) that they "have absolute control" of pilots in Sydney Harbour "and the granting of licences to pilots in said waters with authority to appoint and dismiss such pilots"; and (by paragraph 8) that the appellant "was not wrongfully dismissed in the month of April, 1912, but that his

services * * * were dispensed with at a regular meeting of the said pilotage authority for good and sufficient reasons and *no licence was granted to said plaintiff to act as pilot for the season of* 1912 *and* 1913, *and said plaintiff was not entitled to receive a licence from said Board.*

The learned trial judge held that the respondents' attempt to justify the exclusion of the appellant from the list of pilots failed because any power they possessed to suspend or withdraw the appellant's licence could only be valid if exercised after proper inquiry which had admittedly not taken place. The full court reversed this judgment on the ground that the act of the respondents was the act of a body exercising judicial functions for which they were not accountable without proof of "malice."

I think this ground of decision cannot be sustained, but before discussing it it is desirable to consider a little more fully what the appellant's claim really is and the ground upon which it rests.

In June, 1912, the appellant was a pilot licensed under the "Shipping Act." The practice (the validity

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of which will demand a word of discussion) of this particular Pilotage Authority seems to have been to issue licences for a term limited according to the tenor of the licences to one year; and it was stated by the appellant and not disputed that this annual term expired in August of each year. On the 13th of June at a meeting of the Pilotage Authority a resolution was passed which is entered in the minutes in these terms:—

> Moved by Com. Barrington, seconded by Com. Vooght, that the following pilots be dismissed from the service. Carried.

And the appellant's is the first among the names which follow. The appellant says he was then "notified to quit" and that he acted on the notice.

The first point to consider in the case which the appellant advances is that this action of the Pilotage Authority, assuming it to have been in law inoperative, had nevertheless the intended effect of preventing him exercising his calling as a licensed pilot.

This point being of considerable importance I have examined the evidence closely in its bearings upon it and I think the appellant's contention is fairly made out.

That such was the intention has never been disputed and in the pleadings and at the trial the respondents contended that this act was legally effective for the purpose intended; the defendant alleges and Mr. Justice Graham expressly holds, speaking for the majority of the full court, that on the passing of this resolution the appellant "ceased to be a licensed pilot."

The "Shipping Act" contains provisions making it an offence for a

licensed pilot suspended or deprived of his licence or compelled to retire

to fail to produce or deliver up his licence (sec. 534, see also sec. 451); for any person not a "licensed pilot" to pilot a ship (sec. 535); or for a licensed pilot to "act as a pilot whilst suspended" (sec. 550(*d*)). There is no evidence that the superintendent of pilots was communicated with; but the appellant no doubt assumed, and rightly assumed, that the respondents would take the steps necessary to give effect to this resolution. Having regard to the consequences which resistance (other than by legal proceedings simply) might entail if it should prove that the respondents were acting within their authority, the appellant acted wisely in not resorting to primitive methods of asserting his rights; and as to legal proceedings—at this stage it is enough to say that a legal contest with officials backed by the resources of the Government is not to be lightly undertaken by people in the appellant's position.

These considerations, together with the conduct of the respondents in October and November, 1913, to which I need not refer in detail, justify, I think, a finding that the respondents did in fact (as they intended to do) by this purported dismissal prevent the appellant from exercising his calling as a licensed pilot at least during the unexpired portion of the pending term.

The statement of defence seems to proceed upon the theory that for the purpose of measuring legal responsibility the consequences of this dismissal came to an end with the expiry of the term and that I shall discuss; but for the present it is sufficient to repeat that the dismissal was an act which being not only

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calculated, but intended to prevent the appellant continuing the exercise of his calling had in fact this intended effect; and the respondents are consequently answerable in damages unless there was in law justification or excuse for what they did. Per Bowen L.J., *Mogul S.S. Co.* v. *McGregor*(1).

The justification pleaded and relied upon at the trial is stated in the two paragraphs of the statement of defence quoted above. It should be observed that in these paragraphs there is no suggestion that the respondents have exercised a judicial discretion and no such suggestion was made during the course of the trial.

The powers of the Pilotage Authority to deprive a licensed pilot of an unexpired license rest upon the provisions of sections 433, 550, 551, 552 and 553 of the "Shipping Act."

It is not suggested that any of these sections other than 433 has any relevancy here. Sec. 433 provides:—

433. Subject to the provisions of this part, or of any Act for the time being in force in its pilotage district, every pilotage authority shall, within its district, have power, from time to time, by by-law confirmed by the Governor-in-Council, to,—

(*d*) License pilots and, except in the pilotage district of Quebec, apprentices, and, except in the pilotage districts of Quebec, Montreal, Halifax and St. John, grant certificates to masters and mates to act as pilot, as hereinafter provided:—

(*e*) Fix the terms and conditions of granting licences to pilots and, except in the pilotage district of Quebec, apprentices, and, except in the pilotage districts of Quebec, Montreal, Halifax and St. John, the terms and conditions of granting such pilotage certificates, as are in this part mentioned, to masters and mates, and the fees payable for such licences and certificates and to regulate the number of pilots;

(*f*) Make regulations for the government of the pilots, and the masters and mates, if any, holding certificates from such pilotage

(1) 23 Q.B.D. 598.

authority, and for ensuring their good conduct and constant attendance to and effectual performance of their duty on board and on shore, and for the government of apprentices, and elsewhere than in the pilotage districts of Quebec, regulating the number of apprentices;

(*g*) Make rules for punishing any breach of such regulations by the withdrawal or suspension of the licence or certificate of the person guilty of such breach;

(*h*) Fix and alter the mode of remunerating the pilots licensed by such authority, and the amount and description of such remuneration, and the person or authority to whom the same shall be paid subject to the limitation respecting the pilotage district of Quebec in the next following section contained;

(*j*) Provide for the compulsory retirement of licensed pilots who have not attained the age of sixty-five years, proved on oath before the pilotage authority to be incapacitated by mental or bodily infirmity or by habits of drunkenness;

The by-laws passed under the authority of this section are before us and the only one we need consider is by-law No. 9 in these words:—

By-law No. 9.—Any pilot or apprentice incapacitated by mental or bodily infirmity, or by habits of drunkenness, shall forfeit his licence, and not be at liberty to serve in the capacity of a licensed pilot, and any pilot or apprentice guilty of drunkenness and incapacity while on duty shall be suspended for three months.

That is the only regulation touching the suspension or forfeiture of a pilot's certificate or the compulsory retiring of pilots which has been brought to our attention. It professes to make provision for the cases specifically dealt with in sub-section (*j*) and it can, I think, only go into effect subject to the condition laid down in that sub-section. The more general powers conferred by the earlier sub-sections cannot legitimately be brought into operation in order to declare that the "forfeiture" attached as a consequence by sub-sec. (*j*) to incapacity arising from the causes therein mentioned and proved as therein provided for, shall arise as a consequence of incapacity in fact

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whether the same is or is not evidenced as required by that sub-section; and it cannot be contended that an *ultra vires* by-law becomes valid in consequence of publication by-force of sec. 437. It follows that if by-law 9 is a valid by-law the "forfeiture" takes place only when incapacity has been

proved on oath before the Pilotage Authority.

433(*j*) obviously imports inquiry of a judicial nature and notice and full opportunity to be heard as essential conditions of any valid decision or executive action upon the evidence adduced. It cannot successfully be invoked in support of the claim of absolute authority set up in the statement of defence. The justification relied on at the trial, therefore, fails.

In the Court of Appeal the judgment of the learned trial judge was reversed on the ground that as the Pilotage Authority in the acts complained of was exercising a judicial capacity, the appellant could only succeed by alleging and proving malice in fact. For two reasons that seems inadmissible.

First, it rests, I think, upon some misconception of the character and ground of the appellant's claim which are that the respondents are answerable in damages for intentionally preventing him pursuing his calling of a licensed pilot without lawful justification or excuse. The respondents not denying but admitting that they had done acts which were intended to have and had the effect of preventing the appellant acting as a licensed pilot, set up as I have said as justification for these acts an absolute power conferred upon them as Pilotage Authority to "dismiss licensed pilots." It was not alleged that the power was a judicial power or that in doing the acts complained of

they in fact exercised judicial functions; and the defendant's case at the trial failed, I repeat, simply because they were unable to shew the existence of any such absolute authority as that upon which they alleged they had acted. I do not think it was open to the respondents in the court of appeal to change face and take up the position that in what they did they were exercising judicial functions for which they were answerable only on proof of express malice. That is a position which ought to have been taken in the pleadings or at least at the trial when the appellant if so minded could have raised the question whether the respondents had acted otherwise than in good faith in the interests of the public service. The evidence now in the record is not calculated to convince one that the prosecution of a claim founded upon such a charge would have been a hopeless enterprise.

Secondly, assuming the respondents are entitled to rest upon the position in which they succeeded in the full court, I think the defence fails on the merits in both law and fact on the evidence as it now stands.

I have already said enough to shew that as the facts present themselves to my mind, it is sufficiently established that there was in fact no exercise of judicial function or of authority resting upon a judicial decision under section 433(*j*).

As to the law, assuming there had been an intention to exercise authority under by-law 9 since there was no hearing, no evidence on oath, no judicial determination, it follows that no "forfeiture," to use the language of the by-law, took place and consequently there is nothing amounting to a justification of the

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so called dismissal; which is, therefore, an actionable wrong under the principle of the *Mogul Steamship Company's Case*(1). Moreover, the rule is sufficiently established that persons in the position of the respondents exercising quasi-judicial powers are only protected from civil liability if they observe the statutory rules conditioning their powers as well as the rules of natural justice. *Wood* v. *Woad*(2); *Riopelle* v. *City of Montreal*(3), and see the judgment of Buckley L.J. in *Ex parte Arlidge*(4), and the judgment of Lord Macnaghten in *Herron* v. *Rathmines and Rathgar Improvement Commissioners*(5), at page 523.

I have not, of course, overlooked the argument of Mr. Rogers founded upon authorities relating to the responsibility of the judicial officers strictly so called, judges of the inferior courts and magistrates. Generally, no doubt, in the absence of bad faith such judicial officers are not responsible for harm caused by acts otherwise wrongful when such acts are judicial acts done in the course of some judicial proceeding in which the officer has jurisdiction as regards the persons affected, and the matter before him is some matter with which he has authority judicially to deal. No authority has been cited, however, for the extension of this principle to protect administrative officers such as the respondents from the consequences of injurious acts for which authority is wanting owing to the omission of the essential statutory prerequisites. Even as regards the acts of judicial officers strictly so called in respect of matters in which there is juris-

(1) 23 Q.B.D. 598.
(2) L.R. 9 Ex. 190.
(3) 44 Can. S.C.R. 579.
(4) [1914] 1 K.B. 160.
(5) [1892] A.C. 498.

diction over the person affected as well as over the subject matter where the jurisdiction is purely statutory, the statutory conditions must be observed at the peril of the officer, assuming, at all events, that he is under no mistake as to the facts. Thus, a magistrate being empowered by a statute to issue a warrant on complaint in writing before him on oath, the issue of a warrant in the absence of evidence on oath is an act for the consequences of which he is civilly responsible. *Morgan* v. *Hughes*(1); see also *Jones* v. *Gurdon*(2).

There remains the question of damages. A preliminary point arises touching the appellant's tenure of office. The practice of the Sydney Pilotage Authority (we have no information as to the origin of it) has been apparently, as I have said, to issue licences expressed to be for a term of one year. I can find no authority in the statute for imposing this limitation. In the by-laws produced there is nothing touching the point and having regard to the express provisions of section 454, I think that section 433(*e*) relating to "the terms and conditions of granting licences" does not authorize the imposition of any limit upon the duration of the term for which the license is to be in force. The relevant statutory provisions appear to be sections 445, 448, 452, and 454. (It may be observed in passing that the judgment of the trial judge seems to involve a finding that the appellant was not within the operation of section 462. An application before the delivery of judgment in this appeal for leave to adduce further evidence on this point was rejected on the ground that no adequate rea-

(1) 2 T.R. 225.
(2) 2 Q.B. 600.

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son was shewn for the admission of further evidence at that stage.)

Section 454 authorizes pilotage authorities to limit the period for which any licence shall be in force to a period of not less than two years. But our attention has not been called to any authority for limiting the period to one year. I am inclined to think that the words inserted in the licence granted to the appellant professing to provide that the licence shall only be in force for one year must be treated as inoperative. But, at all events, if it must be assumed that the Pilotage Authority intended to grant a valid licence, and if the proper assumption is that the intention was to grant a licence only for the minimum period permitted by the law, then, on that assumption, each of the licences must be treated as a licence valid for a period of two years.

On these assumptions the appellant's licence held by him in June, 1912, did not expire until August, 1913, and the position taken by the respondents in their statement of defence and sustained by the full court that the appellant ceased in law to be a licensed pilot after June, 1912, necessarily fails.

Assuming that the proper course is to treat the appellant's licence as a licence limited as to duration under section 454, and that the discretion to renew, conferred upon the Pilotage Authority by sub-section (*b*) of that section, is an absolute and not a judicial discretion; it would still, I think, be wrong to deal with the question of damages on the footing of the consequences of the proceedings in 1912 having ceased to operate with the expiry of the licence in August, 1913. The proceedings in evidence in August, October and November of 1913, shew that the majority of the

Board insisted at that time on treating the appellant as compulsorily retired from the service and disqualified from holding a licence. This loss of status and the prejudice thereby occasioned him in his character of applicant for a licence in August, 1913, is one of the consequences natural and intended of the respondents' conduct in respect of which the appellant is entitled to reparation.

On this footing the appellant would not be entitled to recover compensation *nominatim* for the loss of prospective earnings in the season of 1913-14. But without deciding whether or not the appellant's position was that of a licensee with a licence limited as to time under section 454, I still think the damages found by the learned trial judge are not excessive. Apart altogether from the right to reparation just mentioned this is emphatically not a case for measuring damages with nicety.

There was some suggestion, although I do not think it was seriously pressed, that substantial damages ought not to be awarded on the ground that the evidence shews the appellant's habits to have been so notorious that, if there had been an investigation conducted as the law required, the respondents must have reached the conclusion judicially that the appellant was incapacitated as an inebriate. But the findings of the learned trial judge dispose of this contention effectually. Not only does the finding as to damages tacitly involve a rejection of any such contention, but the learned judge explicitly holds that the appellant had successfully repelled the attack upon his character. The statements of some of the respondents must be evaluated in light of the fact that they were seeking some refuge from legal

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responsibility and of the strong suspicion, not to say probability, that the respondents as a whole whatever may have been their beliefs as to the appellant's conduct, were not free in the impeached proceedings from the influence of other motives than a desire to elevate the character of the pilotage service. In this aspect of the case it is eminently one in which the view of the trial judge ought to guide a court of appeal.

Two further points are suggested.

First, that the acts by which the respondents professed to "dismiss" the appellant from the service being legally void no damages can be recovered. Secondly, that the appellant should have had recourse to mandamus and can only recover such damages as could not have been prevented by resorting to that remedy. As to the first of these points. This is not a case like *Wood* v. *Woad*(1), where a member of a partnership complained of an illegal decision of a domestic tribunal professing to exclude him from the benefits of the partnership. This decision having been invalid in law and no special damage having been proved, it was held that as damage was the gist of the plaintiff's action he must fail. It is unnecessary to repeat what I have said above in order to dispose of this point.

As to the second: I have already said sufficient to indicate my view that the respondents cannot complain that the appellant did not take legal proceedings to compel them specifically to execute their duties or rather to refrain from wronging him in order to reduce the damages to which he might eventually prove to be entitled.

(1) L.R. 9 Ex. 190.

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The appeal should be allowed and the judgment of the trial judge restored.

ANGLIN J.—I assume, as was contended on their behalf, that when acting within the ambit of the jurisdiction conferred upon them, the defendants are entitled to the immunities of a quasi-judicial body. But after a careful consideration of the duties and powers of the Pilotage Authority, their relations to pilots, the relevant provisions of the "Canada Shipping Act," and all the circumstances of the present case, I have reached the conclusion that in directing the cancellation of the plaintiff's licence, the defendants neither acted, nor professed to act in the discharge of a quasi-judicial function, but exercised an assumed absolute and arbitrary power to dismiss the plaintiff or to cancel his licence, without complaint, notice or investigation. Having regard to sections 433(*j*), 514, 550(*e*), 552 and 553 of the "Canada Shipping Act" (R.S.C., ch. 113), I think it is clear that the Pilotage Authority did not possess any such absolute power. The relationship of master and servant does not exist between the Board and the pilot. The Board has a statutory control over the licensing of pilots within the territory for which it is constituted. Its jurisdiction to cancel a pilot's licence is also statutory and arises only after it has been satisfied either by a quasi-judicial investigation, held after fair notice has been given the pilot and he has had a reasonable opportunity to make his defence (and in cases not within sections 552-3 it would seem that the Board must take testimony upon oath), or by the production of a conviction thereof made by a competent

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tribunal, that the commission of an offence subjecting the pilot to cancellation of his licence has been established. The plaintiff had a clear and definite interest in the earnings of the body of pilots to which he belonged. His sharing in those earnings depended upon the continuance of his licence. The principles which govern the action of such a body as the Pilotage Authority in dealing with charges which, if established, may entail forfeiture of licence, are those which the courts have applied in such cases as *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montréal*(1), at page 539; *Fisher* v. *Keane*(2); *Labouchère* v. *Earl of Wharncliffe*(3); *Béland* v. *L'Union St. Thomas*(4).

There is some evidence which indicates that the defendants' action in cancelling the plaintiff's licence was induced by motives other than zeal for the public welfare, and a finding of malice on their part would not entirely lack support. It is, however, unnecessary to deal with this aspect of the case.

In ordering the cancellation of the plaintiff's licence the defendants, in my opinion, proceeded without jurisdiction. They committed an unwarranted and illegal act which subjected them to liability to the plaintiff for such damages as he sustained as a natural and direct consequence thereof.

The learned trial judge assessed these damages at $1,800. The plaintiff's loss was, no doubt, substantial; but, with respect, I incline to think the evidence does not warrant so large a verdict. The plaintiff was bound to minimize his loss by seeking other employ-

(1) [1906] A.C. 535.
(2) 11 Ch. D. 353.
(3) 13 Ch. D. 346.
(4) 19 O.R. 747.

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ment. This he does not appear to have made any great effort to obtain. His conduct was by no means above reproach and it may be that the cancellation of his licence was not undeserved. Had the Board proceeded judicially and in accord with the requirements of natural justice its action could not have been reviewed. It is certainly difficult, however, to determine with any degree of accuracy what amount of compensation should be awarded. My learned colleagues, with whom I agree in allowing this appeal, think the plaintiff entitled to the full amount of the damages awarded by the learned trial judge. It may be that as wrongdoers the defendants are not in a position to ask that the amount of the damages to which the plaintiff is entitled should be closely scrutinized. Their course of action was undoubtedly high-handed. On the whole, while not entirely satisfied with the amount allowed, I am not prepared to dissent on the quantum of damages.

Appeal allowed with costs.

Solicitor for the appellant: *Finlay Macdonald.*

Solicitor for the respondents: *Joseph Macdonald.*

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*Oct. 18.
*Nov. 2.

HAMILTON READ (DEFENDANT).....APPELLANT;

AND

JOSEPH COLE (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Solicitor and client—Fiduciary relationship—Transfer of lands—Joint negotiations—Agreement to share profits—Intervention of third party—Solicitor's separate advantage—Bonus from third party—Obligation to account to client.

The Government of British Columbia had unsuccessfully attempted, through the agency of A., to obtain a transfer of the rights of a band of Indians in the Kitsilano Reserve. About a year afterwards C. became interested in the matter and arranged with R., a solicitor, that they should undertake to obtain the required transfer on the understanding that any profits made out of the transaction should be equally divided between them. Long negotiations with the band took place without any definite result, when, without the consent of C., through the intervention of A. at the request of R., the transfer was obtained and R. received a sum of money from A. as a share of the profits realized on carrying the transaction through. In an action by C. to recover one-half of the amount so received by R.,

Held, affirming the judgment appealed from (20 B.C. Rep. 365), that throughout the whole transactions the fiduciary relationship of solicitor and client had continued between R. and C. and, consequently, that R. was obliged to account to C. for what he had received from A. as remuneration for services in connection with the business which they had jointly undertaken in order to obtain the transfer of the title from the Indians.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the judgment of

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

(1) 20 B.C. Rep. 365.

Hunter C.J., at the trial, and maintaining the plaintiff's action with costs.

The circumstances of the case are stated in the head-note and the questions in issue on the appeal are referred to in the judgments now reported.

J. A. Ritchie for the appellant.

J. W. deB. Farris for the respondent.

THE CHIEF JUSTICE.—This was an action brought by the respondent against the appellant (defendant) for a share of a commission received from the sale of lands. The plaintiff alleged an agreement with the defendant to use his influence with certain Indians to secure their consent to a sale of their reserve to the Provincial Government, and if successful he was to receive $20,000 as his commission. The defendant denied the alleged agreement and denied that he ever received any commission from the Government for services rendered in connection with the sale. The trial judge found in favour of the defendant. The case turned apparently upon the question whether a third party named Alexander, who received a commission from the Government, was an *alter ego* of Read. The trial judge held that this was not established. This judgment was reversed by the full court, Martin J. dissenting. The defendant now appeals.

The case for the appellant is that, accepting the version of the transaction as given by witness Alexander, the deal was off on the Saturday, and that he, Alexander, took it up again on the Monday following at the direct request of the Indians and independently of all that had previously transpired. When it was

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subsequently put through Alexander, being then alone interested in the transaction, paid out of the profits which he made not a commission but a bonus to the defendant. It is urged that whatever may have been the previous relations between Read and the Government they had ceased on the Saturday.

In my opinion Read should be held as a trustee in view of his professional relations with Cole. He would never have been brought into the transaction were it not for Cole, and on the whole evidence I am satisfied that the sale effected by Alexander, who had previously failed to secure a surrender of the Indian title, was the consequence of the previous negotiations carried on by Read and Cole in respect to which Read was bound to pay Cole $20,000. I entirely agree with the Court of Appeal that judgment should go for that sum.

The appeal is dismissed with costs.

DAVIES J. concurred with Duff J.

IDINGTON J.—A perusal of the evidence herein and careful consideration thereof and especially the admitted facts and circumstances presented therein do not lead me to the conclusion that respondent entirely failed, as pretended by appellant, in accomplishing what they had jointly agreed upon attempting but, on the contrary, that he had practically succeeded in bringing about all but the formal conclusion of the bargain with the Indians; and that formal part he was prevented from assisting in by the curious conduct of appellant.

Any other view must imply that the lavish com-

mission the Government allowed to be included in the price was little short of scandalous in light of the marvelous celerity and unanimity with which the Indians got through with the pow-wow and the signing of their surrender.

It seems inconceivable that such an afternoon's work alone could be so handsomely compensated for unless upon the hypothesis that much labour had preceeded it.

Appellant was confessedly ignorant of the Indians and everything relating to them till respondent sought him out as a solicitor in a position to be possibly helpful to pave the way for respondent's efforts being made to bear fruit, and instructed him accordingly.

Alexander seems to have been brought into the matter as a person who had tried and failed a year previously but apparently of necessity had to be conciliated.

He has been compensated accordingly. Securing him as an assistant or instrumental agent was only a step in the pursuit of that at which the parties hereto aimed.

Disagreeable surmises may arise in one's mind in surveying the unpleasant features of the whole transaction, but I cannot see how we can well do otherwise than assent to the reasoning upon which the Chief Justice and Mr. Justice Irving have proceeded in the court below.

If the parties hereto and Mr. Alexander, magnifying their importance, or the importance of their services, have misled the Crown by making misrepresentations to the Attorney-General as to the value of their services, then it might well be that none of

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them are entitled to anything in law. The appellant has not presented, indeed could not present with hopes of success for himself, such a defence. If it turns out as the result of this litigation that such a surmise is well founded and the Crown imposed upon, the remedy lies with the Attorney-General. On this case as presented we are helpless in that regard.

I think, therefore, this appeal should be dismissed with costs.

DUFF J.—I have no difficulty in this case in concluding that the judgment of the Court of Appeal is right and that the present appeal should be dismissed with costs.

Indeed, there is considerable reason to think that the appellant is fortunate in not having been compelled to account for the whole sum received by him after deducting a reasonable allowance for professional services. The respondent approached the appellant as solicitor, exposed to him, as his solicitor, the business in respect of which the appellant's professional assistance was required. At the appellant's suggestion the respondent consented to an arrangement by which they became jointly interested in that business. That was an arrangement which it was the appellant's duty not to permit the respondent to conclude with him, his professional adviser, without insisting upon independent advice being obtained. The respondent has not impeached the arrangement on this ground, but the relation of the parties has a most important bearing when the reciprocal rights and the duties of the parties under the arrangement come to be considered.

The relation between the parties being such as it was, and the appellant having allowed the respondent to leave his interests entirely in the appellant's hands, the appellant could not be heard to say that he failed to do what the most rudimentary notions of professional duty required him to do; namely, to include in the arrangement between him and the respondent every stipulation which reasonable prudence might suggest for the respondent's protection.

He cannot be allowed to say that the agreement in fact permitted him to act so unfairly towards the respondent as he now pretends he is entitled to do, to appropriate the entire profit of the business into which he was introduced as the respondent's solicitor to the entire exclusion of the respondent.

I do not think the respondent's claim can properly be treated as resting merely upon an agreement to pay a commission on a certain result being obtained, but, even on that basis, the appellant manifestly fails when the facts are looked at broadly. The conception of the respondent's rights put forward by the appellant is absurdity itself, the conception, that is to say, that the appellant's rights rest upon the condition that the Indians should be induced to execute an agreement with the appellant, *eo nomine,* for the "sale of their rights." The so-called "option" in itself (as any reasonably intelligent person who had taken the slightest trouble to inform himself of the status of the Indians must have known) could not be a thing of any legal substance; such a document could possess importance only as evidencing the terms by which the Indians were willing to consent to a transfer of the reservation. Its value consisted in the fact that the

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persons desiring to purchase the reservation were willing to pay a reward for obtaining it. The thing of substance was to get the consent of the Indians in order to earn this reward. Whether the consent was given in the form of an option granted to the appellant, *eo nomine*, or an option granted to somebody else (so long as it should be accepted as sufficiently evidencing consent and giving the appellant a title to the expected reward) was a matter of absolute indifference. The condition in substance was performed, the consent was obtained, the reward was paid and the sum received was no less than the sum that would have been received if the so-called option had been taken in the appellant's own name instead of the name of Mr. Alexander.

The respondent's title to relief, even on this basis, is thus complete.

ANGLIN J.—I think the correct conclusion from the whole evidence is that which the Chief Justice of the Court of Appeal appears to have reached, namely, that the sale effected nominally through Alexander was in reality the very sale in respect of which Read admits that he had agreed to pay the plaintiff Cole $20,000. Read's course of conduct in this matter, having regard to his professional status and his relations to the plaintiff, was indefensible. But still more amazing, if the story told by both parties to this action be true, was the assurance said to have been given by a member of the Government of British Columbia that if the twenty Indians interested in the Kitsilano Reserve could be got to give options for the acquisition of their rights in it for a payment to them of

$10,000 apiece the Government would purchase such options for the sum of $300,000.

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

BRODEUR J.—This is an action for commission concerning the sale of Kitsilano Indian Reserve.

Cole, the plaintiff respondent, was trying to induce the Indians, owners of that reserve, to sell their rights. He had an interview with Mr. Bowser, Attorney-General of British Columbia, at his legal office in British Columbia, who intimated that the Government was prepared to purchase.

Cole wanted to have an option prepared in connection with the proposed sale of the reservation. He was directed by Mr. Bowser to confer with Hamilton Read, an employee in his office, who took his instructions. The option, however, was not prepared immediately; but some other interviews took place between Read and Cole and it was agreed that they should share the profits which would be made if the deal went through. Formal meetings of the Indians were called, and at one of those meetings some of the Indians wanted to consult with Mr. Alexander, a prominent citizen of Vancouver, who had always entertained friendly relations with them.

The appellant Read came back from that meeting, put himself in communication with Mr. Alexander, and it was understood between the two that they would divide the profits of the sale. An option was then prepared in Mr. Alexander's name which was signed by the Indians. The lands were sold to the Government and after the amount was paid a sum of

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about $80,000, representing the profits of the transaction, was divided between Mr. Alexander and Read. Cole now sues to have his share in the profits which Read realized.

Read became connected with this matter as Cole's solicitor, and their relations are those of solicitor and client, relations which have never been terminated. If Read has thought fit to make a deal with some other persons he has acted contrary to the mandate which it was his duty to execute.

The Court of Appeal found that he should give to Cole a share of the profits which he made on the sale of those lands. I cannot see how he could escape from being condemned to pay that share.

In these circumstances, the judgment condemning him to pay that share should be confirmed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Tupper, Kitto & Wightman.*

Solicitors for the respondent: *Farris & Emerson.*

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BOULEVARD HEIGHTS, LIMITED (DEFENDANT) ..... APPELLANT;

*Oct. 25, 26.
*Nov. 2.

AND

CHARLES B. VEILLEUX (PLAINTIFF) ..... RESPONDENT.

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

Construction of statute—Sales of subdivided lands—Registration of plans—Prohibitive sanction—"Land Titles Act," 6 Edw. VII., c. 24, s.-s. 7 (Alta.); 4 Geo. V., c. 2, s. 9; 5 Geo. V., c. 2, s. 25 (Alta.)—Retrospective legislation—Illegality of contract—Recission—Recovery of money paid—Right of action—Practice—Pleading—Appeal.

The effect of the amendment to the Alberta "Land Titles Act," 6 Edw. VII., ch. 24, by 1 Geo. V., ch. 4, sec. 15(25), adding the seventh sub-section to section 124 of that Act, is to prohibit sales of lands subdivided into lots according to plans of subdivision until after the registration of the plans in the proper land titles office and also to render any sales made in contravention of the prohibition inoperative.

The vindicatory sanction imposed by the statute is directed against the vendor and where there is no presumption of knowledge of the invalidity on the part of the purchaser he cannot be deemed *in pari delicto* with the vendor and is not deprived of the right of action to set aside the agreement and recover back moneys paid thereunder.

After the judgment appealed from had been rendered the statute was further amended (5 Geo. V., ch. 2, sec. 25) by the addition of sub-section 8(*a*) providing that the seventh sub-section could not be pleaded or relied upon in any civil action or proceeding by a party to any such agreement when the plan in question had been registered before the action or proceeding was instituted or where it was the duty of the party pleading to make such registration.

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

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Held, that, as the last amending Act was not a statute declaratory of the law as it stood at the time when the judgment appealed from was rendered, and as appeals to the Supreme Court of Canada are not of the nature of re-hearings to which the principle of the decision in *Quilter* v. *Mapleson* (9 Q.B.D. 672) applies, the restricting provisions can have no effect upon the decision of the present appeal.

Judgment appealed from (8 West. W.R. 440) affirmed.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta(1), affirming the judgment of Walsh J., at the trial(2), by which the plaintiff's action was maintained with costs.

The circumstances of the case and the questions in issue on the present appeal are stated in the judgments now reported.

A. H. Clarke K.C. for the appellants.

M. B. Peacock for the respondent.

THE CHIEF JUSTICE.—This is an appeal from the Supreme Court of Alberta. The action was brought for return of moneys paid on account of a contract for the purchase of lands and for a declaration that the contract was rescinded. The judgment at the trial was in favour of the plaintiff. This judgment was affirmed by the full court and I can see no reason to interfere with the conclusion reached below.

The appeal is dismissed with costs.

IDINGTON J.—This is an action to rescind an agreement for the sale of lots in a subdivision, and the appeal must turn upon the meaning to be given to the section of an Alberta Act, which reads as follows:—

(1) 8 West. W.R. 440. (2) 7 West. W.R. 616.

No lots shall be sold under agreement for sale or otherwise according to any townsite or subdivision plan until after the same has been duly registered in the land titles office for the registration district in which the land shewn on said plan is situate; providing that this section shall not apply to any plan now in existence and approved by the Minister.

This was in force at the time when the agreement in question was entered into. It seems, therefore, to be the very thing which the Act prohibits, for, admittedly, there was no plan registered when it was entered into.

The respondent was ignorant of that fact and brought this action for rescission the next day after his discovery thereof.

The purpose of the Act may primarily have been the convenience of those having to deal with registrations, but the court of appeal suggests another purpose had in view by the legislature was to protect intending purchasers from possible fraud by manipulation of unregistered plans. I think we must feel bound to give due weight to that view resting upon knowledge of local conditions which we may not as clearly apprehend as the local courts.

It is by accepting that view that the respondent is entitled to succeed herein.

He comes, thus, within a class of whom each person is entitled, when acting in ignorance of an illegality tainting a contract he has entered upon, to recover from the other party to the contract, notwithstanding the illegality.

Had he known the fact when entering into the contract, or possibly when acting under the contract in a way to ratify it, he could hardly claim to recover.

The Act was amended after judgment was given

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herein by the court of appeal, and the amendment, it is urged, does away with his right therein.

Whatever might be said in the case of such an amendment as appears, enacted before the hearing in appeal, cannot, I think, help the appellant now.

That judgment was right when given. We can only give the judgment which the court below appealed from should have given. To go further would be to exceed our jurisdiction.

I think, therefore, the appeal must be dismissed with costs.

DUFF J.—I have no difficulty in reaching the conclusion that, apart from the enactments discussed below, the respondent is entitled to rescind the agreement in question on the ground of misrepresentation, on the principle of *Redgrave* v. *Hurd*(1); and this, of course, would entail the consequence that he is entitled to recover back the moneys paid under the agreement.

It is necessary, however, to notice the points upon which the argument chiefly proceeded (touching certain legislation), and which are dealt with in the judgments of the other members of the court. I entertain no doubt that sub-section 7 of section 124 of the "Land Titles Act," which is in the following words:—

> No lots shall be sold under agreement for sale or otherwise according to any townsite or subdivision plan until after the same has been duly registered in the land titles office of the registration district in which the land shewn on said plan is situate; providing that this section shall not apply to any plan now in existence and approved by the Minister,

(1) 20 Ch. D. 1.

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does prohibit any agreement for the sale of "lots"— "according to any townsite or subdivision plan until after the same has been duly registered"; and that, consequently any such agreement, made in the circumstances mentioned, though *de facto* complete, is by reason of this enactment legally inoperative.

It does not, however, necessarily follow, where moneys have been paid under such a transaction in professed and intended performance of the obligations supposed to be thereby created, that such moneys can be recovered back by the party paying them on discovering that the transaction was illegal. The law of England as touching the right to recover back moneys paid or property delivered under an unlawful agreement or the right to set such an agreement aside was fully discussed in the case of *Lapointe* v. *Messier* (1), and, for convenience, I quote from my own judgment, at pages 287, 288 and 289:—

> The general rule of the English law is stated in the judgment of Lord Mansfield, in *Holman* v. *Johnson* (2).
>
> "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which defendant has the advantage of contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of the country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and the defendant were to change sides, and the defendant was to bring his action against

(1) 49 Can. S.C.R. 271. (2) Cowp. 341, at p. 343.

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the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.*"

There are, however, apparent exceptions to this rule and the question is whether or not the present case comes within any of those exceptions. These exceptions have been stated in two text books of high repute and in two comparatively recent judgments. And, before considering the scope of them in their application to this case, it will be convenient to reproduce the passages: 1st Pollock on Contracts, pages 404, 405:—

"Money paid or property delivered under an unlawful agreement cannot be recovered back, nor the agreement set aside at the suit of either party—unless nothing has been done in the execution of the unlawful purpose beyond the payment or delivery itself (and the agreement is not positively criminal or immoral);

"Or unless the agreement was made under such circumstances as between the parties that, if otherwise lawful, it would be voidable at the option of the party seeking relief.—Note (*b*).—This form of expression seems justified by *Harse* v. *Pearl Life Assurance Co.*(1).

"Or in the case of an action to set aside the agreement, unless in the judgment of the court the interests of the third persons require that it should be set aside."

Secondly, Anson on Contracts, pp. 253-4:—

"But there are exceptional cases in which a man may be relieved of an illegal contract into which he has entered; cases to which the maxim just quoted does not apply. They fall into three classes: (1) The contract may be of a kind made illegal by statute in the interests of a particular class of persons of whom the plaintiff is one; (2) the plaintiff may have been induced to enter into the contract by fraud or strong pressure; (3) no part of the illegal purpose may have been carried into effect before it is sought to recover the money paid or goods delivered in furtherance of it."

The first of the judgments is in *Kearley* v. *Thomson*(2), where Lord Justice Fry says (pp. 745-6):—

"To that general rule there are undoubtedly several exceptions, or apparent exceptions. One of these is the case of oppressor and oppressed, in which case usually the oppressed party may recover the money back from the oppressor. In that class of cases the delictum is not par, and, therefore, the maxim does not apply. Again, there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class. Instances of that description are familiar in the case of contracts void for usury under the old statutes, and other instances are to be found in the books under other statutes, which are, I believe, now repealed, such as those

(1) [1904] 1 K.B. 558. (2) 24 Q.B.D. 742.

directed against lottery keepers. In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithstanding that both have been parties to the illegal contract."

In the present case it may be suggested that the respondent brings himself within either one of two of the exceptions mentioned. First (and as I have intimated this is sufficient for disposing of the appeal), that the agreement was made under such circumstances that if otherwise lawful it would have been voidable at the option of the respondent. Secondly, that the enactment was intended to afford protection to a particular class of persons of whom the respondent is one. It is open to doubt, I think, whether the respondent does in truth bring himself within this last mentioned exception. I am disposed to think the better view to be that this enactment is intended to serve the general public interest in the security and certainty of title which is one of the main objects of the "Land Titles Act."

Assuming, however, as some of my learned brothers think, that the respondent has a status to set aside the agreement on the ground of illegality alone, then it become necessary to consider the contention of Mr. Clarke that the rights of the parties are governed by sub-sections 8(*a*) and 8(*b*) of section 124, which sub-sections were enacted on the 17th of April, 1915, after the judgment of the Appellate Division of Alberta now appealed from was delivered; (5 Geo. V., ch. 2, sec. 25). If we are governed by these amendments in the decision of this appeal, then the respondent must fail in so far as his case rests upon the illegality of the agreement of sale.

There can be no doubt, I think, that if these amend-

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ments had been enacted before the hearing of the appeal by the Appellate Division of Alberta, that court would have been governed by them in the disposition of the appeal. *Quilter* v. *Mapleson*(1). The question we have to consider is another question. The Legislature of Alberta has no authority to prescribe rules governing this court in the disposition of appeals from Alberta; and the enactments invoked by Mr. Clarke, which do not profess to declare the state of the law at the time the action was brought, or at the time the judgment of the Appellate Division was given, can only affect the rights of the parties on this appeal to the extent to which the statutes and rules by which this court is governed permit them so to operate.

In my judgment, the appeal to this court is an appeal strictly so called, not an appeal by way of rehearing. The "Supreme Court Act" (sec. 51), expressly declares that this court should give the judgment which ought to have been given by the court below, and there are no words corresponding to those of Order 58, Rule 2, of the Judicature Rules, which enable the court of appeal to

> make any further or other order as the case may require.

Speaking generally, subject to some special provisions of the Act which have no present application, and to some exceptions established for the purpose of preventing the abuse of the right of appeal, it is the duty of this court to give the judgment which the court below ought to have given according to the state of the law on which it was the duty of that court to base its judgment.

(1) 9 Q.B.D. 672.

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Anglin J.

ANGLIN J.—The contract under which the payments that the plaintiff claims to recover back were made was, in my opinion, unquestionably in contravention of sub-section 7 of section 124 of the "Land Titles Act" of Alberta (2 Geo. V., ch. 4, sec. 15, subsec. 25). I cannot assent to Mr. Clarke's contention that what this statute forbids is not the making of an agreement for the sale of lots on an unregistered plan, but the conveyance or transfer of lots sold under such an agreement. It is the sale under an agreement (or otherwise) which is prohibited and that is effectuated by the agreement itself which vests in the purchaser the equitable title to the lots agreed to be sold. The agreement was, therefore, illegal and void.

The amending statue of 1915, although made applicable to pending litigation, is not declaratory of the law as it stood at the time of the contract in question or at any subsequent period anterior to its enactment. It became law only after the judgment of the Appellate Division in this case had been delivered. This court is bound by statute to render the judgment which the court appealed from should have given —of course upon the law as it was when that court delivered judgment. The appeal to this court is upon a case stated and it is not a re-hearing such as would render applicable the principle of the decision in *Quilter* v. *Mapleson*(1). It is impossible to say that the provincial appellate court should have given effect to an amendment of the statute law which was not in force when it rendered judgment. Nor can an amendment not declaratory in its nature, such as was that dealt with in *Corporation of Quebec* v. *Dunbar*(2),

(1) 9 Q.B.D. 672.

(2) 17 L.C.R. 6.

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cited by Mr. Clarke, enable us to say that the law was at the date of the judgment appealed from what the subsequent amendment has made it. I express no opinion as to how far such a declaratory amendment enacted by a provincial legislature after a right of appeal to this court had arisen would be binding on us.

Ordinarily, a party to an illegal contract cannot recover back moneys paid under it. But to this rule the law admits of an exception in favour of a plaintiff whom it does not regard as *in pari delicto* with the defendant. In the present case it is the sale, not the purchase, of land according to an unregistered plan which is forbidden. The penalty provided by sub-section 8 of section 124 of the "Land Titles Act" (4 Geo. V. (2nd Sess.), ch. 2, sec. 9, sub-sec. 4), is, as I read it, imposed on the vendor. He is the "offender" who sells. The seller may be presumed to know whether the plan according to which he is selling is or is not registered. There is no ground for a presumption of like knowledge on the part of the purchaser. Moreover, there is reason to believe that the statute was passed for the protection of purchasers. These are circumstances which, upon the authorities, suffice to relieve the present plaintiff, as a party not *in pari delicto,* from the operation of the rule which would, otherwise, disentitle him to sue for the recovery back of money paid under an illegal agreement.

It is unnecessary to consider the other grounds on which the respondent claimed to be entitled to rescission.

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

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Brodeur J.

BRODEUR J.—This is an action in rescission of an agreement for sale based upon three grounds:—

1. Illegality of the contract;
2. Defendant's inability to make title;
3. Misrepresentation of the vendors.

The illegality of the contract is invoked by the purchaser who claims that it was made in contravention of a statute passed in 1912 (sub-sec. 7, of sec. 124, "Land Titles Act"), declaring that

no lots shall be sold under agreement for sale, or otherwise, according to any townsite or subdivision plan until after the same has been duly registered in the land titles office.

The lots of land in question in this case were shewn on a subdivision plan that was not registered as required by that statute.

The trial judge and the Appellate Division of the Supreme Court came to the conclusion that the agreement for sale should be rescinded in view of that prohibitory law. I concur in the reasons given by the trial judge, Mr. Justice Walsh.

But, since the judgment of the court of appeal was rendered, on the 12th of March, 1915, the Legislature of Alberta has amended the "Land Titles Act," on the 17th of April, 1915 (5 Geo. V., ch. 2, sec. 25), and has enacted sub-sections 8(*a*) and 8(*b*) of section 124, which provide as follows:—

8(*a*). No party to any sale or agreement for sale shall be entitled in any civil action or proceeding to rely upon or plead the provisions of sub-section 7 of this section, if the plan of subdivision by reference to which such sale or agreement for sale was made was registered when such action or proceeding was commenced, or if, pursuant to the arrangement between the parties, it was the duty of the party who seeks to rely upon or plead the provisions of such sub-section to himself register such plan of subdivision or cause the same to be registered.

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8(*b*). The costs of pending proceedings to which sub-section 8(*a*) applies shall be disposed of as if the said sub-section had not been passed.

The question which is raised as a result of that new legislation is whether we should give effect to it or not in this case.

By the "Supreme Court Act," section 51, this court may dismiss an appeal or give the judgment which the court whose decision is appealed against should have given.

At the time the court below was considering this case, the statute now invoked had not been passed. It could not be then acted upon by that court. Our duty is to render the judgment which the court below should have rendered.

The Legislature of Alberta could not pass any legislation that could interfere with the powers vested in and restrictions imposed on this court by the Federal Parliament.

If it was a declaratory law that had been passed by the provincial legislature, of course we would be bound by it.

I am of opinion that the judgment of the Supreme Court of Alberta should be confirmed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Savary, Fenerty & De-Roussy.*

Solicitors for the respondent: *Peacock, Skene & Skene.*

LEMUEL J. TWEEDIE (DEFENDANT) . . APPELLANT;

AND

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

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*May 18, 19.
*Nov. 2.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Title to land—Foreshore—Title by possession—Nature of possession —Disclaimer—Evidence of title—Nullum tempus Act.

In proceedings by the Dominion Government for expropriation of land on the Miramichi River the owner, T., claimed compensation for the part of the adjoining foreshore of which he had no documentary title. It was proved that in 1818 the original grantee had leased a part of the land and the privilege of erecting a boom for securing timber on the river in front of it; that his successors in title had, by leasing and devising it, dealt with the foreshore as owners; that for over forty years from about 1840 the boom in front of it was maintained and used by the owners of the land; and that at low tide the logs in the boom would rest on the solum.

Held, reversing the judgment of the Exchequer Court (15 Ex. C.R. 177), Davies and Idington JJ. dissenting, that there was sufficient evidence of adverse possession of the foreshore by the owners of the adjoining land for more than sixty years to give the present holder title thereto.

Per Anglin J.—From a continuous user for more than forty years, which is proved, a prior like user may be inferred. Moreover, from the evidence of assertion of ownership and possession since 1818 a lost grant might, if necessary, be presumed.

Per Davies and Idington JJ.—The placing and use of the boom was only incidental to the lumber business carried on at this place and the consent of the riparian owner thereto cannot be regarded as a claim of adverse possession. The presumption of lost grant was not pleaded and cannot be relied on; moreover, a lost grant could not be presumed in the circumstances.

On application by the Minister of Justice for a disclaimer of damages for the taking of the foreshore the Government of New

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

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Brunswick passed an order in council stating that the owner of the adjoining land taken claimed title to said foreshore; that it had been used by the owners for booming purposes and otherwise for more than sixty years; that the Attorney-General was of opinion that whatever rights the province may have had were extinguished and that no claim should be made by it to said foreshore.

Held, per Duff J.—This is an admission touching the title to the foreshore by the only authority competent to make it and is evidence against the Dominion Government in the expropriation proceedings; that it is *primâ facie* evidence of title by possession in T.; and that there is nothing in the record to impair the strength of this *primâ facie* case.

APPEAL from a judgment of the Exchequer Court of Canada(1), awarding compensation for land expropriated for purposes of the Intercolonial Railway.

The Attorney-General for Canada filed an information in the Exchequer Court for assessment of compensation to the defendant Tweedie for the land expropriated. The Crown had tendered $2,150 as its full value.

The defendant claimed compensation for the foreshore of the Miramichi River in front of his land. This was refused by the Exchequer Court and he appealed to have the award increased by the value of his interest in said foreshore, claiming to be the owner or, in the alternative, to have an easement on it for lumbering purposes.

Teed K.C. and *Lawlor K.C.* for the appellant. A subject may acquire title to the foreshore by possession under the Statutes of Limitations. Hall on the Seashore (2 ed.), pages 23 and 154; Moore on the Seashore (3 ed.), pages 690-1 and 830. But the extent and character of the user must depend on the circum-

(1) 15 Ex. C.R. 177.

stances of each particular case. *Lord Advocate* v. *Young*(1), at page 553; *Lopez* v. *Andrew*(2).

The principle as to possession in ordinary cases is stated in *Lord Advocate* v. *Lovat*(3), at page 288; *Kirby* v. *Cowderoy*(4), at page 603.

To acquire title to the foreshore such full and actual possession as is proved in this case is not necessary. See Moore, pages 511, 658, 660; 28 Halsbury, 368-70; *Attorney-General for Ireland* v. *Vandeleur* (5).

Baxter K.C., Attorney-General of New Brunswick, for the respondent, referred to *The King* v. *Cunard* (6); *Wood* v. *Esson*(7); Hall on the Seashore, page 387; *Rose* v. *Belyea*(8); *Attorney-General of British Columbia* v. *Attorney-General for Canada*(9).

THE CHIEF JUSTICE.—The pleadings and evidence are so fully dealt with by my brother judges that it will not be necessary for me to do more than state briefly the conclusion I have reached.

The grant to the appellant of lot 37 did not include the adjacent foreshore, but I think appellant has established a possessory title to it. The evidence shews sufficient continuous use of the boom extending over the foreshore for the purpose of retaining the floating logs. The only other question that arises is as to the nature of this use of the foreshore and its consequences.

(1) 12 App. Cas. 544.
(2) 3 Man. & R. 329*n*.
(3) 5 App. Cas. 273.
(4) [1912] A.C. 599.
(5) [1907] A.C. 369.
(6) 12 Ex. C.R. 414.
(7) 9 Can. S.C.R. 239.
(8) 12 N.B. Rep. 109.
(9) [1914] A.C. 153.

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The Chief Justice.

It seems to me that it is strictly analogous to the common practice of mooring vessels to the bank in such a way that rising and falling with the tide they rest at extreme low tide on the soil of the foreshore. This is the right or privilege known as groundage and in respect of which dues are payable. It is recognized that this right like that of anchorage is one directly affecting the soil and its use raises a presumption of ownership of the soil. See the judgment of Chief Justice Erle in *Le Strange* v. *Rowe*(1).

It seems to me that this floating of logs that ground at every tide upon the soil of the foreshore affords a strong instance of such possession as can be had of lands covered by water at the flow of the tide; it is incompatible with any ordinary use to which the foreshore could be put by another as owner.

The case must be referred back to the Exchequer Court to fix the additional compensation to which the appellant is entitled in view of the fact that he is the owner not only of lot 37, but of its adjacent foreshore.

The appellant is entitled to his costs of this appeal.

DAVIES J. (dissenting).—This is an appeal from a judgment of the Exchequer Court awarding the appellant, as explained in the learned judge's reasons for judgment, the sum of $2,100 "as a just and liberal compensation" for the upland expropriated by the Crown from the appellant,

and for all damages resulting therefrom, including such rights held by the defendant as a riparian owner as distinguishable from those held by the public at large as are mentioned in the case of *Lyon* v. *The Fishmongers Co.*(2), covering all rights whatsoever the defendant may have in respect both of the upland and the water lots.

(1) 4 F. & F. 1048.

(2) 1 App. Cas. 662.

The appellant, however, contended both in the Exchequer Court and in this court that he had acquired a title to the water lot in front of his upland, either under the grant of his upland or by possession and that any rate he had acquired an easement in and over such water lots beyond his riparian right which had been injuriously affected by the Crown's expropriation.

With regard to the claim of ownership of the soil of the foreshore of the water lot it was not vigorously pressed, but at the same time was not abandoned. The argument mainly relied upon was that the plaintiff had acquired an easement in and over the water lot to boom logs therein appurtenant to the upland grant and that the easement had been improperly denied by the judgment below and not considered in the assessment of damages.

So far as this claim to an easement based upon the presumption of a lost grant is concerned, it was not pleaded by the appellant in the Exchequer Court and under the authorities it would seem that this appeal court should not entertain it.

In the view, however, I take of the evidence and the proved facts I do not think the appellant has succeeded in establishing any claim to the water lot in question other than that of a riparian owner and for his damages as such he has been awarded ample compensation.

Now, what are the controlling facts of the case? The appellant claims title under a Crown grant to one Thomas Loban of a lot called No. 37, fronting on the Miramichi River (a tidal river) dated 4th May, 1798.

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The lot in question is one of the number of lots granted to different parties in severalty by the same grant and the whole tract is particularly described by metes and bounds. It begins at the specified point at the "northerly bank of the said river" and after running by defined courses and distances to embrace the 37 lots, returns by a line

> to the northerly bank or shore of the said river, thence along the said northerly bank or shore of the said river following its several courses upstream to the bounds first mentioned.

It seems clear beyond all argument that under this grant the several lots were bounded by the bank of the river and that no part of the foreshore was embraced within the lands granted. The several grantees were riparian owners of their several lots. They had rights of uninterrupted access from their respective lots to the river, and if they gained a prescriptive right to any part of the foreshore it could only be by reducing such part into actual exclusive and notorious possession and maintaining that possession for the statutory number of years.

Now, what acts of possession did the plaintiff or his predecessors in title ever exercise over the foreshore in question ? So far as the soil of the foreshore is concerned, absolutely none. It is true that Loban and perhaps others of the appellant's predecessors leased to some lumbermen or millowners for a number of years a part of this upland lot. Two of these leases were in evidence. The one to Young was dated in 1818 and the other to Muirhead was dated 1873. That to Young, after describing the upland leased, contained the following words:—

> And also the privilege of erecting a boom for the purpose of securing timber, etc., in front of the said lot 37.

The lease to Muirhead after describing the upland leased continued as follows:—

> With the full privilege *of the water* in front of the said piece of land above described and also the privilege of keeping and erecting a boom for the purpose of securing timber and other lumber in front of said lot 37.

No mention is made of any part of the foreshore being leased nor is there any pretence of leasing any part of it. The upland leased is particularly described as running down to the river and bounded by a line *following the courses of the river bank or shore*, and the privilege is given the lessees of keeping and erecting a boom in the waters in front of the land leased.

The facts shew that this booming privilege so called was exercised by fastening a line of logs to a post or pillar driven in the upland and running out to the "boom block" which had been erected by someone in the bed of the river beyond the foreshore or low water mark and again from the block to a wharf some distance further up and running out beyond the foreshore. In this way the logs were protected from being carried away by the tides or storms. There is no evidence whatever of any post or pillar having been placed in the foreshore to retain the boom. As a matter of fact, for many years back, the appellant in his evidence says about twelve, other witnesses say much longer, more than twenty, there has been no boom maintained there at all.

It does seem to me clear that the placing of these booms where they were placed must be considered only in connection with the general conduct of the lumber business on the river at the time. They were necessary to the proper carrying on of that great and exten-

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sive business, but no doubt without the consent or acquiescence of the riparian owner they could not be legally maintained by a third party as against him if they interfered with his right of access to and from the river. His consent or permission, whether appearing in a lease or otherwise, could not be construed as evidence of a claim of adverse possession of the foreshore as against the Crown. It was, it seems to me, such a concession as a riparian owner as such might for a consideration fairly make of his riparian rights. The boom would naturally interfere with his right of access to the river and so far as he could he conceded to the lessee the right to erect and maintain the boom. But I cannot see in such an act a claim to either an adverse possession of the foreshore or of an easement in it beyond the riparian owner's rights therein. And as I have before said, the leases contain no language shewing a claim to the soil of the foreshore, or authorizing the lessee to interfere with it. Nor does it appear that at any time the appellant or his predecessors in title or their lessees ever disturbed or interfered with that soil. All that was done was by means of a line of logs fastened at one end to the owners' ripa and at the other to the boom block in the river beyond low water mark to make a boom to save and keep logs. A case instructive on the point now under discussion as to the extent of a riparian owner's rights is that of *Booth* v. *Ratté*(1), where it was held

> that a riparian owner is at liberty to construct and moor to his bank a floating wharf and boathouse, the same not being an obstruction to the navigation, and is entitled to maintain an action for damages in respect thereof caused by any unauthorized interference with the flow and purity of the stream.

(1) 15 App. Cas. 188.

In delivering the judgment of the Judicial Committee, Sir Richard Couch says, at page 193:—

> So far from being an obstruction to navigation, the maintenance of a floating wharf of that kind, is, in the circumstances stated by the learned Chancellor, a positive convenience to those members of the public who navigate the river with small craft. As a riparian owner, the plaintiff would be at liberty to construct such a wharf and would be entitled to maintain an action for the injuries to it which are complained of.

Applying that language to the booms maintained on the Miramichi River at the place in question, I would say that no question arose as to there having been any obstruction to the navigation of the river. On the contrary, they were essential to the carrying on effectively of the great lumbering and logging business on that river. They did not, in my judgment, affect the title to the soil of the foreshore which always remained in the Crown, nor in the circumstances which surrounded them, would they appear to the Crown to have been maintained by the riparian owners or their lessees *animo habendi, possidendi et appropriandi* which would be necessary to enable their owners or users to gain a title as against the Crown by possession or an easement in the foreshore appurtenant to the upland owned by them beyond their ordinary riparian rights.

For these reasons and without entering upon the question of the New Brunswick "Prescription Act" I would dismiss the appeal with costs.

IDINGTON J. (dissenting).—The appellant claims in three or four alternative ways a title to part of the land over which the Miramichi, a tidal navigable river, flows. The origin of the claim rests in a grant in 1798, made by the respondent to one Thomas Loban

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of lot thirty-seven and other lands. In some way which I cannot understand it is claimed this grant carried with it dominion over part of said land upon which said lot thirty-seven fronted.

As the said lot is defined in the grant by metes and bounds of which that next the river is stated to be

> thence along the southerly bank or shore of the said (Miramichi) river following its several curves down stream,

the grant thereof could not carry with it any part of the land overflowed by said river.

It is further claimed that a lease, which is produced, was made 28th August, 1818, to one Robert Young by the executors of the last will and testament of Thomas Loban, deceased, Jane Loban, his widow, and Alexander Loban, his son, of a part of the said lot thirty-seven described by metes and bounds

> and also the privilege of erecting a boom for the purpose of securing timber, etc., in front of the said lot number thirty-seven down stream until it comes to the distance of fifty feet from the upper part of the boom now occupied by Francis Peabody, Esq.,

and also another part of said lot thirty-seven as described.

The lease was to run for fifteen years from said date and was made renewable for fifteen years or at the option of Jane Loban or her assigns, or in the event of her death, of said Alexander Loban, his heirs, executors, administrators or assigns, to continue it for a further term of fifteen years or to pay "for the buildings and improvements made thereon" at a valuation.

We are not enlightened as to what happened pursuant to this lease. We are told of a boom existing in the locality in question for a number of years and it

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might be possible to infer that it existed before the time of the recollection of the oldest witness speaking thereto. Giving credit to all such witnesses tell us, I cannot find therein anything upon which a title to the soil in question could be acquired by virtue of the Statute of Limitations as against the Crown. Indeed, that ground of claim was not pressed as strongly as the next alternative of an alleged easement acquired by prescription.

This sort of claim seems rather indefinite. If we accept the high authority of Lord Cairns speaking in the case of *Rangely* v. *Midland Railway Co.*, in 1868 (1), relative to the definition of an easement, we would be puzzled to find in the evidence herein exactly what he defines an easement to be, or if the land in question is the servient tenement, what land the easement was appurtenant to.

Or if we should attempt to treat the rights claimed (whatever legal definition we may give them) over this part of the Miramichi River by virtue of the creation and use of the boom in question as the subject of acquisition by prescription, as claimed, against the Crown, we find that there was no Act in force in New Brunswick enabling such prescription till 1st of January, 1910.

Admittedly there was no use or enjoyment of this so-called boom for a number of years before that date. And according to my reading of the evidence there had been no use or enjoyment possessed by anybody thereof for over twenty years before that date.

There was apparently no necessity for it, much less actual use of it, after some time not actually fixed,

(1) 3 Ch. App. 306, at p. 310.

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but I think some time twenty years before this proceeding, though occasionally logs or loads of lumber were to be found thereabout.

The timbers forming the boom had, however, disappeared.

In short, I do not think the appellant brings his claim within the meaning of the statute, section 1, chapter 139, Consolidated Statutes of New Brunswick, 1903, which is as follows: —

> No claim for lands or rent shall be made, or action brought by His Majesty, after a continuous adverse possession of sixty years.

The kind of possession that was ever had at any time of the water in question was what every-day experience exhibits in any river used by lumbermen. The possession never could have been conceived as adverse to His Majesty, but in the exercise of a right permitted to those taking such possession in common with others of the public using navigable waters in the like way for the promotion of trade and commerce. Nor was the possession of that continuous character which would lay a foundation for a prescriptive title. The alternative of prescription also must fail.

Then it was suggested that we must presume a lost grant. There are two answers to this. It has not been pleaded, and in the next place, I hardly think the evidence warrants such presumption.

As to the necessity for pleading a lost grant if relied upon see *Smith* v. *Baxter* in 1900(1), at foot of page 146 and top of page 147. That case was tried without pleadings under an order directing the issue and as no point made of the alleged lost grant theory on getting such direction, the claim, started on the

(1) [1900] 2 Ch. 138.

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trial, of lost grant instead of prescription it was held by Sterling J. could not be set up; for as such it must be pleaded. And that holding was followed by Parker J. in trying the case of *Hyman* v. *Van Den Bergh* (1), and maintained in appeal(2), and the *Smith* v. *Baxter* case(3) was specifically approved of by Cozens-Hardy M.R. in giving judgment on said appeal.

This seems to dispose of the claim to rest on presumption of lost grant, for it is not pleaded.

There is not sufficient in the length of time which elapsed and in that which transpired before the Act, 8 Will. IV., ch. 1, came into effect, to give any efficacy to the presumption before that.

That statute by its terms seems to forbid any presumption of a grant thereafter such as we are asked to presume. The grants thereafter must be of the open kind susceptible of proof from the records that must exist.

The maxim *omnia præsumunter,* etc., relied upon cannot help. There is no basis shewn upon which it could operate. To so apply it would be irrational. In short it would to do so be to presume the advisors of the Crown had acted against rather than in accordance with law.

As to the claim that a sufficient sum was not allowed for expropriation of that for which appellant was entitled to be compensated, I think the weight of evidence against him is such as to forbid our interference.

The appeal should be dismissed with costs.

(1) [1907] 2 Ch. 516. (2) [1908] 1 Ch. 167.
(3) [1900] 2 Ch. 138.

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DUFF J.—The lands that are the subject matter of this controversy were taken for the purposes of the Intercolonial Railway under the provisions of chapter 143, R.S.C., on the 21st September, 1910.

On the 16th of July of the same year the following minute had been passed by the Lieutenant-Governor in Council of New Brunswick:—

Memorandum and report of the Honourable Attorney-General for the information of the Committee of the Executive Council. The Attorney-General reports, that it is proposed to make a diversion of the line of the Intercolonial Railway from Nelson to Loggieville in the County of Northumberland, in the Province of New Brunswick, and the Minister of Justice of Canada has through his agent, Warren C. Winslow, Esquire, K.C., of Chatham, N.B., applied for a disclaimer of damages on account of taking for use of the said Intercolonial Railway, certain lands covered with water, situate below highwater mark on the Miramichi River, at a point called Walsh's Cove, the particular lots being described as follows:—

Lot number eighty-six, beginning at station 290-77 on the centre line of the right of way of the new diversion at its intersection with the eastern side line of the Russell Wharf, so called; thence north-westerly by the said line seventy-five (75) feet, more or less, to a point distant seventy-five (75) feet at right angles north-westerly from the centre line; thence easterly parallel to the centre line and distant therefrom north-westerly seventy-five (75) feet at right angles four hundred and thirty (430) feet, more or less, to the prolongation of the western boundary of the property of Walsh Brothers at a point distant seventy-five (75) feet, north-westerly at right angles from the centre line, thence by the said western boundary and prolongation south-easterly, crossing the centre line four hundred and seventy (470) feet, more or less, to a point on the southerly shore of the river Miramichi, so called, at highwater mark; thence north-westerly by the shore at highwater mark, four hundred and ten (410) feet, more or less, to the eastern side line of the Russell Wharf aforesaid; thence by the said eastern side line fifty (50) feet, more or less, to the place of beginning, containing 154,330 square feet, more or less.

Lot number eighty-four, beginning at the intersection of the centre line of the right of way of the new diversion with the western boundary of the property of the said Dominion Government; thence by the said boundary north-westerly seventy-five (75) feet, more or less, to a point distant seventy-five (75) feet at right angles north-westerly from the centre line; thence easterly parallel to the centre

line one hundred and fifty (150) feet, more or less, to the eastern boundary of said property at a point distant seventy-five (75) feet at right angles north-westerly from the centre line; thence south-easterly by the said boundary crossing the centre line, and the shore of the river Miramichi, so called, at the original highwater mark, three hundred and ninety (390) feet, more or less, to the eastern boundary of the property of Walsh Brothers; thence north-westerly by the said eastern boundary four hundred and ten (410) feet, more or less, to the place of beginning, containing 48,350 square feet, more or less, and containing in both lots 202,680 square feet, more or less.

The Attorney-General having carefully inquired into the matter has ascertained that the owners of the lands above mentioned along the shore, claim that they are entitled to the land covered by water in front of their said lands to the channel or to a line drawn from the north-easterly corner of the Russell Wharf, to the north-westerly corner of the Loggie Wharf, with the exception of the property claimed by the Walsh Brothers, and that the said land covered by water has been used for over sixty years by the owners of the said lands for booming purposes and otherwise, and that blocks have been built in front along the channel for said booming purposes for over sixty years. He is, therefore, of opinion that whatever rights the province may have formerly had in the said lands covered by water, that said rights have become extinguished, and that it would be inadvisable to set up any claim to the same. He, therefore, recommends that upon His Honour the Lieutenant-Governor approving of this minute, that the Minister of Justice be informed that the said Province of New Brunswick lays no claim to the said lands covered by water and situate below highwater mark, and that the Department of Railways must deal with the parties claiming said lands and lands covered by water.

And the Committee of the Executive Council concurring in the said recommendation.

It is accordingly so ordered.

Certified: Passed July 16th, 1910.

(Sgd.) JOE. HOWE DICKSON,
Clerk of the Executive Council of N.B.

This instrument constitutes an admission touching the title to the lands in question made by the only executive authority competent at the time to make admissions on that subject on behalf of the Crown; and, therefore, as an admission on behalf of the Crown it is admissible in my opinion in evidence against the plaintiff in this proceeding.

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This admission, of course, does not operate as a conveyance; but it is *primâ facie* evidence of title by possession. And it is sufficient for the purposes of this appeal to say, (applying the well settled principle that enjoyment of "all the beneficial uses of the foreshore" for sixty years,

which would naturally have been enjoyed by the direct grantee of the Crown

Lord Advocate v. *Young*(1), at page 553, is sufficient to establish a case of title by possession) that the evidence as a whole (while it cogently supports) contains little or nothing to detract seriously from the strength of this *primâ facie* case.

There should be a reference back to ascertain the amount of compensation to which the appellant is entitled in respect of the parts of the foreshore and solum taken. I should not disturb the finding in respect of the value of the upland taken or in respect of compensation for injurious affection of the upland.

ANGLIN J.—For the construction of a line of railway, known as the Chatham Diversion of the Intercolonial, the Crown has taken a portion of lot 37, admittedly the property of the defendant. In respect of this piece of upland, including riparian rights, he has been awarded in the Exchequer Court as compensation the sum tendered by the Crown, $2,150. The Crown has also utilized for its railway a portion of the foreshore in front of lot 37 to which the defendant has hitherto in this litigation unsuccessfully asserted title. On the present appeal he seeks to have his title

(1) 12 App. Cas. 544.

to the foreshore established, or, in the alternative, his right to an easement over it for the booming of logs, and to receive compensation in respect thereof, and he also claims increased compensation for the upland taken and injuriously affected.

In regard to the latter claim I have not been satisfied that the amount allowed by the learned trial judge is inadequate.

I also agree with the learned assistant judge of the Exchequer Court that the grant to the defendant's predecessor in title of lot 37, bounded by the waters of a tidal river, did not carry to the grantee title to the foreshore. It should scarcely be necessary to say that the order in council passed by the Provincial Government disclaiming any interest in the foreshore in question does not vest title to it in the appellant. But if he was in possession when the expropriation proceedings were instituted, his inchoate holding title, though short of the statutory sixty years duration, would avail as a defence against everybody but the true owner, and inasmuch as, if the defendant is not the owner, the title would be in the Crown in right of the Province of New Brunswick and not in right of the Dominion, the disclaimer of the former may be of importance. Moreover, if the defendant had possession when the expropriation proceedings were commenced and the Crown had been out of *de facto* possession for twenty years, the statute 21 Jac. I., ch. 14, may be an obstacle in the plaintiff's path. *Doe d. Watt* v. *Morris*(1); *Emmerson* v. *Maddison*(2). But in the view I take of the defendant's claim of title by

(1) 2 Bing. N.C. 189. (2) [1906] A.C. 569.

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possession it is not necessary to dwell upon these aspects of the case.

In so far as the defendant's claim to a prescriptive easement rests upon the "Prescription Act" (C.S., N.B., 1903, ch. 156), he encounters the difficulty that the alleged right of booming logs had not been exercised for several years before this action was brought (section 3). His claim to an easement apart from the operation of the statute need be considered only if his claim of title by possession to the solum cannot be supported. After hearing the evidence in support of this latter claim the learned trial judge deemed it insufficient. The question is one of fact, and the judgment in favour of the Crown should be interfered with only if upon a careful consideration of the evidence it is clear that the conclusion reached is erroneous.

In order to establish title by possession to a portion of the foreshore it is not necessary to prove the same exclusive possession of it which would be requisite in a case of uplands. A grantee of foreshore holds it subject to the *jus publicum* of navigation and fishing and a similarly restricted title to it by possession may be established by proof of such beneficial enjoyment as a grantee holding subject to this *jus publicum* might have exercised. *Lord Advocate* v. *Young*(1); Moore on Foreshore (3 ed.), pp. 658, 660, 779, note (*u*), and 830, note (*s*); 28 Halsbury, pp. 368-9. In *Johnston* v. *O'Neill*(2), at page 583, Lord Macnaghten, quoting from the speech of Lord O'Hagen in *Lord Advocate* v. *Lord Lovat*(3), said:—

(1) 12 App. Cas. 544, at p. 553. (2) [1911] A.C. 552.
(3) 5 App. Cas. 273, at p. 288.

As to possession it has been said in this House that "it must be considered in every case with reference to the peculiar circumstances * * * the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might be expected to follow with due regard to his own interests—all these things, greatly varying as they must under various conditions, ought to be taken into account in determining the sufficiency of a possession."

This same passage was quoted with approval in *Kirby* v. *Cowderoy*(1). This restriction upon the nature of the possession requisite must be borne in mind in considering the sufficiency of the case made out. What is that case?

The upland lot No. 37 was granted to Thos. Loban in 1798. We have no evidence of any dealing with the foreshore by him. He died in 1817. By a lease dated August 29th, 1818, his executors and his devisee demised to Robert Young for fifteen years from the 1st of July, 1817, *inter alia,*

the privilege of erecting a boom for the purpose of securing timber, etc., in front of the said lot No. 37, from the upper line of the said lot 37 down stream until it comes to the distance of 50 feet from the upper part of the boom now occupied by Francis Peabody, Esq.

There is no evidence of actual occupation under this lease and it may be contended that the lease itself is as consistent with a claim by the Lobans to an easement of the right to boom logs as it is with an assertion of a title to the solum of the foreshore. But see *Van Diemen's Land Co.* v. *Table Cape Marine Board*(2), and *Le Strange* v. *Rowe*(3). The next piece of documentary evidence is not subject to this observation. It is the will of Jane Loban, widow and devisee of Thos. Loban, made in 1852, whereby she

(1) [1912] A.C. 599, at p. 603. (2) [1906] A.C. 92 99.
(3) 4 F. & F. 1048.

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devised to her son, John Loban, the foreshore in front of lot 37 "to the outside of the boom in front." Meantime the evidence of the actual presence and use of the boom itself commences.

His Honour Judge Wilkinson, aged 89 years, and a resident of Chatham for 75 years, formerly County Court Judge of the County of Northumberland, deposed to the existence and use of the boom for storing logs from 1850 for a number of years down to a period some "20, 30 or 40 years ago."

Jas. Curran, aged 78, who resided in Chatham all his life, cannot remember when the boom was not in front of the Loban lot. His memory goes back to 1846. The boom was first used to his knowledge by Joseph Cunard, then by Johnston and MacKay, and later by Ritchie and by Muirhead. He remembers constant user of the boom down to about 27 or 28 years ago and a subsequent user some eight or nine years ago.

Jas. Mowatt, aged 81, knew the Loban property for sixty years. He had a shop on part of it for 25 years prior to 1880. The boom was maintained during that period.

Jos. Synott knows of the existence of the boom since 1850. He and Mowatt, however, state that they think the user of it for storage purposes ceased about 1884 or 1885.

Alexander Fraser, aged 81, came to Chatham in 1846. He remembers the block to which the boom was attached from about that time, and that the Rainnies used the boom from about 1847 to 1850.

In 1862 John Loban devised to his widow, Jane Grey Loban, the foreshore "to the outside of the boom in front."

Allan Ritchie deposed that the firm of D. & J. Ritchie made payments of rent for the use of the boom in question first to John Loban and afterwards to Jane Grey Loban from 1855 to 1873, when it was leased to Muirhead.

Jas. Robinson deposed to the use of the boom from 1861 down to about ten years ago.

The defendant Tweedie, 65 years of age, gives evidence of the constant use of the boom from his earliest recollection down to 1886 by lessees or licensees of the Lobans and to subsequent intermittent use of it down to about ten or twelve years ago. He acted as solicitor for Jane Grey Loban and drew a lease of the boom from her to Muirhead in 1873. He also proves payment of rent for the boom by Muirhead to Jane G. Loban and the user of it by Muirhead down to 1886 and subsequently by Richards.

John Johnson, a witness called by the Crown, says that sixty years ago the boom was an old established boom and that it was used for many years until some time, he cannot say how long, after the burning of the mill in 1873.

There is also evidence from Alexander Fraser that he had heard that the boom existed long previous to 1845, but this I treat as inadmissible.

In 1892 Muirhead's interest as lessee of the boom was sold by the sheriff and bought by the defendant. In 1895 Jane G. Loban demised to the appellant *inter alia* the boom privilege for a term of thirty years. This he assigned to Helen Russell. In 1906 Jane G. Loban conveyed to the defendant her reversion in the property, including the block and boom, and assigned to him her rights under the existing

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leases. In 1909 Helen Russell surrendered her rights to the defendant. There is no contradiction of the oral evidence of occupation and there is no suggestion that all the documents mentioned were not executed and delivered for substantial consideration and in good faith, no question of title having then arisen. They leave no room to doubt the character of the right to the foreshore which the Lobans asserted and make clear the intention with which the acts of occupation were performed. *Duke of Beaufort* v. *Aird*(1). While the storage of logs at high tide may not have involved any actual possession of the solum of the foreshore, at and for some time before and after low tide the logs undoubtedly lay upon the solum itself. *Le Strange* v. *Rowe*(2), at pages 1052-3. Moreover, the block to which the booms were attached, though perhaps outside the foreshore, was a permanent structure and the booms were themselves secured by pickets. They would not otherwise have held in place. These were, in my opinion, acts indicative of an assertion of ownership such that those interested in disputing the title asserted by the Lobans would so understand them. Coulson & Forbes, Law of Waters (3 ed.), 29-39.

Having regard to all these circumstances I think the user of the foreshore shewn to have been made by the predecessors in title of the defendant and their lessees or licensees was of the character necessary to support a claim of possessory title. Continuous user of this kind from 1840 to 1885 or 1886 is clearly shewn by the evidence and it indicates that the Loban boom

(1) 20 Times L.R. 602. (2) 4 F. & F. 1048.

was well known and established for years prior to 1840 or 1845, beyond which the memory of living witnesses does not go. There is no reason to suppose that the booming privilege demised in 1818 to Robt. Young was not exercised or that the assertion of ownership of the foreshore by the Lobans and occupation of it under them do not date at least from that time. *Rogers* v. *Allen*(1); *Attorney-General* v. *Emerson*(2). The reference in the lease of 1818 to the fact that an adjacent part of the foreshore was then occupied by a boom held by Francis Peabody, Esq., is significant in this connection. If the later user of the Loban boom has been intermittent it would appear to have been only because owing to the burning of mills and other causes permanent tenants for it were not available. There is no evidence of anything to suggest abandonment of the foreshore or of the right to use it for booming purposes.

From a continuous user of upwards of forty years (such as has been actually proved in this case) an earlier like user may readily be inferred. *Chad* v. *Tilsed*(3). This, coupled with the lease of 1818 and subsequent documents indicative of the character of the right asserted (*Re Alston's Estate*(4)), in my opinion suffice to support the defendant's claim to a possessory title under the New Brunswick statute, 6 Wm. IV., ch. 74 (now C.S.N.B., ch. 139, sec. 1).

If it were necessary for him to invoke the doctrine of lost grant, even a shorter user than has been proved might warrant the presumption of such a grant; 28 Halsbury, 371 (*g*); Moore's Foreshore (3 ed.), p. 598;

(1) I Camp. 309.
(2) [1891] A.C. 649, at p. 658.
(3) 2 Brod. & B. 403, at p. 408.
(4) 28 L.T. (O.S.) 337.

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Duke of Beaufort v *Mayor of Swansea*(1); *Re Alston's Estate*(2). Although the statute of 8 Wm. IV., ch. 1, probably precludes a presumption of a grant made subsequently to 1837, it presents no difficulty in presuming a grant prior to that date. The evidence proves actual possession from 1840 at least to 1886, if not 1902, and warrants an inference of assertion of ownership and possession consistent therewith since 1818 and there appears to be no reason why a lost grant of a date earlier than 1837 should not be presumed. Taylor on Evidence (10 ed.), 138; *Turner* v. *Walsh*(3).

Although in most instances the courts have, no doubt, dealt with ambiguous and equivocal grants of upland, and the question presented has been whether the proof of user of the adjacent foreshore was such as warranted its inclusion in the grant of the upland, such cases as *Lord Advocate* v. *Young*(4), and *Mulholland* v. *Killen*(5), would seem to be authorities for the view that, although the description of the riparian lot cannot be said to include any part of the adjacent foreshore, a grant of the latter may be presumed from long user. That title to foreshore may be acquired against the Crown by occupation for the statutory sixty years in cases where the grant of the upland clearly does not include it, is, I think, not open to doubt. 6 Encyc. Laws of England, 199.

The evidence adduced by the defendant in support of his possession is as satisfactory as could reasonably be expected, having regard to all the circumstances,

(1) 3 Ex. 413.
(2) 28 L.T. (O.S.) 337.
(3) 6 App. Cas. 636.
(4) 12 App. Cas. 544.
(5) Ir. R. 9 Eq. 471, at p. 481.

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and it should, in my opinion, be held that he has established title to the foreshore in question.

It is quite clear that the compensation which has been allowed him is confined to the damage sustained by deprivation of and injury to his upland property and riparian rights incident thereto. Nothing has been allowed for his interest in the foreshore, it having been held that he had none. As already indicated that interest is subject to the *jus publicum* of navigation and fishing, and it is quite possible that any user of the foreshore such as the defendant alleges he contemplated was out of the question. Any possibility of obtaining a license to so use it he is entitled to have taken into account. *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*(1); but its remoteness must also be considered. *Cunard* v. *The King*(2). The value of the foreshore in question in former years for booming purposes may perhaps be estimated from the rental paid for the privilege, but the revenue which would have been derivable from this or any other available source, now or in the future, had the Chatham Diversion not been undertaken, may be greater or smaller than formerly. It must also be borne in mind that in the $2,150 already allowed as compensation there is included a substantial sum for riparian rights, and it may be that the situs of the pier or block to which the boom was attached and of part of the boom itself is not included in the property to which the defendant's title has been established. *Fithardinge* v. *Purcell*(3).

On the whole, while the appellant is entitled to

(1) [1914] A.C. 569. (2) 43 Can. S.C.R. 88.
(3) [1908] 2 Ch. 139, at p. 166.

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some additional compensation in respect to his interest in the foreshore, I think we are not in a position to fix the amount which should be allowed him, and that the case must be referred back for that purpose to the Exchequer Court.

The appellant is entitled to his costs of this appeal.

Appeal allowed with costs.

Solicitors for the appellant: *M. & J. Teed.*

Solicitor for the respondent: *Allan A. Davidson.*

EPIPHANE LACHANCE (DEFENDANT) . APPELLANT; 1915

AND *Nov. 26.

EMILE CAUCHON (PLAINTIFF) . . . . . RESPONDENT.

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

Appeal—Jurisdiction—Injunction—Matter in controversy—Refusal of costs—Supreme Court Rule 4—"Supreme Court Act," s. 46.

In an action for an injunction restraining the defendant from carrying on dangerous operations in a quarry, and for $100 damages,

Held, that the Supreme Court of Canada had no jurisdiction to entertain an appeal. *Price Bros.* v. *Tanguay* (42 Can. S.C.R. 133), and *City of Hamilton* v. *Hamilton Distillery Co.* (38 Can. S.C.R. 239), referred to. *Shawinigan Hydro-Electric Co.* v. *Shawinigan Water and Power Co.* (43 Can. S.C.R. 650), distinguished.

The appeal was quashed but without costs as the respondent had neglected to move for an order to quash the appeal within the time limited by Supreme Court Rule No. 4.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of McCorkill J., in the Superior Court, District of Quebec, whereby the plaintiff's action was maintained with costs.

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

When the case come on for hearing on the appeal to the Supreme Court of Canada, counsel for the re-

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

(1) Q.R. 24 K.B. 421.

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spondent drew attention to the fact that there was no question of title to real estate involved on the appeal and the amount of damages claimed by the action was insufficient to give the court jurisdiction under section 46 of the "Supreme Court Act." Counsel for the appellant contended that the effect of the order declaring the injunction absolute was to restrict his rights in the use of the quarry upon his land, and, incidentally, might subject him to a fine of $2,000 as provided by article 971 of the Code of Civil Procedure.

Marchand for the appellant.

Gelly for the respondent.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—This is an appeal from the Court of King's Bench affirming a judgment of Mr. Justice McCorkill which declared perpetual an interlocutory injunction and condemned the appellant to pay $50 for damages and the costs of the suit. The proceedings began by way of a petition for an injunction alleging that the defendant was the proprietor of a quarry situated in the Village of Château Richer, and the plaintiff had his home upon a lot of land a short distance from the quarry. The petition alleged that the quarry was owned by defendant Lachance and operated by defendant Baker, that the work was dangerous to the life and property of the plaintiff through blasting, etc., setting out various occasions upon which rocks had been thrown upon his property and had endangered the life of members of his family and of the public. The petitioner claimed damages of $100 and asked for an interlocutory injunction enjoining

defendants and their officers and agents from carrying on their dangerous operations.

The order made by Mr. Justice McCorkill sets out the facts shewing that the interlocutory order had been made, that a writ had been issued and served with a certified copy of the judgment granting the interlocutory injunction. He says that the plaintiff moved for a rule *nisi* ordering the defendants to shew cause why they should not be held in contempt for having violated the injunction, that this motion was granted, that the defendants pleaded separately to the said interlocutory order on the merits. He held that the defendants had failed to prove the material allegations of their defence and that the plaintiff had proved the material allegations of his petition. He maintained the plaintiff's action, made absolute and permanent the interlocutory injunction, and ordered the defendants to pay the plaintiffs $50 damages. The Court of King's Bench confirmed this judgment and the defendant Lachance now appeals to the Supreme Court.

This appeal coming from the Province of Quebec is, of course, governed by the provisions of section 46, which say that no appeal shall lie—

(*a*) Unless it involves the validity of an Act of the Parliament of Canada. . . .

(*b*) Relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty, or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound.

(*c*) Amounts to the sum or value of two thousand dollars.

This case clearly does not fall within any of the above sub-sections.

In a number of cases an appeal has been attempted to be brought to this court where the remedy asked

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has been an injunction, but in all of them there was some foundation for the contention that titles to land were involved.

In *Price Bros.* v. *Tanguay*(1) the plaintiffs complained that they were impeded in the right to drive logs down the course of a river and asked for the removal of a boom placed across the river by the defendants. This court held that there was no jurisdiction.

In *City of Hamilton* v. *Hamilton Distillery Co.* (2) the plaintiffs asked for a declaration that certain municipal by-laws were illegal and for an injunction restraining the defendants from levying or collecting certain water-rates. In this case also the court held that they had no jurisdiction.

The case of *Shawinigan Hydro-Electric Co.* v. *Shawinigan Water and Power Co.*(3) does not assist the appellant because there the action was to set aside a by-law and an injunction prohibiting the carrying into effect a contract of sale made pursuant to the by-law and involving property worth $40,000. The majority of the court held that the matter in dispute was the $40,000 provided for in the contract.

In the present case there appears to be nothing upon which the appellant can rely to support the jurisdiction of the court.

Appeal quashed without costs.

Solicitors for the appellant: *Casgrain, Rivard, Chauveau & Marchand.*

Solicitors for the respondent: *Gelly & Dion.*

(1) 42 Can. S.C.R. 133. (2) 38 Can. S.C.R. 239.
(3) 43 Can. S.C.R. 650.

MARY E. LEWIS, ADMINISTRATRIX OF EDWIN E. LEWIS (PLAINTIFF) .. } APPELLANT;

AND

THE GRAND TRUNK PACIFIC RAILWAY COMPANY (DEFENDANTS) ..... } RESPONDENTS.

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*Oct. 21, 22.
*Nov. 15.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Negligence—Operation of railway—Unsafe roadbed—Speed of trains—Disobedience to orders—Answers by jury—"Lord Campbell's Act"—Injury sustained outside province—Right of action in Manitoba.

At a curve in the permanent way there was a sink-hole, over which the roadbed had been recently constructed, where the weight of passing trains caused the tracks to be depressed, but trains running slowly had been safely operated across the unsafe spot for several months. Orders had been given that no trains were to be run over this place at greater speed than 5 miles per hour. The husband of plaintiff was engine-driver of a train which was run over the dangerous spot at a rate exceeding that indicated in the order and was derailed, causing injuries which resulted in his death. The accident happened in the Province of Ontario and the action to recover damages was instituted in Manitoba. In answer to the question, "In what did such negligence consist," the jury answered, "a defective roadbed, and not having provided a watchman for same."

Held, affirming the judgment appealed from (24 Man. R. 807), Idington and Brodeur JJ. dissenting, that the answer returned by the jury was insufficient and vague; that there was no reasonable evidence to support a finding that, assuming the order regulating speed of trains to be observed, the permanent way at the place in question was so dangerous as to make it negligence on the part of the railway company, *vis-à-vis* deceased, to operate trains thereupon or that the cause of the accident was the state

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

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of the roadbed rather than the running of the train at excessive speed.

Per Idington, Duff and Brodeur JJ.—A legal obligation *ex delicto*, arising in consequence of a fatal accident which happened beyond the territorial limits of the Province of Manitoba, may be enforced in the Manitoba courts where, according to the law in force in Manitoba, a similar right of action would have arisen if the accident had occurred within the province. *Phillips* v. *Eyre* (L.R. 6 Q.B. 1) referred to.

APPEAL from the judgment of the Court of Appeal for Manitoba(1) setting aside the judgment entered by Galt J., on the verdict of the jury, and entering nonsuit.

The material circumstances of the case are stated in the headnote.

C. R. Bethune and *W. M. Crichton* for the appellant.

H. J. Symington for the respondents.

THE CHIEF JUSTICE.—The jury found that the death of Edwin R. Lewis was caused by the negligence of the defendant company, and to the question:—

In what did such negligence consist ?

answered:—

A defective roadbed, and not having provided a watchman for same.

Now negligence is defined in many ways, but perhaps for general use the best definition is that—

Negligence is the absence of such care as it was the duty of the defendant to use.

It is clear that "a defective roadbed" is no real answer to the question: "In what did such negligence con-

(1) 24 Man. R. 807.

sist?" A railway company may be negligent either in constructing or maintaining its railway and perhaps the answer of the jury is to be interpreted as a finding of one or other of these causes of negligence, though it is at any rate exceedingly vague.

It does not appear from the evidence that there is anything to support a charge of negligent construction of the railway. What are known as "soft spots" or "sink-holes" are necessarily encountered more or less frequently on a long line of railway; they are simply places where owing to the loose or shifting nature of the subsoil it is impossible to get a firm foundation on which to rest the railway track. It may be possible to overcome the difficulty, as has often to be done for buildings, by sinking piles, putting in concrete foundations or by other costly expedients. As long, however, as a railway is made reasonably safe, it is impossible to say that there is negligence if it is not constructed in the most perfect manner; a railway is never perfect, it is always being improved, and a new line of enormous length like the one in question in this case must necessarily embrace a number of weak and more or less dangerous places which can only be eliminated gradually after long experience of working the line. Such dangers are found not only in the track itself, but in its surroundings, for instance, the liability to land slides in cuttings where it is impossible to remove sufficient earth to ensure perfect safety.

As to the maintenance of the roadbed, it is shewn that the arrangements made for the watching of this particular spot necessitated the sectionmen going over it at least twice every day, and a gang of men were constantly employed keeping up the level of the track

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by filling up with gravel the depression caused by the passage of trains. Though trains had been constantly passing there had been no previous trouble at this place and an inspection after the accident shewed no unusual conditions in the track.

It would seem to me that this disposes of any negligence which could properly be covered by the verdict "a defective roadbed." There is no finding of negligence in the operation of the road, but it may be pointed out that though no negligence is to be attributed to the respondent company in the construction and maintenance of the railway, the company was bound to exercise due diligence in endeavouring to protect the public and its own employees from known dangers which required to be guarded against at particular places.

It is not suggested the company was not alive to its duties in this respect or that it failed to take precautions. We find that the engineer and conductor were each furnished with a copy of an order directing that speed was to be reduced at this sink-hole to 5 miles per hour. It is in evidence that the rule is that such an order is to be understood as meaning that the speed is not to exceed 5 miles an hour. Further, there was a "slow sign," that is, a board about 3 feet wide, standing out 15 feet from the right-hand side of the track on the engineer's side and that sign said: "slow."

Lewis, the engine-driver, had passed over this place dozens of times and knew the conditions perfectly; so had other men and always with safety. How then did the accident happen? It seems to me, in the absence of better explanation, that it is impossible to disregard that offered by the respondent that it was

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caused by the train proceeding at a rate of speed that in the circumstances was too high. I do not propose to examine the evidence to try and ascertain what that rate of speed was, because it seems indisputable that it was over 5 miles an hour. The excessive speed of the train at this dangerous spot is, I think, the only plausible explanation of the accident, and for that excessive speed the deceased himself was responsible.

The presence of a watchman could not have had the slightest effect in preventing the accident since at the time there was nothing unusual in the appearance of the road and no reason for holding up the train; the engine-driver knew all that a watchman could have known.

As I have said before I do not think that the answer "a defective roadbed" was any statement of an act of negligence on the part of the defendant; but any negligence there was could, I think, only have been that of the deceased engine-driver himself.

I agree with the reasons for judgment of Mr. Justice Perdue in the Court of Appeal for Manitoba, and I think that this appeal should be dismissed and judgment entered for the respondents (defendants), the whole with costs.

DAVIES J.—Many interesting points were discussed at bar in this appeal raising the question of the right of a party to bring an action in one province of the Dominion to recover damages for injuries received in another province for which damages, if sued for in the latter province, the defendants would be liable. The questions debated covered alike the common law lia-

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bility and that created under the "Workmen's Compensation for Injuries Acts," and, if under the latter Acts, whether the language declaring that the action must be brought within a fixed time after the accident with a proviso

> that in case of death the want of notice should be no bar to the maintenance of such action if the judge should be of opinion that there was reasonable excuse for such want of notice,

extended to another province than the one legislating.

It seems to be conceded that such question must depend largely upon whether the question of notice required and the excuse for its not having been given is or is not of the essence of the right of action created by the statute.

In the view, however, which I take of the facts as proved and of the jury's findings upon them, I do not find it necessary to discuss or decide any of these questions.

Assuming the appellant's contentions to be sound —that she had the right to sue in the Manitoba courts —and that the judge of that court was competent to determine the question of there having been a "reasonable excuse" for the want of the statutory notice, the question to be determined is whether the defendant company had failed in its duty to provide a railway track or roadbed which could be safely used for the purpose of operating a locomotive thereon and in not having provided a watchman at the soft spot or sinkhole where the accident occurred.

The answer of the jury to the question:—

> In what did the negligence of the defendant consist ?

was:—

> A defective roadbed, and not having provided a watchman for the same.

The evidence shewed that at the time of the accident there was nothing unusual in the condition of the roadbed at that point which would have attracted a watchman's attention, if he had been there. A watchman in such circumstances could only have signalled to the deceased if there was anything unusual or symptomatic of danger in the conditions. The evidence is clear beyond question that there was nothing of the kind when the engine in question passed the spot, and, in view of the order to slow at the point in question to five miles an hour given to the deceased engineer, and the slow-board some distance back to indicate when and where he should begin to slow, the finding as to negligence in not having a watchman seems superfluous and without any grounds or evidence to support it.

Then as to the defective roadbed the finding is general and in no sense specific as to negligence on defendant's part.

The deceased engineer had been running over this spot every day for several months. The soft spot had been in existence ever since the construction of the road. Its length was about 50 feet and the depression of the rails as the trains passed over it at times was from two to four inches. There was a section gang looking after the spot and they had crossed it once or twice on that day. An examination of the track after the accident shewed that it was in proper alignment and some eight hours afterwards, on the train being hauled away, there was no depression of the track over the sink-hole or soft spot. This soft spot was protected by a slow-order of five miles an hour and by a slow-board sign some 2,000 feet from it. There was no evidence to shew that the depression in question was dangerous when the speed of the passing

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trains was confined to five miles an hour. A railway roadbed may be quite safe for a speed of five miles an hour, but be dangerous for a speed of eight or twelve miles or more.

The evidence, however, was conclusive that the commencement of the accident, where the front pony-wheels of the engine first left the tracks, took place before the engine reached the depression and that it completely passed over the depression, some 200 or 300 feet, before it left the roadbed and fell down the embankment. Some cause for the derailment there must have been, happening at the place it did, other than the depression or any defect in the roadbed at the depression. The only reasonable suggestion offered is the deceased engineer's disobedience of his express orders as to speed and his continuance of a speed beyond the prohibited rate up to the time the pony-wheels of his engine left the track. As to the actual rate of speed he was running, there is the usual discrepancy between the evidence of the different witnesses. Most of them put it from 6 to 8 miles; one of them 12 miles. But not a single witness puts it as low as five miles an hour, the limit of speed he was ordered to run at.

After listening to the able arguments of counsel and the careful analysis of the evidence made by them and reading all the evidence called to our attention on the crucial point of the defendants' alleged negligence, I have reached the conclusion that there was no evidence to justify the jury's finding of negligence on the defendants' part "in a defective roadbed and want of a watchman for same" and that the real cause of the accident arose from the excessive and prohibited speed at which the deceased was running his train.

It was argued that the finding of the jury that the deceased by the exercise of ordinary care could not have avoided the accident amounted to a finding that the speed of the train was not beyond the five miles an hour his orders prescribed. But I think that is asking too much of the court. No witness ventured the statement that the speed was as low as five miles, while the facts proved did not admit of any reasonable inference being drawn to that effect. I do not think the jury intended in this indirect way to find that the rate of speed was in accordance with the orders.

I would dismiss the appeal with costs.

IDINGTON J. (dissenting).—This is an action for damages by the widow and administratrix of a locomotive engine-driver, for damages suffered by reason of his having been killed in an accident on the respondent's road on the 19th July, 1911, claimed by her to have been caused by the negligence of respondent.

The action was tried at Winnipeg by Mr. Justice Galt, with a jury, who rendered a verdict of $5,000 for the plaintiff, now appellant.

Upon that verdict judgment was entered for appellant. The Court of Appeal for Manitoba reversed it. Chief Justice Howell and Mr. Justice Cameron dissented from the judgment of reversal, holding that there was evidence of negligence as charged which must be submitted to the jury.

The negligence charged was that there was a sink-hole over which the track had been laid, by reason of which the track, or at least one of the rails, was liable to sink from two to four inches as the trains passed over it. It was in that condition in October, 1910,

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and had continued so up to the time of the accident. Meantime the respondent's men from time to time had been putting in material to try and solidify the track. It never seems to have occurred to the respondent that such a continued series of failures from October to July demonstrated the necessity for more vigorous methods of rendering that part of the track safe for travel; unless indeed the existence of a heap of gravel deposited recently before the accident at the spot indicated an intention to do so.

It is proven other methods such as bridging the hole or avoiding it might have been adopted.

No precaution was taken to avoid any accident except the issuance of a general order in October to engineers to reduce speed of travel to five miles an hour in passing over this sink-sole and a notice merely to slow down posted at some distance from the spot. Copies of this order were issued to each engineer making the trip over this part of the road. No watchman was appointed to warn approaching trains in case of any danger. No sectionmen were called to shew any one had seen it that day, or when any one had seen it, though sectionmen had, about fifteen hundred feet distant therefrom, a station for operating from. It is said sectionmen had general instructions to look after the repairing. From two to six trains a day passed over it.

If that condition of things does not constitute such a case of negligence on the part of the defendant as should be submitted to a jury, I am at a loss to know what would. If some passengers had got killed as the result thereof and those responsible for the continuance of such a condition of things, from October to 19th July, had been put on trial for manslaughter,

I think the jury trying them would have been justified in finding a verdict of guilty.

It never occurred to able counsel at the close of the trial to move for a nonsuit on the ground of want of proof of negligence. There was a motion of nonsuit on other grounds and a hope that respondent could prove to the satisfaction of the jury that the deceased had disobeyed the order to reduce his speed to five miles an hour.

In that the respondent failed; and I think, considering the evidence as presented in the analysis thereof in the appellant's admirable factum, which I have found most helpful, that the jury properly refused to find that deceased had neglected his duty.

It was quite competent for the jury to have disbelieved the evidence, and some of it certainly was not entitled to much credit. As to those speaking of the rate of speed being six to eight miles an hour, between the slow-down post and the place of the accident, they were at best making a guess about something in respect of which they had no duty to observe anything, whilst the deceased had his mind solely directed to the matter in discharging his duty. And it is to be observed that the order was

> to reduce speed to five miles an hour over sink-hole half a mile east of Farlane.

The man who issued this order asserted on the witness stand the sink-hole proper was *only twenty feet* in length.

To apply the like illustration I have given relative to the negligence of respondent, had the deceased been put on trial for manslaughter caused by neglect of this peculiarly worded order, could he have been

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convicted thereof on evidence resting upon such a guess ?

I repeat this defence had to be established to the satisfaction of the jury and their verdict is conclusive, but by reason of the theories put forward (to demonstrate rate of speed and not the respondent's negligence as the cause) resting upon the appearance of things as found after the accident being coupled with this evidence, I think it well to point out how little that can be depended upon. So far as the theories themselves, quite independent of such support, are concerned they are equally matters which the jury could reject, especially as not supported by any positive expert evidence and are not based upon accurate representation of the facts.

The question thus comes back to the primary one of whether or not the respondent can in law be permitted to maintain in such condition for such a length of time such a dangerous condition of things without more drastic means to remedy them and without more protection to those whose duty or business might call them to venture across so treacherous a spot.

I concur in the main in the reasoning adopted by the judges dissenting in the court below from the judgment of the court. I need not repeat same here.

I think the action lies at common law. The negligence was that of the respondent.

As to the point, taken by Mr. Symington, that the action would not lie in Manitoba, I think as the law of England, including the "Fatal Accidents Act" was introduced into Manitoba in 1870, and a like law in force in Ontario, that the action would lie in Manitoba where the appellant lived, and respondent had property.

See Dicey on Conflict of Laws, pages 645 to 647 —Rule 178.

In my view of the case it is neither necessary nor desirable that I should express any opinion upon the many questions raised relative to the possibility of the claim being rested upon the "Workmen's Compensation Act."

I think the appeal should be allowed with costs here and below and the trial judgment be restored.

DUFF J. — This appeal should be dismissed. There is not in my opinion any reasonable evidence to support a finding either:—

(1) That the track and roadbed at the place in question were, assuming the order as to speed to be observed, so dangerous as to make it negligence on the part of the company, *vis-à-vis* the appellant, to operate for traffic; or

(2) That it was the state of the roadbed rather than excessive speed which was the real cause of the most unfortunate and distressing accident in which the husband of the plaintiff met his death.

I refer to the argument on the question of jurisdiction for the reason only that silence might be construed as implying some doubt as to the jurisdiction of the Manitoba courts to entertain the action. The effect of the provincial and Dominion legislation [chapter 12 of the Statutes of Manitoba, passed in the year 1874 (38 Vict.) and section 6 of chapter 99, R.S.C. (51 Vict., ch. 33)] is that *primâ facie* the law of England as it existed in the year 1870 is, for the purposes of this appeal, to be regarded as the law of Manitoba. By the law of England, speaking generally, a legal

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obligation *ex delicto* (where the *res gestæ* giving rise to the obligation have occurred outside the territorial jurisdiction of the English courts) may be enforced in those courts if, according to the law of England, a like obligation would have arisen had the scene of the *res gestæ* been within that jurisdiction; *Phillips* v. *Eyre*(1), at pages 28 and 29. Nothing has been suggested to create a doubt that this is the law of Manitoba to-day. The argument founded upon the limited legislative jurisdiction of the province misses the mark. If there could be anything in it in the absence of the Dominion legislation above mentioned the argument would be disposed of by reference to that legislation. It follows, therefore, that if a right of action by common law (the law of England) became vested in the plaintiff in Ontario the obligation to which that right of action was attached would be enforceable in Manitoba. The fact that the plaintiff's right to sue in Ontario rests upon "Lord Campbell's Act" is really no objection because "Lord Campbell's Act" is in force in Manitoba: and it is literally true to say that if the scene of the *res gestæ* had been in Manitoba the right to redress independently of the "Workmen's Compensation Act" would not have been any less there than in Ontario. As to the enforceability of any obligation imposed upon the respondents by the "Workmen's Compensation Act" I have formed no opinion upon the point whether the provisions of that Act relating to notice and to dispensing with notice are of the essence of the employees' rights to such a degree as to make that right enforceable in Ontario only.

(1) L.R. 6 Q.B. 1.

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I think it is proper to add that acknowledgments are due to counsel on both sides for the very admirable way in which the appeal was argued.

BRODEUR J. (dissenting).—This is the case of a railway accident which occurred on that part of the Grand Trunk Pacific Railway which runs through the Province of Ontario.

The action was instituted in Winnipeg, the place of destination of the train on which the accident occurred. Winnipeg is also the centre of operations of the Grand Trunk Pacific Railway Company and was in that respect the place where, for the convenience of the respondent, the suit could be best tried.

The accident having occurred in the Province of Ontario was necessarily to be decided according to the laws of that province. *"Lex loci actus"* must furnish the rule to dispose of the case, as Cockburn C.J. decided in *Phillips* v. *Eyre*(1).

The company respondent has property in the Province of Manitoba and it could have been sued in the latter province although the cause of action had not arisen there.

The jury found that the accident was due to the negligence of the company.

That judgment, however, was reversed by a majority of the judges of the Court of Appeal.

The deceased, in consequence of whose death the present action was instituted, was operating as a locomotive engineer. On the line of the defendant company, there was a soft spot or sink-hole over which the trains of the defendant company ran.

(1) L.R. 4 Q.B. 225.

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LEWIS v. GRAND TRUNK PACIFIC RWAY. CO.

Brodeur J.

On the 19th of July, 1911, as the deceased was driving a freight train over this soft spot the engine was turned over and he was killed.

An order had been given that the trains should not run, at that place, at a speed exceeding five miles. It was claimed by the company that this order had not been carried out and that the accident was due to an excessive rate of speed.

The evidence is very conflicting with respect to that, and a jury could reasonably infer that the order had not been violated. With that verdict of the jury it is not within our province to interfere.

The jury has also found that the accident was due to a depression of the track caused by the weight of the engine and by a defect of construction in the road. That was also a matter for the jury to decide and the evidence is also on that point somewhat conflicting. But the jury having come to the conclusion that there was negligence on the part of the company, we should not interfere with that verdict.

In those circumstances, I think that the verdict of the jury should stand and that the judgment of the Court of Appeal, which has rejected that finding, should be reversed with costs of this court and of the Court of Appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Crichton, McClure & Cohen.*

Solicitor for the respondents: *Joseph Yates.*

JOHN RITCHIE (PLAINTIFF) ..... APPELLANT;

AND

WILLARD S. JEFFREY (DEFENDANT) ..... RESPONDENT.

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*Oct. 26.
*Nov. 29.

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

Builders and contractors—Materials supplied—Order for money payable under contract—Evidence—Estoppel—Lien—Enforcing equitable assignment—Practice.

A building contractor gave a written order upon the owner directing him to pay the sum of $800 to the plaintiff on account of the price of materials supplied for use in the building which was being erected. The order was presented to the owner and, although not accepted in writing, was held over to await the time for making payments under the contract. The contractor failed to complete the work, and it was finished by the owner at an outlay which left the balance of the contract price insufficient to meet the full amount of the order.

Held, the Chief Justice and Idington J. dissenting, that the order was effective as an assignment of money payable under the contract, but, as there was no evidence of a promise to pay the amount thereof out of the fund, or of facts precluding the owner from denying the sufficiency of what ultimately was payable to the contractor, it could not be enforced against the owner as an equitable assignment.

Per Duff J.—As the equitable relief sought could be granted only upon a consideration of all the circumstances and no claim therefor was made in the courts below nor was the evidence directed to any such claim, the claim came too late on an appeal to the Supreme Court of Canada.

Per Fitzpatrick C.J. and Idington J., dissenting.—As the conduct of the owner respecting the order was equivocal and misleading and induced the materialman to abstain from filing a lien to

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

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protect himself, the owner ought to be held liable for the full amount of the order as an equitable assignment.

The appeal from the judgment of the Appellate Division (8 West. W.R. 729) was dismissed with costs.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Ives J., at the trial, and dismissing the plaintiff's action with costs.

The circumstances of the case appear from the head-note.

Lafleur K.C. for the appellant.

Gerald V. Pelton for the respondent.

THE CHIEF JUSTICE (dissenting).—I am satisfied on the evidence that the appellant failed to file a lien under the Act because of the defendant's promise to pay Horn's order. J. W. Ritchie, when examined as a witness, says that he did not file a lien because he trusted Mr. Jeffrey would pay the order given by Mr. Horn and again on his re-examination he testifies as follows:—

Q. Did you actually at any time have any intention of filing a lien against Mr. Jeffrey's property ?

A. We would have, if he hadn't given us the assurance that he was going to pay it.

And again:—

Q. Had you consulted your solicitor about your right to file the lien ?

A. Yes.

The same witness also says that he accomplished the shipment of lumber on that understanding.

(1) 8 West. W.R. 729.

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If the appellant had filed his lien he, as material man, under the Act would have been entitled to precedence over Haugen, the sub-contractor, who was subsequently paid $558.10. To say the least, Jeffrey's conduct at the time Horn's order in favour of appellant was presented to him was shifty and ambiguous, and if in the result he led the appellant into error and induced him by his conduct and representations not to file a lien, he should be held liable.

I would allow the appeal with costs.

IDINGTON J. (dissenting).—The only question of any difficulty in this appeal is whether or not the order upon respondent for $800 by Horn, a contractor, engaged in building for him a shop for which, when completed, Horn was to be paid $3,000, can, with the attendant facts and circumstances, be held as furnishing sufficient evidence to maintain the appellant's claim of an equitable assignment of part of the said $3,000.

The shop was being erected in Jasper Park. The appellant furnished lumber therefor to an amount greater than $800, as respondent well knew. Horn, in order to give security to appellant therefor to the amount of $800, gave the following order:—

John Ritchie Lumber Co.,
Edmonton, Alta., Jan. 27, 1914.

W. S. Jeffrey, Esq.,
2005 Jasper W.

Please pay to John Ritchie Lumber Co. the sum of $800 on account of material delivered and shipped to Jasper Park.

C. R. HORN.

This order is not as unambiguously worded as was that in question in the case of *Brice* v. *Bannister* (1).

(1) 3 Q.B.D. 569.

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In that case the order expressly said it was to be "paid out of moneys due or to become due from you to me," and thus within its very terms fulfilled the exact requirements of an equitable assignment.

But we must bear in mind that it is not necessary that such an equitable assignment as in question need to be reduced to writing.

The language of Mr. Justice Chitty in the case of *Brown, Shipley & Co.* v. *Kough*(1), as quoted by Mr. Justice Beck herein, so accurately defines what is required that I think we may accept it, coupled with what Lord Macnaghten said in the case of *Tailby* v. *The Official Receiver*(2), in 1888, as our guide herein.

The quotation I refer to in the former case is as follows:—

> An agreement to pay out of the fund is a good equitable charge. It matters not whether it (the agreement) be to pay an existing debt or a sum of money advanced at the time or whether it (the money to be paid) be (the amount of) a bill of exchange; but it must be shewn on the part of those who assert an equitable charge that they have obtained it (the charge) by agreement. The agreement may be shewn by producing a written document which is clear, or the agreement may be fairly derived from the course of dealing, and, where there is a contest as to an oral agreement, the court must decide whether there is such an oral agreement or not and the plaintiffs have to make out in this case one or other of the things I have mentioned before they can succeed in establishing an agreement amounting to an equitable charge or an equitable assignment of part of the fund. An agreement may be shewn by the terms which the parties came to with reference to the supposed course of dealing and derived also from the course of dealing itself relating to transactions that have been entered into or transactions which it is proposed should be entered into, or it may be shewn by the special terms agreed to at the time when the transaction takes place.

To apply the law as laid down by Mr. James Chitty in this extract we need not go further than consider

(1) 29 Ch. D. 848. (2) 13 App. Cas. 523.

the course of dealing between the parties. That alone has not been relied upon herein for we have an order and the course of dealing illuminating, as other considerations I am about to advert to, the meaning to be given the order.

It is beyond dispute that the respondent was building a shop in Jasper Park which was being built by Horn, who gives the order; that the appellant had delivered and shipped to Jasper Park material for said building far exceeding in value the amount of the order; that the material so shipped and delivered was at the date of the order being used and ultimately was all used to the knowledge of the respondent by Horn for the purposes of the construction of said building; that respondent knew and recognized such facts and his consequent benefit therefrom and liability upon his contract as the basis upon which Horn proceeded in giving the order; that the "Mechanics' Lien Act" gave him supplying such material to the contractor for such purpose a lien upon the material till used, and upon the building itself when used in the construction thereof, and that in priority to all other liens—unless possibly wage-earners for their labour—and that the parties thereto were entire strangers to each other yet the respondent had no difficulty in understanding why the order was given, and no difficulty in recognizing that it was intended and expected to be paid out of the fund which consisted of the contract price.

The order should be read, if ambiguous, in light of the surrounding facts and circumstances. So read and illuminated thereby, can there be a doubt as to what the order meant and that it did mean that it was to be paid out of the fund in respondent's hands to pay

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for said building and to be a charge thereon and that the fund was to be administered according to the legal rights of the parties concerned in its distribution and that respondent was entitled to discharge *pro tanto* his obligation to Horn by payment of said order? I think not.

To put beyond doubt the knowledge of the respondent I may refer to the following from his own evidence:—

Q. Correct, I know, but the order which was presented to you was an order for the payment of a certain sum of money in connection with the sum of $800 on account of material delivered and shipped to Jasper Park?

A. Yes, that is what the order was for I suppose.

* * * * *

Q. You knew that they were expecting payment from you of the amount of that order?

A. I don't know hardly how to answer that; I presume Mr. Horn had told them that I would pay it without any question.

Q. And you also certainly led them to understand that it would be paid?

A. I told them that it would be paid after the building was done if it was coming to Mr. Horn.

Q. Did you always put in that "If it was coming to Mr. Horn"?

A. I think so, as near as I can remember.

Q. Beg pardon?

A. I think so.

Q. The Court: What I don't understand is why in your dealing Mr. Ritchie should be the only creditor to have to wait or lose if any one was to lose and you pay everybody else?

A. Well, Mr. Horn agreed to furnish all these materials.

Q. But you knew they were coming from Ritchie?

A. I supposed they were, yes; Mr. Horn said he was getting a lot from them; I don't know where the cement and the——

Q. Mr. Grant: You knew that Mr. Ritchie did expect to get the money from you?

A. I know they wanted it from me; they asked me; there is four occasions when they came to me for it.

Q. Now will you answer my question. You knew that Mr. Ritchie expected to get the $800 from you?

A. Why, I suppose he did.

There is much more needless to quote on the same point.

He hedges about paying it by saying he told appellant's agent if that much were coming to Horn when he had completed his contract, he would pay it. As he was under no liability to pay a single dollar till the time had arrived, I cannot see how that helps him. If he had paid no one else till then there would have been no trouble.

If labourers had gone unpaid and, what was highly improbable, their unpaid wages had eaten up the fund in liens therefor the appellant might have been left unpaid. No such thing happened.

A sub-contractor named Haugen got far more than required to pay this appellant. In short, he whose claim was in law and equity subject to be postponed to the claims of the material-men was paid. Respondent quibbles about this being for labour, pretends that at first and later on shews at least as to one item of $500 alone it was for a sub-contract.

The learned trial judge had no difficulty once he arrived at the conclusion that appellant had an equitable assignment then respondent was bound to answer for the whole amount of the order.

And the position taken in the court of appeal proceeds entirely upon the ground that there was no equitable assignment—and indeed only a bill of exchange.

For the reasons already indicated I most respectfully say I cannot accept that view.

It is quite true there is a decision (*Shand* v. *Du Buisson*(1)) that a mere bill of exchange, evidently

(1) L.R. 18 Eq. 283.

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intended as such, is not of itself an equitable assignment, and another that a cheque on a banker cannot be so held. The parties concerned herein never supposed they were dealing with either such thing, but something different.

What we have to pronounce upon herein is not of that simple character in form or intention when we try to understand what the parties were about.

The case of *Percival* v. *Dunn*(1), relied upon below, is clearly distinguishable, for the order was not even addressed to the party who had to pay and was not accompanied, so far as appears, by any attendant circumstances that helped to explain or form an independent arrangement.

The argument presented by counsel here endeavoured to shew that the court in *Brice* v. *Bannister* (2) was divided, but it has ever since stood as good law and been, I venture to think, extended in principle as the equitable doctrine became more familiar to the profession than it was when *Brice* v. *Bannister* (2) was decided, shortly after the "Judicature Act."

The case of *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*(3), though not exactly covering this case, shews how in recent times the court is disposed to treat such claims as rest upon the doctrine relative to equitable assignment.

I agree with the court of appeal that the bargaining between the respondent and the agent of appellant standing alone has little to do with the matter, yet that does not do away with the knowledge the respondent had of the plain purpose of the order to have

(1) 29 Ch. D. 128. (2) 3 Q.B.D. 569.
(3) [1905] A.C. 454.

it paid out of the fund in existence or to come into existence.

I think the appeal should be allowed with costs here and below.

DUFF J.—I have no doubt that the order in question was a good and effective equitable assignment of the fund over which the contractor should ultimately prove to have the power of disposition as between himself and the respondent. To give the appellant the right he now claims, the equitable assignment must be supplemented by something additional, that is by some act or acts of the respondent himself raising a right against him; such, for example, as a promise founded upon legal consideration or conduct precluding the respondent from disputing the existence of an equitable charge for the amount claimed. For such equitable relief no claim was made in the courts below and as such relief could only be granted as the result of an examination of the circumstances as a whole—which it cannot be said the evidence places before us—it is too late now to consider it.

As to promise—the finding at the trial is against it. On the whole I am constrained to the conclusion that the appeal should be dismissed with costs.

ANGLIN J.—Except in so far as he questioned the sufficiency of the order given by Horn to the plaintiff as, under the circumstances, a good equitable assignment, I am in accord with the views expressed by Mr. Justice Beck in delivering the judgment of the Appellate Division. There is nothing in the record which warrants extending the fund upon which that assignment should operate beyond moneys in the defendant's

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hands over which Horn had the right of disposition. The evidence does not warrant a finding of a promise by the defendant to pay upon the order in question more than this amount—and there has been no such finding. Neither does it establish a representation that the fund to which the order attached would be sufficient to meet it, or would amount to any specific sum. It may be that the plaintiff in refraining from registering a mechanic's lien relied upon his equitable assignment and the defendant's acceptance of it, but it has not been shewn that the defendant said or did anything which would warrant an inference by the plaintiff that he had relinquished in his favour his undoubted right to make out of the moneys payable to his contractor such payments as might be necessary to protect his property from liens and to ensure the completion of the building contract and to deduct payments so made from the moneys which would otherwise be payable to the contractor. The plaintiff has failed to make out a case either of a promise to pay the amount of his order or of an equitable estoppel precluding the defendant from denying the sufficiency of the fund in his hands to meet it.

I would, for these reasons, dismiss this appeal with costs.

BRODEUR J.—The defendant Jeffrey was erecting a building and a man named Horn had a contract in connection with that construction. Horn, having purchased materials from the plaintiff Ritchie, gave, on the 27th January, 1914, the following order:—

W. S. Jeffrey, Esq.,
2005 Jasper W.

Please pay to John Ritchie Lumber Co. the sum of $800 on account of material delivered and shipped to Jasper Park.

C. R. HORN.

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At the time this order was given and was notified to the respondent no money was due upon the Horn contract by Jeffrey. Horn seems to have been unable to carry out his contract and the proprietor had to pay money to third parties to finish the building. He had to pay some wages of labourers and when the building was finally completed $296.99 remained due to Horn, which he deposited in court for the plaintiff Ritchie.

It is clear from the evidence that the respondent Jeffrey never undertook to pay the full amount of the order. He was willing, however, out of the amount which would ultimately remain owing to Horn on the completion of the contract, to pay that amount to the plaintiff. It would have appeared ridiculous that he would have formally agreed to give an absolute and unconditional promise to pay when he did not know whether Horn would carry out his contract and when some liens could have been registered by wage-earners or others.

The trial judge held that this order constituted an equitable assignment; but it is necessary, in order to constitute such an assignment, that the fund should be specified (*Percival* v. *Dunn*(1)); and, besides, this order was valid subject to any claim under the contract which would have been good against the assignor.

For these reasons the appeal should be dismissed with costs.

Appeal dimissed with costs.

Solicitors for the appellant: *Parlee, Grant, Freeman & Abbott.*

Solicitors for the respondent: *Edwards, Dubuc & Pelton.*

(1) 29 Ch. D. 128.

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*Oct. 14, 15.
*Nov. 29.

ROBERT BALL AND LAWRENCE SWITHEN WHIELDON (DEFENDANTS) ..... } APPELLANTS;

AND

THE ROYAL BANK OF CANADA (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Banking—Purchase of company's assets—Bill of sale—Description of chattels—B.C. "Bills of Sale Act," R.S.B.C., 1911, *c.* 20—*Registration—Recital in bill of sale—Consideration—Defeasance—Reference to unregistered note—Collateral security—Loan by bank —"Bank Act,"* 3 *&* 4 *Geo. V., c.* 9, *s.* 76.

Under the British Columbia "Bills of Sale Act," R.S.B.C., 1911, ch. 20, any description by which the goods affected by a bill of sale can be identified is formally sufficient, as the Act does not require specific description of the chattels comprised therein.

A bill of sale given as security for the payment of a promissory note contained recitals shewing particulars of the note and that interest was payable on the amount thereof, but the rate of interest was not mentioned and the note was not annexed thereto nor registered with the bill of sale.

Held, per Davies, Idington, Duff and Brodeur JJ. that the recitals stated the consideration in a manner which substantially conformed to the requirements of section 19 of the "Bills of Sale Act," R.S.B.C., 1911, ch. 20, and the omission to annex the note to the instrument as registered was, in this regard, immaterial. *Credit Co.* v. *Pott* (6 Q.B.D. 295) followed.

Per Duff, Anglin and Brodeur JJ. (Idington J. contra.)—As the assurance was embodied in two documents, the bill of sale and the note, and one of these documents, the note, was not registered as required by section 19 of the B.C. "Bills of Sale Act," the absence of a complete statement of the terms of defeas-

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

ance in the bill of sale rendered it void as a security to the bank. *Cochrane* v. *Matthews* (10 Ch. D. 80*n*); *Ex parte Odell* (10 Ch. D. 84); *Counsell* v. *London and Westminster Loan and Discount Co.* (19 Q.B.D. 512); *Edwards* v. *Marcus* ((1894) 1 Q.B. 587), and *Ex parte Collins* (10 Ch. App. 367), referred to.

As part of the consideration of an agreement by which the bank acquired the office site and business of a trust company the bank became responsible for the claims of persons who had deposited money with the company and, to secure the bank in respect to this liability and form a fund to meet payments to depositors, the company gave the bank a promissory note for the amount of the deposits and assigned assets to the bank which included, amongst other securities, the bill of sale above mentioned.

Held, per Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ. (Idington J. contra), that the transaction was not a loan of money or an advance made by the bank in contravention of section 76, sub-sec. 2 (*c*), of the "Bank Act," 3 & 4 Geo. V., ch. 9, but a legitimate exercise of the powers conferred by the Act.

Per Duff J.—If the transaction were to be considered as a loan it would, nevertheless, be unobjectionable because it would be a loan upon the security of an "obligation" of a corporation within the meaning of clause (*c*) of the first sub-section of section 76 of the "Bank Act," and it is immaterial that the "obligation" was secured by a charge upon the property of the corporation.

The judgment appealed from (22 D.L.R. 647; 8 West. W.R. 734) was reversed, Fitzpatrick C.J. and Davies J. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia(1) affirming the judgment of Murphy J., at the trial(2), by which the plaintiff's action was maintained with costs.

The material circumstances of the case are sufficiently stated in the head-note.

J. W. deB. Farris for the appellants.

Geo. F. Henderson K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—The claim in this case is under a bill of sale, a form of security

(1) 22 D.L.R. 647; 8 West. W.R. 734; *sub nom. Royal Bank of Canada* v. *Whieldon.*

(2) 20 B.C. Rep. 242.

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beset with difficulties and a fruitful source of litigation. In the case of *Thomas* v. *Kelly*(1) Lord Chancellor Halsbury said:—

> My Lords, I cannot say that any construction of this obscure statute (the "Bills of Sale Act") seems completely satisfactory or gives an adequate solution to all the difficulties suggested in the argument,

and Lord Macnaghten used even stronger language, saying the Act was beset with difficulties which could only be removed by legislation. The difficulties presented by the British Columbia statute are, I think, no less and, as it differs from the English Act, we have not so much assistance from decided cases.

The defendant, the present appellant, raised many points but, at the argument before this court, two were, I think, mainly relied on; the first being the alleged insufficiency of the description of the goods and chattels covered by the bill of sale and the second that the transaction by which the respondent acquired the chattel mortgage is void under the provision of the "Bank Act," ch. 29, R.S.C. 1906, sec. 76, sub-sec. 2, par. (*c*).

That the description is quite inadequate for a proper bill of sale must, I think, be conceded; neither the nominal enumeration of the three items in the schedule nor the general words afford any satisfactory means of identification of the goods and chattels intended to be covered by the bill. There is granted, first, the three enumerated items of which the identification is not sufficient; I refer to the similar cases of *Carpenter* v. *Deen*(2), and *Davies* v. *Jenkins*(3).

Secondly, the goods on the farm at the time of the

(1) 13 App. Cas. 506. (2) 23 Q.B.D. 566.
(3) (1900) 1 Q.B. 133.

making of the instrument; these are, of course, not identified so that it can be said that they are still on the land at the time when the mortgage is put in force.

And thirdly, after-acquired property which may be brought on the farm.

In truth a grant such as this is not so much a bill of sale as a floating charge, that is a charge on whatever happens to be on the farm at the time when it is called into operation.

Under the English "Bills of Sale Act" no such charge can be given, as section 5 of the Act of 1882 (45 and 46 Vict. ch. 43) makes void, except as against the grantor, a bill of sale of any personal chattels of which the grantor is not the true owner.

In the case before the House of Lords of *Tailby* v. *Official Receiver*(1), at page 540, Lord Fitzgerald said:—

> In a case recently before the House, Your Lordships considered that the policy of the "Bills of Sale Act" of 1882 was to prohibit, in cases coming within its provisions, bills of sale of property not in existence, but which might be acquired thereafter.

Even if permissible in British Columbia, it is only equitable title that the grantee can obtain in such after-acquired property.

In the case of *Jones* v. *Roberts*(2) (in 1890), Fry L.J. said that this question of specific description in bills of sale was perpetually re-appearing and was always embarrassing. The necessary description varied according to the circumstances of each case.

The question always was—Was the description one which could reasonably be required to assist in

(1) 13 App. Cas. 523. (2) 34 Sol. J. 254.

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identifying the particular property in question ? The description (in the particular case) was sufficient to diminish the difficulty of identifying the property in case an execution were put in.

Though, as will appear from the above remarks, I have some hesitation in holding that the description of the goods and chattels is sufficient, I do not on the whole think there is occasion for this court to avoid the bill of sale on the ground of its being insufficient.

Both the trial judge and the judges of the Court of Appeal of British Columbia have declared themselves satisfied of the identity of the goods and chattels covered by the bill of sale with those sold by the appellant and that being so, I think the judgment should not be disturbed.

I have not thought it necessary to examine into the validity of the registration of the sale. Under section 19 of the British Columbia "Bills of Sale Act," a bill of sale is not void for failure to comply with its requirements. It is only the registration that is void. The British Columbia Act is taken apparently from the Imperial Act of 1878 which did not require registration in all cases for the validity of a bill of sale; this is only provided by the amendment Act of 1882, sec. 8.

In the "Bills of Sale Act," R.S.B.C., 1897, sections 11 to 14 are under the caption "Effect of Registration," and section 15, "Result of non-Registration."

In the British Columbia Court of Appeal, McPhillips J.A. insists

> that the appellant Ball was in no way a purchaser for value or otherwise entitled to the goods and chattels sold by him * * * The appellant in making the sale of the goods was selling not his goods, but the goods of the defendant Whieldon.

If it is true that the grantor of the bill of sale remained the owner of the goods, there is an end of any question, because the bill of sale certainly could not be void as against the grantor.

If, however, this is not the effect of the deed of the 11th August, 1913, it is still necessary for the appellant to shew that he is one of the persons as against whom the British Columbia "Bills of Sale Act" provides that an unregistered bill shall be void.

Section 7 of the Act is set out at page 6 of the respondent's factum, but he does not hazard any suggestion as to which of the class of persons therein enumerated he belongs.

As regards paragraph (*a*) in this section it may be noted that the Imperial statute reads:—

> As against all trustees or assignees of the estate of the person whose chattels or any of them are comprised in such bill of sale *under the law relating to bankruptcy or liquidations, etc.*

The words italicized are omitted in the British Columbia statute.

Even without such assistance as the comparison gives for reading the British Columbia provision, it does not seem possible that the appellant can be within any of the classes enumerated.

As for paragraph (*d*) the appellant cannot be considered a purchaser. He was entitled to hold neither the goods nor the purchase money.

I am not disposed to attach much importance to the point of a suggested contravention of the "Bank Act." The transaction was one of legitimate banking business and the taking over of this security was a small incident such as in no way brings it within the purview of the provisions of section 76 of the "Bank Act."

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The opinion that the taking by the respondent of the mortgage security is an infringement of the prohibition contained in section 76 of the "Bank Act" appears to be based on the assumption that "the company did not sell its business to the bank." I venture to suggest that this is not borne out by the facts and the agreement of the 13th January, 1913. It is not, of course, the opinion of the judges of the Court of Appeal of British Columbia. The trial judge says "the agreement was for the purchase of a banking business"; and McPhillips J.A.:—

> The People's Trust Company had engaged in business—in some respects analogous to that engaged in by a bank subject to the "Bank Act," but not in contravention of it—and to acquire the business so carried on was, in my opinion, the doing of something by the Royal Bank appertaining to the business of banking.

Turning to the agreement of the 13th January, 1913, whatever its effect, it certainly purported to dispose of the business of the trust company because it recites (*inter alia*) that the company had been carrying on business as agents and trustees and as the receivers of moneys paid on deposit at South Hill and various other places in British Columbia and that the company was desirous of selling the said business at South Hill to the bank and had agreed with the bank, for the consideration thereafter appearing, to transfer to the bank the business together with the office, etc. And it was witnessed (*inter alia*), by paragraph 9, that the company should hand over to the bank all documents relating to all business carried on by the vendors at South Hill aforesaid except as there mentioned and, by paragraph 10, that the company should in no wise attempt to procure or induce any of the depositors to thereafter continue their business with the company or any of its other branches.

It would seem that one must naturally arrive at different conclusions concerning the effect of the agreement of 13th January, 1913, and its legality according as the transaction is considered as being only a sale of the property, and a separate arrangement for discounting the company's note, or as one transaction for transferring to the bank the whole business of the company of which these are two incidental terms specially provided for. In the former case it might be contended that there was an advance on security prohibited by the "Bank Act," but in the latter case the transaction is proper banking business, the loan is not made on the security of goods and the taking over of the security is merely incidental to the transaction, no evasion of the Act, and not to be considered as even technically within its prohibition.

I may add that I very much question whether the appellant was entitled to plead this as a defence to the action.

I am of opinion that the appeal should be dismissed with costs.

DAVIES J. (dissenting).—There were several substantial questions argued upon this appeal. First, it was contended that the bill of sale in question did not contain a true statement of the note or debt for the payment of which it was given as collateral security and that the note itself or, at any rate, a true copy of it should under the statute have been annexed to the bill of sale.

I agree with the Court of Appeal for British Columbia that the question is concluded by the case of *Credit Company* v. *Pott*(1), and that the recitals in

(1) 6 Q.B.D. 295.

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the bill of sale in question in this appeal state with substantial accuracy, though perhaps not with strict or technical accuracy, the facts of the indebtedness due from the grantor to the grantee which the bill of sale was given to secure. It is true that neither the note nor a copy of it was attached to the bill of sale, but the recitals contain the date and the amount of the note, the time when it became payable and that it carried interest. No question was or could be raised as to the *bona fides* of the transaction and it seemed to me the objection was reduced to this that the omission to state, in the recital of the note in the bill of sale, the *rate* of interest it carried, although all other particulars were correctly recited, was fatal as not complying with the statute. But in my judgment, if the case of *Credit Company* v. *Pott*(1) is good law, and I must say it commends itself to me as such, the objection cannot prevail.

It is a question whether the recitals contain with substantial accuracy a true statement of the consideration for which it was given so as to satisfy the requirements of the "Bills of Sale Act" of British Columbia.

In that case of *Credit Company* v. *Pott*(1) the bill of sale recited that B. had agreed to lend A. £7,350, and the consideration for such bill of sale was stated to be £7,350 then paid by A. to B. It was held that although no such money was then actually paid by A. to B., it being a balance due on accounts stated between the parties, and by such bill of sale was to be paid by A. to B. with interest on demand in writing, nevertheless the bill of sale "truly set forth" the consideration for which it was given so as to satisfy the statute.

(1) 6 Q.B.D. 295.

Brett L.J. (afterwards Lord Esher), says, at page 299:—

> Now I am inclined to agree that such facts are not strictly accurately stated, but then it will suffice if they are accurately stated either as to their legal effect or as to their mercantile and business effect, although they may not be stated with strict accuracy.
>
> What took place was this:—An account was stated between the parties, and it was agreed that a certain sum should be taken as the amount due to the company, and that, in consideration of the debtor giving the security of a bill of sale, the sum so due, and which might have been demanded at once of the debtor, should be held over until it was demanded in writing. That arrangement was carried out by the bill of sale in question. Then what is the effect? Why the old debt which was payable at once was wiped out, and a new debt constituted which was payable only after a demand in writing. A new credit was thus given, and the effect is the same as if after taking the accounts, £7,350, the sum found to be due, had been put into the hands of the creditors, and then handed back by them to the debtor to be repaid by him on demand in writing. Therefore, both the legal effect and the mercantile and business effect of the transaction was as if there had been an actual advance in money of the £7,350. and consequently the consideration is, I think, truly described in this bill of sale, both according to its mercantile and business effect and its legal effect.

The next objection was that the transaction between the People's Trust Company and the bank, as evidenced by the agreement of January 13th, was, so far as this bill of sale was concerned, a violation of section 76 of the "Bank Act."

Scrutinizing the transaction between the People's Trust Company and the bank as a whole, I have had no difficulty in reaching the conclusion that it was one with respect to which, as said by Chief Justice Macdonald, neither party had any intention of evading the "Bank Act." I think that it was within the permissive sections of that Act and I do not think it can be held to be a transaction violating any of the prohibitory sections of that Act.

I cannot for a moment believe that, in taking the

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assignment of the People's Trust Company's assets and making the advance to that company it did on the security it took, the bank could be held to be "lending money upon the security of any goods, wares or merchandise" within the prohibition of sub-section (*c*), para. 2, of section 76.

The mere fact that for one of the many notes transferred to the bank as collateral security for its advances the trust company held a bill of sale as collateral which also passed to the bank does not create such a condition as is covered by this prohibitory section. We must ascertain and scrutinize with care the *real* transaction, and if and when one finds that to be within the bank's general powers he will be slow to hold that the inclusion and transfer as a part of the larger transaction of a trivial debt and its collateral security upon goods and chattels would necessarily make that security void in the hands of the bank. I venture to say that the existence of this bill of sale as collateral security to one of the many promissory notes transferred to the bank never entered into the calculations of any one and I cannot hold that in taking an assignment of it under the circumstances it did the bank was guilty of any violation of the section of the Act referred to prohibiting the "lending of money upon the security of goods, wares and merchandise."

Then as to the last point taken, namely, the identity of the goods sold, I think there was evidence justifying the inference of the trial judge as to such identity and that his conclusion and that of the Court of Appeal was correct.

The appeal should be dismissed with costs.

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IDINGTON J.—The respondent recovered judgment against appellant for the sum of $1,136.30, being the amount of a promissory note secured by a chattel mortgage upon certain goods and chattels of which appellant became possessed and disputed respondent's right to enforce the chattel mortgage against him.

Of the several objections taken by appellant arising out of the alleged invalidity of the chattel mortgage itself, I agree with the courts below that he must fail therein.

The consideration is truly set forth within the meaning of the "Bills of Sale Act" according to what was held by the Court of Appeal in England in the case of *The Credit Co.* v. *Pott*(1), when construing the English Act using substantially the same language.

The omission (if there was in fact such) to annex to the registered instrument a copy of the promissory note which was to be secured thereby seems of no consequence in face of the full description thereof in the document itself. The allusion therein to its being annexed, if in fact it never was annexed, may well be treated as surplusage, having under such circumstances no meaning.

If, in fact, there was a copy of the promissory note annexed to the instrument, it was quite competent for the appellant to have not only shewn that fact, but also to have made of it anything found arguable by shewing that it substantially varied from that described in the instrument.

In default of his having done so I think it must be presumed that the certified copy of the instrument

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contains all that was registered, and that treated in the way already suggested.

Rather changing, I suspect, the ground taken in the court below reliance is put by appellant upon the provisions in section 19 of the Act, providing

> if the bill of sale is made or given subject to any defeasance or condition or declaration of trust not contained in the body thereof, etc.,

then that is to be written out and registered under pain of nullity of the instrument.

It seems to me quite clear that this promissory note is within the plain ordinary sense of the words "contained in the body" of the instrument, and the defeasance clause therein expressly provides that it is upon payment

> of the aforesaid promissory note at maturity or any renewal thereof and all interest in respect thereof, etc.,

that these presents shall cease and be utterly void.

I fail to comprehend where any other defeasance or condition has been found. I cannot conjure it up, unless something more to rest upon than my imagination, which is too inactive to supply the obvious requirement of the section to give vitality to the objection.

This is not the case of a mortgage given for a debt and a promissory note given for same debt is outstanding but never referred to in the mortgage. Nor is it a case of two promissory notes for same thing or different things intended to be covered by the same mortgage.

The only formidable objection, as it appears to me, set up by appellant to the respondent's right of recovery is, that its title to the mortgage rests upon what is an infringement of the prohibition contained in section 76 of the "Bank Act," which reads:—

76. Except as authorized by this Act, the bank shall not either directly or indirectly:

(c) lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements or immoveable property, or of any ship or other vessels, or upon the security of any goods, wares and merchandise.

It is to be observed that this is such an absolute prohibition as to render such a transaction as within its terms illegal. To apprehend correctly what was done a brief statement of the facts is necessary.

The People's Trust Company seems to have been engaged in a quasi-banking and insurance business, when the respondent, desirous of acquiring its place of business at South Hill, in South Vancouver, in which to establish a branch bank, made a bargain with it for the purchase of the building and its contents, excepting the safe and its contents, for the price of $12,500. That was a perfectly legitimate transaction and was, I assume, the chief motive leading up to what followed. But the chief motive does not cover all that was done.

The company had in course of its business obtained money from its customers, by way of deposits earning four per cent. per annum interest, to the total amount of $30,341.31 and acquired, presumably by using said moneys in way of so loaning, and obtained in course of doing so, promissory notes and bills of exchange and other securities for the re-payment thereof to the amount of $25,578.50.

The assignment upon which the respondent's right to maintain its action and uphold the judgment now in question must rest, recites said facts and further recites as follows:—

And whereas the company is desirous of selling the said business at South Hill to the bank and also of providing for the payment to

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the said depositors at the branch at South Hill aforesaid of the amounts due to them with interest, and for the transfer of the various securities held by the company as collateral security for the payments to the said depositors by the bank.

And whereas the company has agreed with the bank for the consideration hereinafter appearing to transfer to the bank the business carried on by the company at South Hill aforesaid, together with the office and office premises and the contents thereof, and also the moneys deposited by various depositors through the said branch of the said company at South Hill aforesaid, and the securities, bills of exchange, and promissory notes hereinafter mentioned.

And whereas the company has agreed to pay to the bank the difference between the amount of such deposit accounts and the total amount of such promissory notes and bills of exchange in cash upon the completion of this agreement.

Such is the scope and purpose of the agreement relied upon by which, in its operative part, the company agrees to transfer to respondent all the premises of the company as described, and all goods therein as described in a schedule, and the said deposit accounts (whatever that may mean) enumerated in a schedule.

It then proceeds as follows:—

The company shall forthwith upon the transfer of the said accounts pay to the bank a sufficient sum to pay in full the total amount of ($30,341.31) so deposited with the company by any depositor in accordance with the said schedule, *which said sum shall be realized by the discounting by the bank of the promissory note referred to in clause 5 hereof, and the deposit of the proceeds with the bank.*

5. The company shall execute and deliver to the bank its promissory note for the said sum of thirty thousand three hundred and forty-one and 31/100 ($30,341.31) dollars payable to the bank on demand, with interest at eight per cent. (8%) per annum as well after as before maturity, which said promissory note shall be indorsed by R. D. Edwards, E. H. Mansfield, W. A. Pound J. B. Springford, H S. Rashleigh, Musgrave Norris, A. A. Falk, Charles C. Kilpin, A. Smith and J. K. Burden, the directors of the company.

6. The company shall also forthwith upon the execution of the agreement transfer and deliver to the purchaser the various promissory notes and bills of exchange in the hands of the company made by the customers of the said company in accordance with the third schedule hereunto annexed, *together with all securities for the payment thereof, held by the company,* which said promissory notes,

bills of exchange, *and securities* shall be dealt with in the manner hereinafter appearing.

It further provides:—

11. The said sum of thirty thousand three hundred and forty-one and 31/100 ($30,341.31) dollars, to be paid to the bank as hereinbefore set forth, shall be deposited to the credit of the company with the said Royal Bank of Canada in a special account to be opened as the People's Trust Company account in trust for depositors of South Hill branch, the said sum being derived from the proceeds of the promissory note to be given by the company and indorsed by the directors of the company as hereinbefore set forth, and neither the said company nor the said directors shall be at liberty to withdraw any portion of the said sum until the whole of the said depositors have been paid in full and the liability of the said company and the said directors to the bank, and the said depositors is completely discharged, and thereafter such sum as remains to the credit of the said company shall be repaid by the bank to the company.

* * * * *

13. The bank shall pay upon the said promissory note for thirty thousand three hundred and forty-one and 31/100 ($30,341.31) dollars, hereinbefore mentioned, the amount which may be collected by the bank on account of the promissory notes and bills of exchange due to the company and by the securities collateral thereto transferred to the bank pursuant to clause 6 hereof.

There are provisions for working out the scheme thus provided for protecting the depositors and for the application of the payments received from said bills, promissory notes and other securities, upon said promissory note for $30,341.31 to be given by the company and indorsed by the directors and also for returning any of said bills, promissory notes or other securities within six months if the bank should so elect, but if it did not so elect within that time they shall, as to all not so returned, at expiration thereof be deemed to be and shall be taken over by the bank as and for its own use and benefit and the company shall thereupon become entitled to credit therefor.

There is then the following clause:—

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In consideration of the premises and upon the due transfer of the various property, real and personal, to be transferred by the company to the bank as hereinbefore set forth, the bank shall pay to the company the sum of twelve thousand five hundred ($12,500) dollars.

There follows a clause of indemnity of company and directors who, by the way, were not parties to anything except to the note.

The contention set up is that this was an agreement providing for the advance of money upon the "security of goods, wares and merchandise."

There can be no doubt surely that the promissory note of the company, indorsed by the directors, was in the very language of the instrument discounted to raise the desired and needed sum set apart to meet a class of the company's obligations.

There can surely be no doubt that, *pro tanto*, the amount of this chattel mortgage was a substantial part of the security upon which the advance was made. The company evidently was in deep water at the time. Its directors as indorsers had a right on the face of the agreement, and leaving aside for the moment all question as to the effect of section 76, to look to that as part of their protection. If not illegal the bank could not discard, if it would, save under the six months' option, that part of the transaction, and insist upon the sureties so indorsing paying up and being disentitled to assert the ordinary rights of a surety and receive a transfer of that given the bank in way of security.

In passing I may say that the security of this chattel mortgage was, in one sense, so clearly severable from the rest of the transaction that its relation thereto may, in some aspects of the matter, be arguable as not tainting the entire obligation; especially in view

of the provision that it was not scheduled or specifically named in the agreement and that the bank had a right for six months for any reason it saw fit, or without reason, to reject it.

Does that make any difference herein? It may well be that the bank could say it was through an oversight this was not rejected within the six months and that it never would have deliberately accepted a chattel mortgage "on goods, wares or merchandise" or mortgage on real estate as part of the security presented and in view at the time of agreeing to the advance upon which it made same.

Assuming that, which I think quite probable, I am not disposed to think in such a peculiar case the consequences of a violation of the Act must necessarily taint the whole transaction.

The rule is that any part of the consideration of a contract being illegal, renders the whole void.

Can it be said with this right of rejection of the evil part that it vitiated the whole?

However that may be it is the question of the title of respondent that we must pass upon herein. And when it asserts the title it sets up it can only rest it upon the security having been part of the original consideration which never can within the law form part of the security, given contemporaneously with the agreement to make the advance which is made to rest thereon.

It so happens that there is no other title possible here for the bank to rely upon. It got an assignment later, but that was too late as an assignment for creditors had intervened. Hence, it comes back to the question of its possibly forming part of the original consideration or nothing.

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It is only the comprehensive language of paragraph 6 of the agreement and others in accord therewith which carry an equitable assignment of the mortgage in question.

And if we give this a fair construction can we impute to the respondent the intention to bargain thereby for that which would by the taking thereof vitiate the whole ? I incline to think not.

If anything had transpired later between the parties, say at the end of six months, when the taking of the mortgage then might have been interpreted as taking an additional security for a past debt, that would have been quite legal. I can find nothing in the case to rest such a holding upon.

It is said the motive of the whole transaction was the purchase of the property and the business of the company, but it is distinctly a contract of a two-fold character. One relates to the purchase of the property and the other to the discounting of the company's note secured by the indorsement of the directors for a purpose entirely separate from the purchase.

If the company had chosen to go to another chartered bank and there discount the note indorsed by its directors, with the same collaterals including this chattel mortgage as security, and made same arrangement relative to the fund in every way, could there be any doubt of the invalidity of such a transfer of the chattel mortgage ?

It is not true that the company sold its business to the bank. It sold its business site and furniture for $12,500. It recites the absurdity of selling its indebtedness to the depositors, but can that be treated seriously ? I think not.

The cases cited and relied upon do not seem to me to have much bearing upon the point raised herein.

The case of *Bank of Toronto* v. *Perkins*(1) is distinctly against the respondent.

It has occurred to me possibly the indorsers as sureties might have an equity to have the mortgage applied, but that I imagine would be only by way of subrogation, and I fail to find any equity on the part of the respondent through them in face of the express terms of the contract, which I interpret as excluding any intention to cover this mortgage. Indeed, no such argument was put forward.

The suggestion that the transaction was in fact a purchase of the securities including this chattel mortgage, seems to me at variance with many provisions and stipulations in the agreement. If it had provided at the expiration of six months it might take over the securities and give up the company's note indorsed by the directors, such an argument might have been tenable and, at all events, what we should have expected to find if a sale and purchase of securities had been its purpose.

It might be arguable that the phrase "goods, wares and merchandise" does not cover farm stock. No such argument was hinted at, but I have considered such a possible argument and concluded that the word "goods" does cover farm stock though it certainly does not cover every kind of personal property.

Standard dictionaries such as "Murray," the "Century" and the "Imperial" have nothing to enlighten us in regard to the meaning of the word "goods." The various definitions given by Stroud certainly indicate

(1) 8 Can. S.C.R. 603.

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that it does not cover every kind of personal property, and as defined by Bouvier I find the following:—

> Goods, wares and merchandise. A phrase used in the "Statute of Frauds." Fixtures do not come within it: I. Cr. M. & R. 275. Growing crops of potatoes, corn, turnips and other annual crops, are within it; 8 D. & R 314; 10 B. & C. 446; 4 M. & W. 347; *contra*, 2 Taunt. 38. See Addison, Contr. 31; Blackb., pp. 4, 5; 2 Dana 206; 2 Rawle 161; 5 B. & C. 829; 10 Ad. & E. 753. As to when growing crops are part of the realty and when personal property, see 1 Washb. R.P. 3.

The rest of the definition in Bouvier evidently relates to the sense in which the word is used by local legislatures. I think we must take it that coupled with the other words as in the phrase quoted it cannot mean personal property in the wide sense of the term such as promissory notes, bills of exchange or the like securities. Experience teaches us that bankers who have never hesitated in advancing upon collaterals of the latter description would certainly hesitate to take a chattel mortgage upon goods such as those now claimed herein.

I regret to have to come to the conclusion I have, but the long-standing policy of the "Bank Act" is so distinctly against countenancing loans by a bank on real or personal (so far as defined by the term "goods, wares and merchandise") property, that I think it should be adhered to and the appeal allowed and the judgment below reversed with costs.

DUFF J.—(1) As to the chattel mortgage.

(*a*) The description and identification of the goods. The description is formally sufficient, the British Columbia "Bills of Sale Act" not requiring a specific description of the property comprised in the bill of sale; any description by which the goods can be

identified being admissible. Of the identification of the goods I think there was evidence.

(*b*) As to the statement of consideration. The point is covered by *Credit Co.* v. *Pott*(1).

(*c*) The objection from which at present I see no escape is based upon the fact (which I must, I am afraid, unavoidably find) that the "assurance" was embodied in two documents, one of which was not registered.

It is possible that the copy of the promissory note recited as being annexed and marked "B" was in fact annexed at the time of the execution; but, if so, the whole document was not registered because the registrar's certificate is conclusive that the document put in evidence is a true copy of the document registered. If there was no such copy then the "assurance" was embodied in the two documents executed, the bill of sale, so called, and the promissory note. Whether the "assurance" was embodied in these two documents or only in the document executed and registered is, of course, a question of fact; but I do not see how I can find otherwise than as above indicated. The purport and intent of the "assurance" is to charge the goods with the payment of the principal and interest of the promissory note. The extent of this charge could only be ascertained by an examination of the note; and the two documents being executed at the same time, I think, having regard to the circumstances, I must hold as a fact that the note was part of the "assurance." This is consonant with the general effect of the earlier decisions upon the Act of 1854. See the

(1) 6 Q.B.D. 295.

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judgment of Lindley J. in *Cochrane* v. *Matthews*(1), and the judgment of James L.J., *Ex parte Odell*(2), in the same volume, and the judgment of Lord Esher in *Counsell* v. *London and Westminster Loan and Discount Co.*(3), at page 515.

(2) As to the objection based upon the "Bank Act."

It was intended no doubt that in certain eventualities the bank should be entitled to assume the position and exercise the rights of a lender holding the promissory notes, etc., * * * of the trust company as collateral security for an advance. Assuming this to be so, I am inclined to think that the provisions enabling the bank to assume that position ought to be regarded as merely subsidiary to the main purpose of the contract which was a sale and purchase of assets and as such quite unobjectionable.

But taking the most extreme view as against the bank, the loan was a loan upon the security of an "obligation" of a corporation within the meaning of section 76, sub-section 1, para. (*c*) of the "Bank Act" and that being the case it is quite immaterial that this obligation was secured by a charge on the property of the corporation.

ANGLIN J.—Reluctantly, because a chattel mortgage taken with unquestionable good faith to secure an honest debt will be avoided on what may be regarded as a technical ground, I have reached the conclusion that the omission of the rate of interest from the recital in it of the promissory note of the mort-

(1) 10 Ch. D. 80*n*. (2) 10 Ch. D. 76, at p. 84.
(3) 19 Q.B.D. 512.

gagor thereby collaterally secured, which was not otherwise registered, is fatal to the validity of the mortgage under section 19 of the British Columbia "Bills of Sale Act." Without a statement of the rate of interest, the mortgage did not "contain" the entire terms of defeasance. These could only be learned by referring to the promissory note. No doubt upon registration of the mortgage everybody was put on inquiry as to the contents of the promissory note and, had that met the requirements of section 19, the mortgage might be upheld. *Winchell* v. *Coney*(1). But, in order to prevent fraud, the scheme of the statute is that the extent of the interest both of the creditor and of the debtor in the property should appear upon the registered document itself.

If the words in the mortgage recital, "at interest," conclusively imported the statutory rate of interest and if the mortgage would be defeasible on payment of the principal secured with interest at that rate, regardless of the rate stipulated in the promissory note, the latter might possibly be regarded as an additional security such as was held not to require registration in *Ex parte Collins*(2). But see *Edwards* v. *Marcus*(3), which seems to be, if anything, a stronger case than that now before us and much in point.

Here it is clear from the defeasance clause in the mortgage that it is redeemable only on payment of the promissory note according to its terms. It would, therefore, seem clear that the parties committed their contract to two instruments, that its whole tenor and effect could be ascertained only from both, and that,

(1) 34 Alb. L.J. 210. (2) 10 Ch. App. 367.
(3) [1894] 1 Q.B. 587.

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unless the full terms of the note were inserted in the chattel mortgage, it was necessary that the note itself should be registered. It was only by payment of the note that the mortgage could be satisfied. I cannot distinguish this case in principle from *Counsell* v. *London and Westminster Loan and Discount Co.*(1), relied on by the respondent. See, too, *Re Odell*(2).

What I have written suffices for the disposition of the appeal, but, having regard to the great importance of the question raised on the "Bank Act," I think I should express the view which I entertain upon it.

The substance of the transaction between the People's Trust Company and the Royal Bank was as follows. Its purpose was the taking over by the latter of the business of the former at South Hill. This entailed the assumption by the bank of the liabilities of this branch of the trust company's business as well as the acquisition of its assets. As to the latter the bank was prepared to take and pay for only such of them as it should, upon investigation, find to be worth purchasing. This involved the allowance of a period of time within which the bank might elect to take or to reject any of the assets. On the other hand, in order that the good will of the business to be taken over should be preserved, it was necessary immediately to provide for the payment of the liabilities assumed, especially for the claims of depositors. These latter amounted to $30,341.31. The assets in outstanding book debts and securities to be taken over had a face value of $25,578.50 which, if all the securities should be accepted by the bank, would be the amount to be

(1) 19 Q.B.D. 512. (2) 10 Ch. D. 76.

paid in respect of them to the trust company. The company agreed immediately to transfer all the book debts and securities to the bank and to pay it a sum which, added to their face value, would make up $30,341.31, which amount the bank on its part agreed to put to the credit of a special account to meet the claims of the company's depositors. To further secure itself the bank took the company's note for the whole $30,341.31. The company and its directors further bound themselves to immediately replace with its cash equivalent at face value any security which the bank should reject during the period of six months allowed for election. Book debts and securities not so rejected were to be deemed, after the expiry of that time, the unconditional property of the bank, and the company was to be entitled to credit for the face value thereof.

This was, in my opinion, a legitimate banking transaction and, while the agreement no doubt refers to the advance of the $30,341.31 as made upon the company's promissory note and the transaction took that form, its substance was the setting aside by the bank of that sum as the contingent purchase price of the assets handed over to it.

As to $4,764.81 paid in cash by the company to the bank contemporaneously with the taking over of the assets, the note was the merest form. It represented neither a loan nor a liability of the makers. As to the balance of $25,578.50 the note in fact served as security to the bank for the re-payment to it of the face value of such assets (if any) as it should reject. The transaction, in my opinion, was not within the

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mischief aimed at by section 76(*c*) of the "Bank Act" and should not be held to contravene it.

BRODEUR J. concurred with Duff J.

Appeal allowed with costs.

Solicitors for appellants: *Affleck & McInnes.*

Solicitors for respondent: *Tupper, Kitto & Wightman.*

THE CANADIAN PACIFIC RAILWAY (DEFENDANTS) ..... APPELLANTS;

AND

FRANKLIN SEAFORD JACKSON (PLAINTIFF) ..... RESPONDENT.

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*Oct. 27.
*Nov. 29.

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

Damages—Verdict—Excessive award—Personal injuries—Complete reparation—Loss of prospective earnings—Pain and suffering—Evidence—Mortuary tables—Practice—New trial.

Where, from the amount of the damages awarded and the circumstances of the case, it does not appear that the jury took into consideration matters which they should not have considered, or applied a wrong measure of damages, the verdict ought not to be set aside or a new trial directed simply because the amount of damages awarded may seem excessive to an appellate court. Duff J. dissented on the ground that a jury appreciating the evidence and making due allowance for the risk of accident, apart from negligence, in the hazardous pursuit in which the plaintiff was employed, could not have given the verdict in question.

Per Idington and Anglin JJ.—The evidence of a witness testifying in regard to estimates based on mortuary tables in use by companies engaged in the business of annuity insurance is admissible, *quantum valeat*, notwithstanding that he may not be capable of explaining the basis upon which the tables had been prepared. *Rowley* v. *London and North Western Railway Co.* (L.R. 8 Ex. 221), and *Vicksburg and Meridian Railroad Co.* v. *Putnam* (118 U.S.R. 545), referred to.

Judgment appealed from (8 West. W.R. 1043) affirmed, Duff J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) affirming (on

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

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an equal division of opinion) the judgment entered at the trial, by McCarthy J. upon the verdict of the jury in favour of the plaintiff.

The circumstances of the case are stated in the judgments now reported.

O. M. Biggar K.C. and *Geo. A. Walker* for the appellants.

Frank Ford K.C. and *G. M. Blackstock* for the respondent.

THE CHIEF JUSTICE.—The respondent, an engine-driver in the employ of the appellant company, was severely injured whilst in the performance of his duty. The jury found the appellant

> guilty of negligence from the fact that the mail crane was in faulty condition and that the plaintiff was injured by it in the performance of his duty.

They awarded the plaintiff $27,000 damages.

I have no hesitation in saying that in my opinion the amount of the damages is too large. There is, however, a general consensus of authority that it is for the jury alone to fix the amount of damages to be awarded in an action and that under ordinary circumstances the verdict should not be set aside merely on the ground that the damages appear excessive. Where the damages are manifestly so unreasonable that no body of twelve men could have honestly given such a sum, or where it is shewn that in arriving at the amount the jury took into consideration something which they ought not to have taken, or failed to take into consideration something which they ought to have taken, there may be ground for the court to set aside the verdict. It is not, however, a ground

for interference that the damages seem to the court too large and more than would to most people have seemed ample.

One might assume that the jury have not sufficiently taken into account the accidents of life, and that they probably misapprehended the effect of the figures in the actuarial tables produced, but, with all respect, I do not think that is sufficient to justify us in granting a new trial on the ground that the jury have gone beyond a figure which any jury of reasonable men properly informed as to the question which they were to decide could have reached.

In *Thoms* v. *Caledonian Railway Co.*(1), Lord Kinnear said:—

> Now it is impossible to read the account of this man's history and his present position without seeing that no amount of damages could ever be considered as real compensation for the personal injury he has suffered. It is obvious that that is not a consideration which can be pressed to any logical conclusion because the result of it would be that the defender, in a case of personal injury, might be ruined, and yet the pursuer not compensated. And, therefore, that cannot be treated as a ground for any exact or logical estimate of damage, but I think it is a consideration which may fairly lead us to think that, upon a question of this kind a larger latitude, within the bounds of reason, is to be allowed to a jury than upon matters which are capable of anything like exact calculation.

The same might well be said of the respondent in the case as it comes before us.

This court held in *Fraser* v. *Drew*(2), that where a case has been properly submitted to a jury and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial judge was dissatisfied with the verdict.

(1) [1912-13] Ct. of Sess. 804. (2) 30 Can. S.C.R. 241.

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The case of *The Canadian Pacific Railway Co.* v. *Roy,* decided in this court in November, 1913, might be consulted with advantage. On that appeal the only question pressed was as to the amount of the damages.

That the damages were excessive, was the only ground for setting aside the judgment that was urged by the appellant at the argument before us. I do not think the damages, though undoubtedly high, are so excessive as to warrant the interference of this court on that ground. I do think, however, that the trial judge did not direct the jury as fully as was desirable as to the measure of damages which the plaintiff was entitled to recover. True, he told them that they were not to award punitive damages, but the instruction would, I think, have been more intelligible to lawyers than to a jury of laymen. I cannot help thinking that the amount of the damages awarded indicates that the jury did not properly appreciate the considerations on which they had to assess these damages.

There is yet another serious objection to this judgment being allowed to stand. Although, as I have said, the amount of the damages was the only question discussed, on the hearing before this court, the notice of appeal by the defendants to the Appellate Division of the Supreme Court of Alberta claims that there was no evidence of negligence on the part of the defendants.

Now there was, I think, misdirection by the learned judge at the trial. After referring to the

order of the Board of Railway Commissioners, dated the 20th November, 1908, which provides that

such crane must be erected at a distance of not less than 7′ 1¾″ * * * in position,

(*i.e.*, from the centre of the track), he continues—

that briefly is the allegation of negligence on the part of the plaintiff that this crane was erected or allowed to be closer to the track than the order of the Board of Railway Commissioners provided. That question I must leave to you, whether or not that crane was permitted to be closer to the centre of the track than the order provides for. That is the question which you must determine.

And further on he says:—

The defendants in this case would be liable for the acts of their servants or workmen if they did construct this crane closer to the track than the order of the Board of Railway Commissioners provided.

It may perhaps be assumed that the order was passed for the protection of railway employees in the position of the plaintiff, though, of course, unless this were so, he could advance no claim founded upon it. The judge, however, did not instruct the jury that they must not only find a breach of the statutory duty, but also that this was the cause of the accident.

The failure to give such a necessary instruction was the main reason why the Privy Council directed a new trial in the case of *Grand Trunk Railway Co.* v. *McAlpine*(1). At page 846 the judgment reads:—

Where a statutory duty is imposed upon a railway company in the nature of a duty to take precautions for the safety of persons lawfully travelling in its carriages, crossing its line, or frequenting its premises, they will be responsible in damages to a member of any one of these classes who is injured by their negligent omission to discharge, or secure the discharge of, that duty properly, but the injury must be caused by the negligence of the company or its servants. * * *

In the last passage quoted from the charge of the learned judge

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in the present case, he did not point out to the jury that it was necessary, in order that the plaintiff should recover, that the omission to whistle or to give the warning, or both combined, and not the folly and recklessness of the plaintiff himself, caused the accident. For all that appears, the omission to whistle might not have contributed in any way to the happening of the accident. The jury, instructed as they were, may well have been under the impression that the two alleged breaches by the company of its statutory duties—the two faults of which the jury found them guilty—rendered them liable whether or not those faults caused to any extent the injury to the plaintiff or the contrary.

These are, in the main, the reasons which led their Lordships to the conclusion that a new trial should be directed.

In precisely the same way in the present case the jury, instructed as they were, may have concluded that the breach by the defendants of the order of the Board of Railway Commissioners, of the 20th November, 1908, rendered them liable whether this fault caused the injury to the plaintiff or the contrary.

Though, for these reasons, I am of opinion that there was misdirection of the jury, yet as the appellant has not raised the point I do not think this court should send the action for a new trial on this ground. The respondent ought to have had an opportunity to argue that the verdict shews, as perhaps it does, that the jury were not misled by the misdirection and that no substantial injustice has been caused thereby.

Though I find much that is unsatisfactory about the conduct of this trial and its results, I cannot say that there is sufficient ground for setting aside the judgment. I have not come to this conclusion without much hesitation, and I think it would be unfortunate if the case were to be regarded as any precedent for awarding such enormous damages in similar actions in the future.

IDINGTON J.—This is an appeal on the ground of excessive damages. There is nothing else put forward

to support it except the untenable objection to evidence admitted to shew how much an annuity might be purchased for. This practice of using such evidence to help a jury in arriving at a reasonable estimate has been in daily use for many years in our courts.

The objection that because a man called to testify what his company held to be the market price could not vouch for the accuracy of the tables upon which it and such life companies proceed, therefore the evidence was inadmissible, seems to me as unsound as it would be to object to the evidence of actuaries resting their estimate upon the basis of the "Carlisle Tables," for example, because none of them can vouch personally for the accuracy of the figures upon which such tables rest. The truth is the evidence which was adduced was of little value and made nothing of by the learned trial judge or the jury so far as we can see, but that is quite another thing and furnishes no ground for setting aside the trial, which seems to have been eminently fair.

It is impossible to say there was a miscarriage of justice by reason of anything connected therewith.

To come to the real ground of appeal resting upon excessive damages it may be admitted the damages are large and possibly larger than we as a jury would have assessed.

But can we say they are such as to demonstrate that the jury must necessarily have proceeded upon an erroneous basis or been moved by some indirect motives in arriving thereat?

The almost uniform course of this court has been to refuse to interfere with the mere assessment of

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damages when maintained by the local court having usually an immense advantage over us in the way of fairly appreciating the damages which must be measured in light of many local conditions.

But I must respectfully decline to accept the suggestion of counsel for appellant, and apparently some of the judges below, that the possibilities of a permanent investment producing eight per cent. per annum forms a proper basis of estimating the value of this verdict simply because that may be a fair rate of interest at the present moment.

We all know, if we can recall the economic history of other provinces, that this will not continue. And some other arguments put forward by counsel and in a measure countenanced in the court of appeal seem to me untenable.

It seems, for example, assumed, as matter of course, that the earnings of the respondent at the time of the accident must be taken as basis for life. They are properly taken in ordinary cases as basis of estimating pecuniary loss of a temporary character. But in the case of a young man only thirty-two years of age, when probably earnings would increase, being disabled for life, there is no rule of law preventing the jury from contemplating the possibilities of the future in that regard.

Again, it was even suggested that the pain and suffering of him injured could not enter into the basis of the estimate of compensation. I dissent entirely from any such proposition. Physical and mental pain and suffering have always, by law, entered into the basis of such estimates, and when these must endure for a lifetime, or the victim be reduced to the deplorable condition of the respondent, it is hard to place

the limit of an adequate compensation therefor. And the possible need of attendance to help and comfort him in decay may also be considered.

It is quite true that in cases resting upon the "Fatal Accidents Act," pain and suffering are excluded from the basis of the estimate for damages. In such cases the estimate must be confined to the mere monetary considerations bearing upon the case of survivors who have suffered in a monetary sense as well as otherwise by the death of him upon whom they were dependent for the deprivation of what they might reasonably have hoped to enjoy.

No such rule obtains in the case of him suffering and suing for such damages as caused thereby.

We may yet hear it urged that a man reduced to the impotent condition in which respondent, a young man with the prospects before him of increasing his earnings and savings and thereby adding to the comfort of his life and enjoyment thereof, when so reduced ought to be treated as a helpless creature who can enjoy life no longer and hence might as well be kept, or keep himself in some asylum or house of refuge for a few cents a day, and thereby ameliorate the sad condition of the unfortunate offender in the like position the appellant is now in.

I prefer resting as usual upon the broad common sense of an intelligent jury as being more likely to fix justly the amount which the wrongdoer should pay than to look for justice in anything which might be determined in a very logical way either thus or otherwise.

The appeal should be dismissed with costs.

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DUFF J. (dissenting).—With respect I am unable to concur in dismissing the appeal. While the charge of the learned trial judge is not in any way open to exception I have been unable to satisfy myself, after considering the whole of the evidence, that a jury appreciating the evidence and making due allowance for the risk of accident (negligence apart) in a hazardous pursuit, would have given the verdict now before us.

There is, of course, no difference of opinion as regards the principle; which is well settled. The facts are carefully considered in the judgment of Mr. Justice Beck and it is unnecessary to repeat what he has said.

I think there should be a new trial.

ANGLIN J.—Having regard to all the circumstances of this case—the plaintiff's earning capacity prior to his injury, his comparative youth, the pain and suffering to which he was subjected, his probable total incapacity for work in the future, and the inconvenience, discomfort and unhappiness which his condition is likely to entail during the rest of his life—it is, in my opinion, not possible to say that the verdict in this case is so execessive that it is apparent that the jury must have been influenced by views and considerations to which they should not have given effect; *Johnston* v. *Great Western Railway Co.*(1); *Cox* v. *English, Scottish and Australian Bank*(2). If the only element of damage were the plaintiff's actual pecuniary loss, it might be argued with great force that an attempt had been made to award him full and

(1) [1904] 2 K.B. 259. (2) [1905] A.C. 168.

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complete compensation; and when the loss to be compensated for has a money value capable of precise ascertainment there is no good reason why that should not be done. But with such other elements of damage, as I have indicated, present, which must be taken into account, while the jury should not attempt to give full compensation, it is almost impossible to say that an amount awarded short of what would distinctly shock the conscience, is so great that a new trial should be ordered purely on the ground of its excess.

The admission of evidence as to the expectation of life of a person of the plaintiff's age and as to the cost of an annuity equal to his income is made a ground of appeal. The objection is based on the alleged lack of qualification of a witness who gave this evidence and the misleading character of the evidence itself.

Standard mortuary tables shewing the expectancy of life and the cost of an annuity at given ages are admissible in evidence; *Rowley* v. *London and North Western Railway Co.*(1); *Vicksburg and Meridian Railroad Co.* v. *Putnam*(2). The appreciation of the value to be put upon such tables in any particular case may always be affected by appropriate cross-examination and by directing the attention of the jury, by other relevant evidence and by argument, to considerations calculated to lead to the conclusion that the plaintiff's expectation of life should be regarded as less than the average and that his continued receipt during the full period of his expectation of life of the income which he enjoyed when injured was subject to many contingencies.

If a witness called can verify a mortuary table pro-

(1) L.R. 8 Ex. 221. (2) 118 U.S.R. 545.

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duced in evidence as one in actual use by a company dealing in that class of business I do not understand it to be the law that he must possess knowledge sufficient to enable him to explain the basis on which the table was prepared or to give an opinion worth something as to its reliability or correctness in order to render his evidence, *quantum valeat,* admissible. No doubt such tables are not conclusive and the jury should be warned to take into account the contingencies to which the continued receipt of his income by the plaintiff would have been subject had he not met with the injury for which he sues. In the present case those contingencies were called to the attention of the jury by the learned trial judge by reading a passage from a judgment in which they were referred to. He was not asked further to emphasize them or specially to warn the jury against attaching too much weight to the evidence now objected to. No doubt its value had been fully discussed by counsel for the defendant in his address. No objection was taken either at the trial, in the notice of appeal to the Appellate Division, or in the appellant's factum in this court to the accuracy or sufficiency of the charge itself. At bar counsel suggested non-direction only; *Creveling* v. *Canadian Bridge Co.*(1). Misdirection upon any aspect of the case was not even hinted at.

The verdict is, no doubt, large, but a case has not been made for interfering with it or for ordering a new assessment of damages, which, if an experience not uncommon should be repeated, might not result favourably to the defendants.

The appeal fails and should be dismissed with costs.

(1) 51 Can. S.C.R. 216.

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Brodeur J.

BRODEUR J. — The only question in this case is whether a new trial should be granted because the amount granted by the jury for damages is excessive.

It is a railway accident. The plaintiff (respondent) was a locomotive engineer, an employee of the appellant company. He seems to have been incapacitated for life. He was earning a sum of about $2,100 a year. There was not much evidence given as to the damages which should be granted and the verdict was for the sum of $27,000.

I am inclined to think that the amount is excessive, and if I had been on the jury I would certainly not have given so large a sum. But the charge to the jury seems to have been fair and it was for them to decide as to the amount.

I am sorry that we have to accept their verdict. It is to be expected that some day legislation will be passed in the provinces, where it does not exist now, by which those verdicts could be reduced by the courts of appeal.

In the circumstances, I cannot do otherwise than to dismiss the appeal.

Appeal dismissed with costs.

Solicitor for the appellants: *Geo. A. Walker.*

Solicitors for the respondent: *Mahaffy & Blackstock.*

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*Oct. 19.
*Dec. 29.

THE DOMINION FIRE INSURANCE COMPANY (DEFENDANTS) } APPELLANTS;

AND

MINNIE NAKATA (PLAINTIFF) ..... RESPONDENT.

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

Fire insurance—Bawdy house—Immoral contract—Legal maxim—"Ex turpi causâ non oritur actio"—Cancellation of policy—Statutory condition—Notice to insured—Return of premium—Principal and agent.

On application by plaintiff, through an insurance broker, the company insured her house and furniture against loss by fire, the premises being described as a "sporting house" (a house of ill-fame), and, soon afterwards, the local general agent of the company received notification from the head-office that the policy had been cancelled. On being notified the broker wrote to plaintiff informing her of the cancellation, but his letter was not delivered and was returned through the mails. In an action on the policy,

Held, reversing the judgment appealed from (9 Alta. L.R. 47), Idington and Duff JJ. dissenting, that on the face of the policy of insurance it appeared that the effect of the contract was to facilitate the carrying on of an illegal or immoral purpose and, therefore, it would not be enforced in a court of justice. *Pearce* v. *Brooks* (L.R. 1 Ex. 213), applied; *Clark* v. *Hagar* (22 Can. S.C.R. 510), *Johnson* v. *Union Marine Fire Insurance Co.* (97 Mass. 288), and *Bruneau* v. *Laliberté* (Q.R. 19 S.C. 425), referred to.

Per Davies J.—In the circumstances of the case the broker through whom the plaintiff effected the insurance became her agent for all purposes in connection therewith and he was also constituted the agent of the company for the purpose of giving notice of the cancellation of the policy.

Per Idington and Duff JJ. (dissenting).—The mere description of the premises insured as a bawdy house is not sufficient evidence

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to justify the inference that the contract had the effect of promoting illegal or immoral purposes. *Clark* v. *Hagar* (22 Can. S.C.R. 510); *Lloyd* v. *Johnston* (1 Bos. & P. 340); *Bowry* v. *Bennett* (1 Camp. 348); *Hamilton* v. *Grainger* (5 H. & N. 40), and *Pearce* v. *Brooks* (L.R. 1 Ex. 213), referred to. *Bruneau* v. *Laliberté* (Q.R. 19 S.C. 425), discussed.

Per Idington and Duff JJ.—The broker, who was handed the policy for delivery to insured and collection of the premium, became the agent of the company for those purposes. He, however, had no authority from the insured to receive notice of cancellation of the policy on her behalf nor to waive the requirements of statutory condition 19 of the "Northwest Territories Ordinance," ch. 16 (1st sess.), 1903, as to notice of cancellation of policies of insurance and return of premiums paid.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of Beck J., at the trial, maintaining the plaintiff's action with costs.

The circumstances of the case are stated in the head-note.

Hamilton Cassels K.C. for the appellants.

C. T. Jones K.C. for the respondent

THE CHIEF JUSTICE.—I have come to the conclusion, with some hesitation, that this appeal must be allowed. This is certainly not from any desire to assist the appellants, for I think, as Lord Mansfield says in *Holman* v. *Johnson* (2).

the objection that a contract is immoral and illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant.

The objection is allowed on principles of public policy which the defendant has the advantage of con-

(1) 9 Alta. L.R. 47. (2) Cowp. 341.

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trary to the real justice as between him and the plaintiff.

In the appellants' factum it is said:—

It must be clearly borne in mind in dealing with this appeal that this is not one of those too frequently occurring cases of an attempt by an insurance company to escape by means of some technicality a liability deliberately assumed by it and for the assumption of which it has received its stipulated recompense.

These are brave words, but unfortunately are not borne out by the facts. The factum proceeds:—

The plaintiff is a foreigner of bad character.

I do not think it is particularly creditable for the appellants to allege as one of the grounds for trying to escape liability that the respondent is a foreigner, and, as to the fact that she is of bad character, it appears on the face of the policy, issued under the corporate seal of the company and the signature of its president, that the premises were kept by the insured as a disorderly house.

The law, I think, is stated in Phillips on Insurance, (5 ed.), in chapter III., section 2, on the legality of the insurable interest. We read sub-section 210:—

Insurance upon a subject is void if the interest insured is illegal or if the contract contemplates an unlawful use of it;

and this is carried further in sub-section 211,

though there is no express prohibition in respect to a subject, still if insurance upon it is contrary to the spirit and general principles, or what is called "the policy" of the law, the owner cannot make a valid insurance upon it.

Again, sub-section 231, after referring to cases partly legal and partly illegal where a valid insurance may be made for the legal part, continues:—

In the preceding cases no illegality appeared on the face of the contract of insurance. Where such does appear, the whole contract is void, as in the case of an agreement to employ a ship in an illegal trade.

In *Pearce* v. *Brooks*(1), at page 218, Chief Baron Pollock said:—

> No distinction can be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *ex turpi causâ non oritur actio*, and whether it is an immoral or an illegal purpose in which the plaintiff has participated it comes equally within the terms of that maxim and the effect is the same; no cause of action can arise out of either the one or the other.

In the notes to the case of *Collins* v. *Blantern*(2), in Smith's Leading Cases (ed. 1915), it is said:—

> Contracts made for immoral purposes are simply void. * * * The illegality is equally fatal when created by statute.

Many cases are cited in support of this latter proposition. By section 228 of the Criminal Code the keeping of a disorderly house is an indictable offence and the purpose for which this house is used, being expressly stated in the policy, there can be no doubt of the illegality of the purpose for which it was used.

In *Scott* v. *Brown*(3), at page 728, Lindley L.J. said:—

> *Ex turpi causâ non oritur actio.* This old and well known legal maxim is founded in good sense and expresses a clear and well-recognized legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal. * * * If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.

In his judgment in the case in this court of *Clark* v. *Hagar*(4), Mr. Justice Gwynne refers to a number of cases as establishing that the true test whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to estab-

(1) L.R. 1 Ex. 213.
(2) 1 Sm. L.C. (12 ed.) 412.
(3) (1892) 2 Q.B. 724.
(4) 22 Can. S.C.R. 510.

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lish his case. In the present action the plaintiff, now respondent, could not, of course, succeed without proving the policy bearing on its face evidence of illegality. Such proof is offensive to the court and cannot be received.

That we find in the English reports no case exactly in point is not, I think, a matter of surprise. English insurance companies, it is well known, rarely dispute their liabilities, never except in gross cases. Further, I should think it probable that respectable companies would be unwilling to state in their policies an immoral purpose. Few people, one may suppose, are willing to advertise their own turpitude unnecessarily.

There is a case in the Circuit Court of Quebec of *Bruneau* v. *Laliberté*(1), in which Mr. Justice Andrews held that

> insurance upon the furniture in a house of ill-fame is an illegal and immoral contract and will not be enforced by the courts.

I do not think it is necessary for me to dissent from anything said in the judgment above referred to of *Clark* v. *Hagar*(2). It is relied on in the decision of *Morin* v. *The Anglo-Canadian Fire Insurance Co.* (3), in the court of appeal for the Province of Alberta, which the decision now under appeal professes to follow, and also in the later case of *Trites Wood Co.* v. *The Western Assurance Co.*(4), in the Court of Appeal for British Columbia. It is, however, unnecessary to examine this judgment particularly, as I am unable to find in it anything to support the decisions in these cases in which, as in the present case, the

(1) Q.R. 19 S.C. 425.
(2) 22 Can. S.C.R. 510.
(3) 13 West. L.R. 667.
(4) 15 West. L.R. 475.

illegality appears upon the face of the contract sued upon.

For the French law on the subject, see Planiol (6 ed.), vol. 2, para. 1009 *et seq.*, and cases there cited. The modern tendency of the Cour de Cassation would appear to be, however, to maintain the validity of contracts such as the one here in question on the ground that the reciprocal obligations which the parties assume relate exclusively to the payment by the insured of the agreed premium and to the payment by the company of the stipulated indemnity in the event of the destruction of the thing insured. *Vide* Sirey, 1904, 1, page 509; but see S.V. 1896, 1, 289; Appert's note; S. V. 1913, 1, 497, note, and S. & P. 1909, 1, 188.

There is no provision in the Code Penal which corresponds with section 228 of the Canadian Criminal Code.

The appeal will be allowed and judgment entered for the defendants, the present appellants, but without costs.

DAVIES J.—I think this appeal should be allowed upon the grounds submitted by Mr. Cassels.

In the first place, I think Carr was the agent of Nakata for the purpose of procuring the policy of insurance in question.

The insured was the keeper of a "sporting house" which Mr. Jones, for the respondent, candidly admitted was well understood to be a bawdy house or house of ill-fame.

The husband of the plaintiff applied to Carr, an insurance broker, to obtain the insurance and was told by him that he could not take it in the insurance

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company for which he was agent, but would apply to other companies and was instructed to do so. He applied to the general agent in the province of the appellant company, who agreed to take it. The applicant paid to Carr a part of the insurance premium and shortly afterwards returned to Carr to obtain the policy when he was told it was subject to cancellation at any time. He then paid Carr the balance of the premium and Carr handed over to him the policy.

Carr says that at that time he asked them whether in case of cancellation he would return the money or put the insurance in some other company—and he was told to put it in some other company.

The same afternoon Carr received notice that the head-office had cancelled the policy, whereupon he wrote and sent by registered post a letter to the plaintiff telling her the policy was cancelled. Carr had received the premium from the applicant, and on receiving notice of the cancellation of the policy made, as instructed, efforts to obtain insurance elsewhere, but was unsuccessful and the premium remained in his hands.

The trial judge was of the opinion that

> the whole thing depended upon the question of the agency of Carr for the insured upon which there is much to be said upon both sides.

The learned judge was not satisfied that Carr was an agent to receive notice of cancellation and this view prevailed in the court of appeal.

I am of opinion, however, that Carr was such an agent and that the premium having been left with him in case of cancellation to obtain insurance in some other company, that he was the agent of the insured for receiving notice of such cancellation.

On the other ground also, that the contract was one for facilitating the carrying on of an illegal and immoral object, I think the appeal should be allowed. The trial judge and the court of appeal felt themselves concluded by the case of *Morin* v. *Anglo-American Fire Insurance Co.*(1). I am not able to accept that authority or the reasoning upon which it was founded. I think the principle upon which the case of *Pearce* v. *Brooks*(2) was decided the proper one to apply in this case.

That principle is that one who makes a contract for sale or hire with the knowledge that the other party intended to apply the subject-matter of the contract to an immoral purpose cannot recover on the contract. As Pollock C.B. said in that case if an article was required and furnished "to facilitate the carrying on of the immoral purpose" that is sufficient. The courts would not lend their aid to carry it out. It seems to be that the facts of the case now before us are stronger against the enforcement of the contract than those in the case of *Pearce* v. *Brooks*(2), which the Exchequer Court refused their aid to enforce. In that case, the plaintiffs sued for the hire of a brougham by a woman known by them to be a prostitute and who used the brougham to their knowledge for the purpose of making a display favourable to her immoral purposes.

In the case of *Johnson* v. *Union Marine and Fire Insurance Co.*(3), the court followed a previous decision of their own in *Kelly* v. *Home Insurance Co.*(4), and held that if a person engaged in the unlawful business

(1) 13 West. L.R. 667.
(2) L.R. 1 Ex. 213.
(3) 127 Mass. 555.
(4) 97 Mass. 288.

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of selling intoxicating liquors without a licence at the time of the making and acceptance of a policy of insurance on his stock in trade and a month afterwards, the policy does not attach, although he made application for a licence immediately after he began such business.

The grounds on which the decision was placed in *Kelly* v. *Home Insurance Co.*(1) above referred to were that the object of the assured in obtaining the policy was to make their illegal business safe and profitable and that the direct and immediate purpose of the contract of insurance being to protect and encourage an unlawful traffic the contract was illegal and never attached.

The same principle was held by Andrews J. to govern in the case of *Bruneau* v. *Laliberté*(2).

I think this principle should apply to this case, the contractual obligation of the company being in case of loss either to pay the same up to the amount insured or to "replace the property damaged or lost." Could it be fairly argued that the replacement of the property would not be an aiding or facilitating of the immoral purpose for the carrying on of which the house and furniture were used? I think the courts of this land should not lend their aid to enforce contracts made to facilitate the keeping of houses of ill-fame, which, in my judgment, this insurance policy was calculated to do.

IDINGTON J. (dissenting).—This is an action upon a policy of insurance against fire on a house in Calgary owned by respondent and used as a bawdy house,

(1) 97 Mass. 288.

(2) Q.R. 19 S.C. 425.

in modern slang phrase described, as it was in the said policy, as a "sporting house," and on furniture therein.

The chief ground of defence set up was that, pursuant to a statutory condition indorsed thereon, the policy had been cancelled long before the fire.

It is quite clearly established, indeed not seriously disputed, that the policy was duly issued by the general agents of the appellant and the premium therefor paid.

It was procured by a local broker from the said general agents. A good deal of what was, I respectfully submit, needless discussion, has taken place as to the details of how this payment and its alleged return was dealt with. I assume, upon the facts in evidence, that the general agents received the premium, but failed to return same in any way for more than six weeks after the date of the policy, although the alleged cancellation is claimed to have taken place within ten days after said date.

This alleged re-payment is only material in considering the contention set up by appellant that Mr. Carr, the broker, was the respondent's agent to receive the return of the money.

The power of cancellation relied upon is that contained in the condition, No. 19, of the statutory conditions in force in Alberta.

I think it is necessary for any company seeking to avail itself of the power therein contained to follow the very simple and clear terms of that condition.

I cannot find in what was done anything even resembling what the power requires. Nor can I find that what the respondent's husband said to Carr could

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entitle him, as her agent, to set aside or waive that condition and all implied therein.

The details of all that have been so fully dealt with by the learned judges in the courts below that I do not think I can serve any good purpose by setting forth an additional elaboration thereof.

The appellant stoutly maintains Carr was not its agent, though appearing on the policy as agent. I accept its contention in that regard.

The doing so relieves me of the necessity for considering the possible effect of his sending her a notice. The only notice alleged to have been given the insured was one mailed to her by Carr, but never received by her, or heard of by any one acting for her as her agent for that purpose.

There never was, unless Carr was appellant's agent, anything done, I repeat, resembling what the statutory condition imposes upon the insuring company to be done by it in such cases, but not by some one else.

Again, it is contended that the policy was illegal upon the ground that the owner of a bawdy house cannot insure himself, or herself, against loss thereof by fire.

We have all heard of leases made of a house to be used for such like purposes being illegal, either because it obviously promotes the illegal purpose had in view, or because the consideration for such a lease may be tainted thereby and, hence, the contract is void.

I am unable to understand how the policy of insurance can, as of course, in itself promote the carrying on of such a traffic, or in law be held to fall within the principles upon which I suggest a lease, for example, may be illegal and be thereby void.

It is urged the house had become vacant and that change of condition so increased the risk as to violate the condition. The learned trial judge upon the facts found against the appellant, and no appeal was made against that finding.

Though neither set up in the pleadings, nor urged at the trial, nor presented to the court of appeal, counsel for the appellant seeks now, for the first time, in this court to set up the further defence that there was an undisclosed encumbrance on the property and some false statement of proof of loss in that regard.

The manifest injustice of allowing such an issue of fact to be raised at this stage for the first time has always been held a sufficient answer here to permitting any such course.

The appeal should be dismissed with costs.

DUFF J. (dissenting). — The first question is whether the policy was in force at the time of the fire and that subdivides itself into: (*a*) Did the appellant company receive payment of the insurance premium ? and (*b*) Was the power of cancellation with which the insurers were invested by the terms of the policy effectively put into operation ?

The answer to the former question must be in the affirmative or the negative according as the appellant company is held or not held to be precluded from disputing both that payment to Carr and that payment to Tavender & Co. would be payment to themselves. As to Carr—for some purposes he no doubt was the agent of the respondent, but it does not necessarily follow that he was not also the agent of the appellant company for the purpose of receiving payment of the premium.

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The policy was delivered by Carr to the respondent's husband and on the policy there was a declaration to the effect that Tavender & Co. were the general agents of the company and there was also a statement that Carr was the company's agent. In the appellant's factum it is said that the designation of Carr as agent was adopted as a matter of office procedure in recognition of Carr's right to a commission for the introduction. For our present purpose we are not concerned "with the appellant's office procedure." Carr held the policy for delivery to the respondent on payment of the premium and the designation of him as agent correctly describes the character in which he had possession of the policy which he unquestionably held for the company and delivered to the respondent on their behalf; the description of him as agent and his possession of the policy for the company together constituted a representation upon which the respondent was entitled to act on paying the premium. Counsel for the respondent did not, of course, dispute, it would have been hopeless to do so, that if a loss had occurred immediately after the delivery of the policy and before the tranmission of the premium by Carr and before any steps had been taken looking to cancellation, that it would have been impossible to deny that the risk had attached. As to Tavender & Co.—the premium was in fact paid by a set off of the accounts between Tavender & Co. and Carr—the repudiation of Tavender & Co.'s action by the company could have no effect upon the rights of the respondent, who, having no notice of any limitation of authority was entitled to assume that Tavender & Co. were acting within the scope of that conferred upon them.

As to cancellation. It is not disputed that notice of cancellation was not received by the respondent. The appellant's contention rests upon the proposition that Carr had been constituted the respondent's agent for the receipt of such notice. The contention breaks down on the facts, there being simply no evidence to support a conclusion that the parties intended that the policy should be subject to cancellation without notice to the respondent personally. The direction alleged to have been given to Carr to retain the premium in the event of cancellation cannot fairly be held to imply authority to receive notice of cancellation. The learned trial judge found against agency in fact and I entirely agree with his view on this point.

We now come to the difficult question: Was the policy invalid as tainted with illegality by reason of the purported contract being a contract entered into for the purpose of assisting the respondent in carrying on an illegal business by securing her indemnity against loss of property by fire while the property was being employed for an illegal purpose?

The facts are that the house and personal effects, the subjects insured, were at the time of the application in the possession of the respondent who carried on in the house and used the furniture for the purpose of carrying on the business (as it is described in the application) of a "sporting house," in other words, a house of ill-fame. This fact, being stated in the application, was, of course, known to the company. At the time the fire occurred the house was not occupied by the respondent, but was in the care of a caretaker who slept there at nights. The usual premium was charged, there being no augmentation because of

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any special hazard that might be supposed to exist by reason of the character of the occupation, and there is no suggestion that this last mentioned circumstance in itself, according to insurance practice, would be regarded as entailing any special hazard or as affecting the character of the risk from the actuarial point of view. It appears further that the appellant company was unwilling to accept the risk and directed the cancellation of the policy as soon as they became aware of the facts. The point, however, upon which the appellant company based its objection was a rather narrow one. The officials of the company appear to have had no objection to accept a risk of this character if the place was situated within what was described as a "licensed district," in other words, if the place was permitted to flourish by the openly understood sanction of the police. The house in question not being as I have said within a "licensed district" these officials decided to put an end to the risk.

The argument for the appellant is now put in this way. The respondent, it is said, sought insurance to enable her the more safely to carry on a business which is not only a violation of the law itself, but is a public trading in immorality. It is said that the performance of such contracts of indemnity by the insurer has a tendency directly to encourage illegality and immorality and such contracts are, therefore, in such circumstances, within one of those classes which the courts refuse to enforce, as being in the traditional phrase "tainted with illegality." I have come to the conclusion that this view does not furnish the governing rule for the decision of this appeal; but I am far from suggesting that there is not a great deal of force in the strictly legal considerations that may be ad-

duced in support of it, however little one may be disposed to look with anything but impatience upon the posture of this company whose interest in the public morals finds adequate expression in a distinction between bawdy houses protected by the police, according to clearly understood convention, and bawdy houses whose toleration is more irregular and precarious.

The question is, of course, a dry question of law. This contract of insurance is not in itself illegal in the sense that it is a contract directly forbidden by law or in the sense that it is intended to create an obligation to do anything forbidden by law. If the appellant company had paid the respondent's claim, nothing in the making or the performance of the contract could be described as illegal. A contract, however, on the face of it collateral to an unlawful act or to an unlawful course of business or to an unlawful design may be so connected with the illegality as to be vitiated by it; the question as Marshall C.J. said in *Armstrong* v. *Toler*(1) very often is a question of considerable nicety whether the connection is or is not of such a character as to have that effect.

There is a number of decisions in cases similar to this in which the insurance contract is treated (1) as an agreement to indemnify against the consequences of an illegal course of action or (2) as a mere incident in the carrying on of some transaction or business forbidden by law.

The former is the interpretation which has been given to marine policies insuring a voyage illegal in its inception, such policies being held void as attempts

(1) 11 Wheaton 258, at p. 272.

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to contract for indemnity against the loss suffered by reason of carrying out an unlawful enterprise. See *Wilson* v. *Rankin*(1); *Ocean Insurance Co.* v. *Polleys*(2). The latter is the interpretation upon which rest certain decisions in the American courts, notably in the courts of Massachusetts in which policies of insurance effected upon stocks of liquor held for sale by unlicensed dealers in violation of the law have been thought void as transactions in reality constituting in part the carrying on of an unlawful business.

These interpretations cannot, I think, be said to fit the case before us. The fact that in accordance with settled practice an applicant for insurance is required to state the business, if any, carried on on the premises proposed for insurance, and the fact that the business named is illegal and the fact that this statement with other statements in the application constitute the basis of the contract do not justify the interpretation of the contract as a contract to indemnify against loss incurred by reason of the carrying on of an illegal business; the policy being in the usual form, the risk insured against being the risk of fire from causes usually insured against in a policy in that form, the premium, as I have already said, being the usual premium. One would not think of describing a policy of insurance upon his office furniture taken out by a promoter whose chief business was to effect mergers obnoxious against the provisions of the Criminal Code as an agreement to indemnify against loss incurred in the course of his illegal business; and yet the parallel if not exact is approximate.

(1) L.R. 1 Q.B. 162. (2) 13 Peters 157.

Neither ought the latter of the above mentioned views (which has been given effect to in Massachusetts in the cases referred to) to govern in this case. It would be a quite unreasonable interpretation of the intentions of the parties to this contract to hold that the terms of the bargain in any way turned upon the character of the business carried on. One could better interpret their intentions by saying that the contract was made in spite of the fact rather than because of the fact that the occupation was of the character mentioned.

A distinction suggested by a series of English cases dealing with the enforceability of contracts made with persons of the respondent's class may, I think, well serve as a key to the solution of the question before us. In *Lloyd* v. *Johnson*(1) Mr. Justice Buller, in *Bowry* v. *Bennett*(2) Lord Ellenborough, and in *Pearce* v. *Brooks*(3) the Court of Exchequer had such contracts before them and the net result, I think, of the authorities of which these are typical examples, is summed up with accuracy in the treatise on contracts by Mr. Manisty, in Halsbury Laws of England, vol. 7, p. 400, in these words:—

> An action lies to recover the price of goods sold or work done even though that the plaintiff knew that the person with whom he was dealing was a prostitute (*Lloyd* v. *Johnson*(1); *Bowry* v. *Bennett*(2)), unless it appears that the goods were sold or the work was done for the purpose of enabling her to exercise or assisting her in the exercise of her immoral calling. (*Hamilton* v. *Grainger*(4); *Pearce* v. *Brooks*(3).

In *Pearce* v. *Brooks*(3) Baron Bramwell, who had tried the action, says:—

(1) 1 Bos. & P. 340.
(2) 1 Camp. 348.
(3) L.R. 1 Ex. 213.
(4) 5 H. & N. 40.

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I told the jury that, in some sense, everything which was supplied to a prostitute is supplied to enable her to carry on her trade, as, for instance, shoes sold to a street walker; and that the things supplied must not merely be such as would be necessary or useful for ordinary purposes, and might be also applied to an immoral one; but that they must be such as would under the circumstances not be required, except with that view.

This insurance company, no doubt invites us to hold that when they do enter into contracts for the insurance of such places (being, of course, let it be well understood, within a "licensed district") they do so with the object of enabling the proprietors to exercise and to assist them in the exercise of their immoral calling. In fact, of course, it is not so and it would be ridiculous to say that they ever thought of assisting the respondent in the exercise of her trade or of supplying her with anything that had any special reference to her trade or of contracting with her in any other character than that of the proprietor of a furnished dwelling simply.

The above mentioned cases were applied in this court in the case of *Clark* v. *Hagar*(1), and the judgment of Mr. Justice Gwynne, who spoke for the majority of the court, contains an exhaustive but luminous exposition of the effect of the decisions and his conclusions are substantially in harmony with the passage quoted above from Mr. Manisty's treatise.

Mr. Justice Gwynne's judgment was applied in a case similar to the present by the British Columbia Court of Appeal, *Trites Wood Co.* v. *Western Insurance Co.*(2).

I must not omit a reference to *Bruneau* v. *Laliberté*(3) (Mr. Justice Andrews), in which it was

(1) 22 Can. S.C.R. 510. (2) 15 West. L.R. 475.
(3) Q.R. 19 S.C. 425.

held that a policy of insurance on the furniture of a house of ill-fame was an illegal and immoral contract and non-enforceable. The decision is, in part, based on an interpretation of *Pearce* v. *Brooks*(1), which is not, I think, an admissible interpretation; and upon certain French authorities which were supposed to support the conclusion at which the learned trial judge arrived. In France, however, the jurisprudence is by no means uniformly in favour of the learned judge's view as is shewn by the following passages from Carpentier, Rep. Supplément, 2 Assurance contre l'incendie, Nos. 64 and 207(2), giving the effect of two comparatively recent decisions of the Cour de Cassation:—

64. Le contrat d'assurance contre l'incendie passé par le tenancier d'une maison de tolérance ne peut être annulé comme ayant une cause immorale, alors que, dans ce contrat, les prestations que les parties se sont mutuellement promises consistaient, d'une part, dans le paiement de l'assuré des primes convenues, d'autre part, dans le paiement par la compagnie d'une indemnité pécuniaire, ou, à son choix, dans la reconstruction ou la réparation des batiments incendiés et le replacement en nature des objets détruits; ces prestations licites en elles-mêmes, n'ont pu devenir illicites par cela seul que les risques assurés dépendaient d'une maison de tolérance, et elles ne sauraient être considérées comme ayant eu en vue la création, le maintien ou l'exploitation d'un établissement de cette nature. Cass., 4 mai, 1903.

207. (2) Y a-t-il fausse déclaration de la part du tenancier d'une maison de tolérance qui se qualifie de loger en garni? La question s'est posée devant la cour de cassation. Le pourvoi soutenant l'affirmative par les motifs suivants: L'exploitation d'une maison de tolérance, disait-il "présente des risques considérables. Le danger d'incendie, en effet, est plus grand que partout ailleurs dans une maison fréquentée la nuit par des gens souvent avinés, où l'orgie est quotidienne, le drame fréquent, et dont le personnel par sa profession même, est une perpétuelle menace d'imprudence, sinon d'actes malveillants. Ces risques considérables entrainent les compagnies, quand elles consentent à assurer les tenanciers de maisons de tolér-

(1) L.R. 1 Ex. 213.

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ance, à exiger d'elles le paiement de primes fort chères." Mais les juges du fond avaient refusé d'accueillir le moyen de nullité, par la raison que la compagnie ne pouvait se méprendre sur le sens et la portée des expressions "logeur en garni" dans les circonstances ou elles avaient été employées. C'est la solution qu'a fait prévaloir la Cour de cassation. Cass., 4 mai, 1903, Comp. d'assur, terr. Le Monde (S. & P., 1904, D. 1906,5,33).

The appeal should be dismissed with costs.

BRODEUR J.—The first question in this case is whether the contract of insurance was valid.

In the application for insuring the premises, it was stated that the plaintiff (respondent) was keeping a "sporting house," which was understood as being a house of ill-fame.

The policy was procured through the appellants' agents in Calgary. They had the power to accept risks, subject to cancellation by the head-office, as is the usual insurance practice. The head-office of the insurance company refused to maintain the policy and a notice of cancellation was given.

The agents of the appellant company in Calgary immediately notified the broker through whom the application had been made. This broker, Carr, on the same day, wrote to the plaintiff telling her the policy was cancelled and asking for its return. He did not enclose the premium because, as instructed by the plaintiff, he intended to try and get insurance elsewhere.

This letter was not received by the plaintiff and was subsequently returned to Carr.

A fire having taken place on the premises, the present action has been instituted for the purpose of recovering the amount of the insurance.

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The company claims that the contract was illegal because it facilitates immorality.

It has been decided in a case of *Bruneau* v. *Laliberté*(1), by Mr. Justice Andrews that an

insurance upon the furniture in a house of ill-fame is an illegal and immoral contract, and will not be enforced by the courts.

Addison, on Contracts, p. 72, summarises the matter in stating—

Contracts tending to promote fornication and prostitution are void.

And Beach on Contracts, p. 2019, says that

any contract auxiliary to the keeping of a bawdy house is void.

Halsbury, Laws of England, vol. 7, No. 829, p. 400, relying on the case of *Pearce* v. *Brooks*(2), says that if it appears that a work was done for the purpose of enabling a prostitute to exercise or assisting her in the exercise of her immoral calling, no action would lie.

Pollock on Contracts (7 ed.), p. 370, in speaking of transactions where there is an agreement for a transfer of property for a lawful consideration, but for the purpose of an unlawful use being made of it, says that—

The later authorities shew that the agreement is void not merely if an unlawful use of the subject-matter is part of the bargain, but if the intention of one party so to use it is known to the other at the time of the agreement.

* * * * *

If goods are sold by a vendor who knows that the purchaser means to apply them to an illegal or immoral purpose he cannot recover the price.

I find in Dalloz, Répertoire Pratique, *vo.* "Contrats et Conventions en général," Nos. 398 and 401, that

(1) Q.R. 19 S.C. 425. (2) L.R. 1 Ex. 213.

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the contract whose consideration is the maintenance of a house of ill-fame is illicit and the action for the price of the service of a domestic in a house of ill-fame should not be accepted. I must say, however, that this latter decision has been severely criticized by some authors. Baudry-Lacantinerie, vol. 11, No. 313, says:—

> C'est l'obligation sur cause illicite que l'art. 1131 déclare sans effet. Il en est autrement de l'obligation dont le motif seulement est illicite. Ici donc apparaît encore l'utilité de la distinction entre la cause et le motif. Cette distinction est nettement établie dans quelques décisions judiciaires. Mais beaucoup d'autres l'ont perdue de vue et la confusion a engendré des décisions vraiment fantastiques. N'a-t-on-pas vu le tribunal de commerce de la Seine, refuser sur le fondement de la cause illicite, tout effet a l'obligation contractée par le directeur d'une maison de tolérance pour acquisition de vins de champagne destinés à être consommés dans son établissement ?

On that first ground, I would be of opinion that the contract of insurance was illegal and that it should be set aside. The appeal should be allowed with costs.

Appeal allowed without costs.

Solicitors for the appellants: *Cassels, Brook, Kelly & Falconbridge.*

Solicitors for the respondent: *Jones, Pescod & Adams.*

PAUL A. PAULSON (DEFENDANT) ....APPELLANT;

AND

HIS MAJESTY THE KING, (ON THE RELATION OF THE ATTORNEY-GENERAL FOR CANADA,) AND THE INTERNATIONAL COAL AND COKE COMPANY (PLAINTIFFS) ..... RESPONDENTS.

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*Oct. 29.
*Dec. 29.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Dominion lands—Lease of mining areas—"Dominion Lands Act," s. 47—Statutory regulations — Conditions of lease — Defeasance — Notice—Cancellation on default—Forfeiture of rights—Principal and agent—Solicitor.

A lease granted under the regulations regarding the leasing of school lands in the North-West Territories for coal mining purposes, made pursuant to section 47 of the "Dominion Lands Act," provided that, on default by the lessee to perform conditions of the lease, the Minister of the Interior should have power to cancel the lease by written notice to the lessee, whereupon the lease should become void and the Crown might re-enter, repossess and enjoy its former estate in the lands.

Held, reversing the judgment appealed from (15 Ex. C.R. 252), Idington and Brodeur JJ. dissenting, that in order to determine such a lease it is essential that the cancellation should be effected by a notice in writing from the Minister which actually reaches the lessee.

Per Fitzpatrick C.J.—The notice should declare the intention of the Minister to make the cancellation on account of breach of the conditions, and the lessee should be given an opportunity to remedy the breach in question or, at least, to be heard before forfeiture. No proposed cancellation can be effective against the lessee unless such a notice has been given to him before the forfeiture is declared.

Per Duff J.—In the absence of special authority, solicitors employed by the lessee in respect of his business with the Department can-

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

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not be deemed agents to whom such notice of cancellation could be given on his behalf.

Per Duff J.—Section 6 of the regulations has not the effect, upon default in performance of the nominated conditions, of terminating the lessee's interest *ipso jure*, but only on the election of the Crown manifested as provided for in the lease. *Davenport* v. *The Queen* (3 App. Cas. 115) applied.

Per Idington J. (dissenting).—The lease in question was determinable at the election of the Crown upon the mere fact of breach of conditions and, the Crown having so elected, the Minister was not competent to revive it or to waive the consequences of default.

Per Idington and Brodeur JJ.—By notification to his solicitors and the effect of the correspondence with the Department, which took place thereafter, it must be taken that the lessee had actual notice of the intention of the Minister to cancel the lease for breach of conditions.

APPEAL from the judgment of the Exchequer Court of Canada(1) whereby it was declared that a certain lease by the Crown to the defendant, of mining lands in the Province of Alberta was properly forfeited and cancelled.

The circumstances of the case fully appear in the judgments now reported.

W. N. Tilley K.C. and *J. F. Smellie* for the appellant.

R. G Code K.C. for the respondent, His Majesty The King.

Lafleur K.C. and *Falconer K.C.* for the respondents, The International Coal and Coke Company.

THE CHIEF JUSTICE.—The appellant obtained from the Crown a mining lease dated the 8th August, 1904, of coal under Dominion Lands in the then Provisional District of Alberta. He did not fulfil the conditions

(1) 15 Ex. C.R. 252.

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of the lease. It is unnecessary to enter into the correspondence between the parties which ensued until we come to the letter addressed on the 13th September, 1909, by the assistant-secretary of the Department of the Interior to the lessee, the present appellant. That letter is as follows:—

Department of the Interior,
Ottawa, 13th September, 1909.

Sir,—I am directed to inform you that as you have failed to comply with the provisions of clause 12 of your lease for coal mining purposes of the east half of section 29, township 7, range 4, west of the 5th meridian, by commencing active mining operations on the land within the time required by the said section of the lease, the Department has been obliged to cancel your lease, and it will, therefore, now make such other disposition of the land as may seem advisable.

I am to add that a refund cheque for $96 paid by your solicitors, Messrs. Lewis & Smellie, as rental for the year ending the 15th July next, will be forwarded to them on your behalf in the course of a day or two.

Your obedient servant,
(Sgd.) L. PEREIRA,
Assistant-Secretary.

Paul A. Paulson, Esq.,
Coleman, Alberta.

The envelope containing this letter was addressed in the same way as the letter itself. It appears to have remained in the post-office of the Town of Coleman some two months and was then returned from the dead letter office marked "no address — not called for."

This communication was no doubt intended to be a notice pursuant to the 16th and 17th conditions in the lease, which are as follows:—

16. That any notice, demand, or other communication which His Majesty or the Minister may require or desire to give or serve upon the lessee, may be validly given or served by the secretary or the assistant-secretary of the Department of the Interior.

17. That in case of default in payment of the said rent or royalty for six months after the same should have been paid or in case of the

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breach or non-observance or non-performance on the part of the lessee of any proviso, condition, term, restriction or stipulation herein contained and which ought to be observed or performed by the said lessee and which has not been waived by the said Minister, the Minister may cancel these presents by written notice to the said lessee and, thereupon, the same and everything therein contained shall become and be absolutely null and void to all intents and purposes whatsoever and it shall be lawful for His Majesty or His Successors or assigns into and upon the said demised premises (or any part thereof in the name of the whole) to re-enter and the same to have again, re-possess and enjoy as of His or their former estate therein anything contained herein to the contrary notwithstanding.

Provided nevertheless that in case of such cancellation and re-entry the lessee shall be liable to pay and His Majesty, His Successors or Assigns shall have the same remedies for the recovery of any rent or royalty then due or accruing due as if these presents had not been cancelled but remained in full force and effect.

The notice was incompetent to cancel the lease for two reasons:—

1. It was not such a notice as is called for by condition 17.

2. It was not given to nor served on the lessee.

As to the first reason, it would be necessary, in order to hold the notice of any validity, that the condition should be construed to mean that the Minister may cancel the lease, but must then give notice to the lessee that he has done so. This is in terms what the letter of the 13th September, 1909, does. There can be no doubt that this is not such a notice as is called for. The notice must be to the effect that it is the intention of the Minister to cancel the lease for breach of the conditions of the lease, thus giving the lessee an opportunity of remedying the breach or at any rate of being heard before his lease is forfeited. There can be no object in a notice that the lease has been already irrevocably cancelled without notice. In the most extreme view, the notice should state that the Minister cancels the lease for breach of condition and

not that he had already done so without notice which he had no power to do.

It has been represented to us that the provision for re-entry was a cumulative requirement for putting an end to the lease; there can be no doubt that frequently in leases the proviso for re-entry stipulates that notice shall be given before a forfeiture is enforced.

The courts lean against a forfeiture and a condition like this should be strictly construed. It is most reasonable to suppose that notice should be given before the forfeiture is enforced because the power to cancel the lease by notice only arises on breach of any of the conditions. If there had been no breach of condition a notice could not have rendered the lease void and there would, therefore, be uncertainty whether the lease was still subsisting or not.

The Imperial statute, 44 & 45 Vict. ch. 41 ("The Conveyancing Act, 1881"), provides by section 14, subsection 1, as follows:—

> A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

A similar provision is to be found in the Ontario statute (R.S.O., ch. 155, sec. 20(2)) and perhaps in the statutes of others of the provinces.

Secondly, the notice such as it was, was neither given nor served on the lessee. It was simply mailed

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to him at the Town of Coleman and, as he did not happen to inquire at the post-office if there was such a notice there for him, which he was certainly not bound to do, it never came to his hands at all.

Whatever the effect of a proper notice would have been, this notice was clearly insufficient for any purpose.

The next document calling for attention is the letter of the 28th January, 1910, addressed by the secretary of the Department of the Interior to the lessee's solicitors. It is as follows:—

Ottawa, 28th January, 1910.

Gentlemen,—With further reference to the Departmental letter of the 11th instant, I am directed to say that, in view of your representations, it has been decided to reinstate the lease in favour of Mr. Paul Paulson for the coal-mining rights of the east-half of section 29, township 7, range 4, west of the 5th meridian.

The re-instatement is, however, granted on the express condition that Mr. Paulson will fyle evidence in the Department, shewing the nature and progress of the work it is understood he has now commenced on the land, giving full particulars as to the extent and depth of the shaft, as well as the necessary works connected therewith.

Your obedient servant,
(Sgd.) P. G. KEYES,
Secretary.

Messers. Lewis & Smellie,
Barristers,
7 Trust Bldg.,
Ottawa, Ont.

This letter was written on the erroneous assumption that the lease had been cancelled, but that it was in the power of the lessor to allow it to hold good, as the letter says, to reinstate the lease.

It is clear that, if the lessor was willing to continue the lease notwithstanding the breaches of condition, he must be taken, on the true fact that the lease was still existing, to have consented to waive the forfeiture of the lease for breach of condition.

This waiver disposes of any necessity for inquiring into the question whether the subsequent lease of the 28th June, 1910, to the International Coal and Coke Co., Ltd., constituted a sufficient re-entry by the lessor. Having waived the breaches of condition the lessor had no right to re-enter for a forfeiture.

I desire to add that I concur in what I understand was the view of the learned judge of the Exchequer Court that the remedy pursued by the Crown in this case was entirely unsuitable.

The appeal should be allowed and the information of the Attorney-General dismissed. The defendant Paulson is entitled to be paid by the Crown his costs of the action and of this appeal.

IDINGTON J. (dissenting).—This is a remarkable case. The appellant so long ago as 8th August, 1904, obtained from the Crown a coal-mining lease or licence over half a section of school lands held by the Crown. The lease or licence professed on its face to be pursuant to and in conformity with a statute providing for the administration of such school lands, and the regulations made thereunder, of which latter the sixth is as follows:—

6. Failure to commence active operations within one year and to work the mine within two years after commencement of the term of the lease, or to pay the ground rent or royalty as before provided shall subject the lessee to the forfeiture of the lease and to resumption of the land by the Crown.

The regulations provided that such a lessee should pay in half-yearly payments thirty cents an acre annually and in addition a royalty of ten cents per ton on all coal taken out of the mine and furnish sworn statements relative thereto.

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No less than 160 acres, nor more than 640 acres, could be leased under said regulations to one person.

The appellant, when this case was tried in December, 1913, had never mined on said land a pound of coal. It is admitted, or at all events alleged and not denied, that any coal existent within the area in question is at least two thousand feet below the surface and thus, in competition with that more easily available, commercially speaking, an impossibility.

On the 30th April, 1906, the secretary of the Department having the matter in charge wrote appellant calling his attention to the regulation above quoted, and copying it for him to read, and reminding him that the Department had no evidence that he had commenced active mining operations on the land in question and that the year within which the clause in question required active operations to be commenced had expired on the 1st August then last.

This was answered by his solicitors in a letter of the 18th of May, 1906, quoting instructions from him as follows:—

> Referring to your letter of the 30th April last addressed to Mr. Paul A. Paulson, we have to-day received a letter from Mr. Paulson, which we submit explains the situation. In part Mr. Paulson's letter to us reads as follows:—
>
> "Enclosed please find a letter which I have just received from the Department of the Interior, relating to the mining of coal on the east half of section 29, township 7, range 4, west of 5th meridian.
>
> "Will you be good enough to go to the Department for me and explain to them that I was the original purchaser of a lot of coal land adjoining this half-section, which has been transferred to the International Coal and Coke Company, in which company I am a large stockholder; that coal is being mined on the land to the north of section 29, and that the tunnels are being steadily extended southward toward this land, and that all coal unerlying section 29 will have to be mined through the tunnels now being pushed forward to the south toward section 29 by the International C. & C. Co. The coal, under section 29, cannot be mined or gotten out any other way,

except by the tunnels above referred to, and these tunnels will tap the coal seam in section 29 at great depth. As a matter of fact there are no outcrops of coal on section 29, and it is many hundred feet underlying the surface of that section. The outcroppings are all on section 28, to the east of section 29. When the present tunnels are extended to the north limits of section 29, the coal on it will be mined and come through the tunnels 2½ miles to the International Company's works on the railway in section 8, township 8, range 4, west of 5th. I trust there will be no trouble about this, and that the Department does not intend to force me to mine the coal just now, when it is impracticable to do so.

Upon this he was given an extension of time to 1st August, 1907.

On the 21st of August, 1907, his solicitors were reminded of this extension and told

so far no advice has been received of the mining operations having been commenced.

On the 4th of September, 1907, his solicitors wrote the secretary of the Department explaining the slow progress of tunnels for other mines likely to reach this land and need of another year's extension for appellant.

In this letter they say:—

It is absolutely impossible to mine the coal from this section until the tunnels reach it from the north, as all the coal has to come through these tunnels to the railway.

On the 28th September, 1907, the secretary answered:—

I beg to say that before the extension asked for can be granted it will be necessary to file here a definite statement by the applicant as to the extent of the operations already undertaken and the expenditure incured so far in developing the mines from which these lands will be reached.

To this they reply on the 15th October, 1907, as following extract shews:—

The International Coal and Coke Company which owns the coal lands to the north, south and east of the above half-section, have

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approximately spent $1,000,000 and upwards in the development and improvement of its property, and are now engaged in running tunnels from the north in the southerly direction toward the above-mentioned half-section.

The said tunnels were started from section 8, township 8, range 4, W. 5th, and extended through section 5 into sections 32 and 33, 7-4, and will in due time be extended into the east half of section 29.

On the 25th November, 1907, in view of the representations so made, appellant was granted an extension to the 1st February, 1909.

On the 27th November, 1908, the respondent company applied for a mining lease of the land in question and were told by letter of 14th December, 1908, that the application could not be entertained as the land was under lease to appellant for coal mining.

On the 11th March, 1909, the appellant's solicitors wrote reciting part of the foregoing and reiterating the story of the respondent company having expended a million dollars and its tunnels being needed to enable mining on land in question.

They parenthetically remark as follows:—

(Mr. Paulson was the original owner of the properties owned by the company and is now a large holder of its shares.)

And they state further as follows:—

The coal from the east half of 29 would have to be hauled through the above mentioned tunnels down to the railway on section 8-8-4.

They conclude by asking an extension to 15th July, 1909.

On 9th March, 1909, the manager of the respondent company writes the Minister pointing out that appellant's lease has existed for years and nothing has been done thereunder to fulfil the conditions; that there is no work done on the land and that it is located right in the centre of the company's property

and is being held solely with the object of holding us up for a bonus or for royalty on the coal we might at any time make arrangements to mine therefrom.

He further pointed out that the company were working in the next section adjacent to this land in question and will have to go through it to reach sections 28, 21 and 16 of same township and range, and asks, under these conditions, if the lease now in question cannot be cancelled and the company's application for a lease thereof reconsidered. He explained appellant had no other land in the vicinity and recognizes that if he had there might be a legitimate excuse and assumes the Minister's investigation will shew appellant has none.

The Minister replies promising an investigation.

The secretary then answers the solicitor's letter of 11th March informing them an inspector has been instructed to visit the land and report fully.

On the 14th July, 1909, he wrote to the solicitors of appellant acknowledging receipt of a cheque to cover rental for year ending 15th July, 1910, and informs them it is only

accepted conditionally pending a decision in regard to the extension of time asked for by Mr. Paulson, which cannot be settled until the Minister's return.

I enclose receipt No. 20239 for $96.

It may be observed this was tender of rent for a year in advance not yet due.

On 13th September, 1909, the assistant-secretary writes the appellant's solicitors that

in view of the inspector's report in the matter, and after careful consideration of the circumstances, it has been decided that it would not be in the public interest nor in that of the School Lands Endowment Fund to grant Mr. Paulson the extension asked for, and I am, therefore, to inform you that he is being advised that his lease for coal mining purpose of this half section has been cancelled. The

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Department will now make such other disposition of the land as may seem advisable.

A refund cheque will be forwarded to you within the course of a day or two in favour of Mr. Paulson for $96 paid as rental for the current year ending the 15th July, 1910, which, as you were advised by letter of the 14th July, was only accepted conditionally.

The appellant was notified accordingly by letter directed to same address as a former one (evidently received), but it was returned as uncalled for.

It is quite clear from the foregoing recital of the facts that the appellant never intended to do any mining on the lands in question except by means of using the tunnels which the respondent company was making and did make; that he hoped by means of his influence as a leading shareholder therein to acquire the right to use the said tunnels; that he obtained such extensions as he got by representations relative thereto; that the mining of coal under said lands otherwise was as he instructed his solicitors to represent, and they on his behalf did represent, to the officers of the Crown, an impossibility; that assurances thus given and the expectations thus raised of his acquiring the right to use such tunnels, was the only reason why his long continuing defaults in complying with not only the terms of the lease, but also the obvious scope and purpose of the statute, and regulations by which all within the lease must be governed, was tolerated; that but for those representations and consequent expectations the neglect of the Minister in charge to declare the lease forfeited and recover possession would have been such a disregard of the duty cast upon him by the statute and regulations as to render his doing so unjustifiable; and that the attempt of appellant to maintain on foot the said lease was not with the expectation of developing, as the interests of the Crown demanded,

a profitable mine productive of coal, and the consequent production of revenue to be derived therefrom for the support of schools, and all implied therein, but for the unworthy purpose of making merchandise of the lease itself at the expense of his fellow shareholders in respondent company and of the Crown; unless, indeed, his representations are to be taken as false, which it does not lie in his mouth now to set up.

It seems, however, that despite the reiterated statement by the secretary of the Department so late as 11th January, 1910, of adherence to the forfeiture of the lease and its termination thereby, the Department unfortunately was induced to write appellant's solicitors a letter of 28th January, 1910, that in view of their representations it had been decided to reinstate the lease in favour of appellant. But even that concludes as follows:—

> The reinstatement is, however, granted on the express condition that Mr. Paulson will fyle evidence in the Department, shewing the nature and progress of the work it is understood he has now commenced on the land, giving full particulars as to the extent and depth of the shaft, as well as the necessary works connected therewith.

This, I admit, is somewhat ambiguous, but must be read in light of the solicitors' letter of the 21st January, 1910, which induced that of the 28th just now referred to as a reply thereto.

It is as follows:—

> Referring to the correspondence and interviews between yourself and our Mr. Smellie, we now beg to inform you that Mr. P. A. Paulson, the lessee of the east half of section 29, township 7, range 4, west of the 5th principal meridian, in the Province of Alberta, under Departmental lease No. 3, reference No. 730,279, dated 8th August, 1904, having endeavoured, unsuccessfully, to obtain a further extension of time, has commenced active operations on the land and has started mining on the property. We are instructed that Mr. Paulson is sinking his shaft from the surface with all possible speed.

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I take it to refer to operations between August and the said date.

So read any one in the position of the Minister would have expected to have heard from the appellant with a report of what, up to the 28th of January, had been done, shewing something to justify the reinstatement.

Nothing came so far as I can find till after the 14th of April when the same solicitors are told by a letter from the secretary that the law officers of the Crown had advised that it was not within the competence of the Minister of the Interior to revive the lease which was properly cancelled for non-compliance with the conditions, and refusing to consider his application therefor.

The appellant relies upon the conditional acceptance of rent which was returned and the foregoing conditional reinstatement as an answer to the forfeiture of the lease which the learned trial judge finds as a fact took place within the terms thereof.

With the reasons he assigns for so holding I agree and need not repeat same here.

However, if there be any doubt as to the correctness of his findings resting upon the lease alone as such, I think a full consideration of the provisions of the statute and of the regulations thereunder which are themselves of statutory force and effect, must lead to the conclusion that under same the Minister in charge of the trust thus created for school purposes was given authority only to grant such leases as contemplated thereby.

If the lease and its provisions carry in them such pitfalls as the elaborate argument addressed to us im-

plies, it was not, I submit, in conformity with the scope and purpose of the statute and regulations.

In so far as the lease and implications therein conflict with the due operation of the statute, and the regulations pursuant to which it purports to have been made and beyond which it cannot be extended either by its terms or implications resting on the language used the statutory authority must prevail.

I cannot read the statute and regulations as being capable of permitting such consequences as implied in the argument supporting an appellant whose whole course of conduct as evidenced in the facts and circumstances which I have outlined above was productive of the nullification thereof.

To do so would, I submit, frustrate the purposes of the statute and that which set apart these school land sections for administration for the public trust created in support of education.

It has been also argued that the lease so called is but a licence and the cases of *Roberts* v. *Davey*(1); *Doe d. Bryan* v. *Bancks*(2), are relied upon. In addition thereto the cases of *James* v. *Young*(3), *In re Brain*(4), and the remarks of Sir Montague Smith in delivering the judgment in the case of *The Attorney-General of Victoria* v. *Ettershank*(5), at page 371, would seem to indicate a mining lease, so called, may be considered from a different point of view from ordinary leases in regard to the application of the law governing same.

The latter case was brought to my notice by my brother Duff, since the argument, as having relation to the question I had raised in argument and have just

(1) 4 B. & Ad. 664.
(2) 4 B. & Ald. 401.
(3) 27 Ch. D. 652.
(4) L.R. 18 Eq. 389.
(5) L.R. 6 P.C. 354.

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re-stated above relative to the statute governing the right of the parties rather than what by acts or language they had expressed when acting under a statute. The matter has not been fully argued from either point of view.

I, therefore, content myself with stating what I conceive to be law which cannot be got rid of in the way attempted herein.

Of course, I recognize that there must be on the part of the Crown an election to repudiate and a repudiation of the appellant's rights, but deny more is needed under this statute and that it has not incorporated therein the technical doctrines as to re-entry and all implied therein.

That repudiation was clearly and effectually made and a judicial declaration thereof and effects to be given it under the statute is all that is involved in the decision appealed from.

The case of *Bonanza Creek Hydraulic Concession* v. *The King*(1), relied upon in appellant's factum, but not pressed in argument, turned upon a statute which expressly required a judicial decision on the part of the Minister and hence is clearly distinguishable.

I may add also that appellant has put himself beyond the pale of these cases relied upon, which entitle a lessee to be relieved against forfeiture.

If he has any right to be indemnified for expenditure incurred in reliance upon the apparently inadvertent suggestion of reinstatement he may have some right, upon which I express no opinion, to assert in another way than he attempts herein.

I think, therefore, the appeal should be dismissed with costs.

(1) 40 Can. S.C.R. 281.

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DUFF J.—In my view of this appeal two questions only require discussion. One of these was raised, I think, for the first time during the course of the argument and touches the construction of the order-in-council under the authority of which the appellant's lease purports to be granted. The suggested construction which, if adopted, would be conclusive against the appeal is not consistent with the interpretation followed by the department charged with the administration of the lands affected by the order-in-council and the working of the order-in-council itself; but nevertheless it must be considered.

The exact point is this:—Has section 6 of the order-in-council the effect of causing the lessee's interest to come automatically to a termination, without the exercise of any election on behalf of the Crown, on failure to perform any of the conditions thereby prescribed, namely: (1) the commencing of active mining operations on the demised property within one year after the commencement of the term, or (2) the working of a mine or mines within two years after that date, or (3) the payment of the reserved ground rent or royalty ?

The words of the section are as follows:—

> Failure to commence active operations within one year and to work the mine within two years after the commencement of the term of the lease, or to pay the ground rent or royalty as before provided, shall subject the lessee to the forfeiture of the lease and to resumption of the land by the Crown.

Does this section merely vest in the Crown the right, at its election, to free its title from the lessee's interest on default of performance of the nominated conditions; or, does it operate on such default to terminate that interest *ipso jure* irrespective and independently of any election on behalf of the Crown ?

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The question is a question of construction simply. There can be no doubt that under section 47 of the "Dominion Lands Act" the Governor-in-Council has power to pass a regulation having the force and operation of statute and having the meaning it is now suggested we should ascribe to section 6. The question is:—What is the meaning of section 6? In examining that question it will be convenient to apply some of the usual aids to construction—the traditional interpretation of similar provisions by the courts, the language and the tenor of the order-in-council as a whole, the administrative interpretation of this order-in-council and of similar regulations passed by the Governor-in-Council under the authority of the "Dominion Lands Act," and providing schemes for the administration of various classes of public land by the same Department, the Department of the Interior.

The manner in which the courts have dealt with such provisions, whether found in contracts or in statutes, is described by a very eminent judge in the following passages taken from a judgment of final authority. (Sir Montague Smith speaking for the Privy Council in *Davenport* v. *The Queen* (1), at pages 128, 129 and 130.)

> In a long series of decisions the courts have construed clauses of forfeiture in leases declaring in terms, however clear and strong, that they shall be void on breach of conditions by the lessees, to mean that they are voidable only at the option of the lessors. The same rule of construction has been applied to other contracts where a party bound by a condition has sought to take advantage of his own breach of it to annul the contract: see *Doe* v. *Bancks* (2); *Roberts* v. *Davey* (3), and other cases in the notes to *Dumpor's Case* (4).
>
> In *Roberts* v. *Davey* (3) the words were that the licence "should

(1) 3 App. Cas. 115.
(2) 4 B. & Ald. 401.
(3) 4 B. & Ad. 664.
(4) 1 Sm. L.C. (12 ed.) 56.

cease, determine, and be utterly void and of no effect to all intents and purposes." As far, therefore, as language is concerned, it was stronger in that case than in the present.

It is, however, contended that this rule of construction is inapplicable when the legislature has imposed a condition. But in many cases the language of statutes, even when public interests are affected, has been similarly modified. Thus, where the statute provided that if the purchaser at an auction refused to pay the auction duty, his bidding "should be null and void to all intents and purposes," it was decided that the bidding was void only at the option of the seller, though the object of the Act was to protect the revenue. In that case Mr. Justice Coltman said: "It is so contrary to justice that a party should avoid his own contract by his own wrong that, unless constrained, we should not adopt a construction favourable to such a view." *Malins* v. *Freeman*(1).

There is no doubt that the scope and purpose of an enactment or contract may be so opposed to this rule of construction that it ought not to prevail, but the intention to exclude it should be clearly established.

The question arises in this, as in all similar cases, whether it could have been intended that the lessee should be allowed to take advantage of his own breach of condition, or, as it is termed, of his own wrong, as an answer to a claim of the Crown for rent accruing subsequently to the first year of his tenancy. The effect of holding that the lessee himself might insist that his lease was void, would, of course, be to allow him to escape by his own default from a bad bargain, if he had made one. It would deprive the Crown of the right to the future rents, although circumstances might exist in which it would be more to the interest of the Crown, representing the colony, to obtain the money than to re-possess the land, as, indeed, in the present case, it was thought to be.

See also *Bonanza Creek Hydraulic Concession* v. *The King*(2).

Such being the way in which the courts have looked at similar provisions, is it capable of being "clearly established" that the intention of section 6 was to exclude this "rule of construction," as Sir Montague Smith calls it? The order-in-council provides for the "issue" of "leases" and it is indisputable that the word "lease," as designating an instru-

(1) 4 Bing. N.C. 395. (2) 40 Can. S.C.R. 281.

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ment creating a term of years in the public lands, "issued" by the Department of the Interior, means, in common understanding and usage, a contractual instrument recording in the form of contractual stipulations—covenants, provisoes for re-entry and the like—the terms of the agreement between the Crown and the lessee by which their reciprocal rights and obligations are to be governed touching the subject-matter of the lease. The phraseology of section 6 contains nothing to suggest that the section was framed with a view to excluding the ordinary rule of construction. "Shall subject the lessee to the forfeiture of the lease," while certainly not unambiguous points rather to a penalty exigible from the lessee at the will of the lessor rather than to a consequence decreed by the law itself independently of the will or choice of either. The words "resumption of the land by the Crown" even less disputably seem to point in the same direction.

Ambiguity in such instruments as this order-in-council entitles us by the settled practice of the British and American courts to seek the assistance of any settled administrative interpretation which is clear and unmistakable in its effect for arriving at the more probable intention of the authors of the law. The only actual evidence now formally before us as to administrative interpretation is the lease itself upon which the proceedings are taken coupled with the conduct of the Minister and the Department of the Interior and the attitude of the Crown in the course of this litigation; but there can be no shadow of question that, down to the moment of the hearing of the appeal, the construction of section 6, upon which the Government has deliberately acted, as regards the matter now

under discussion, is the construction for which the appellant contends.

It is common knowledge that the "rule of construction" of *Davenport* v. *The Queen*(1) has usually governed the departmental construction of similar regulations.

I think the proper conclusion is that the lease contemplated by the order-in-council is a contractual instrument and that the form of covenant made use of for the purpose of binding the lessee in the lease before us to perform the conditions of section 6 and the clause of forfeiture employed for the purpose of giving effect to the provisions of section 6 are proper clauses to which it was within the power of the Minister to assent and that the reciprocal rights and duties of the Crown and the lessee in respect of the matters to which these clauses relate are in this litigation to be determined by giving effect to the clauses according to their proper construction as stipulations in an instrument *inter partes*.

I do not find it necessary to decide the question raised by the learned Judge of the Exchequer Court whether or not the phrase "excused from so doing by the Minister," in the 12th clause of the lease, applies to the covenants to commence active operations within a year and to work a mine within two years. There is no doubt much could be said in favour of the view of the learned judge, if I may say so respectfully. But the acceptance of that view must, I think, lead to the dismissal of the information for this reason. The judgment of Lord Cozens-Hardy M.R. in *Stephens* v. *Junior Army and Navy Stores*(2), cited at length in

(1) 3 App. Cas. 115. (2) [1914] 2 Ch. 516.

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the factum of Mr. Smellie, is a sufficient authority for holding that the covenant to commence operations within a year and to work a mine or mines within two years (which I take to mean to open a mine or mines within two years) is not a continuing covenant but a covenant that can only be broken once, and consequently that a waiver of the right of forfeiture (which undeniably took place) arising from the breach of this covenant was an election by the Crown not to avail itself of that right, which election once made, of course, is final.

As to the covenant to continue to work any opened mine—that obviously only comes into effect upon a mine being opened; and the waiver of the forfeiture, or rather the election not to exercise the right of forfeiture accruing for non-performance of the first two mentioned covenants, necessarily imports, or rather necessarily is, an election against exercising that right in respect of any breach of any of the covenants expressed in the clause. The only suggestion that could be made against this view, the suggestion, namely, that a covenant to work continuously any mine or mines that might be operated implies a general covenant to open mines. That suggestion is negatived in the decision referred to as putting forward an interpretation of the clause which is far fetched and unreasonable. I am not satisfied that this conclusion as to the consequences of the waiver of forfeiture arising from the breach of the first two covenants in clause 12 —a conclusion difficult to escape if we accept the learned judge's construction—would rest upon quite so satisfactory a foundation under the construction put upon that clause by the appellant; but I shall not consider this point further, it being unnecessary

to do so in consequence of the opinion I have formed that the right of cancellation vested in the Minister by the provisions of the lease has not in fact been effectively exercised.

The clause (17) is in the following terms:—

That in case of default in payment of the said rent or royalty for six months after the same should have been paid or in case of the breach or the non-observance or non-performance on the part of the lessee of any proviso, condition term, restriction or stipulation therein contained and which ought to be observed or performed by the said lessee and which has not been waived by the said Minister, the Minister may cancel these presents by written notice to the said lessee and, thereupon, the same and everything herein contained shall become and be absolutely null and void to all intents and purposes whatsoever and it shall be lawful for His Majesty or His Succesors or Assigns into and upon the said demised premises (or any part thereof in the name of the whole) to re-enter and the same to have again, re-possess and enjoy as of His or their former estate therein anything herein contained to the contrary notwithstanding.

Provided, nevertheless, that in case of such cancellation and re-entry the lessee shall continue to be liable to pay and His Majesty, His Successors or Assigns shall have the same remedies for the recovery of any rent or royalty then due or accruing due as if these presents had not been cancelled, but remained in full force and effect.

The acts upon which the Attorney-General relies as constituting the exercise of the power of cancellation given by this clause are set out in paragraph 4 of the information, which is as follows:—

That the Minister, by memorandum, under date of September 1st, 1909, directed the cancellation of the said lease and pursuant to such direction, the assistant-secretary of the said Interior Department, on September 13th, 1909, by letter addressed to said defendant. Paulson, advised said defendant, Paulson, that he (Paulson) having failed to comply with the provisoes of clause twelve (12) of said lease, the Department had been obliged to cancel his said lease, to which memorandum and letter the plaintiff will on trial hereof crave leave to refer.

The letter there referred to admittedly in fact never reached Paulson, and that it should reach him,

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was, I think, essential to its taking effect as a cancellation. The words

> the Minister may cancel these presents by written notice to the said lessee and, thereupon, the same and everything therein contained shall become and be absolutely null and void,

import a written notice to the lessee as a condition of the valid exercise of the forfeiture as, indeed, the mode appointed exclusively for exercising it. It required no argument to shew that the paper deposited in the post-office, addressed to the lessee but not received by him, cannot be treated as a written notice within either the letter or the spirit of this stipulation. The learned trial judge appears to have thought that a letter addressed to the lessee's solicitors and admittedly received by them informing them that the Minister had by notice to Paulson cancelled the lease was either by itself sufficient to satisfy the condition or that, as supplementing the letter addressed to Paulson, it completed and perfected the notice thereby initiated.

With great respect, to my mind, this reasoning is not convincing. In the first place there is no allegation in the pleadings that the gentlemen who, in their capacity as solicitors, were conducting a correspondence with the Department of the Interior on behalf of the appellant in relation to this lease, had any authority to receive notice under clause 17 as agents for the appellant. It hardly requires authority to shew that the fact that they were employed in this non-litigious business did not necessarily in itself invest them with such capacity.

In the next place the letter does not profess to be sent on behalf of Minister and in exercise of the power reserved to him by clause 17 and, indeed, evidently

was not so sent. It was, therefore, neither actually nor constructively a notice of cancellation by the Minister, and it cannot be regarded as constituting any essential element of such a notice. Then, if it had been intended to rely upon the correspondence which subsequently passed as constituting notice within the clause, the information should have been framed in such a way as to apprise the appellant that such was the case he would have to meet at the trial. In the absence of anything of the kind in the pleadings, the Crown could only take such a position if it were clear that all the facts were before us so that the appellant could not be prejudiced by the frame of the allegations in the pleading. After analyzing the correspondence I have no difficulty in reaching the conclusion that there is no evidence entitling us to say judicially that the conditions of the forfeiture clause were complied with in respect of written notice. This conclusion makes it unnecessary to consider the other points raised in the argument presenting, what appeared to me upon superficial examination of them only, rather formidable difficulties in the way of the Attorney-General's success. I pass no opinion upon them.

The appeal should be allowed and the information dismissed with costs.

ANGLIN J.—The regulations (11th June, 1902) empower the Minister of the Interior to make leases of school lands for coal-mining purposes, and provide that failure of the lessee to commence active operations within one year and to work the mine within two years shall subject him to forfeiture of his lease. The lessee clearly made default. Under the regulations

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his lease, thereupon, became not *ipso facto* void, but voidable. The lease itself provided that upon default under the regulations

> the Minister may cancel these presents by written notice to the lessee.

There is nothing in this provision inconsistent with the regulations. It was within the power of the Minister, to whom the statute (R.S.C. 1886, ch. 54, sec. 24) entrusted the administration of the school lands, to stipulate as to the manner in which the power of cancellation vested in him by the regulations should be exercised.

Professedly in the exercise of the power conferred by the provision of the lease, a letter from the Department of the Interior, dated the 13th September, 1909, signed by "L. Pereira, assistant-secretary," and addressed to the appellant at Coleman, Alberta, informing him that "the Department has been obliged to cancel your lease," was placed in the post-office. It never reached Paulson and was subsequently returned to the Department from the dead letter office. Concurrently with the mailing of this letter, Paulson's solicitors were notified that their client

> is being advised that his lease * * * has been cancelled.

Assuming the sufficiency of a notice that the *Department has cancelled* the lease, if duly given (I think it was clearly insufficient because it does not purport to be the act of, or even to have been authorized by the Minister himself, and because it signifies past and not present action), the notice so mailed was not given to the lessee. That the notice to which he was entitled should actually reach him is what the lease contemplated. There is nothing in it which consti-

tuted the post-office his agent to receive the notice for him—nothing which dispensed with its actual delivery to him.

But it is contended that the stipulation for a written notice was waived by the subsequent steps taken on Paulson's behalf to secure a re-instatement of the lease. I do not find in what was done anything amounting to such a waiver. There is no evidence of intention on the part of the lessee, with full knowledge of the facts on which his rights depended, to forego or abandon those rights.

Moreover, the Minister subsequently decided

to re-instate the lease in favour of Mr. Paul Paulson.

His solicitors were so notified by letter of the 28th January, 1910. This step clearly involved a waiver by the Minister (who was competent to waive them) of any grounds of forfeiture existing up to that date. It is true that the re-instatement is said to be made on condition that Paulson should file certain evidence with the Department. No time was specified within which that should be done. Whether this condition had been already complied with was perhaps doubtful when, on the 14th April, 1910, not at all for failure to comply with it, but because the Minister had been advised by the law officers of the Crown that it was

not within his authority to revive the lease in Mr. Paulson's favour,

the appellant's solicitors were informed by letter that the Department would treat the lease as having been cancelled from the 13th September, 1909.

With respect, I am of opinion that the lease was not terminated in the manner in which the Minister was empowered to effect cancellation. The conditions of a clause of forfeiture in its favour must be observed

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by the Crown with the same care and precision which is exacted from a subject.

BRODEUR J. (dissenting).—This is a declaratory action on the information of the Attorney-General of Canada to have a lease of the 8th of August, 1904, made by the Crown to the appellant, Paulson, declared duly cancelled and terminated; and, in the alternative, that the lease to the respondent company of the 28th of April, 1910, be declared to have been issued in error.

These two leases cover the same mine.

By the lease of the 8th of August, 1904, a yearly rent of $96 was stipulated and by section 12 it was declared

> that the lessee shall commence active operations upon the said lands within one year from the date of the commencement of the said term and shall work a mine or mines thereon within two years from that date and shall thereafter continuously and effectually work any mine or mines opened by him unless prevented from so doing by circumstances beyond his control or excused from so doing by the Minister;

and, by clause 17 of the agreement, it was covenanted that in case of non-performance of any condition not waived by the Minister, the Minister may cancel the lease by written notice to the lessee and, thereupon, the lease shall become absolutely null and void and the Crown may re-enter and re-possess the property leased.

The lessee Paulson is described in the lease as residing in the Town of Coleman, Alberta. His solicitors were Messrs. Lewis & Smellie of the City of Ottawa.

The lessee was also in possession of several mining rights adjoining the property in question in this

lease and he organized the respondent company to carry out his mining operations. His shareholders, however, refused to take over the mining rights which he had in virtue of his lease of the 8th of August, 1904. The operations on mines acquired by the respondent company were carried out with very extensive and successful results.

The appellant failed to commence operations on the mine in question in this case, as provided in the contract. He obtained from time to time from the Minister extensions of time for the beginning of the carrying out of his operations.

On the 11th of March, 1909, his solicitors, Messrs. Lewis & Smellie, made a new application for an extension of time until the 15th July, 1910, to begin operations under this lease.

On the 9th July, 1909, Messrs. Lewis & Smellie sent to the Department a cheque for $96 in payment of the rental for the year ending 15th July, 1910. The secretary of the Department acknowledged receipt of that letter but stated that the amount

was accepted conditionally pending a decision in regard to the extension of time asked for.

On the 1st of September, 1909, the Minister directed the cancellation of the lease and a letter notifying Mr. Paulson accordingly, dated the 13th September, 1909, was addressed to him at Coleman.

At the same time and on the same day, a letter was sent to Messrs. Lewis & Smellie telling them that it had been decided not to grant Mr. Paulson the extension which they asked for him and they were informed that his lease had been cancelled.

Messrs. Lewis & Smellie continued to correspond

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with the Department, urging that the cancellation should not be carried out, and as a result of their representations they were informed by letter of the 28th January, 1910, that it had been decided to re-instate the lease in Mr. Paulson's favour, subject to the condition that evidence should be filed shewing the nature and progress of the work.

Later on, on the 14th of April, 1910, the Department of the Interior wrote Paulson's solicitors that they had been advised by the law officers of the Crown that it was not within the authority of the Minister to revive the lease, which lease

was properly cancelled for non-compliance with the conditions thereof.

The appellant, who had been instructed by the letter of the 28th January to give evidence of the work which he claimed having done, did not produce that evidence before the latter part of April. He continued to offer his rent, which was refused.

On the 25th April, 1910, the respondent company gave an undertaking to the Department to indemnify the Crown for any damage which might result from the refusal of the Department to revive the Paulson lease and, on the 28th of June, 1910, the mining rights in question were leased to the respondent company.

One point has been raised as to the meaning of clause 12 of the Paulson lease.

That clause, as I already stated, provided that the work should begin within a year, that the mine or mines thereon should be operated within two years and that thereafter the mine would be continuously and effectively worked, unless excused by the Minister.

Three different covenants are provided in that clause:—

1. The beginning of operations within a year;
2. The working of a mine within two years;
3. Its continuous working.

It is contended that the waiver of the Minister could apply only to the working of the mine, but could not affect the beginning of operations and the opening of mining.

I am unable to accept that contention. It seems to me that the Minister had the right to excuse the lessee not only with regard to the continuous working of the mine, but also with regard to the beginning of operations and the opening of a mine. In other words, this clause empowering the Minister to interfere should cover the three different operations covered in that section. It is a well established rule that where a section contains distinct covenants and there are words of restriction either in the prefatory or concluding part, those words must be extended to every part of the section. Beal, Interpretation (2 ed.), p. 185; 1 Saunders, p. 60.

The main question is as to the validity of the cancellation. The lease provided that the Minister

> may cancel these presents by written notice to the said lessee * * * and it shall be lawful for His Majesty * * * to re-enter.

As I have already said, the notice addressed to the lessee's residence, mentioned in the contract, was not delivered. But, at the same time, his solicitors, who had been carrying out all the correspondence with the Department, were notified that the Department could not grant the extension of lease they had asked for Mr. Paulson and that he was being advised that his lease has been cancelled and that

> the Department will now make such other disposition of the lands as may seem advisable.

The correspondence which followed shews conclu-

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sively that Mr. Paulson knew of the cancellation of the lease and that, if the formal written notice did not reach him, he had been advised through his solicitors of the cancellation, since he took steps to counteract the decision of the Department and begged of the Minister to be reinstated in his rights as lessee. The Minister acceded to his request and, by a letter of the 28th January, 1910, he informed him through his solicitors that the lease had been reinstated, but on the condition that certain evidence should be given as to the extent of the work he claimed to have done.

Several months passed before this condition was fulfilled and, at last, the Minister on the advice of the law officers of the Crown informed Mr. Paulson's solicitors that the lease should be considered as duly cancelled, since he had not the right to revive it.

All those circumstances disclosed by the correspondence in the case shew to me conclusively that the appellant knew of the cancellation of the lease. He may have, however, on the strength of the letter of the 28th of January, performed some operations and incurred liabilities in connection with the working of the mine. I would recommend that he be compensated for the damages which he has suffered in connection therewith.

The appeal should be dismissed.

Appeal allowed with costs.

Solicitors for the appellant: *Lewis & Smellie.*

Solicitors for the respondent, His Majesty the King: *Code & Burritt.*

Solicitors for the respondents, The International Coal and Coke Co.: *Fleet, Falconer, Phelan & Bovey.*

THE CANADIAN GENERAL ELECTRIC COMPANY (PLAINTIFFS) ... APPELLANTS;

AND

THE CANADIAN RUBBER COMPANY OF MONTREAL (DEFENDANTS) ..... RESPONDENTS.

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*Nov. 18, 19.
*Dec. 29.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Contract—Delivery—Specified time—Default—Liquidated damages—Pre-estimate—Penalty—Inexecution — Compensation — Cross-demand—Practice—Arts 1013, 1076, 1131 *et seq., C.C.—Art.* 217, *C.P.Q.*

A contract (in the form usual in the Province of Ontario) for the manufacture, in Ontario, of electrical machinery to be delivered within a specified time at Montreal, provided that in case of failure to deliver various parts of the machinery as provided therein the sum of $25 should "be deducted from the contract price as liquidated damages and not as a forfeit for every day's delay in the delivery of the apparatus as specified, etc." The contractor brought action in the Province of Quebec to recover an unpaid balance of the price and the defendants contended that they were entitled to have the claim reduced by a sum equal to the amount so stipulated for default in prompt delivery.

Held, that, on the proper construction of the contract, the intention of the parties was to pre-estimate a reasonable indemnity as liquidated damages for delay in the execution of the contract; that effect should be given to their intention by allowing the deduction of the amount so estimated from the contract price, and that there was no necessity for a cross-demand therefor by the defendants nor that they should allege or prove that they had sustained actual damages in consequence of the delay in delivery. *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* ([1915] A.C. 79); *Wallis* v. *Smith* (21 Ch. D. 243); *Web-*

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

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ster v. *Bosanquet* ([1912] A.C. 394); *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierda y Castaneda,* ([1915] A.C. 6); *Hamlyn* v. *Talisker Distillery Co.* ([1894] A.C. 202); *The "Industrie"* ((1894) P. 58); and *Ottawa Northern and Western Railway Co.* (36 Can. S.C.R. 347), referred to.

Judgment appealed from (Q.R. 47 S.C. 24) affirmed.

APPEAL from the judgment of the Superior Court, sitting in review (1), affirming the judgment of Charbonneau J., in the Superior Court, District of Montreal, by which the action of the plaintiffs was dismissed with costs.

The material circumstances of the case are stated in the head-note. The defendants contended that, on account of delay in the delivery of the machinery in question, they were entitled to deduct from the amount of the purchase price the sum of $14,550, either as pre-estimated liquidated damages or as a reduction in price stipulated in the contract, but, being willing to effect an amicable settlement of the plaintiffs' contention that in some measure the delay was to be attributed to the defendants themselves, they had tendered to the plaintiffs, before action, $3,000 in full settlement of their claim, and they renewed the tender with their plea. In the trial court, Mr. Justice Charbonneau gave effect to the contentions of the defence and dismissed the plaintiffs' action with costs. This decision was affirmed by the judgment now appealed from.

F. W. Hibbard K.C. and *G. H. Montgomery K.C.* for the appellants.

A. Chase-Casgrain K.C. and *Errol M. McDougall* for respondents.

(1) Q.R. 47 S.C. 24.

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THE CHIEF JUSTICE.—I am of opinion that the judgment in this case is right. It is unnecessary for me to go into the facts of the case; the only point that was pressed upon us at the hearing of the appeal was the legal effect of the provision in the contract that

> the sum of $25 per day for each motor, each generator and a complete switchboard shall be deducted from the contract price as liquidated damages and not as a forfeit for every day's delay in the delivery of the apparatus as specified in the delivery clause.

The contract is in English, relates to a purely business transaction and uses terms well recognized in English law. The words "liquidated damages" and "forfeit or penalty" are commonly to be found in similar contracts and, as judicially interpreted by the courts, have a perfectly well understood meaning in English and French law.

A penalty is the payment of a stipulated sum on breach of the contract, irrespective of the damage sustained. The essence of liquidated damages is a genuine covenanted pre-estimate of damage.

I think any difficulty the case may present has arisen from the fact that similar terms have not perhaps quite the same meaning in English and in French law. In the latter the word "peine" does not correspond to the word "penalty" as construed by the English courts. Whilst the exact amount of the former may be recovered irrespective of damage, it is only so much of the latter as represents the actual damage sustained that the party in default can be made liable for. To some extent, therefore, the word "peine" corresponds more nearly to "liquidated damages" than to a penalty. See Planiol (6 ed.), vol. II., pp. 90 and 91. I think it must be some confusion of these terms which caused Mr. Justice Tellier to dissent from the

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judgment of all the other judges before whom the case has come. He seems to think that as the contract provides that the agreed sum payable in lieu of damages is declared not to be a forfeit, the respondent can only recover the damages which he is able to prove he has sustained.

Mais il n'y a pas lieu de rechercher si le créancier souffre ou non un dommage par suite de l'inexécution de l'obligation. La convention faite à forfait a justement pour but de supprimer tout examen de ce genre. La clause pénale est due (et c'est là un de ses grands avantages) dès que le débitur est responsable de l'inexécution. Planiol, *loc. cit.*

The first paragraph of article 1229, C.N., is not reproduced in the Quebec Civil Code.

There are innumerable cases in which it has been necessary, in particular cases, to decide whether the parties intended that the payment provided for by the contract should be in the nature of a penalty or liquidated damages. The principles on which such cases are determined are well established. It is only necessary for me to refer to the recent case in the House of Lords of *Dunlop Pneumatic Tire Co.* v. *New Garage and Motor Co.*(1), in which they are very clearly laid down. The English rule seems to be in accord with that laid down by Pothier, Obligations No. 345:—

Where the payment of a smaller sum is secured by a larger, the stipulation will be relieved against as penal, but where the agreement is for an act other than the payment of money and the injury that may result from a breach is not ascertainable with exactness, depending upon extrinsic circumstances, a stipulation for damages, not on the face of the contract out of proportion to the probable loss, may be upheld, the difficult cases turning mainly upon the interpretation of the language of the particular contract. Harvard Law Review, vol. 29, p. 129, and cases there cited.

(1) [1915] A.C. 79.

In the contract in the present case there is a clear agreement for the deduction from the contract price for delay in delivery; there is no objection to such an agreement being entered into and no reason why effect should not be given to the agreement by the courts. As Sir George Jessel puts it:—

> Courts should not overrule any clearly expressed intention on the ground that judges know the business of the people better than the people know it themselves.

Wallis v. *Smith* (1882) (1), at page 266.

Article 1076, C.C.:—

> When it is stipulated that a certain sum shall be paid for damages for the inexecution of an obligation, such sum and no other, either greater or less, is allowed to the creditor for such damages.

As far back as 1849 it was said by Cresswell J., in the case of *Sainter* v. *Ferguson* (2):—

> If there be only one event upon which the money was to become payable and there is no adequate means of ascertaining the precise damage that may result to the plaintiff from a breach of the contract, it is perfectly competent to the parties to fix a given amount of compensation, in order to avoid the difficulty.

This ruling has been approved in many cases ever since. Halsbury, vol. 10, Damages Nos. 604 *et seq.* It appears to me that it entirely covers the stipulation in the present contract. It could not have been possible to ascertain the damage in advance; the amount fixed is not alleged to have been an extravagant one; and the provision was in every respect a reasonable and proper one which both parties may perfectly well be supposed to have intended.

I may add that the contract is for delivery of an apparatus consisting of the things therein specified, for which apparatus the purchaser agrees to pay

(1) 21 Ch. D. 243. (2) 7 C.B. 716, at p. 730.

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$33,000. The delivery clause provides for the delivery of the apparatus not later than May 1st, 1911, and the contract provided that

> the sum of $25 per day for each motor, each generator, and a complete switchboard shall be deducted from the contract price (1) for every day's delay in the delivery of the apparatus.

It might perhaps be contended that until the whole apparatus was delivered, $25 per day should be deducted for each motor, etc., whether delivered or not. The contract does not say for each motor undelivered. It is not necessary, however, to decide this as the respondents advanced no claim on such a construction of the contract. I mention it because the appellant has certainly suffered no hardship in the deduction made from the contract price and perhaps is fortunate in not having to submit to a larger deduction. But one cannot entirely overlook that possible construction of the contract because of the second paragraph of article 1076 C.C. However, the parties are presumed to be the best judges of the object they had in view when this provision was inserted in the agreement and neither has chosen to raise the question as to whether the obligation to deliver was performed in part.

It may possibly be useful to observe that article 1076 C.C. is new law. See Report of Codifiers for the reasons why they reject the rule as laid down in Pothier, "Obligations," No. 345.

The appeal is dismissed with costs.

DAVIES J.—This is an appeal from the Court of Review of the Province of Quebec affirming a judgment of the Superior Court as to the proper construction of a contract made between the parties for the

manufacture and delivery by the electric company to the rubber company of certain apparatus comprising direct and alternating current motors and a large switchboard in the wiring.

The controversy turned upon the proper construction of a clause in the contract providing for the damages to be paid by the electric company to the rubber company in case default was made in the delivery of the apparatus within the time contracted for.

The clause reads as follows:—

> The sum of twenty-five dollars ($25) per day for each motor, each generator and a complete switchboard shall be deducted from the contract price as liquidated damages and not as a forfeit for every day's delay in the delivery of the apparatus as specified in the delivery clause herein, and this sum shall be over and above the cost of any extra inspection.

The rubber company, on being sued for the price of the apparatus manufactured and supplied, claimed the right under this clause to deduct from the contract price as genuine pre-estimated liquidated damages $25 per day for 582 days the plaintiff electric company was in default in delivering the motors and generators less 122 days which it conceded should not be charged because they were or might be attributable to the defendant company's own fault, thus reducing the number of days for which damages were chargeable to 460, and fixing the damages at $11,500.

Both courts below maintained the defendants' contentions alike as to its legal rights under the above clause of the contract and as to the actual number of days for which it was entitled to deduct the $25 per diem as genuine pre-estimated liquidated damages.

On the question of fact as to the actual number of days chargeable owing to fault in the delivery of the apparatus, after listening to the lengthy argument of

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counsel for the respective parties, I felt myself quite unable to say that the findings of the trial judge concurred in by the Court of Review should be disturbed.

As to the legal question, the principal objection raised was that it was not competent for the defendants, respondents, to plead in answer to an action for the recovery of the stipulated price of these motors and generators the liquidated damages agreed upon in the contract for delays in the delivery of the articles, unless and until damages of some kind and amount had at least been first alleged and proved.

I have not been able to understand on what principle such a contention can be maintained.

Once it is established that the damages are genuine pre-estimated liquidated damages, and are not unconscionable, I cannot see why they should not be pleaded in answer to a plaintiff's demand for the price of the article sold.

But in the case at bar the parties expressly provided that these damages should "be deducted from the contract price" and so the courts below properly held that the defendant was entitled to deduct them for the number of days he established the vendors' default.

It has been suggested as a possible construction of the contract that a failure to deliver even a fractional part of the "apparatus" might make the vendor liable for the $25 per diem even on the motors and generators he had delivered until the entire apparatus was delivered.

I think, however, this is not the true construction of the clause which only makes the vendor liable for the per diem damages pre-estimated for each motor

and each generator undelivered on time and for the days only there was default in the delivery of each such motor and generator.

If the suggested possible construction was the true one there would certainly be strong ground for holding the $25 per diem for each motor and generator not a genuine pre-estimated damage, but an unconscionable amount which was really a penalty.

On the whole, I would dismiss the appeal with costs.

IDINGTON J.—The appellant seeks to recover from the respondent the balance due for certain machines to be made at the factory of appellant in Peterborough, in Ontario, and delivered to respondent in Montreal for the contract price of $33,000 and for some other supplies and work incidental to the contract.

The differences between the parties are confined to a claim made by the respondent, and so far sustained by the courts below, to deduct $25 a day from the contract price in the event of a failure to comply with certain alleged terms of the contract.

The frame of the contract is in some regards ambiguous, and as the claim to these reductions must rest upon the correct interpretation and construction of the contract which is somewhat complicated, I purpose analyzing it.

It consists of three parts. The first is briefly the operative part and therein contains the respective obligations of each party as follows:—

> The contractor will manufacture, deliver and erect and operate the apparatus contracted for herein, consisting of four direct current motors—two motor generator sets—four alternating current motors, and a large switchboard with wiring, etc., all as herein specified.

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The purchaser agrees to accept and pay for the apparatus the sum of thirty-three thousand dollars ($33,000) under the terms and conditions set forth herein, provided that the apparatus complies in every respect with the general conditions and the specifications herein contained.

The next part consists of the conditions referred to in the foregoing. In one of these conditions is the following somewhat ambiguous expression:—

> The contractor will begin work immediately upon signing the contract and complete the same as per the delivery clause, free of all liens and charges within the time specified herein, etc.

Another condition provides as follows:—

> The sum of twenty-five dollars ($25) per day for each motor, each generator and a complete switchboard shall be deducted from the contract price as liquidated damages and not as a forfeit for every day's delay in the delivery of the apparatus as specified in the delivery clause herein, and this sum shall be over and above the cost of any extra inspection.

It is upon this clause coupled with the delivery clause thus referred to and what that delivery clause contains that the claim of respondent to reductions must rest.

This condition is immediately followed by another which says:—

> In the event of the purchaser ordering the work in connection with this contract to be discontinued, or in any manner whatsoever delays the work, it is hereby agreed that such delay caused by purchaser shall be added to the delivery date, mentioned herein, and such delivery date extended by the number of days that will be equal to the delay caused by the purchaser.

Upon this condition the appellant rests a number of claims to reduction from what respondent might otherwise be entitled to. With these I shall deal presently in detail.

The respondent, however, alleges it has made due allowance for all such counterclaims as well founded.

These delays it estimated at one hundred and

twenty-two days in all and tendered a sum to cover same which the learned trial judge has found sufficient and in that has been sustained by the court of appeal.

The "delivery clause" above referred to I find under the heading "Delivery and Erection" and under that appear the following provisions:—

> The apparatus shall be delivered on purchaser's foundations, free of cost to the purchaser in his power house in the City of Montreal, Province of Quebec, not later than May 1st, 1911.
>
> In case the contractor should fail to deliver the apparatus by May 1st, 1911, the sum of twenty-five dollars ($25) per day for damages as provided for herein shall apply.
>
> * * * * *
>
> The purchaser agrees to have the power house foundations, etc., ready for the apparatus. If the purchaser causes any delay to the contractor thereby preventing the installation of the apparatus, or the delivery of the same, the damages of $25 per day provided for herein shall not apply for the number of days delay caused by the purchaser.

It is herein I find the ambiguity I first mentioned. Clearly there is in this latter clause a confusion between delivery and installation.

True, there are between these just quoted, two provisions I omit, of which one provides appellant shall provide men to erect without delay and have same complete and ready for service not later than May 20th, 1911. But as there is no reduction of price or provision for liquidated damages or anything specifically bearing thereon I find none can by any possibility be claimed in that regard. Indeed, respondent in argument renounced any such claim save in respect of failure to deliver within the time agreed upon.

Notwithstanding that, can appellant, by virtue of the clause lastly quoted, exonerating the appellant for delays caused by respondent, take any benefit therefrom in way of reduction of respondent's claim, by reason of the peculiar expression therein which reads:

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Thereby preventing the installation of the apparatus, or the delivery of the same,

followed by the words:—

The damages of $25 per day provided for herein shall not apply for the number of days' delay caused by the purchaser?

I am of opinion it cannot. It is restricted to the damages provided therein, and they are only provided for in respect of default in delivery. And that default must be computed from the date, after the 1st of May, when the delays caused by the purchaser have been duly credited, and thus appellant given a later day for delivery.

Now let us consider the bearing of these clauses, thus interpreted and construed, upon the respective claims of respondent to make the reductions allowed, and the appellant to be relieved therefrom by virtue of what the purchaser has thus agreed to excuse.

Beginning with the latter which is chiefly in question herein, I shall take them in the order presented.

The first claim so set up is a delay alleged by the respondent's failure, for nearly a month, to execute the contract, after the appellant had duly signed same and sent it to respondent to be executed. I cannot understand how it can be claimed that such a delay can be held as one of those which was caused by the purchaser within the meaning of the contract. It is clearly a hindering the progress of the work which is aimed at and nothing else.

The appellant had the remedy in its own hands by refusing, if it could justify such a course under the attendant circumstances, to go on, unless and until a modification of the terms had been made, but the contract cannot permit of such a mode of construction. Indeed, the appellant in fact did go on meanwhile with

the work. It was, as I read the contract in the expression I quote above, clearly contemplated by the parties that it should do so as soon as it had signed it; and everything must be treated as if the contract, which has no date, became operative from the date when the appellant signed it.

I have no doubt that, not only was that the purpose of the peculiar expression used, but also that it was the understanding of the parties.

The next item of claim is a change in three of the 175 h.-p. motors.

Inasmuch as the specifications forming part of the contract provided for terminals as follows:—

> The motors shall be provided with terminals located suitably for connecting to the switchboard leads; the terminals will be provided with approved insulating couplings. The switchboard location and wiring may call for the terminals to be on top of the motor,

it does not appear to me as self-evident that the respondent was to blame for asking that they should be placed as at first asked.

It was competent for the engineer to have insisted, as some stubborn, self-sufficient men might have done, that what he had written must stand. If he had I cannot see anything appellant could have done but submit.

Because the engineer was gracious enough to try and meet the appellant's urgent petition to save it expense I do not think his company can be bound to bear the burden thereof. Moreover, I suspect there was ample work for appellant's men, working on these machines, to keep going steadily on.

The next is in respect of the test on those 175 h.-p. motors. The evidence bearing upon this item illustrates, by the slip-shod methods of those in the appel-

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lant's employment, in charge of its business, how very provoking they could be.

The appellant had been warned by a letter of the 5th May, in the nature of a personal appeal to its vice-president, and by a formal letter of 9th May to the company, that full deductions for delays for non-delivery would be insisted upon. Yet in face of these appeals neither business energy nor ordinary despatch, much less the urgency that a possible loss of a hundred dollars a day should have evoked, was used. And there is no proof which can excuse them at the expense of the respondent.

The next item is in regard to three 175 h.-p. motors and one 20 h.-p. motor. The fault in part admittedly was on the part of appellant, and the requirements of the engineer in way of change were within the contract and no proof is adduced that the entire work was held up by any such cause as assigned.

The next cause of delay by respondent, if any, rests upon what transpired relative to some sub-bases which formed no part of the contract in question, yet were to be so used in connection with the work done under the contract that it might reasonably have been considered by the appellant as due to the respondent that the work done or to be done in Peterborough, pursuant to the contract, should be so fitted there as to be ready when erected to operate upon the sub-bases.

With every desire to give effect to this reasonable suggestion I am unable to discover wherein the parties concerned provided in the contract for the due execution thereof.

Whatever relief appellant is entitled to herein must rest within the terms of the contract as expressed in that condition above quoted providing for

the extension of the date of delivery by reason of the purchaser causing delay to the contractor.

The reasonableness of the suggestion made in the letter of 1st April, upon which and what followed appellant's claim rests, cannot be gainsaid. But how far does that carry us in relation to the business in hand ?

It, when coupled with what preceded and followed it, seems to disclose only this, that some one had blundered.

The contract itself does not seem to have provided for the contingencies involved in anything relating to the sub-bases. If the appellant's men had paid careful attention to the matter they should have seen to it earlier than this letter of 1st April to Sheldon's Ltd., indicates.

The fact is the fitting of the machines to be made by the appellant to serve sub-bases must have been patent to all concerned if heed paid to the business in hand and the means of doing so or anticipating same, ought to have been provided for in the contract. So far as I can discover this was not done.

In such a situation, what, within the contract, should have been done ?

Clearly the only alternative in law was to have gone on with the completion of the work according to contract so far as it reached, and shipment of the machines so that the terms regarding delivery might have been fulfilled. If shipped in that condition a new difficulty would have been presented no doubt. The installation would have been delayed but for that no damages per diem for delays could have been claimed. Another difficulty would have arisen relative to the extra expense of having the work of fitting

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done in Montreal instead of in Peterborough for which due compensation no doubt would have had to be made by respondent.

Indeed, the parts which needed fitting to the sub-bases might have had to be shipped to Peterborough. But for any such event the respondent would only have itself to blame. It need not have concerned appellant.

It is impossible now for us to re-mould the contract and provide for all this. It is, I repeat, within the lines of the contract as framed that we must determine the rights of the parties and not by something we can presume to have been inserted and assume to have been contemplated as within same when it is clearly not so provided.

A letter of 13th February from respondent to the appellant made clear what was wanted. And therein appellant is asked for a tender for these sub-bases and it ought to have dawned upon some one in appellant's employment that unless this unprovided for feature of the contract was duly provided for, there was trouble ahead.

It may be excusable to overlook the need of this provision in a contract which covers twenty-eight printed pages of the case before us, but doing so furnishes no basis for us to allot the shares to be borne of the burden of a joint blunder.

It was possibly a case for an application within the terms of the contract for an extension of time or for a direct appeal to respondent.

Instead of adopting either such course there was correspondence between appellant and the sub-contractors—Ross & Greig and Sheldons—and needless waste of time at that, without a direct communication

(and probable understanding) with respondent. The only direct thing appellant has from respondent to shew, and rely upon, is the ambiguous letter of the 4th May. It passes my understanding why that should be relied upon, for nothing preceding that letter had been done in any way approaching business methods so far as these sub-bases were concerned. Standing alone as it does, the letter is worthless for appellant's present purpose.

There certainly is fair ground for an appeal in regard to this item to the sense of justice respondent should have. It may or may not have taken that into consideration in arriving at the total of the hundred and twenty-two days it allows for.

But I can see no ground in law upon which to rest the claim made by the appellant in this regard.

I think it might have been possible for the appellant in a contract of this magnitude to have made the templets as requested in the letter of respondent of 13th February at, say, a couple of hundred dollars expense, even without an appropriation.

The next claim is one arising out of the admitted error made by the engineer in connection with the starters for the synchronous and induction motors. It seems well founded, but its consequences, in my opinion, are grossly exaggerated, and amply covered by allowances made.

The last claim relative to the motor generator sets may be disposed of by the like considerations.

I confess, notwithstanding the argument presented, I was disposed at its close to think the claims made by respondent were somewhat harsh and possibly unfounded in law, but the examination I have made

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leads to the conclusion that appellant has only itself to blame for the result.

There remains only the question of law striking at respondent's entire claim as presented for consideration.

In the first place it is to be observed that the terms of the contract raise a most formidable obstacle in the way of the appellant. It sues upon a contract for a price agreed upon which it is stipulated, in certain contingencies which have taken place, shall be reduced to another price. What can it matter in such a case that the reduction of price is called "liquidated damages"?

It is not for the law, unless such stipulation is against law, to act upon the name given or name assigned the amount of reduction, but to give effect to the contract.

Of course, if the law clearly expressed such a stipulation to be null, or subject to modication, then the contract could be of no avail.

I do not think the article 1076 of the Civil Code governing the parties' rights in the premises does so interfere with the efficacy of what the parties have contracted for.

The case of *Ottawa Northern and Western Railway Co.* v. *Dominion Bridge Co.*(1), does not help the appellant. It would be very difficult to extract from the decision in that case anything to help any one. For there was such a difference of opinion in the court as to render its decision unlikely to be ever applicable to another case unless that other should happen to be, as this is not, exactly the same.

(1) 36 Can. S.C.R. 347.

I had the misfortune, in common with my then brother, Mr. Justice Nesbitt, to differ from the result reached by the majority. But each member of that majority took different grounds for the conclusion reached.

There were two contracts involved therein; and in no way could one, by construction of the contract fixing the price, as may be held herein, be able to say that as the result of an application of the damages then and there in question, the price was thereby determined. The case chiefly turned, so far as the majority of those expressing opinions held, upon the point of whether there could be held to be an application of article 217 of the Code of Civil Procedure. The question of whether or not the party seeking there compensation or set-off based in liquidated damages or, as here, such a reduction of price as claimed herein must shew actual damages could only arise in a very incidental manner therein. And as I viewed it then my opinion would be against the appellant. If this court had by the majority clearly expressed a view in conflict therewith upon the exact point involved, I should cheerfully bow thereto, but unfortunately it did not.

The neat point raised herein, that, of necessity, in law the party claiming the reduction of price must allege and prove damages before he can apply the estimate fixed by the contract, does not seem to me tenable in this case.

In the first place the contract does not permit of such a holding. And in the next place the fact is that such proof as was adduced seems to answer the contention.

I can conceive of such a case arising as might give

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place to such a contention as raised herein, but not in this case, or in the way it is presented.

I find in respondent's factum, article 1076 C.C., quoted as follows:—

> 1076. When it is stipulated that a certain sum shall be paid for damages for the inexecution of an obligation, such sum and no other, either greater or less, is allowed to the creditor for such damages.

This is not the whole of that article. The part quoted is followed by this:—

> But if the obligation have been performed in part, to the benefit of the creditor and the time for its complete performance be not material, the stipulated sum may be reduced unless there be a special agreement to the contrary.

This gives an entirely different aspect to the article as a whole and provides for such cases as I have just indicated may possibly arise. In such a case this second part of the article should be availed of by pleading the facts applicable thereunder, which was not done or pretended to be claimed herein.

In concluding I may say that the parties are both agreed that the Quebec law must govern their rights. But there are many features in the case arising from the execution of the contract by appellant in Ontario, and the form of contract, which not only contemplated the work of constructing the machines in Ontario but also the right given respondent incidentally thereto to interfere with the expedition of the work there and the shipment thence and only a delivery at Montreal being provided for, before the clauses in question should become operative, which might suggest the law of Ontario was intended to govern. For the later work of installation, in respect of which nothing arises herein, different considerations might apply.

I express no opinion. I merely suggest there is

room for argument and should not feel bound in that regard by this decision in any case presenting the like features and any different submission as to the law of the place by which the contract should be interpreted.

I think the appeal should be dismissed with costs.

ANGLIN J.—The appellant submits three distinct grounds of appeal:—

(1) That the contract in question must be interpreted and effect given to it according to the civil law of Quebec and not according to English law; and that, under the former, the provision fixing the amount of damages to be paid by the vendors for delay in delivery, installation, etc., is not "a penal clause" within articles 1131 *et seq.*, of the Civil Code, but a pre-determination of the amount of damages under article 1076, and that the purchasers, therefore, cannot recover under it without alleging and proving that the delay complained of had actually caused them some damage, the appellants conceding, however, that upon proof of any damage, more than merely nominal, regardless of its extent, the purchasers would be entitled to recover the full sum stipulated for in the contract.

(2) That damages under the clause in question are not a proper subject of compensation or set-off, but recovery of them can be had only in a cross-action.

(3) That the number of days' delay charged to the vendor is excessive.

Before considering the character and legal effect of the clause in the contract upon which this litigation has arisen, a word should be said as to its scope. It has been suggested that it might render the vendors liable for the sum of $25 per day in respect of each of

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the eleven distinct articles which they undertook to supply so long as any one of them should remain undelivered, because until all had been delivered there was delay in the delivery of the "apparatus" contracted for. But both the parties, by their conduct before action and by their attitude in the litigation itself, have made it clear that they understood that the right to recover the stipulated sum for delay in respect of each of the eleven specified articles should be limited to delay in its delivery. That this is the real purview of the agreement seems to be at least equally probable. As the parties have acted upon this view of its scope and have suggested no other, it would appear to be contrary to sound construction to give to the clause in question an effect different from what they seem to have contemplated (art. 1013, C.C.) more onerous, and possibly calculated to render its enforceability doubtful.

The first point made by the appellants is based upon the words "as liquidated damages and not as a forfeit." Only a very cursory examination of the clause in question is required to make it practically certain that it was prepared from the point of view of the English jurist. It is in a form familiar to every English lawyer who knows anything of commercial contracts. It was no doubt taken from some similar contract framed for use in one of the provinces where English law prevails. The obvious purpose of the parties was to prevent the application of the equity rule, under which courts administering English law relieve from penalties and forfeitures, by inserting a provision that it would be difficult to regard as anything else than "a genuine covenanted pre-estimate of damages" (*Dunlop Pneumatic Tire Co.* v. *New Gar-*

age and Motor Co.(1), at p. 86), in a case in which "it was impossible to foresee the extent of the injury which might be sustained" by the purchasers should the vendors make default. *Webster* v. *Bosanquet*(2), at p. 398. The circumstances are such that it cannot be said that the sum agreed upon is extravagant or unconscionable; it is made to depend upon the number of articles undelivered and the duration of the delay in the delivery of each; and a precise estimate of actual damage either before or after the default would have been so difficult to arrive at as to be impracticable. *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo y Castaneda*(3), at pp. 16, 19.

The apparent intention of the parties, therefore, was to provide for the payment by the vendors, on default, of a sum agreed upon as pre-estimated damages in such a manner that the courts would not relieve from or modify the stipulation and to dispense with what would possibly be very expensive proof of the actual loss to which the delay had subjected the purchasers. Such an intention is conformable to the policy of the civil law of Quebec quite as much as it is to that of English law. Under both systems alike their contract is the law of the parties. It is the duty of the courts to ascertain as best they can from what the parties have expressed, read in the light of the surrounding circumstances proper to be considered, the nature and extent of the engagements to which they intended to commit themselves, and to give effect to them. In English law the term "penalty" may bear a meaning and may import incidents which differ somewhat from

(1) [1915] A.C. 79. (2) [1912] A.C. 394.
(3) [1905] A.C. 6.

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those attached to it by the Civil Code of Quebec. Yet where it is clear, as it seems to be in the present case, that it was the intention of the parties to contract according to English law, although their agreement was partly made and was partly to be carried out in the Province of Quebec, the courts of that province, giving effect to such intention, will put upon its language the interpretation which it would receive in an English court rather than defeat the real purpose of the parties by giving to the terms they have used the significance which they ordinarily bear in contracts governed by the civil law of Quebec when there is no sufficient indication that they should receive any other interpretation. The present contract was partly made in Ontario, where one of the contracting parties had its chief place of business. That fact may account for its having taken the English form. But, however that may be, effect must be given to the manifest intention of the parties that their contract should be construed according to the rules of English law. *Hamlyn & Co.* v. *Talisker Distillery*(1); *The "Industrie"*(2), at pp. 72, 73. In doing so we are but carrying out the provisions of article 8 of the Civil Code.

In this view it is unnecessary that I should consider the points suggested by the appellants as to the differences between the cases provided for by article 1076 C.C., and those dealt with under articles 1131, etc., or whether, if the present case falls under the first mentioned article, it would be necessary for the respondents to allege and to prove that they had sustained some actual damages. I may, however, observe that I would have difficulty in placing a con-

(1) [1894] A.C. 202. (2) [1894] P. 58.

struction on the clause in question which would require the purchasers to prove some actual damage, more than merely nominal, but would upon any such actual damage being shewn, regardless of its extent, entitle them to recover the entire amount stipulated for. I think the first ground of appeal fails.

The term of the contract that the purchasers shall deduct from the contract price any sum payable by the vendors for damages for delay in delivery is an express provision for set-off or compensation which must prevail, the contract being the law of the parties. The effect of this clause must have escaped the notice of Mr. Justice Tellier. But for it I should be prepared to accept his conclusion that, in view of the provisions of article 1188 C.C., and article 217 C.P.Q., there could not be compensation in such a case as this. *Ottawa Northern and Western Railway Co.* v. *Dominion Bridge Co.*(1).

A study of the record has satisfied me that there has been no overcharge against the vendors for the several periods of delay in delivery and that they have had the full advantage of any reduction in damages to which defaults of the purchasers entitled them. In every case where there was any room for doubt they have not been charged with delay. Only in a very clear case could we interfere on this branch of appeal with the concurrent judgments of the Quebec courts.

BRODEUR J.—Les appelants sont manufacturiers de pouvoirs moteurs électriques et ils s'étaient engagés envers l'intimée de lui livrer certaines machines le 1er mai, 1911, avec obligation de leur part de payer $25

(1) 36 Can. S.C.R. 347.

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par jour de dommages pour livraison tardive. La convention portait que ces dommages seraient déduits du prix du contrat

as liquidated damages and not as a forfeit for every day's delay in the delivery.

Il s'agit de savoir si la compagnie intimée était obligée d'alléguer et de prouver qu'elle avait souffert des dommages.

En principe général, le débiteur est tenu de payer des dommages quand il n'exécute pas son obligation (article 1065 C.C.) et le créancier est alors tenu de justifier de la perte qu'il a éprouvée et du gain dont il a été privé et il doit aussi établir le *quantum* des dommages. (Article 1073 C.C.) Cette preuve est parfois extrêmement difficile à faire et donne lieu à des frais d'enquête considérables et alors les parties conviennent d'une certaine somme pour tenir lieu des dommages-intérêts. (Article 1076 C.C.) C'est la loi qu'elles se font et qu'elles doivent, par conséquent, observer.

Il y a eu évidemment dans la cause actuelle inexécution de son obligation de la part de l'appelante. Elle n'a pas livré les machines dans le délai stipulé au contrat. Alors, comme la convention portait que le prix de vente serait reduit dans la proportion de $25 par jour de retard dans la livraison de chacune des machines, la defenderesse avait le droit par sa defense d'invoquer cette réduction (article 196(3) C. P.Q.).

Mais l'appelante dit que l'intimée aurait dû tout de même, malgré cette stipulation, prouver qu'elle avait subi des dommages.

Je suis d'opinion que la convention dispense le

créancier de faire aucune preuve du préjudice qui lui a été causé.

Marcadé et Pont, art. 1153, p. 421; Larombière Obligations, vol. 4, p. 32, art. 1231; 26 Demolombe, No. 663; 17 Laurent, No. 451, p. 448; *McDonald* v. *Hutchins*(1).

Les parties avaient en vue évidemment qu'il était essentiel pour l'intimée d'avoir ses machineries à une date fixe et, à raison, je suppose, de certains contrats qu'elle aurait eu elle-même à remplir, il était absolument nécessaire pour elle qu'elles fussent livrées à cette date-là, afin de pouvoir à son tour remplir les obligations qu'elle avait contractées envers d'autres personnes. Comme ces dommages auraient été extrêmement difficiles à établir, il a été jugé à propos par les parties de déterminer immédiatement par convention le *quantum* de ces dommages et dans quelles conditions ils deviendraient dûs. Le *quantum* a été fixé à $25 par jour et la condition est que si la marchandise n'est pas livrée le 1er mai cette somme de $25 par jour pourra être déduite du prix de vente.

Si nous interprétons même littéralement la convention nous pouvons dire qu'une certaine somme avait été stipulée pour le prix des marchandises si elles étaient livrées le 1er mai mais que cette marchandise commanderait un prix moindre si elle était livrée plus tard.

Je ne vois pas comment l'intimée aurait été obligée, dans les circonstances, de prouver qu'elle a souffert des dommages.

L'appelante cependant aurait pu établir que si le temps pour l'entière exécution avait été de peu d'im-

(1) Q.R. 12 K.B. 499.

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portance la somme stipulée aurait pu être réduite (articles 1076, 1135); mais le fardeau de la preuve retombait sur elle; et, comme elle n'a pas rempli cet *onus*, nous ne pouvons pas faire autrement que d'appliquer la convention des parties et dire que l'appelante est tenue de subir une reduction de prix.

Une preuve volumineuse cependant a été faite sur la question de savoir si l'inexécution de la convention n'était pas due à la négligence de l'intimée. Une clause de la convention comportait que si l'acheteur causait quelque délai au vendeur, qui aurait pour effet d'empêcher l'installation des machineries ou leur livraison, la reduction de prix ne pourrait pas être réclamée pour le nombre de jours de délai qui auraient été causés par l'acheteur.

L'intimée elle-même admet dans ses plaidoiries qu'un certain nombre de jours de délai devaient lui être imputés et elle donne crédit à l'appelante de ce chef pour une somme d'environ $3,000.

Il s'agissait de savoir si les autres délais n'étaient pas également dûs à la faute ou à la négligence de l'intimée.

L'un des premiers chefs imputés à la *Canadian Rubber Company* était que le contrat n'avait été signé par elle qu'un mois environ après que l'appelante elle-même eût signé.

Il aurait fallu dans ce cas-là pour la demanderesse établir qu'elle avait au moins protesté l'intimée; mais elle n'a pas jugé à propos de faire cette procédure. Elle a reçu le contrat dûment signé par l'intimée et d'ailleurs il est en preuve que les parties s'étaient entendues longtemps auparavant sur la nature des travaux à faire et que même la demanderesse avait commencé à exécuter son contrat. Le contrat formel

qui a été signé n'a été fait que dans le but de coucher dans un document formel leurs conventions qui étaient déjà bien arrêtées et bien connues.

Il résulte de la preuve que la demanderesse a signé cette convention d'une manière bien imprévoyante. En effet, nous avons au dossier une lettre du surintendant de sa manufacture lui disant, peu de jours après la signature du contrat, qu'il était absolument impossible de fabriquer les machines dans le temps stipulé. Il me semble alors qu'avant de s'obliger formellement, comme elle l'a fait, la demanderesse aurait dû s'enquérir du surintendant de la manufacture s'il était en position de fabriquer ces machines dans le temps stipulé. Elle me paraît n'en avoir rien fait et alors elle n'a pas raison d'imputer ce delai à l'intimée, lorsqu'il est bien évident que c'est elle qui est en faute.

Elle se plaint également d'autres délais, concernant, par exemple, les bases sur lesquelles les machines devaient être assises.

Ces bases devaient être faites par la Canadian Rubber Company. Elle les a fait faire par un fabricant à Montréal; mais comme les machines avaient à être fixées sur ces bases-là, il était très important qu'elles fussent essayées à l'avance pour que ces machines qui demandent à être installées avec beaucoup de soin fissent les travaux qu'on attendait d'elles. L'appelante a fait transporter ces bases à sa manufacture à Peterboro pour faire ces essais.

Il y a divergence d'opinion dans la preuve à ce sujet. Quelques témoins disent que ces essais étaient nécessaires; d'autres disent que c'était inutile.

La Cour Supérieure et la Cour de Revision, sur ce

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point aussi bien que sur les autres, qu'il est inutile de discuter, sont arrivés à la conclusion que sur ces faits l'intimée devait réussir.

Il est bien difficile pour nous de mettre de côté ces décisions concurrentes des deux cours inférieures. Il s'agit, comme on le voit, d'une question de faits; et, suivant la jurisprudence bien établie de cette cour, nous ne devons intervenir que lorsqu'il y a une injustice bien flagrante et bien évidente.

Dans ces circonstances, je suis d'opinion que le jugement de la Cour de Revision doit être confirmé avec dépens.

On a dit que le contrat en question en cette cause-ci, étant un contrat commercial, devrait être interprété suivant la loi anglaise.

Je ne puis pas accepter ce principe. Nos lois dans Québec sur la clause pénale sont différentes de la loi anglaise. Glasson, dans son ouvrage sur l'Histoire du Droit et des Institutions de l'Angleterre, déclare expressément, au vol. 6, p. 375, que les lois françaises et les lois anglaises posent des règles différentes quant aux obligations avec clause pénale.

Appeal dismissed with costs.

Solicitors for the appellants: *Hibbard, Gosselin & Moyse.*

Solicitors for the respondents: *Casgrain, Mitchell, McDougall & Creelman.*

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AMELIA JANE BROWNING, AND OTHERS, TRADING AS THE SHARPE CONSTRUCTION COMPANY (DEFENDANTS) APPELLANTS; *Nov. 22, 23. *Dec. 29.

AND

MASSON, LIMITED (PLAINTIFFS) .... RESPONDENTS.

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

Contract — "Consistent conditions" — Impossibility of performance— Release from liability.

The defendants having filed a tender with the City of Quebec for the reconstruction of Dufferin Terrace agreed with plaintiffs that, if their tender was accepted, they would enter into a written contract, "consistent with the conditions" of such contract as might be made with the city, for the purchase from the plaintiffs of all the structural steel work that would be needed. The city corporation accepted the tender, but only on the condition that the steel and iron work should be purchased by the defendants from another firm.

Held, reversing the judgment appealed from (Q.R. 24 K.B. 389), Davies and Idington JJ. dissenting, that, on a proper construction, the agreement contemplated a contract to be entered into on terms consistent with whatever contract might have to be made with the city; that the nature of the condition imposed by the city corporation made it impossible for the defendants to purchase the necessary steel and iron work from the plaintiffs, and that, without fault on the part of the defendants, the agreement never became operative and both parties were liberated from obligation thereunder.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), whereby the judgment of Dorion J., in the Superior Court, District of Quebec, in

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

(1) Q.R. 24 K.B. 389.

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favour of the plaintiffs, was varied by reducing the amount of the judgment entered for them from $1,982 to $1,482, with costs against the defendants in the Superior Court and costs against the plaintiffs on the appeal to the Court of King's Bench.

In the circumstances stated in the head-note, the plaintiffs brought the action for breach of the agreement to enter into the contract therein mentioned and claimed damages as follows, viz., $182 for their expenses incurred in taking measurements and preparation of the plans in order to enable them to make a tender; $3,100 for profits expected from the execution of the works in question, and $2,330 for damages resulting from being deprived of the benefit of being contractors for the construction of works of an important public character in such a prominent situation and the loss of the advantages that they would thereby have obtained in the way of advertisement of their capability in matters of construction of that nature. The trial judge allowed the first item in full, also 10% profit on the estimated cost of the works contemplated to be done by the plaintiffs, amounting to $1,300, and $500 for loss of advertisement, thus making $1,982 for which judgment was entered in favour of the plaintiffs with costs. On the appeal to the Court of King's Bench, the trial court judgment was reduced by the disallowance of the item of $500 for loss of advertisement and affirmed as to the balance, $1,482, with costs as stated above.

From the latter judgment the defendants appealed to have the action dismissed with costs and the defendants, by cross-appeal, sought to have the judgment of the Superior Court restored.

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L. A. Taschereau K.C. for the appellants and cross-respondents.

St. Laurent K.C. for the respondents and cross-appellants.

THE CHIEF JUSTICE.—The appellants are general contractors and, as such, made, in competition with others, a tender for the reconstruction of the Dufferin Terrace in the City of Quebec. After consideration, the Road Committee decided to recommend the appellants' tender for acceptance by the council as the most advantageous, but on the condition that they—the appellants—would purchase the steel and iron required for the execution of their contract from the Eastern Canada Steel Company, a local concern engaged in the manufacture and erection of steel and iron structures. The respondent company also carried on the same business at Quebec. The council, adopting the recommendation of the Road Committee, awarded the contract to the appellants.

A letter purporting to set forth an agreement theretofore made between the appellants and the respondents was written about the time the tender was being considered by the council; but this letter, although drafted by the respondents on August 21st, was not signed until the 24th August by the appellants. That letter is in these words:—

Quebec, August 21st, 1914.

Object: New Dufferin Terrace.

Messrs. Sharpe Construction Company,
109 Fleurie Street, Quebec.

Gentlemen,—This will confirm our verbal agreement to the effect that you hereby bind yourself to sign a contract with us for furnishing and erecting complete the structural steel work for the New Dufferin Terrace for the sum of $11,400 (eleven thousand four

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hundred dollars), as soon as your contract with the City of Quebec for the work is executed, it being understood that this price covers a structure comprising columns, beams, ties with fittings complete, capable of supporting wooden joists and wooden floor consistent with the requirements of the specifications for Steel Superstructures of Bridges and Viaducts of the Department of Railways and Canals of Canada, and it being further understood that this structure be subject to the approval of the City of Quebec.

This also confirms our verbal agreement that in case the City of Quebec does not approve of a structure as above mentioned, that immediately following the signing of your contract with the City of Quebec, you hereby bind yourself to sign a contract with us for the furnishing and erecting of the structural steel work completely erected in place for the New Dufferin Terrace, for the sum of $13,000 (thirteen thousand dollars). Said structure to comprise columns, beams, ties and fittings and to be capable of supporting a uniformly distributed live load of 140 lbs. per sq. ft., floor construction to be of wooden joists and planking.

It is further understood and agreed that either of the contracts mentioned above will be *consistent* with the conditions in your contract with the City of Quebec.

Yours very truly,
MASSON, LIMITÉE,
E. D. Kellogg,
Ing. in charge.

Accepted:
SHARPE CONSTRUCTION CO.,
A. Laurent.
W. Sharpe.

It will not be necessary to consider the legal effect of the vague and ambiguous language used in the first two paragraphs. This appeal turns upon the meaning attributable to the last paragraph and more particularly to the governing word "consistent." To properly appreciate the effect of the language used, it is important to consider the circumstances under which the letter was written. It is apparent upon the evidence that the paragraph now directly in question was added to the letter at the instance of the appellants and for their protection and, in view of the then existing situation, it was a very elementary precaution to take because, at the date the letter was signed, not only did both parties know that the appellants' tender

was accepted subject to the condition that the steel required should be purchased from the Eastern Canada Steel Co., but a contract containing that condition was actually prepared by the city notary and ready for appellants' signature. One should not lightly assume that in those circumstances the appellants would give an absolute undertaking to sublet the same work to the respondent company.

Let us now analyze the language used, because, of course,

> all contracts must be construed according to the primary and natural meaning of the language in which the contracting parties have chosen to express the terms of their mutual agreement.

Evidently the appellants must not be presumed to have intended to bind themselves to do more than to give the contract to the respondents if they could do so consistently with the terms of their own contract with the city. It is not to be assumed that their intention was to obligate themselves without consideration to give a contract which it was impossible for them to carry out. The respondents, who drafted the letter and are, therefore, responsible for the choice of words, say:—

> *It is further understood and agreed that either of the contracts mentioned above will be consistent with the conditions in your contract with the City of Quebec.*

Bearing in mind that the dictionary meaning of the word "consistent" is "compatible with," "not contradictory of," the sentence must be read to mean that the appellants obligate themselves to enter into a contract with the respondents only if such a contract would be compatible with and not contradictory of the conditions in their own contract with the city. And could anything be more incompatible with or more

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contradictory of that condition of the contract with the city by which they bound themselves to give the preference to the Eastern Canada Steel Company than an undertaking to give the respondent company the steel work for the terrace? And that it was not intended when the letter was written to enter into a binding agreement such as is now relied upon is made absolutely clear by the evidence of Masson, one of the chief officials of the respondent company. Speaking of the letter, he says:—

Q. Maintenant, subséquemment à l'ouverture des soumissions, avez-vous rencontré les représentants de la Sharpe Construction Company, lors de la signature du document produit comme exhibit P. 3?

R. Nous avons été les rencontrer a l'instance de Monsieur Laurent et nous avons discuté cette question-la justement et de la faire accepter par écrit.

Q. Alors pour quelle raison, pour quel motif votre premier prix a-t-il été réduit à treize mille piastres ($13,000)?

R. Par le fait, il y avait dans le temps des pourparlers justement, qui pouvaient nous causer des embarras, et nous avons dit "s'ils étaient consentant de nous signer ce papier-là, que nous consentirions à réduire la chose à ce prix-là, pour avoir le contract," pour lequel nous aurions le contract et qu'ils *nous promettent que en tant qu'il serait en leur pouvoir*, que le contract n'aille à aucune autre.

In those words, *"en tant qu'il serait en leur pouvoir,"* we have the key to the meaning which the word "consistent" had in the minds of both the parties.

The allegations of respondents' declaration also support that construction of the sentence. The claim for damages is largely, if not entirely, based not upon a breach of the written undertaking, but upon the allegation that, notwithstanding that undertaking, the appellants allowed the city to insert in their contract a condition which made it impossible for them—the appellants—to carry out their agreement with the respondents and on the evidence it is clear that the ap-

pellants were not privy in any way to the action of the City Council but, on the contrary, did all they could to get the consent of the city officials to give the work to the respondents.

The judgment in appeal proceeds on the assumption that the appellants distinctly connived at the insertion in their contract with the city of the condition giving the preference to the Eastern Canada Construction Company. Mr. Justice Pelletier, who gave the majority judgment below, says:—

Sharpe a signé ce contrat et accepté ces conditions qui lui faisaient manquer à son contrat avec l'intimé, *sans même en parler à ce dernier;* sa soumission pour les travaux à faire à la Terrasse *était de* $17,000 *plus basse* que les autres et le Conseil de Ville n'aurait pas imposé cette différence considérable aux contribuables si Sharpe *avait voulu résister un peu, il n'avait qu'à faire un semblant de résistance* et dans quelques jours l'affaire aurait été réglée par l'abandon de la condition imposée par la ville.

Upon the evidence I would reach a contrary conclusion. Laurent says:—

Q. Quant à vous personnellement, comme membre de la société de la Sharpe Construction Company, aviez-vous aucune objection quelconque à ce que le contrat de l'acier fut donné à la compagnie Masson ?

R. Non monsieur, au contraire, j'étais très désireux, j'aurais été très désireux de lui donner le contrat.

Q. Pourqoui ne leur avez-vous pas donné ?

R. Par rapport à cette clause qui nous obligeait de donner le contrat à la Eastern Construction Company, c'est ce qui m'a fait.

* * *

Q. A la Eastern Canada Steel Company ?

R. Oui, monsieur, c'est ce qui m'a fait comprendre le notaire, quand nous avons signé le contrat.

Q. Vous avez examiné la chose avec le notaire ?

R. Oui, monsieur.

Q. Et le notaire a fait remarquer que ?

R. J'aurais voulu exiger qu'il enlève cette condition-la afin de nous permettre de donner le contrat à ceux que nous aurions voulu; et le notaire a fait remarquer que ce n'était pas possible qu'il fallait signer le contrat tel qu'écrit et nous conformer aux exigences.

* * *

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Q. Pourqoui cette obligation-là se trouvait ?

R. Parce que c'était car un ordre du Conseil qui mettait une clause passée par la ville, c'est-à-dire par le comité des chemins.

Q. Approuvée par le conseil ?

R. Approuvée par le conseil.

To the same effect Sharpe and Drouin testify.

To repeat what I have already said, if the document relied upon is construed as it should be according to the primary and natural meaning of the language in which the contracting parties chose to express the terms of their mutual agreement, then the undertaking of the appellants was to give the steel work to the respondents if to do so would be compatible with the terms of their contract with the city. The language used, I submit respectfully, is not susceptible of being construed to mean that the appellants assumed to give respondents a contract which would in its terms conform to their contract with the city, as assumed by the trial judge, but to give them a contract, if they could do so consistently with the conditions of their contract with the city; and that is the only contract which in the circumstances business men could reasonably be expected to have made.

I have gone carefully through all the evidence and can find nothing to justify in any way the suggestion of wrong-doing on the part of any member of the City Council. They were all examined as witnesses and, judged by the ordinary standard of municipal ethics, there is no ground of complaint. In any event, our sole duty is to interpret the agreement which the parties made and we have no mandate or authority to sit in judgment on the conduct of the members of the Quebec City Council.

The appeal should be allowed with costs and the cross-appeal dismissed with costs.

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DAVIES J. (dissenting).—The appellants being the successful tenderers with the City of Quebec for certain work to be done to the new Dufferin Terrace in that city, at the tendered price of about $55,000, entered into a written agreement with the respondents binding themselves to sign a contract with the latter as soon as the contract with the City of Quebec was executed for the furnishing and erecting complete the structural steel work of the said terrace. It would appear from the agreement made between the parties hereto that the city had the right to adopt either one of the two alternative plans stated in the agreement under one of which the respondents were to furnish and erect complete the structural steel work of the terrace for $11,400, and under the other for $13,000.

Then follows this clause:—

> It is further understood and agreed that either of the contracts mentioned above will be consistent of the with the conditions of your contract with the City of Quebec.

As a matter of fact, the City of Quebec caused, with the respondents' assent, the insertion of a clause in the contract professing to bind the appellants to give the preference to the Eastern Canada Steel Company, Limited, for the furnishing of the steel structure, provided the price they charged was not greater than other companies were prepared to supply such structure.

The appellants sought, under cover of this extraordinary clause, to the insertion of which in the contract with the city they had assented, to escape their contractual obligations to the respondents under the agreement made with them.

It does not seem possible that such an attempt

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could be successful. Both courts below have held adversely to such contention and I concur with them.

The language of the clause is ambiguous, I admit, just such curiously ambiguous language as gives rise to so much litigation in commercial and business contracts. It provides that either of the contracts specified in the agreement in question between the parties

will be consistent with the conditions in appellants' contract with the city.

One of such contracts was adopted by the city and inserted in the tenderer's contract, but to it was added the clause giving rise to the litigation.

That clause does not mean, however, that the appellant was to assent to the insertion of a clause in the city contract, which would completely annul his contract with the respondent.

It allows a latitude for the adoption of either of the contracts provided for in the agreement between the parties and probably also for changes which the city might legitimately make in the size, character and strength of the works tendered for. Within that ambit, reasonable changes might possibly be required from the successful tenderer and to that extent the agreement between the parties might be moulded and its details changed. But I repeat that, whatever else it may mean, such a clause did not contemplate changes being made which completely destroyed the contract the parties had entered into between themselves and if given effect to would transfer to another rival company the work, labour and material which the respondents had agreed to supply at a stipulated price.

I think also that the damages allowed are reasonable and that the respondents cannot recover the

damages for which they have cross-appealed on the ground that they were not such as could be held to have been within the contemplation of the parties at the time they entered into their agreement.

I would dismiss the appeal with costs and cross-appeal with costs.

IDINGTON J. (dissenting).—The appellants tendered for work to be done by the municipal corporation of Quebec in response to an advertisement asking for tenders therefor according to certain specifications.

The tender put in by the appellants as found by the committee in charge of the business was the lowest and most advantageous, and reached a total of about fifty-five thousand dollars.

The next lowest exceeded this by about $17,000. The respondents had given appellants before the tender an estimate of $15,000 for the part in question herein. After the tenders had been opened the appellant succeeded in squeezing the respondent down from this price to the lower price of $13,000.

A written agreement securing this was entered into between the parties hereto as follows:—

Quebec, August 21st, 1914.

Object: New Dufferin Terrace.

Messrs. Sharpe Construction Company,
109 Fleurie Street, Quebec.

Gentlemen,—This will confirm our verbal agreement to the effect that you hereby bind yourself to sign a contract with us for furnishing and erecting complete the structural steel work for the New Dufferin Terrace for the sum of $11,400 (eleven thousand four hundred dollars), as soon as your contract with the City of Quebec for the work is executed, it being understood that this price covers a structure comprising columns, beams, ties with fittings complete, capable of supporting wooden joists and wooden floor consistent with the requirements of the specifications for Steel Superstructures

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of Bridges and Viaducts of the Department of Railways and Canals of Canada, and it being further understood that this structure be subject to the approval of the City of Quebec.

This also confirms our verbal agreement that in case the City of Quebec does not approve of a structure as above mentioned, that immediately following the signing of your contract with the City of Quebec, you hereby bind yourself to sign a contract with us for the furnishing and erecting of the structural steel work completely erected in place for the New Dufferin Terrace, for the sum of $13,000 (thirteen thousand dollars). Said structure to comprise columns, beams, ties and fittings and to be capable of supporting a uniformly distributed live load of 140 lbs. per sq. ft., floor construction to be of wooden joists and planking.

It is further understood and agreed that either of the contracts mentioned above will be *consistent* with the conditions in your contract with the City of Quebec.

Yours very truly,
MASSON, LIMITÉE,
E. D. Kellogg,
Ing. in charge.

Accepted:
SHARPE CONSTRUCTION CO.,
A. Laurent.
W. Sharpe.

The city council in passing a resolution on the 21st of August, 1914, granting the contract to the appellant, inserted, without any reason being assigned therefor, the following clause, which was carried into the contract:—

Dans l'achat de son acier, la compagnie dite "Sharpe Construction Company" devra donner la préférence à la "Eastern Canada Steel Company, Limited,' pourvu que les prix de cette compagnie ne soient pas plus élevés que ceux des autres compagnies pour la fourniture du dit acier.

Thereupon the appellants refused to carry out their contract with respondent making the foregoing the excuse for doing so. The courts below have held it was no excuse and the learned trial judge assessed the damages for breach of contract at $1,982 which was reduced by the court of appeal to $1,482 by the deduction of an item to which I will presently refer when I come to deal with the cross-appeal.

The contention of appellants is that the last sentence of the contract above quoted relative to the contract being inconsistent with the condition in appellants' contract with the city governs; and that the latter contract having inserted therein the clause copied from the resolution put an end to the contract sued upon.

It is quite clear that the contract with the city adopted in its entirety the second alternative, in the contemplation of the parties as set out in their contract, without the slightest variation.

It seems equally clear that it was only the possibility of some variation in that regard that the parties had in mind. Such, I take it, was the meaning which the business men who wrote it intended to give it. It certainly never was intended by the respondent that the instrument should not only give appellants the advantage of reaping the profit of $2,000 which appellants got thereby, but also furnish them with the means of thereby betraying the trust which the respondent had reposed in them. That, however, would be the net result of such an interpretation of the contract as appellants put forward.

The original tender given the appellants before their tender to the city by the Eastern Canada Steel Co., Ltd., was $4,000 in excess of this $13,000.

It certainly could not have been in the contemplation of either party hereto that such a reduction would be made, or that the city council would lend itself to the improper proceeding of favouring, without any other reason than mere favouritism, one city manufacturer over another in face of such a contract as set out above.

Such a proceeding was not, I venture to think, a

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thing that ever could have been anticipated by any one signing such a contract. If the appellants had disclosed such a purpose as possible they never would have got the respondent to sign and give them the $2,000 of advantage they have reaped by such signing.

The appellants were bound to see that the reasonable expectations of respondent under such a contract were realized.

It was not for them to execute a repudiation of it, for that is what it comes to if the clause has the effect they now pretend. However, the clause itself, I incline to hold null as being *ultra vires* and against public policy. The manifest tendency of such a mode of dealing on the part of municipal councils would be to produce that fraud and want of good faith pleaded herein and I submit rendered it objectionable on the latter ground.

And I think it would have puzzled any one trying to enforce it to have found it *intra vires* unless something else put forward than appears in the evidence herein or in the city charter. Counsel could not refer us to anything in the latter maintaining it. The pleading not having set up exactly this view, but the more extreme one of fraud, it is not now open to respondent, save in the way of illustrating the real nature of what the appellants assented to, and their unjustifiable excuse for doing so. That certainly cannot fall within the last sentence of the contract as touching what the parties must be presumed to have understood.

Appellants urge that, in any event, the sum of $180 for expenses of preparing plans, etc., ought not to have been allowed.

The rather ingenious argument of Mr. Taschereau

in regard to this claim that the item of $1,300 for loss of profits impliedly covered it, is, I think, unsound.

The $1,300 for loss of profits only compensates for loss of profits presumably got after the respondent had been recouped, for all his expenditure, including this item in the execution of the work.

I think the appeal should be dismissed with costs.

The respondent cross-appeals in respect of $500 allowed by the learned trial judge on account of the advertising advantages it might have acquired by doing the work in a creditable manner in such a public place as where the work was to have been executed.

Work well done and the good quality of goods supplied count for much, no doubt, in the way of business success, and are the very best advertisements any man can present to the world, but I hardly think the loss of opportunity in such regard has ever been held as an element properly entering into the assessment of damages for breach of a contract.

The only cases I can recall wherein such an element has been allowed to enter into the assessment of damages are actions for libel or slander or such like action which involve undesired or undesirable advertisement.

I think the cross-appeal should be dismissed with costs.

DUFF J.—The agreement upon which the action is brought is in the following terms:—

Quebec, August 21st, 1914.

Object: New Dufferin Terrace.

Messrs. Sharpe Construction Company,
109 Fleurie Street, Quebec.

Gentlemen,—This will confirm our verbal agreement to the effect that you hereby bind yourself to sign a contract with us for fur-

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nishing and erecting complete the structural steel work for the New Dufferin Terrace for the sum of $11,400 (eleven thousand four hundred dollars), as soon as your contract with the City of Quebec for the work is executed, it being understood that this price covers a structure comprising columns, beams, ties with fittings complete, capable of supporting wooden joists and wooden floor consistent with the requirements of the specifications for Steel Superstructures of Bridges and Viaducts of the Department of Railways and Canals of Canada, and it being further understood that this structure be subject to the approval of the City of Quebec.

This also confirms our verbal agreement that in case the City of Quebec does not approve of a structure as above mentioned, that immediately following the signing of your contract with the City of Quebec, you hereby bind yourself to sign a contract with us for the furnishing and erecting of the structural steel work completely erected in place for the New Dufferin Terrace, for the sum of $13,000 (thirteen thousand dollars). Said structure to comprise columns, beams, ties and fittings and to be capable of supporting a uniformly distributed live load of 140 lbs. per sq. ft., floor construction to be of wooden joists and planking.

It is further understood and agreed that either of the contracts mentioned above will be *consistent* with the conditions in your contract with the City of Quebec.

Yours very truly,
MASSON, LIMITÉE,
E. D. Kellogg,
Ing. in charge.

Accepted:
SHARPE CONSTRUCTION CO.,
A. Laurent.
W. Sharpe.

In construing this document there are two general considerations which I think it is important to keep in mind.

First, it is an informal letter containing proposals not intended to be proposals which, on acceptance, shall constitute a contract for the sale of steel or for the erection of a steel structure, but proposals for entering into a presently binding agreement that, in a certain event, namely, the awarding of a certain contract by the council of the City of Quebec to the appellants, the parties shall sign contracts for the erection of the steel structure of the Dufferin Terrace by the

appellants and providing in a general way for the nature of the contracts so to be entered into.

Secondly, that in construing such a document all the parts of it must be read together and each construed by the light of all the others and that especially in case of such an informal document it is important to read the language of the document in the light of the existing circumstances so far as known to both parties and with reference to which they must be assumed to have been contracting.

Now, at the time the appellants signified their acceptance of the respondents' proposal and some hours before that, it was known to both parties that it was quite possible that the municipality would insist upon stipulating as one of the terms of their contract that the steel should be purchased from the Eastern Canada Steel Co. The parties no doubt hoped that they would succeed in inducing the council not to insist upon this condition, but the fact that they were threatened with it was known to them both; and it is in light of the fact that this contingency was present to their minds that the proposals contained in this letter must be read.

And what meaning are we then to attribute to the last paragraph ?

> It is further understood and agreed that either of the contracts mentioned above will be consistent with the conditions in your contract with the City of Quebec.

The "contracts mentioned above" are the contracts which the parties proposed to enter into after the contract with the municipality should be signed. The parties bind themselves to enter into contracts of the general description set forth in the first two paragraphs of the letter, but subject to the proviso that

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these contracts must be consistent with the "conditions" of the municipal contract, that is to say, must be capable of being being carried out consistently with due performance of the obligations created by the municipal contract. There can be no doubt in my view that the language taken in its primary sense limits the obligation of both parties to entering into contracts which shall be "consistent" with the contract with the municipality; an obligation, therefore, which only becomes operative in the event of the contract with the municipality being of such a character as to permit the parties making and carrying out the contracts proposed. That being the effect of the language of this letter, I confess that, with great respect to others who take a contrary view, I have no difficulty in reaching the conclusion that the proper construction of the document is this very construction which is suggested by an examination of the words themselves.

In truth the contention of the respondents seems to me, with great respect, really to involve a more or less palpable *petitio principii* (notwithstanding the disguises which skilful advocacy has designed for it). The argument really rests upon the assumption that the essence of the agreement was that the appellants undertook not to enter into a contract with the municipality which did not permit them to purchase the steel from the respondents. The intention to enter into such an undertaking is not declared in express terms by this document which provides that any contract to be entered into by the appellants with the respondents must be capable of execution consistently with the obligations of their contract with the municipality. No such undertaking can be implied from the

document read as a whole in the light of the circumstances because it is impossible to say from anything before us that such a stipulation was necessary to give effect to the objects of the parties as disclosed by the document; and still less can it be said that reasonable and honest business men if they had thought of the contingency which happened would certainly have stipulated expressly as it is contended they did stipulate impliedly, because the fact is that they had in mind that very contingency and this very document which was prepared by the respondents and proposed by them as expressing the terms of their contract contains no such stipulation.

It is needless to say that a very different question might have been presented for decision if the respondents had proved that the appellants had by their own conduct brought about the insertion in the municipal contract of the stipulation requiring the steel made use of to be purchased from the Eastern Canada Steel Co.

ANGLIN J.—With Mr. Justice Pelletier I have found some difficulty in giving to the concluding clause in the plaintiffs' letter of the 21st August, 1914, the construction for which the defendants contend. The word "consistent" is certainly not the most apt to express the idea which they maintain it was intended to embody. But, read in the light of the circumstances under which it was written, it would seem probable that by the clause in question the parties must have meant not merely to provide for alterations in the contract between the plaintiffs and the defendants so as to make it conform in minor details to the terms of any contract which the municipality should exact

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from the defendants, but also to provide against liability of the defendants to the plaintiffs if the municipal council should insist upon making their contract subject to any condition which would disable the defendants from entering into a sub-contract with the plaintiffs. The municipal council did insist on such a condition. There is nothing in the record which indicates anything in the nature of connivance or collusion on the part of the defendants. On the contrary, they appear to have acted with scrupulous good faith towards the plaintiffs.

I would, therefore, allow this appeal and dismiss the action with costs throughout, substantially for the reasons given by Mr. Justice Cross and concurred in by Mr. Justice Lavergne in the Court of King's Bench.

BRODEUR J.—Il s'agit d'une action on dommages pour inexécution de contrat.

Les appelants avaient soumissionné pour la reconstruction de la terrasse Dufferin, à Québec. La cité de Québec, qui faisait exécuter ces travaux était disposée à accepter la soumission des appelants, mais à la condition qu'en achetant leur acier ils donnent la préférence à la Eastern Canada Steel Company.

Les appelants, qui pour faire leur soumission avaient eu des prix de la compagnie intimée, mirent cette dernière au courant de cette condition; et, de concert avec elle, firent auprès des autorités municipales des démarches dans le but d'induire ces dernières à accepter leur soumission purement et simplement.

Au cours de ces démarches, l'intimée et les appelants ont fait une convention par laquelle les appe-

lants s'obligeaient de prendre leur acier de l'intimée si la cité de Québec leur confiait la reconstruction de la terrasse suivant l'un ou l'autre des plans suggérés, ajoutant en outre:—

It is further understood and agreed that either of the contracts mentioned above will be consistent with the conditions in your contract with the City of Quebec.

Les négotiations se poursuivirent avec la cité de Québec et cette dernière refusa d'enlever la stipulation favorable à la Eastern Canada Steel Company.

Les appelants suggérèrent ensuite à l'intimée de diminuer son prix afin qu'ils soient libérés de cette préférence qui devait être donnée à la Eastern Canada Steel; mais l'intimée refusa et alors ils furent obligés de donner le sous-contrat à cette autre compagnie.

Toute la question repose sur l'interprétation qui doit être donnée à cette convention intervenue entre l'intimée et les appelants.

L'intimée prétend que les appelants étaient tenus du moment qu'ils avaient le contrat avec la cité de Québec, de lui donner la fourniture de l'acier.

Les circonstances, il me semble, ne pourraient pas autoriser une semblable interprétation du contrat. Les parties, quand elles ont fait leur convention, connaissaient les exigences de la ville de Québec; et vouloir dire que les appelants se seraient engagés formellement de donner le contrat à l'intimé même si la cité de Québec persistait dans sa clause préférentielle paraîtrait absolument extraordinaire.

La convention a été préparée par l'intimée elle-même. Dans le cas de doute elle doit être interprétée contre celle qui a stipulé et en faveur de celui qui a contracté l'obligation (art. 1019 C.C.).

Si la stipulation que nous avons citée textuelle-

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ment ne s'y trouvait pas, il y aurait peut-être doute de savoir si les défendeurs se seraient obligés, au cas où ils auraient le contrat de la ville de Québec, de donner le sous-contrat à l'intimée. Mais cette stipulation est à l'effet que les obligations du sous-contrat seront compatibles (consistent) avec les conditions du contrat principal.

Le mot *"consistent,"* dans ces circonstances, peut prêter à différentes interpretations. Ce contrat n'a pas été préparé et examiné par des hommes de loi; mais il l'a été par des hommes d'affaires et il n'y a pas de doute, suivant moi, que l'intention des parties était que s'ils pouvaient réussir à faire disparaître cette condition insérée par la ville de Québec, ou s'ils pouvaient de toute autre manière faire disparaître cette stipulation, alors le sous-contrat irait à l'intimée.

Si nous examinons même le sens littéral de la lettre en question, sans examiner les circonstances particulières dans lesquelles elle a été écrite, je crois que l'intimée ne pourrait pas également réussir.

En effet, les demandeurs auraient dit: Nous sommes bien prêts à vous donner le sous-contrat pour l'acier, mais aux mêmes conditions que la cité de Québec nous imposera.

Or, l'une de ces conditions-la était de donner la préférence à une certaine compagnie pour l'achat de l'acier. Rien de plus facile alors pour l'intimée d'accepter cette condition-la. Il lui aurait fallu simplement donner la préférence dans son achat pour l'acier à la Compagnie Eastern Canada Steel. De sorte que si nous examinons soigneusement les circonstances de la cause, si nous prenons en considération l'intention des parties, et si nous prenons même la lettre du contrat la demanderesse intimée n'est pas en droit de

poursuivre les défendeurs-appelants pour inexécution d'obligation.

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Dans ces circonstances, je considère que le jugement *a quo* doit être renversé avec dépens de cette cour et des cours inférieures et que l' action de la demanderesse-intimée doit être renvoyée avec dépens.

Appeal allowed with costs.

Solicitors for the appellants: *Taschereau, Roy, Cannon & Parent.*

Solicitors for the respondents: *Galipeault, St. Laurent, Métayer & Laferté.*

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*Nov. 18.
*Dec. 29.

JAMES GIBB AND FRANK ROSS (SUPPLIANTS) ..... } APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation—Eminent domain—Public work—Abandonment—Revesting land taken—Compensation—Estimating damages—Construction of statute—Jurisdiction of Exchequer Court—"National Transcontinental Railway Act," 3 Edw. VII., c. 71—"Railway Act," R.S.C., 1906, c. 37, s. 207—"Exchequer Court Act," R.S.C., 1906, c. 140, s. 20—"Expropriation Act," R.S.C., 1906, c. 143—"Railways and Canals Act," R.S.C., 1906, c. 35, s. 7.

Per Curiam.—The jurisdiction of the Exchequer Court of Canada is not, by the effect of the provisions of section 23 of the "Expropriation Act," limited to adjudication upon claims for compensation in consequence of expropriation proceedings in regard to which there has been only partial abandonment of the property taken, but extends as well to claims made in cases where the whole of the property has been abandoned. Decision appealed from (15 Ex. C.R. 157) affirmed.

Under the provisions of section 23 of the "Expropriation Act," the person from whom re-vested land has been taken is entitled to compensation for damages sustained in consequence of the expropriation proceedings in the event of abandonment of the whole parcel of land as well as in the case of the abandonment of a portion thereof only. Idington J. *dubitante.*

Per Fitzpatrick C.J. and Davies, Idington and Brodeur JJ.—Section 23 of the "Expropriation Act" applies in matters of expropriation for the purposes of the National Transcontinental Railway under the provisions of the "National Transcontinental Railway Act";—*Per* Anglin J. It was so held in *The King* v. *Jones* (44 Can. S.C.R. 495); Duff J. *contra.*

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

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Per Duff J.—The Minister of Railways and Canals has not, by virtue of the 23rd section of the "Expropriation Act," authority to abandon lands compulsorily taken for the Eastern Division of the National Transcontinental Railway which have become vested in the Crown by force of the 13th section of the "National Transcontinental Railway Act." Section 207 of the "Railway Act" is not incorporated in the "National Transcontinental Railway Act" by force of the 15th section of that statute.

On the merits of the appeal, Davies, Idington and Brodeur JJ. considered that, in the circumstances, the amount of the award for damages made by the judgment appealed from (15 Ex. C.R. 157) was sufficient, and that the appeal should be dismissed. The Chief Justice and Anglin J held that the appeal should be allowed and the case remitted to the Exchequer Court for the purpose of estimating damages on the basis of allowing suppliants the value of the land at the date of expropriation less its value at the time of the abandonment. Duff J. was of opinion that the suppliants were entitled to the full compensation tendered by the Crown for the land taken, but, having accepted the property as returned and agreed to credit its diminished value in part satisfaction of their claim, the appeal should be allowed and damages awarded estimated according to the difference between the admitted value of the land to them when taken and its value at the date of the abandonment. Consequently, on equal division of opinion among the judges of the Supreme Court of Canada, the judgment appealed from (15 Ex. C.R. 157) stood affirmed, no costs being allowed.

APPEAL from the judgment of the Exchequer Court of Canada(1), declaring that the suppliants were entitled to recover only $3,000 on their petition of right.

In 1911, land belonging to the suppliants was taken by the Crown for the purposes of the National Transcontinental Railway and an information was filed in the Exchequer Court of Canada by the Attorney-General for Canada in which the circumstances of the expropriation were set out, offering to pay $61,447.75 as full compensation and asking for a de-

(1) 15 Ex. C.R. 157.

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claration that the land had vested in the Crown and that the amount tendered was sufficient compensation. This offer was accepted by the suppliants. Before the case came before the court for decision and about fifteen months after the land had been taken, the Minister of Railways and Canals and the Commissioners of the National Transcontinental Railway served notice on the suppliants, stated to be given pursuant to section 23 of the "Expropriation Act," section 207 of the "Railway Act" and section 15 of the "National Transcontinental Railway Act," as well as any other authority in that behalf, that the land was not required for the purposes of the railway and was abandoned by the Commissioners. Thereupon, the proceedings taken by the Attorney-General were discontinued and the suppliants brought the action, by petition of right in the Exchequer Court, claiming compensation in consequence of the expropriation proceedings and the effect of the abandonment. The claim made by the suppliants amounted to $31,747.75, being the balance of the sum which had been tendered by the Crown at the time of the expropriation plus $500 for special expenses incurred in the re-valuation of the property after deduction of $30,000 estimated as the value of the land, in its depreciated condition, at the time of the abandonment. By the judgment appealed from the suppliants were awarded $3,000 as full compensation for damages incidental to the prejudice caused by the expropriation proceedings and damages were refused to them on account of the alleged depreciation resulting from material alterations in the locus by the demolition of a public market-house and other buildings adjacent to the land of the suppliants.

The respondent, by a cross-appeal, contended that there had been no claim made by the suppliants for loss of rent and, consequently, the Exchequer Court had no right to grant damages in that respect; that the Exchequer Court had no jurisdiction to adjudicate in regard to the claim as made, and that the amount of $3,000 awarded included indirect damages, not resulting from the expropriation, which ought not to have been allowed.

G. G. Stuart K.C. for appellants, cross-respondents.

E. Belleau K.C. for respondent, cross-appellant.

THE CHIEF JUSTICE.—Assuming as both parties to this appeal appear to have assumed throughout that the "Expropriation Act" is applicable to these proceedings, I am of opinion that the assistant judge of the Exchequer Court has misapprehended the provision of the "Expropriation Act" governing this matter. The wording of the statute is simple and its meaning, I think, plain. Failure to regard the words of the statute has led to the confusion and difficulties which the learned judge discusses in his judgment occupying many pages of the printed case.

The lands in this case were taken under the powers vested in the Commissioners of the Transcontinental Railway by the "National Transcontinental Railway Act," 3 Edw. VII., ch. 71. These powers which are contained in section 13 are, so far as material, very similar to those in section 8 of the "Expropriation Act." This section 13 provides by sub-section 1:—

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The Commissioners may enter upon and take possession of any lands required for the purposes of the Eastern Division and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds, or the land titles office for the county or registration district in which such lands are respectively situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown, saving always the lawful claim to compensation of any person interested therein.

The provisions of section 23 of the "Expropriation Act" are, I think, applicable to expropriations under the "National Transcontinental Railway Act"; see the case in this court of *The King* v. *Jones*(1).

This section 23, so far as material, provides by sub-section 1 that

whenever, from time to time, or at any time before the compensation money has been actually paid, any parcel of land taken for a public work, is found to be unnecessary for the purposes of such public work, the Minister may, by writing under his hand, declare that the land is not required and is abandoned by the Crown.

And sub-section 2:—

Upon such writing being registered in the office of the registrar of deeds for the county or registration division in which the land is situate such land declared to be abandoned shall revest in the person from whom it was taken.

And sub-section 4:—

The fact of such abandonment or re-vesting shall be taken into account in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken.

It will be observed that this section makes no new provision as to any compensation or damages to be paid as between the Crown and the person claiming compensation for the land taken, but only declares that the fact of the abandonment shall be taken into account in estimating the amount to be paid to any person claiming compensation for the land taken.

(1) 44 Can. S.C.R. 495.

The law casts the inheritance of land upon the heir and he is the only person in whom it vests lands without his consent.

The power conferred upon the Minister by this section is a very exceptional one since it enables him to vest the land in a person even against his will. We might expect that the rights of persons affected by this arbitrary power would be carefully safeguarded by the legislature and that is what in fact we do find, for I do not know that protection in a wider form could be afforded to their interests than it is by subsection 4 of section 23. This gives the court the most ample and general authority by simply providing that in estimating the compensation to be paid for the land taken the fact of the abandonment is to be taken into account.

By section 30 it is provided that if the injury to land injuriously affected by the construction of any public work may be removed wholly or in part, by (amongst other things) the abandonment of any portion of the land taken from the claimant, and the Crown undertakes to abandon such portion

the damages shall be assessed in view of such undertaking.

The intention of the legislature is, I think, the same in the rule, laid down in both sections 23 and 30, that the fact of the abandonment of the land is to be taken into account in assessing in one case the compensation for the land taken and in the other for the injury to land injuriously affected.

The values of the land at the date of the expropriation and at the date of the abandonment have to be ascertained in the ordinary way but otherwise, in my view, it is immaterial to inquire what were the causes of the value of the land at these dates.

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The value of the land at the time of the expropriation is ordinarily the compensation which the owner is entitled to claim. I refer to sec. 47 of the "Exchequer Court Act" and also to the decision of the Judicial Committee of the Privy Council in the *Cedar Rapids Manufacturing and Power Co.* v. *Lacoste*(1), to the effect that the compensation to be paid for land expropriated is the value to the owner as it existed at the date of the taking. If, by the inverse process to expropriation, the Minister forcibly vests the property in him again, the value of the land to the owner at the time of such revesting is an element to be considered in estimating the amount to be paid to him.

Suppose a business that has had to be removed when the property was expropriated; the property is abandoned by the Crown; the business cannot be moved back again; it may be years before the value can be realized, and meantime the owner is compelled to hold it for its speculative prospective value. In taking into account the fact of the abandonment it might in such case he that only the immediate value would be allowed by the court as a deduction from the compensation.

In a somewhat involved statement which, however, is baldly printed, the learned judge suggests that if the Crown is to bear decrease in the value of the land, it should benefit by any appreciation. He forgets, however, that this is an entirely one-sided power and that while the Crown is not obliged to exercise it and would presumably only do so when such exercise would be beneficial to its interests, it would obviously

(1) [1914] A.C. 569.

be impossible to force upon the former owner the property for which he may have no use and which he may not want and at the same time call on him to pay for getting it a sum in excess of the compensation to which he was entitled on the expropriation.

The form in which the proceedings were brought before the court, may have induced the error into which I think the assistant judge of the Exchequer Court has fallen. It is not, as he says, an action for damages resulting from the abandonment. Briefly, he has treated the matter as if it were an option which the Crown took on the property until the payment of the compensation with a liability if it did not exercise the option to pay any damages caused the owner. That, however, is not what the statute does. It provides that, on the expropriation, the lands

> shall be vested in the Crown saving always the lawful claim to compensation of any person interested therein.

The present case is remarkable from the fact that the Government had the property valued and filed an information in the Exchequer Court setting forth that His Majesty was willing to pay compensation to the amount of $61,747.75. This sum, the defendants by their statement of defence accepted. The parties were thus completely *ad idem,* the land was transferred to and vested in the Crown and the compensation agreed on. Then by the "Expropriation Act," as amended by 3 Edw. VII., ch. 22, there is added the power which may never be exercised, of abandoning and re-vesting the property in the original owner. It is more like the case between subjects of an agreement for sale at a valuation with an agreement superadded that the vendor will, at the option of the purchaser, within a

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given time re-purchase at the then valuation of the property. The cases are not, of course, identical, because the powers of the Crown both of taking and abandoning the land are compulsory, and as I have before said, I do not think the value at the time of revesting is necessarily the amount for which the owner of the land should be called on to give credit.

Although the appellants may not be free from blame for the form in which their claim was presented to the court, yet the basis of the judgment, being an erroneous construction of the statute, justice requires that the case should be sent back to the Exchequer Court to determine and award the amount to be paid to the appellants in respect of their claim for compensation for the lands taken, taking into account in assessing such amount, the fact of the abandonment in connection with all the other circumstances of the case.

I may add that I entertain no doubt as to the jurisdiction of the Exchequer Court, but if it were necessary to invoke it, I think the claim would be within paragraph (*d*) of section 20 of the "Exchequer Court Act."

DAVIES J.—This appeal is from a judgment of the Exchequer Court of Canada awarding the suppliant $3,000 for damages sustained by him by reason of the abandonment and re-vestment in the owners of a property in the City of Quebec, which had been expropriated by the Government of Canada for the National Transcontinental Railway.

The suppliant claimed that the lands and buildings had been expropriated in January, 1911, and had

not been revested in them until July, 1912, and that while they were admittedly worth $61,747.75 in 1911 (that being the sum the Government tendered and the suppliant agreed to accept as their value) they had shrunk in value when re-vested to the sum of $30,000, the difference being the damages the suppliant sought to recover, viz., $31,747.75.

The evidence established the fact that there was a "boom" in lands in that part of the City of Quebec, where the property in question was situate, at and about the time these lands were expropriated, brought about in large measure by the belief current amongst the citizens that the principal or terminal station of the National Transcontinental Railway was to be built on the site then occupied by the Champlain Market on or towards which the buildings on the lands in question fronted. That the value of these lands consisted largely in the fact that they so fronted on this market place on one side or end and on the river front on the other where the farmers came with their boats and produce to the market and that this fortunate conjunction enabled the owners to rent their buildings for shops, stalls and stores at very high rentals. That the general anticipation was that the removal of the market house would be followed by the building on its site and the adjoining lands of the principal station of the National Transcontinental Railway and that the subsequent change of plans, the demolition and removal of the market house to another site, and the construction of the principal station elsewhere caused a collapse of the boom and a great depreciation in nominal land values, and by reason of these facts, as stated in the suppliant's petition of right, his lot of land and buildings

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when returned by the Crown had depreciated in value to the extent of $31,747.75.

That these were reasons and causes of the high values placed upon the site and lands when expropriated and those placed upon them when returned were clearly proved by the suppliant's own witnesses Collier, Hearn and Colston and were indeed claimed as existing facts and their reasons in the suppliant's petition.

This claim was not allowed by the trial judge for obvious and clear reasons. The Crown had the right to expropriate the market site and buildings, to demolish the latter and build their principal terminal station on that site and the adjoining properties they expropriated or to change the terminal station site elsewhere without being responsible for the rise or diminution in value of any properties expropriated or otherwise which such changes might cause.

The statutory right to abandon and revest these expropriated properties in their owners could, no doubt, only be exercised subject to the payment of such damages or losses as might have been caused to the owner in consequence of the Crown's proceedings; but the sudden rise or fall in the value of the properties arising from such causes as I have mentioned could not possibly be held to be such a "circumstance in the case" as should be taken into account

in estimating or assessing the amount to be paid to any person claiming compensation for the land taken.

(See sub-section 4 of section 23 of the "Expropriation Act," R.S.C., 1906, ch. 143.)

They were not special damages suffered by this land alone, but such as were shared in common by the

land owners generally in the neighbourhood. They were not caused by the expropriation and the subsequent revestment of appellant's land, but by the change of market-site and transcontinental principal station-site and, in fact, had nothing to do directly with either of these acts of expropriation and revestment. This sudden rise and fall in the temporary speculative value of lands in that section of the city were, no doubt, as shewn by the evidence, caused by public belief that the market-house site would become the terminal site of the Transcontinental, and to the subsequent change in that respect made in the Government's plans.

Under the circumstances, therefore, and with the evidence before him the learned trial judge was right in my judgment in rejecting these fluctuating or speculative prices as the standard by which to estimate suppliant's damages. He allowed $3,000 as a fair and liberal allowance, I think, for the loss of rents the owners sustained during the period between expropriation and re-vestment of the property. The owner's possession had never been disturbed and he continued to draw the rents which were shewn to have been substantially reduced. The owner also escaped the payment of the taxes during the same period, which I should think must have been considerable.

If, however, the owner had lost or been deprived of his right to have sold his property at the high speculative values which may have been reached and had given any evidence to that effect I should certainly think such loss a legitimate damage which could be recovered because it would be special damage caused by direct interference with his right to sell his property. If his *jus disponendi* had been, not technically but

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actually, prevented by the expropriation and he had given any evidence to shew that he had actually lost a sale at the highest figures spoken of I see no reason why he should not be compensated for that loss. The rule laid down in the *Cedar Rapids Case*(1), by the Judicial Committee, at pages 596-7, is that the compensation to be paid for land expropriated is

> the value to the owner as it existed at the day of the taking.

It would seem to follow that in the case of lands expropriated by the Crown, with this statutory right of revestment subsequently exercised, the loss which the owner actually sustained by reason of his being deprived of the right to dispose of the property during the time the title was in the Crown would be the measure of his damages. In the absence of any evidence of an offer to purchase the suppliant's right in the land, the question would be: What would they have brought in the market if put up at auction subject to the exercise of the re-vestment power by the Crown ? *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*(1), at page 579. See also *Pastoral Finance Association* v. *The Minister*(2).

The learned trial judge reviews the evidence given on this question and concludes most fairly, I think, that

> it is impossible to find from it that an offer for either $60,000 or $70,000 was ever made the suppliant for the property before the expropriation.

He might have added or for any other sum either before expropriation or afterwards before re-vestment, for no specific offer ever was shewn to have been made by any one. The best that could be said for the evi-

(1) [1914] A.C. 569. (2) [1914] A.C. 1083.

dence on this point was Ramsay's statement that inquiries were made by speculators, after expropriation, who were willing to consider these large sums. But nothing ever came of their consideration.

A syndicate of speculators was considering the matter, so Mr. Hearn said:—

> We had that in mind ($60,000). I don't know that I would have given that for it. We had in mind that it was worth $60,000.

But no offer ever was made to buy before or after expropriation nor, in my judgment, does the evidence shew that any chance of a sale at these figures was lost. Can it be doubted that if the existence of any such offer could have been proved it would have been, or if the reasonable chance of selling at the price of $60,000 could have been shewn that it would have been shewn ?

It has been suggested that the case might be referred back and the suppliant given another "day in court" to try and prove this loss, but I can see no reason or ground for such an unusual course and because of the absence of any such evidence as I have referred to and because I think the damages awarded ample I would dismiss the appeal with costs.

IDINGTON J.—The respondent on behalf of the National Transcontinental Railway, pursuant to the authority of 3 Edw. VII., ch. 71, on 24th January, 1911, deposited in the registry office in Quebec, a plan and description of certain lands to be expropriated to serve said enterprise, and amongst said lands was a parcel belonging to appellants.

The parties hereto being unable to agree as to the compensation to be given for appellants' lands, the

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respondent, on the 22nd October, 1911, filed an information in the Exchequer Court of Canada for the purpose of determining same and offered thereby the sum of $61,747.75 in payment thereof.

The appellants pleaded thereto accepting said price.

On the 19th March, 1912, respondent filed a discontinuance, and on the fifteenth day of July, 1912, the Honourable the Minister of Railways and Canals for Canada, gave notice to the appellants that the lands so taken were not required for the purposes of the National Transcontinental Railway and that the proceedings were abandoned by the Crown.

Thereupon the appellants, on the 22nd March, 1913, filed a petition of right in said Exchequer Court setting forth the foregoing facts and further alleging that respondent became thereby proprietor of said land and

that the land was abandoned in the month of July, 1912, subject to paying compensation to the suppliants (now appellants) for the value of the land so taken and the damages accruing by reason thereof.

The petition proceeded as follows:—

9. The said land was, on the 24th day of January, 1911, of the value of $61,747.75, and at the time that the said land was returned to your suppliants, in the month of July, 1912, it had a value of $30,000 only.

10. On the 24th of January, 1911, the said lot was situate on a street bounding the Champlain Market, a large and much frequented market place in the City of Quebec, and it was anticipated at that time that the said market if removed would be replaced by the principal station of the National Transcontinental Railway, and in fact His Majesty the King was under contract with the City of Quebec, to which the said market place belonged, to replace the said market by the principal station of the said National Transcontinental Railway in the City of Quebec.

11. In the month of July, 1912, when the said property was abandoned to your suppliants, the Champlain market had been

removed and destroyed, by and on behalf of His Majesty the King, and the proposal to erect the principal, or any, railway station for the National Transcontinental Railway had been abandoned, and by reason of the foregoing facts, the said lot of land when returned by His Majesty the King had depreciated in value to the extent of $31,747.75.

12. The suppliants were put to great expense by reason of the taking of their said land by the Crown, and of the information filed for the purpose of determining the value thereof, to wit: in the sum of $500.

I set forth in full the only claims set up in said petition so that there need be no misapprehension of what the claim herein is. There might, I suspect, have been other claims arising from the interference for a year and a half with the appellants' exercise of dominion over said lands or dealing with same. These, if any existed, are not presented by the pleading.

The appellants never were dispossessed. The proceeding, it is said now, though not so alleged in the pleading had injurious effect upon the appellants' profits derivable from the letting of parts thereof to tenants.

Some of the leases had expired pending the proceedings before the abandonment.

On account of the anticipated expropriation being likely to be completed it was quite natural such tenants should look elsewhere for places of business, or perhaps take advantage of the uncertainty of tenure to get better terms.

Although no case was made in regard thereto in the pleadings evidence was given relative to the subject of losses caused by reason of such disturbance of the tenants and prospective lettings.

Upon that evidence the learned trial judge allowed the sum of $3,000 in way of compensation for past

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and future probable losses occasioned thereby and costs to be taxed.

In his opinion judgment, the learned trial judge held the appellants not entitled to recover in respect of the claims set out in above recited pleading.

The claim for costs in and about the information seems to have been dropped owing, it is alleged, to counsel for the appellants properly declining to be a witness.

I presume the party and party costs were taxed against the Crown on the discontinuance.

And if the solicitor and client costs could not be agreed upon as chargeable to the Crown, it is to be regretted.

I think it is also to be regretted that no evidence was presented as to the amount of the usual assessment of the property, and taxes usually paid thereon. I understood it to be admitted that for two years pending the Crown's registration of title, no taxes were or could be imposed and, hence, appellants benefited to that extent as result of that registration.

The disturbing effect upon leaseholds of a proceeding such as taken and kept open so long may not be fully compensated for by what has been allowed, but that on the meagre evidence presented and no claim thereto having been made in pleading, seems to me all that can be claimed.

The claim made for the difference between alleged values on the date of registration of the plan and the date of abandonment is, in my view of the law, quite untenable even if these relative values had been established, which I think they were not.

It is quite true that the legal effect of the registration of the plans was to vest the title in the Crown,

but that, as Mr. Belleau well put it, was subject as it were to a resolutory condition which, becoming operative, divested the title and re-vested it in the appellants.

In the case of land held for an investment the injurious effect of such a proceeding as this in question, beyond creating an uncertainty of tenure on the part of the tenants and the disturbing effect so far as detrimental to the landlord, can be very little.

In the case of land held for purposes of speculation, or owned for any purpose, being put on the market for sale, the possible loss of a sale in a fluctuating market, by such proceedings as registration of an expropriation plan, might prove serious.

But if one has such a case he must plead it and prove it. Here it is neither pleaded nor proven.

Again, it is to be observed that in such a case the conduct of the party who keeps silent and makes no move to expedite the disposition of the claim to expropriate has to be considered. He certainly has not the right to let things drift as the appellants did here, and neither do nor say anything to expedite matters, and then claim his damages must be based on the result of the common neglect of himself and his opponent.

The non-registration of the notice of abandonment illustrates this.

It was quite competent for appellants to have got it registered and if the expenses attendant on that chargeable to the Crown, it would have come in as part of the compensation they would, in such case, have been entitled to.

I think the appeal should be dismissed with costs.

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There is a cross-appeal which questions the jurisdiction of the Exchequer Court to determine the damages suffered herein.

It is, I think, doubtful if, and arguable that, the Exchequer Court has not by virtue of section 23, subsection 4, of the "Expropriation Act," jurisdiction to determine the compensation to be awarded in case of an entire abandonment of all claims to expropriation. That points to a case of damages being settled on the hearing of the information.

But, independently of that, I think that court has jurisdiction to give relief in any case of the Crown taking, either permanently or temporarily, the lands of a subject.

It has taken for eighteen months or more the lands of the appellants and they should, I imagine, in a proper case be entitled to have indemnity therefor from the Crown at the suit of a suppliant in the Exchequer Court.

I think the cross-appeal should also be dismissed with costs.

DUFF J.—On the 24th of January, 1911, the lands in respect of the taking of which compensation is claimed by the appellants were taken for the purposes of the National Transcontinental Railway, under the authority of chapter 71, 3 Edw. VII., sec. 13, by the Commissioners appointed under that Act, who on that day deposited a description and a plan of the lands in the office of the registry of deeds for the City of Quebec. On the 21st of October of the same year, proceedings were taken by the Attorney-General of Canada, professedly under the authority of section 26 of the "Expropriation Act," ch. 143, R.S.C., 1906, by way of

information in the Exchequer Court of Canada on behalf of His Majesty, by which information it was alleged that by the deposit of the plan and the description just mentioned the lands had become and were then vested in His Majesty and by which it was declared that His Majesty was willing to pay the sum of $61,747.75 in full compensation for the claims of all the persons interested, and a declaration was prayed that the lands were so vested and that the sum mentioned was sufficient and just compensation.

The appellants by their defence alleged that they were the sole owners of the property, accepted the sum offered and prayed for judgment declaring that they were entitled to be paid the same. The statement of defence was filed in October, 1911, but the Attorney-General did not proceed to trial; and on the 19th of March, 1912, a notice of discontinuance was filed, and on the 15th July, 1912, the following notice signed by the Minister of Railways and Canals and by Mr. Leonard for the Commissioners of the National Transcontinental Railway was served upon the appellants:—

Notice of Abandonment of lands taken for the National Transcontinental Railway.

In the Exchequer Court of Canada.

Between:

JAMES GIBB and FRANK ROSS,

Suppliants;

and

THE KING,

Respondent.

Registered in registry office, July 27th, 1912. Served personally on suppliants, July 27th, 1912, by Jean N. Fournier, bailiff.

To James Gibb and Frank Ross, of the City of Quebec, of the Province of Quebec, on plan Estate James Gibb, and to all to whom these presents shall come or to whom the same may in any wise concern.

Whereas the lands shewn upon and described in the annexed

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plan and description have under the provisions of the "National Transcontinental Railway Act," 3 Edward VII., ch. 71, sec. 13, been taken by His Majesty the King, acting through "The Commissioners of the Transcontinental Railway" for the purposes of a public work known as the National Transcontinental Railway, the construction of which public work is under the charge and control of the said "The Commissioners of the Trancontinental Railway" by the depositing of record in the office of the registrar of deeds for the City of Quebec, in the Province of Quebec, on the 24th day of January, 1911, of a duplicate of the said plan and description of the said lands.

And whereas no compensation money has yet been paid by or on behalf of His Majesty for the said lands.

And whereas the said lands have been found to be unnecessary for the purposes of the said public work and the undersigned have decided not to take the said lands for the purposes of the said railway.

Now, therefore, pursuant to and by virtue of the provisions of section 23 of the "Expropriation Act," R.S.C., 1906, ch. 143, and of section 207 of the "Railway Act," R.S.C., 1906, ch. 37, and section 15 of the "National Transcontinental Railway Act," 3 Edward VII., ch. 71, and in pursuance of any other authority in this behalf vested in the undersigned, the undersigned do hereby declare and notify you that the said lands are not required for the purposes of the said railway and that the said lands and the proceedings aforesaid are hereby abandoned by the Crown and by the said "The Commissioners of the Transcontinental Railway."

In witness whereof the Minister of Railways and Canals has hereunto set his hand and "The Commissioners of the Transcontinental Railway" have caused these presents to be executed and the corporate seal of the Commissioners to be affixed under the hand of the Commissioner and Secretary this fifteenth day of July, 1912.

F. COCHRANE,
Minister of Railways and Canals.

The Commissioners of the
Transcontinental Railway.
R. W. LEONARD,
Commissioner.
Per Secretary.

On the 19th of April, 1913, a petition of right was filed by the appellants claiming compensation and it is from the judgment given on the trial of that petition that the present appeal is brought.

The case presented by the petitioners was that upon the deposit of the plan and description in January, 1911, the title to the lands was transferred to the Crown and that in substitution for it a right to compensation became immediately vested in them and that the amount of compensation to which they then became entitled was that admitted to be due to them (the sum of $61,747.75) by the discontinued information. They admitted that on the return of the property the Crown became entitled to credit for a sum equal to the value of the property as of the date of its return and accepted it as payment *pro tanto;* but their contention was that they were entitled to the residue of the sum so admitted to be due to them after making deduction of that sum. The advisers of the petitioners apparently assumed that section 23 of the "Expropriation Act" applied and determined their rights.

The Crown, relying upon this same section, took the position that the Exchequer Court had no jurisdiction to entertain the petition. The learned assistant judge of the Exchequer Court did not accede to this view but rejected the claim of the petitioners for compensation for the value of the property taken—awarding the sum of $3,000 as reparation for loss which the learned judge held to be reasonably attributable to the action of the Crown in dispossessing the appellants.

I have come to the conclusion that both the advisers of the Crown and the advisers of the appellants have misapprehended the effect of the statutory provisions which must be looked to for the purpose of ascertaining the rights of the appellants. These enactments, I think, rightly construed confer no power

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upon the Minister of Railways or upon the Commissioners to revest compulsorily in the owners lands which have been taken under section 13 of the "National Transcontinental Railway Act," or to require the owners to accept, in discharge of the statutory obligation of the Crown to make compensation, anything but compensation in money; and the notice of the 15th July, 1912, was, consequently, without legal effect. That is the position the appellants were, I think, entitled to assume; but their advisers having proceeded on the assumption that the decision of this Court in *Jones* v. *The King* (1) was conclusive against this view of their rights, the petitioners by their petition presented their claim upon the footing that there was a re-transfer of the lands to them which must be treated as satisfaction in part of their right to compensation—to the extent, as I have already said, of the value of the lands at the time of re-transfer. While I think the petitioners were entitled to claim compensation without deduction; since, nevertheless, they have accepted the re-transfer and offered to submit to the deduction mentioned, that, I think, is the footing upon which their claim should be now dealt with.

It will be necessary to refer to several statutes and it will be more convenient, I think, to set out these enactments verbatim before discussing the effect of them.

The statutory provisions to be considered are:—

"National Transcontinental Railway Act," ch. 71, 3 Edw. VII.:—

Sec. 8.—The Eastern Division of the said Transcontinental Railway extending from the City of Moncton to the City of Winnipeg

(1) 44 Can. S.C.R. 495.

shall be constructed by or for the Government in the manner hereinafter provided and subject to the terms of the agreement.

Sec. 9.—The construction of the Eastern Division and the operation thereof until completed and leased to the company pursuant to the provisions of the agreement shall be under the charge and control of three commissioners to be appointed by the Governor-in-Council, who shall hold office during pleasure, and who, and whose successors in office, shall be a body corporate under the name of "The Commissioners of the Transcontinental Railway" and are hereinafter called "the Commissioners."

2. The Governor-in-Council may, from time to time, designate one of the Commissioners to be the chairman of the Commissioners.

Sec. 13.—The Commissioners may enter upon and take possession of any lands for the purposes of the Eastern Division, and they shall lay off such lands by metes and bounds, and deposit of record a description and plan thereof in the office for the registry of deeds, or the land titles office for the county or registration district in which such lands respectively are situate; and such deposit shall act as a dedication to the public of such lands, which shall thereupon be vested in the Crown, saving always the lawful claim to compensation of any person interested therein.

(2) If the lands so required are public lands under the control of the Government of the province in which they are situate, a description and plan thereof shall also be deposited in the department of the Provincial Government charged with the administration of such lands.

Sec. 14.—The Governor-in-Council may set apart for the purposes of the Eastern Division so much of any public lands of Canada as is shewn by the report of the chief engineer to be required for the roadbed thereof, or for convenient or necessary sidings, yards, stations and other purposes for use in connection therewith; and the registration in the office for the registry of deeds, or the land titles office for the county or registration district in which such lands respectively are situate, of a certified copy of the order-in-council setting the same apart shall operate as a dedication of the said lands for the purposes of the Eastern Division.

Sec. 15.—The Commissioners shall have in respect of the Eastern Division, in addition to all the rights and powers conferred by this Act, all the rights, powers, remedies and immunities conferred upon a railway company under the "Railway Act" and amendments thereto, or under any general railway Act for the time being in force, and said Act and amendments thereto, or such general railway Act, in so far as they are applicable to the said railway, and in so far as they are not inconsistent with or contrary to the provisions of this Act, shall be taken and held to be incorporated in this Act.

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R.S.C., 1906, ch. 37, "Railway Act":—

Sec. 207.—Where the notice given improperly describes the lands or materials intended to be taken, or where the company decides not to take the lands or materials mentioned in the notice it may abandon the notice and all proceedings thereunder but shall be liable to the person notified for all damages or costs incurred by him in consequence of such notice and abandonment, which costs shall be taxed in the same manner as costs after an award.

(2) The company may, notwithstanding the abandonment of any former notice, give to the same or any other person notice for other lands or materials, or for lands or materials otherwise described. 3 Edw. VII., ch. 58, sec. 166.

"Exchequer Court Act," R.S.C., 1906, ch 140:—

Sec. 20.—The Exchequer Court shall have exclusive original jurisdiction to hear and determine the following matters:—

(*a*) Every claim against the Crown for property taken for any public purpose;

(*b*) Every claim against the Crown for damages to property injuriously affected by the construction of any public works;

(*c*) Every claim against the Crown arising out of any death or injury to the person or to property or on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties or employment;

(*d*) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor-in-Council;

(*e*) Every set-off, counterclaim, claim for damages whether liquidated or unliquidated, or other demand whatsoever, on the part of the Crown against any person making claim against the Crown. 50 & 51 Vict. ch. 16, sec. 16.

"Expropriation Act," R.S.C., 1906, ch. 143:—

Sec. 2.—In this Act unless the context otherwise requires—

(*a*) "Minister" means the head of the department charged with the construction and maintenance of the public work;

(*b*) "Department" means the department of the Government of Canada charged with the construction and maintenance of the public work;

Sec. 23.—Whenever from time to time, or at any time before the compensation money has been actually paid any parcel of land taken for a public work or any portion of any such parcel, is found to be unnecessary for the purposes of such public work, or if it is found that a more limited estate or interest therein only is required, the Minister may, by writing under his hand, declare that the land or such portion thereof is not required and is abandoned by the Crown,

or that it intended to retain only such limited estate or interest as is mentioned in such writing.

(2) Upon such writing being registered in the office of the registrar of deeds for the county or registration division in which the land is situate, such land declared to be abandoned shall re-vest in the person from whom it was taken or in those entitled to claim under him.

(3) In the event of a limited estate or interest therein being retained by the Crown, the land shall so re-vest subject to the estate or interest so retained.

(4) The fact of such abandonment or re-vesting shall be taken into account in connection with all other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken. 52 Vict., ch. 13, sec. 23.

Sec. 26.—In any case in which land or property is acquired or taken for or injuriously affected by the construction of any public work, the Attorney-General of Canada may cause to be exhibited in the Exchequer Court an information in which shall be set forth—

(*a*) The date at which and the manner in which such land or property was so acquired, taken or injuriously affected;

(*b*) The persons who at such date, had any estate or interest in such land or property and the particulars of such estate or interest and of any charge, lien or encumbrance to which the same was subject, so far as the same can be ascertained;

(*c*) The sums of money which the Crown is ready to pay to such persons respectively, in respect of any such estate, interest, charge, lien or encumbrance; and,

(*d*) Any other facts material to the consideration and determination of the questions involved in such proceedings. 52 Vict., ch. 13, sec. 25.

"Railways and Canals Act," R.S.C., 1906, ch. 35:—

Sec. 7.—The Minister shall have the management, charge and direction of all Government railways and canals, and of all works and property appertaining or incident to such railways and canals, also of the collection of tolls, on the public canals and of matters incident thereto, and of the officers and persons employed in that service. R.S.C., ch. 37, sec. 6; 52 Vict., ch. 19, sec. 3.

Before giving my reasons for thinking that the notice of the 15th July, 1912, was inoperative I make one or two observations touching the positions respectively taken on behalf of the appellants and the Crown in the argument before us.

On the hypothesis that section 23 applies, the con-

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tention advanced on behalf of the Crown that the Exchequer Court is without jurisdiction to entertain the petition seems to be disposed of simply by reference to section 20 of the "Exchequer Court Act," and section 13 of the "National Transcontinental Railway Act." There is nothing in section 23 indicating an intention to take away the right to compensation recognized by section 13 and even assuming that sub-section 4 of section 23 ought to be construed, as the Crown contends it should be construed, as limited, namely, to cases in which the abandonment relates to part of the land taken only, it would still require very explicit language to take away all right of compensation for loss occasioned by the compulsory assumption of the legal title of the property. The general rule which enables the subject to proceed by petition of right for compensation for property which has found its way into the hands of the Crown (*Feather* v. *The Queen* (1), and *Windsor and Annapolis Railway Co.* v. *The Queen*(2), at page 614) would remain operative. I agree, however, with the appellants that this is not the necessary reading of sub-section 4, the construction of which I proceed to consider with special reference to the effect attributed to the statute by the learned trial judge.

The learned judge appears to have taken a view, the practical result of which is that, where section 23 applies and lands taken are returned under that section so that no part remains in the possession of the Crown, the right of compensation is limited to compensation for disturbance of possession. That, with great respect, I think, is not the point of view from

(1) 6 B. & S. 257, at p. 293. (2) 11 App. Cas. 607.

which the subject of compensation is envisaged by sections 22 and 23 of this statute. To prevent misapprehension, I note specially that I refer only to sections 22 and 23 and not to section 30, which deals only with the subject of injurious affection. It may be that section 30 approaches the subject from the same point of view, but that question does not arise and I express no opinion upon it at all. Sections 22 and 23 must be read together. It is perfectly true that, where section 23 applies, the declaration in section 22 that the lands become vested in the Crown and that in substitution for the title, the translation of which is thereby effected, there is vested in the owner a right of compensation—it is quite true that this declaration must be read with the provisions of section 23 empowering "the Minister" compulsorily to re-vest in the owner the lands taken; but on the other hand sub-section 4 of section 23 must be read with section 22 and, reading section 22 and sub-section 4 together, I apprehend it to be sufficiently clear that the governing consideration in determining the effect of the two provisions is the fact that the language of section 22 clearly imports that the compensation to which the owner becomes thereby entitled is normally to be determined as of the date when the lands vest in the Crown by the operation of section 22. In *Re Lucas and Chesterfield Gas and Water Board* (1), Lord Justice Moulton said that the general principle of compensation where land is taken under compulsory powers is that the property *is not diminished in amount but changed in form;* and section 22 seems to be only an explicit statement of this well-settled

(1) [1909] 1 K.B. 16.

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principle. That, as I have said, appears to be the governing consideration for determining the joint effect of these provisions. The result then is that, for the purpose of ascertaining the amount of compensation provided for in section 22, you must take into account the fact that the land taken has been compulsorily re-transferred together with the other circumstances of the case; but you are to take that fact together with the other circumstances into account for the purpose of determining how much money ought to be paid to the owner in order that he may receive in property and money the equivalent in value to him of the property taken as of the date when section 22 became operative; that is to say, the date of the filing of the plan.

One can easily conceive cases in which the question thus formulated might present considerable difficulty. In the case before us, which is a comparatively simple one, we have the formal offer of the Crown and it is not disputed that the amount offered fairly represented that to which the appellants were entitled, namely, the value of their property to them; and it is not suggested, indeed it could not be suggested, that in the circumstances this could be anything other than the market value of their property in the sense in which that phrase is used in the literature of compulsory purchase. The only question of fact, therefore, upon which the learned trial judge was called upon to pass was the question of the value of the property at the date upon which it was returned.

If I had taken the view that the case ought to be dealt with on this footing (that is to say, that section 23 is applicable) I should not have felt embarrassed by the course on which the case proceeded in the

court below. As applied to the circumstances before us, Mr. Stuart's method of working out the statute proposed at the trial and on the argument in appeal was, I think, substantially the right method; and the principle upon which the appellants' claim must rest (assuming always section 23 of the "Expropriation Act" to be applicable) was, I think, set forth with perfect clearness in the petition of right. The evidence given on behalf of the petitioners was explicitly directed to the precise point of fact just indicated; and, I think, the result of the evidence is that a deduction to the extent of $30,000 ought to be made from the amount of compensation originally offered.

I come then to the point upon which I think, as I stated above, the appeal should be decided, viz., that the notice of 15th July, 1912, was inoperative in law.

The first point for consideration is: Does section 23 of the "Expropriation Act" confer upon the Minister of Railways and Canals authority to re-vest compulsorily in the owner lands acquired by the National Transcontinental Railway Commissioners under the authority of section 13 of the "National Transcontinental Railway Act"? "Minister" in section 23 is to be read (in accordance with the direction of section 2 (*a*) and (*b*)) as meaning the

head of the department charged with the construction and maintenance of the public work.

It does not appear to require argument (when the terms of section 7 of the "Department of Railways and Canals Act" are compared with those of the sections extracted above from the "National Transcontinental Railway Act") to shew that the Eastern Division of the National Transcontinental Railway, although

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clearly enough a "public work" within the words of section 2, sub-section (*b*) of the "Expropriation Act" is not a "public work" with whose "construction and maintenance" the Department of Railways and Canals is "charged." The condition of the authority, therefore, of the Minister, under section 23, namely, that he shall be

> the head of the department charged with the construction and maintenance of the public work,

for which lands have been taken is in this case unfulfilled. The case is not a case to which the authority of the Minister of Railways and Canals extends under that section; the language of the section itself excludes it.

Moreover, comparing the provisions of the "Expropriation Act" with the provisions of the "National Transcontinental Railway Act," lands taken for the Eastern Division by the Commissioners seem to be clearly outside the contemplation of section 23. By section 13 of the former Act such lands not only become vested in the Crown, but become affected by a *"dedication to the public"* by the express words of the statute; that is to say, I presume, affected by a "dedication" to the public purposes for which they are taken—for the construction, maintenance and working of the Eastern Division of the National Transcontinental Railway. The "work" was under the charge and control of Commissioners brought into existence by this special statute, passed in pursuance of a contract with the Grand Trunk Railway Co. who were ultimately to be the lessees and operators of it, who, as the agreement between themselves and the Government shews, were narrowly concerned with the economical construction of the railway. Lands acquired for

the undertaking by these Commissioners cannot, I think, be fairly held to be subject to the power of the "Minister" under the provisions of section 23.

Again, section 13, the necessary conditions being satisfied, takes away the title from the owner substituting for it a right of compensation, which means, of course, compensation in money. In *The King* v. *Jones*(1) this court took the view that the claim for compensation means a claim against the Crown, not a claim against the Commissioners as a corporate body; and a claim, therefore, which was not intended to be made through the machinery provided by the "Railway Act," but must be prosecuted and determined in the ordinary way, by proceedings instituted by petition of right or an information filed on behalf of the Crown; this right to compensation, if one is to ascertain and define it by reference to the language of the "National Transcontinental Railway Act" alone (I suspend for a moment a necessary reference to section 15), is simply a right to be paid in money the value to the owner of what has been taken. And it is, of course, not disputed that the introduction of section 23, on any construction of it that has been suggested, must effect a sensible modification of the right so ascertained and defined. There is not a word in the "National Transcontinental Railway Act" referring to the "Expropriation Act"; which circumstance does not shew, of course, that the provisions of the "Expropriation Act" relating to procedure simply are not properly available for the purpose of enforcing rights conferred by the "National Transcontinental Railway Act" in respect of which no remedy is given speci-

(1) 44 Can. S.C.R. 495.

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fically by the last mentioned statute. But it is one thing to say, as I have no difficulty in holding, that the provisions of the "Expropriation Act" relating to procedure simply may be made available for such purposes so long as they are applied consistently with the full recognition of the substantive rights given by the special Act dealing with the particular railway, the National Transcontinental Railway; and it is an entirely different thing to say that such substantive rights can properly be held to be modified by the provisions of another statute, general in its nature, to which not a single word of reference is to be found in the special Act.

It is to be observed, however, that the notice of the 15th July, 1912, is a notice given by the Commissioners of the National Transcontinental Railway as well as by the Minister of Railways and Canals; and it is a conceivable suggestion that the "National Transcontinental Railway Act" establishes a "department of the Government of Canada, charged with the construction and maintenance" of the Eastern Division of the National Transcontinental Railway; and that the Commissioners are the "head of the department" and, consequently, satisfy the description "minister" as defined by section 2, sub-sections (*a*) and (*b*) of the "Expropriation Act." There are two distinct objections severally fatal to this suggestion. "Department of the Government of Canada" is a phrase having a well understood significance and it clearly means one of the departments recognized by statute presided over by a Minister of the Crown, a member of the King's Privy Council for Canada. See R.S.C., 1906, ch. 4, sec. 4; ch. 48, sec. 3; ch. 23, sec. 2, etc. The second objection is that, assuming the lan-

guage used to be capable of a construction reconcilable with this suggestion, it is only by attributing to the words a forced and unusual meaning; and the considerations to which I have just referred are equally weighty to justify the rejection of this interpretation which would have the effect if adopted, of seriously prejudicing the right of compensation given by section 13 of the "National Transcontinental Railway Act."

The notice in question, moreover, professes to be given pursuant to section 207 of the "Railway Act": (see p. 426, *ante*), as well as to section 23 of the "Expropriation Act." The legislative provision now embodied in section 207 of the "Railway Act," which had its origin many years ago, frequently has been considered and it has uniformly, I think, been held that the power conferred by that provision is a power which ceases to be operative the moment the title to the land taken becomes vested in the railway company. *Mitchell* v. *Great Western Railway Co.*(1); *Canadian Pacific Railway Co.* v. *Little Seminary of Ste. Thérèse*(2); *Re Haskill and Grand Trunk Railway Co.*(3). Application, therefore, according to its true intent, it could not have to lands taken under section 13 of the "National Transcontinental Railway Act" the title to which, by the very act of taking, becomes vested in the Commissioners; and section 207, consequently, is not incorporated by force of section 15 of the last mentioned Act. These are the principal reasons which have satisfied me that the Crown is not entitled to invoke the provisions of section 23 of

(1) 35 U.C.Q.B. 148. (2) 16 Can. S.C.R. 606.
(3) 7 Ont. L.R. 429; 3 Can. Ry. Cas. 389.

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the "Expropriation Act," or the provision of the "Railway Act" just referred to.

I have now to consider *The King* v. *Jones*(1). In *The King* v. *Jones*(1) the learned judge of the Exchequer Court had dismissed an information filed by the Attorney-General of Canada praying for a declaration that certain lands taken by the Commissioners had become vested in the Crown and for a determination of the amount of compensation payable in respect of such taking on the ground that the effect of section 15 of the "National Transcontinental Railway Act" was to incorporate the sections of the "Railway Act" relating to compensation and that compensation must be determined in the way provided for by that Act. On appeal to this court it was held that the Exchequer Court had jurisdiction to entertain the information and to pass upon the question of compensation on two grounds, first, that the claim for compensation under section 13 is a claim against the Crown and that jurisdiction is given by section 20 of the "Exchequer Court Act," R.S.C., 1906, ch. 140, subsecs. (*a*) and (*b*), which invest that court with exclusive jurisdiction over every claim against the Crown for property taken for or injuriously affected by any public work; and secondly, on the ground that the Eastern Division of the National Transcontinental Railway is a "public work" within the meaning of sections 26 *et seq.* of the "Expropriation Act." That is the substance of the decision. The ratio is put very clearly in the judgment of Davies J., at page 499, in these words:—

(1) 44 Can. S.C.R. 495.

It is a public work vested in the Crown, constructed at the expense of Canada, or for the construction of which public moneys have been voted and appropriated by Parliament within the meaning of section 2, para. (*d*) of the "Expropriation Act," and the procedure taken by the Crown in fyling this information to determine the claim against the Crown for the lands taken falls within the language of the 26th section of that Act, and the claim itself is one coming in my judgment, within sub-section (*a*) of section 20, of the Act constituting the Exchequer Court and defining its jurisdiction over "every claim against the Crown for property taken for any public purpose."

Altogether I entertain no doubt that the jurisdiction of the Exchequer Court covers the claim made and think the appeal should be allowed and the jurisdiction of the Court affirmed.

With great respect, I am unable to understand why *The King* v. *Jones*(1) can be supposed in any way to decide the question which I have been discussing, touching the applicability of section 23. The effect of section 23 was not a subject of consideration in that case and I do not think anybody supposed that the court was deciding that each and every section of the "Expropriation Act" is applicable for the purpose of determining the substantive rights of the persons whose lands are taken under section 13 of the "National Transcontinental Railway Act." There is not the least difficulty, as I have already said, in holding that the Eastern Division of the National Transcontinental Railway is a "public work" under section 26 for the purpose of applying that section and the subsequent provisions in so far as they relate to procedure merely; and in holding at the same time that other provisions of that statute affecting the substantive rights of the parties are not capable of application because of the very fact that they deal with substantive rights and not with procedure and because

(1) 44 Can. S.C.R. 495.

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they are not consonant with provisions of the special Act governing substantive rights. Section 13 provides for the right of compensation specifically but it says nothing about procedure. There seems no reason for holding that the provisions of a general statute enabling the Crown to take proceedings in the Exchequer Court for the purpose of determining the amount of compensation where compensation is payable in respect of the taking of lands for public works does not apply to the case of compensation payable under section 13 where the language of the statute is broad enough to comprehend, and does literally comprehend, that case; provided always, that the provisions of the general statute are not imported for the purpose or with the effect of modifying the substantive rights which are the legal result of a proper interpretation of the "National Transcontinental Railway Act" itself. That at all events is, I think, the proper interpretation of *The King* v. *Jones*(1).

The consequence would have been that the appellants, had they stood upon their rights, would have been entitled to claim the sum of $61,747.75, which the Crown had solemnly admitted to be the compensation to which they became entitled by the taking of the land. The appellants, however, in the petition of right had chosen to accept the property in part satisfaction and to that position they have consistently adhered throughout. I think this position results from a misapprehension of the "Expropriation Act," but they have asked for relief upon that footing, and upon that footing I think their claim must be

(1) 44 Can. S.C.R. 495.

dealt with. There is satisfactory evidence that the property when returned was not worth more than $30,000. It follows they are entitled to be paid the residue of compensation offered after deducting that sum.

ANGLIN J.—In *The King* v. *Jones*(1), a majority of the judges of this court held that the National Transcontinental Railway is a public work to which the "Expropriation Act" (R.S.C., 1906, ch. 143) applies.

Although sub-section 4 of section 23 of that Act is not as clearly expressed as might be desired, I agree with Mr. Stuart that it applies to cases of total, as well as to cases of partial, abandonment by the Crown, and that in it the words "land taken" mean not land taken and kept, but land taken under the provision for its acquisition, whether wholly or partially retained, or subsequently wholly abandoned. Otherwise there would be no provision in the "Expropriation Act" for compensation in cases of total abandonment, although in such cases the actual loss to the owner may have been very substantial. It cannot be assumed that it was intended to leave such a grievance without remedy, and if the statute is susceptible of an interpretation under which it will be provided for, that interpretation should prevail.

In the Exchequer Court this case has been dealt with on the footing that, upon the Crown exercising its right of abandonment under section 23, the owner became entitled to be indemnified for actual loss sustained as the direct result of his property having been

(1) 44 Can. S.C.R. 495.

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taken out of his hands and held by the Crown from the date of deposit of the plan under section 13 of the "National Transcontinental Railway Act" (3 Edw. VII., ch. 71), until it was re-vested in him under section 23 of the "Expropriation Act." On that basis the learned assistant judge allowed him $3,000 for loss of revenue already suffered and likely to be sustained in the future. This allowance was intended to cover all loss attributable to interference with the suppliant's user of his property, including loss of opportunities to lease it to advantage. But the suppliant was also deprived during all that period of the right to sell or otherwise dispose of his property. Until notice of withdrawal had been given the property to all intents and purposes belonged to the Crown, and the suppliant had no reason or right to expect that he would again have any interest in it. That the deprivation of the right of disposition is in most cases a matter proper for compensation can scarcely admit of doubt. When the property has diminished in value during the time that right has been withheld some compensation should certainly be made. This element of damage was not taken into consideration in the Exchequer Court. No doubt the loss sustained as the result of deprivation of the *jus disponendi* involves elements of contingency. The possibility of profitable sale, as such, must be taken into account. *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*(1). Neither the difficulty of determining the loss proper to be allowed for, nor the fact that elements of contingency or uncertainty are involved in it is sufficient reason for refusing com-

(1) [1914] A.C. 569.

pensation. *Wood* v. *Grand Valley Railway Co.*(1); *Chaplin* v. *Hicks*(2). If the statute should receive the construction put upon it by the learned assistant judge of the Exchequer Court, it would, therefore, be necessary that this case should be referred back to him to consider what additional sum should be allowed as compensation to the appellant for deprivation of his *jus disponendi* while his property was vested in the Crown, the evidence in the record being scarcely sufficient to enable us to deal satisfactorily with that question.

I was, for a time, inclined to think that this appeal should be disposed of in the manner which I have just indicated, but further consideration has led me, though not without some hesitation, to accept the construction placed upon section 23 of the "Expropriation Act" by my Lord the Chief Justice.

Where land or property taken under sub-section 1 of section 13 of the "National Transcontinental Railway Act" is subsequently abandoned and re-vested in the former owner under section 23 of the "Expropriation Act," no provision of either statute expressly deprives him of "the lawful claim to compensation" reserved to him by section 13 of the "National Transcontinental Railway Act," If it has been intended that the right to compensation which accrued upon the taking of the land should cease upon the re-vesting of it, having regard to the extraordinary and exceptional exercise of eminent domain involved in such re-vesting, we should certainly expect to find the extinction of the owner's right to compensation declared in explicit terms. But, on the contrary, sub-section 4 of section

(1) 51 Can. S.C.R. 283. (2) [1911] 2 K.B. 786.

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23, though not as clear as could be desired, appears to be framed on the assumption that, notwithstanding the abandonment and the re-vesting, "the person claiming compensation for the land taken" is still entitled to have "the amount to be paid to" him estimated or assessed by the court, which is directed, in estimating or assessing it, to take into account the fact of such abandonment or re-vesting, *i.e.*, to make allowance, at its then present value to him, for any advantage or benefit which the owner will derive from such abandonment or re-vesting.

The suppliant would, therefore, be entitled to the amount of the compensation which he would have recovered had the Crown retained the property less what is found to be a proper deduction to be made on account of the re-vesting. The property being thus treated as having belonged to the Crown while held under expropriation the Crown is entitled to the *mesne* profits from it during that time, but would be liable to the suppliant for interest for the same period on the full amount of the compensation which he would have recovered had the property not been abandoned.

The case has been dealt with in the Exchequer Court on an entirely different view of the effect of sub-section 4 of section 23 of the "Expropriation Act." We are not in a position to determine satisfactorily what compensation should be allowed the appellant.

The appeal should be allowed with costs and the action should be remitted to the Exchequer Court in order that the amount to be paid to the appellant may be estimated or assessed on the basis indicated.

BRODEUR J.—Il s'agit dans cette cause d'une pétition de droit réclamant des dommages.

Le 24 janvier, 1911, le gouvernement donnait avis d'expropriation d'une propriété appartenant aux appelants et dont il avait besoin pour la construction du Transcontinental. Au mois d'octobre, 1911, des procédures étaient instituées par le procureur-général devant la Cour d'Echiquier pour établir l'indemnité qui devait être payée pour l'expropriation de cette propriété et il offrait une somme de $61,747.75. Il y eut contestation quant au montant de l'indemnité; mais en définitive les parties se sont entendues et les appelants se sont déclarés prêts à accepter le montant offert et les procédures en Cour d'Echiquier furent alors discontinuées.

Le 27 juillet, 1912, la couronne déclarait que l'immeuble en question n'était pas requis et cet avis était enregistré le 30 décembre, 1912.

Dans leur pétition de droit les appelants prétendent que l'immeuble en question valait lors de l'expropriation au-delà de $60,000, ainsi qu'il avait été admis par le gouvernement lui-même et que lors de la rétrocession elle ne valait plus que $30,000 et ils réclament la différence.

La Court d'Echiquier n'a maintenu l'action que pour une somme de $3,000 pour les dommages qu'ils avaient soufferts pour pertes de revenus.

Nous avons à considérer la portée de la sous-section 4 de la section 23 de "La Loi des expropriations" (ch. 143 des Statuts Refondus de 1906). En vertu de cette loi des expropriations, lorsque la Couronne dépose au bureau d'enregistrement un plan et une description des terrains que l'on veut exproprier, cet immeuble, par le fait même de ce dépôt, devient la propriété de Sa Majesté (sec. 8).

Dans la cas actuel, cependant, les appelants sont

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restés en possession de la propriété et en ont retiré tous les loyers.

Il n'y a jamais eu dépossession. La jouissance était nécessairement restreinte et il leur était impossible de pouvoir retirer de la propriété les mêmes revenus qu'elle donnait auparavant. Je considère donc que les dommages qui ont été accordés par le juge de la cour inférieure pour cette perte de loyer doivent être maintenus.

La somme de $3,000 qui a été accordée représente une somme plus élevée qui les loyers qui ont été perdus; mais il faut tenir compte, en même temps, du fait que les appelants se trouvent avec des locataires qui ne leur donneront pas des revenus aussi considérables que ceux qu'ils auraient perçus s'ils avaient pu louer sans restriction. Le montant n'est donc pas trop élevé, loin de là.

Mais le point principal soulevé par les appelants est de savoir si la propriété a diminué de valeur entre la prise de possession et la rétrocession et s'il y a lieu de condamner à la Couronne à payer cette différence.

Je comprends que si la Couronne avait pris possession de la propriété, s'il y avait eu un incendie, par exemple, ou si on avait fait des détériorations, la Couronne serait tenue de payer ces dommages.

Mais dans le cas actual la propriété du terrain en question appartenait à la Couronne en vertu de son avis d'expropriation; mais elle n'a jamais exercé son droit de propriété et a laissé les appelants en possession.

En vertu de la loi, les appellants avaient droit aux dommages qu'ils avaient soufferts comme résultat de cet avis d'expropriation et de la rétrocession.

Le demandeur a-t-il réellement souffert de dommages autres que ceux que je viens de mentionner plus haut ?

Avant que la construction du chemin de fer fût décidée, la propriété des appelants valait à peine $30,000. Elle rapportait environ $2,000 de revenus par année, soit un peu plus de 6%. Il est reconnu, en général, qu'une propriété de ville doit donner un revenu brut de 10%. Or, en évaluant à $30,000 cette propriété qui ne donnait que $2,000 de revenu je fais une évaluation bien libérale.

Il est reconnu par les appelants qu'elle vaut aujourd'hui environ $30,000. Elle a donc la même valeur qu'avant. Quand le gouvernement eût décidé de construire le chemin de fer, de suite cette propriété parut acquérir une plus valeur. Les avis d'expropriation ne furent pas donnés de suite et quand ils furent donnés la propriété avait doublé en valeur. Et comme le gouvernement était tenu de payer la valeur qu'elle avait à la date de l'avis d'expropriation, il a offert un peu plus de $60,000.

Il a considéré, je suppose, à un moment donné, que ce projet de construire une gare à cet endroit était trop dispendieux, à raison probablement de la valeur factice que les expropriés réclamaient pour leurs terrains et alors il a simplement résolu de ne pas donner suite à son projet et de placer sa gare à un autre endroit. Il a donné avis aux appelants qu'il leur rétrocédait leur propriété.

Ces derniers, je considère, ne peuvent pas, comme ils le font, réclamer des dommages pour cette valeur factice que le projet du chemin de fer a donnée à leur propriété. Le juge avait le droit d'examiner toutes les circonstances de la cause, comme le dit le statut,

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et notamment de considérer la valeur de cette propriété non-seulement ou moment de l'expropriation mais même avant le projet de la construction du chemin. Il est bien evident pour moi que les seuls dommages soufferts par les appelants sont ceux qui leur ont été accordés en cour inférieure. Ce jugement devrait être confirmé avec dépens.

The appeal stood dismissed, on equal division of opinion, no costs being allowed.

Solicitors for the appellants: *Pentland, Stuart, Gravel & Thomson.*

Solicitor for the respondent: *Eusèbe Belleau.*

MOSES JOEL SINGER, EXECUTOR OF THE ESTATE OF JACOB SINGER, DECEASED, AND OTHERS..... } APPELLANTS;

AND

ANNIE SINGER, EXECUTRIX, AND OTHERS ..... } RESPONDENTS.

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

Will—Construction—Devise of income — Trust — Codicil—Postponement of division—Maintenance of children.

The will of S. contained the following provision: "I direct my said trustees to pay to my wife Annie Singer, during the term of her natural life and as long as she will remain my widow, the net annual income arising from my estate for the maintenance of herself and our children; should, however, my wife remarry then such annuity shall cease."

Held, that Annie Singer was entitled to said income during her widowhood for her own use absolutely, but subject to an obligation to provide, in her discretion, for the maintenance of the children, which discretion would not be controlled nor interfered with so long as it was exercised in good faith. Such obligation did not extend to a child married or otherwise forisfamiliated.

Per Anglin J.—The jurisdiction to determine the good or bad faith of the widow on an originating notice is questionable.

Another clause of the will directed the trustees "to pay to each of my sons who shall reach the age of thirty years a sum equal to half that portion of my estate to which such son is entitled under this my will upon the death of his mother. * * * Such payment to be considered as a loan from the estate." A codicil added several years later contained this provision: "I hereby further direct that my real property shall not be divided among the beneficiaries as directed by my will until after the lapse of ten years from my death."

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

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Held, that the division so postponed was not the final division to be made on the death or marriage of the widow; that it had the effect of postponing any advance to a son thirty years old of half his portion until the ten years from the testators' death had expired so far as such advance would necessitate the sale or mortgage of any of the real estate.

Judgment of the Appellate Division (33 Ont. L.R. 602) affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), varying the judgment of Middleton J. at the hearing.

The proceedings in this case were begun by originating summons to obtain the construction of certain provisions in the will of the late Jacob Singer. These provisions are set out in full in the above head-note and in the opinions of the judges one clause gave the net income of the estate to the testator's wife during her life and widowhood for the maintenance of herself and children. The appellants claimed that she received the income in trust for such maintenance and Middleton J. so held. This was overruled by the Appellate Division and the clause construed as giving her the income for her own absolute use with an obligation to provide in her discretion for maintenance of the family.

Another clause provided for the advance, by way of loan, to any son reaching the age of thirty of half the portion he would be entitled to on the death or marriage of his mother. By a codicil the testator directed that his real estate should not be divided until the expiration of ten years from his death. The court below held that the advance to sons of thirty was by this codicil postponed for ten years from testator's death unless it could be made out of the per-

(1) 33 Ont. L.R. 602.

sonalty. These were the two questions raised for decision in the Supreme Court.

Dewart K.C. for the appellant M. J. Singer. According to the later decisions the widow took the income in trust and the rights of the children therein would be enforced by the courts. *In re Booth*(1); *In re G. Infants*(2).

Maintenance is not limited to children not forisfamiliated. *In re Miller*(3).

Cowan K.C. and *Rose K.C.* for the other appellants.

Watson K.C. for the respondent Annie Singer. The testator wished his wife to have the income and use it in her discretion. The court will not interfere with such discretion when exercised in good faith. *Lambe* v. *Eames*(4); *Jones* v. *Greatwood*(5); *In re Atkinson*(6); *In re Barrett*(7).

As to right of children forisfamiliated see *Cook* v. *Noble*(8).

Holman K.C. for the other respondents.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs.

DAVIES J.—The difference of opinion between the trial judge, Middleton J., and the Appellate Division as to the rights of the widow Annie Singer to the net annual income arising from the estate during her widowhood is not very great. After consideration of the arguments advanced at bar on the construction

(1) [1894] 2 Ch. 282.
(2) [1899] 1 Ch. 719.
(3) 19 Ont. L.R. 381.
(4) 6 Ch. App. 597.
(5) 16 Beav. 527.
(6) 80 L.T. 505.
(7) 6 Ont. W.N. 267.
(8) 12 O.R. 81.

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of the provisions of the will and codicil relating to this net annual income, I accept that of the Appellate Division as probably the more correct one.

With respect to the construction of the clause providing for advancement to those sons of the testator who reached the age of thirty, I entertained at the close of the argument a good deal of doubt. The reasons given in the dissenting judgment of Mr. Justice Magee are strong and cogent in favour of the construction he adopted that the codicil did not interfere with the provision in the will for payment by way of loan to the sons on attaining the age of thirty years.

While I agree that the solution of the question is surrounded with difficulties, I have reached the conclusion that the arguments in favour of the construction adopted by the Appellate Division preponderate, and that the effect of paragraph 10 of the codicil is to postpone the right under the will of the sons who attain the age of thirty to be paid the one-half of their shares except as stated by the Chief Justice

> in so far as it may be precticable to make payments to them out of the personalty and the proceeds of such of the real property as the trustees may have sold.

On the whole, I adopt the reasoning and conclusions of Chief Justice Sir William Meredith and would dismiss the appeal.

Under the circumstances and the reasonable doubts existing as to the true construction of these clauses of the will taken together with Mr. Justice Magee's dissenting opinion, I would not allow costs against appellants but would let each party pay his own.

IDINGTON J.—The conditions existent in this family are unsatisfactory. I should, however, be sorry to in-

crease and intensify their troubles and then perpetuate them by substituting the discretion of the court for that of the mother whom the testator had wisely chosen to be head of the family when he was gone. She may make mistakes, but her maternal instincts will probably rectify or ameliorate them. The court substituting itself for her inevitably must make mistakes it never can rectify.

The carefully prepared judgment of the learned Chief Justice of Ontario, with which I agree, leaves nothing more for me to say on the question of interference with the mode of the mother's exercising her judgment.

The formal judgment of the Appellate Division lays down correctly the lines to be observed and yet as I read it puts no bar in the way of the mother aiding when they deserve it, even those over twenty-one and *forisfamiliated.*

On the question arising upon the construction of clause 10 of the codicil I agree with the result reached by the judgment appealed from.

The testator by a will made in 1904 directed as follows:—

> I direct my said trustees to pay to each of my sons who shall reach the age of thirty years a sum equal to half that portion of my estate to which such son is entitled under this my will upon the death of his mother, such portion to be valued at the time of each son attaining his thirtieth year, the valuation to be made by my executors and trustees and shall be final. Such payment to be considered as a loan from the estate,

and on 31st October, 1911, two weeks before his death, made a long codicil thereto of which clause No. 10 is as follows:—

> 10. I hereby further direct that my real property shall not be divided among the beneficiaries as directed by my will until after

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the lapse of ten years from my death, and I further direct that the business of managing my real estate shall be carried on by my sons as it has been carried on heretofore, and I direct that my sons shall receive such salaries as shall seem just in the discretion of my executors in remuneration for their services.

And clause No. 14, the last, is as follows:—

14. And I further direct that anything mentioned in the aforesaid will which is at variance with the provisions mentioned in this codicil, shall be subservient and subject to this codicil.

The estate, at his death, consisted chiefly of over three hundred parcels of real estate in Toronto.

Four of his sons had then reached the thirty-year limit.

The estate was under mortgages to three-eighths of its value. Much of it was unproductive or in a state of dilapidation, needing repair. These and many other known circumstances must be borne in mind in attempting the interpretation and construction of this codicil. We can say nothing of the unknown which the prudent testator refrains from disclosing and which we cannot appreciate in order to help construction.

I should have supposed, but for judicial differences of opinion, the mere reading of this clause No. 10, in light of the surrounding facts and circumstances, restricted as it is to real estate, was so plain as to need no aid. But in effect it is urged that it must have read into it the word "finally" as qualifying the word "divided" therein. For the argument presented by appellant means, if anything, that the distribution provided for by the clause I have quoted from the will, was not in substance a division *pro tanto,* though conditionally subject, however, in case of a shrinkage of the estate to a return or reduction in share, but merely a loan, and that according to some

theories put forward, on good security and bearing a good rate of interest; the prospective share in the estate, of course, forming part of the security.

If it was in essential characteristics merely a loan, why all this litigation ? The parties concerned, over thirty years of age, could possibly borrow in Toronto on their respective shares almost as advantageously as the executors without all this expensive litigation to be paid for, in addition to the usual commissions on such transactions.

Plus the contingency of death without issue, possibly insurable against, there is not much difference in the character of the borrowing by the trustees sought herein to be immediately enforced by this proceeding and that obtainable by each of the appellants in respect of his share.

For admittedly the trustees of the estate cannot just now in the present state of the market sell its real estate and can only meet the obligations which the construction contended for would involve, by borrowing at a great disadvantage.

All this is, it may be said, aside from the question of construction. I agree. I only desire to illustrate the real nature of what is contended for by those relying upon the language used in the clause relative to the advances to be made being merely loans to those attaining thirty years of age.

What has happened may, or may not, have been within the contemplation of the testator when making his will, but assuredly it was when making his codicil thereto, and anything in the will at variance therewith is expressly made subservient to the codicil. Such submission extends to the giving, if need be, of an en-

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tirely different shade of meaning to that it might have borne standing alone and amid entirely different surrounding circumstances.

I think, however, such advances were merely intended to be *pro tanto* a distribution of the estate, but in order to provide for the contingencies necessary to be kept in view, having regard to the equal division ultimately to be made and contemplated by the testator, should be in such view, but in that only, treated as loans.

Assuming any such advance made upon terms only within the language of the clause and without any further stipulation for its return than implied therein, is it at all conceivable that any court would maintain an action for the recovery back of any part thereof, save so far as needed to produce the equal distribution contemplated ?

If not, then the advance is to the extent not so recoverable neither more nor less than the division in the language of the codicil

among the beneficiaries as directed by my will.

Again, the language of the clause itself presupposes the money in hand; for nowhere is there any direction to sell or mortgage for any such purpose. To imply such an imperative direction in the clause or whole will (to be read now in light of the codicil now dominating its expressions) dealing with such an estate as left at the death of the testator, would be, I think, attributing to him a want of that business sense and foresight which, I think, he was possessed of.

If no other question had been raised than one asking the court to compel the trustees to mortgage and pay for such a purpose, would the court have listened

to it and acceded to that which might spell ruin for the estate ?

The testator realizing, as every sane man of experience and foresight must have done in the end of October, 1911, that by the end of a year thence, when his will would have become operative for purposes of partial distributions, and the fruits of real estate speculation would have begun to ripen; and of these a long period of depression in real estate was sure to ensue, provided against such contingencies. He realized the possibly disastrous results of an enforced distribution under such conditions of a large part of his estate. He wisely anticipated all that and what was or might be involved therein and provided against it by clause No. 10 of this codicil.

We are invited to frustrate his purpose by putting on his will, and on this codicil, a construction that I venture to think would have surprised him. So far common knowledge, if we use it, can guide us.

But in view of the lapse of time betweeen the making of will and codicil, it is not at all improbable, in light of the story unfolded herein by some of those concerned, that in the development of his sons he had found something to warrant him in providing (in a way his earlier hopes in that regard induced him to refrain from) against their possible or probable improvidence or that of some of them.

I do not think we are entitled to frustrate the results he aimed at, whatever they were, by placing upon his language used in clause No. 10, and clearly emphasized in clause No. 14, a construction it does not necessarily bear.

Moreover, it is quite clear he left to the future developments, that time and chance might bring, the

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earlier conversion, in the ordinary prudent way, of his real estate into personalty, whereupon the clause for partial distribution would become operative.

The power of sale remained intact, save that impliedly it was not to be used in obedience to an enforced demand for distribution within the period of ten years.

I need not dwell upon the bearing of other minor considerations such as, the income of the estate belonging to the widow and the consequent results upon it by the construction contended for; and the salaries provided in the codicil for the management of the estate by his sons, and the possibility of the codicil having been drawn by a non-professional hand as the providing for a seal in the execution thereof indicates.

The true construction must ever be in the case of a will, the ascertainment of the purposes of the testator to be gathered from the will read in light of the circumstances known to surround him making it and not least of these the condition of the estate.

Then its entire scope and purposes must be kept in view and no single feature, unless so expressed as in this codicil, allowed to dominate the rest. So treating will and codicil I do not feel any doubt in the results I have reached.

I agree that no compensation is allowable to the executors. The actual labour in that connection is provided for by salaries to be paid the sons in regard thereto. The responsibility evidently was not to be compensated for.

I think the appeal should be dismissed with costs.

DUFF J.—The important question turns upon the effect of clause ten of the codicil. It is by no means

free from doubt, but I think effect may be given to the intention of the testator, as I infer from the admitted facts, without doing violence to the language. The intention unquestionably was, I think, to prohibit a sale of any part of the real estate for a period of ten years.

The appeal should be dismissed with costs.

ANGLIN J.—The first question presented on this appeal is as to the effect of the following provision of the will of the late Jacob Singer:—

> I direct my said trustees to pay to my wife Annie Singer during the term of her natural life and as long as she will remain my widow the net annual income arising from my estate for the maintenance of herself and our children; should, however, my wife remarry, then such annuity shall cease.

Middleton J., who heard the case in the first instance on an originating notice, held that:—

> The said Annie Singer is not entitled to the net annual income arising from the said estate to her own use absolutely, but subject to the obligation to use the same not only for her maintenance, but also for the maintenance of the children of the testator, and that the right of any child to maintenance does not cease on attaining majority or marriage;

and he directed a reference to determine what allowance, if any, should be made to each of the children of Jacob Singer out of the income of the estate.

The Appellate Division varied this judgment by declaring that:—

> The said Annie Singer is entitled to the net annual income arising from the said estate during her widowhood for her own use absolutely, but subject to an obligation to provide thereout for the maintenance of the children of the testator or such of them as in her discretion to be exercised in good faith she shall deem to require the same, but such obligation does not extend to any child who has or shall be married or otherwise be forisfamiliated.

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The appellants contend for the restoration of the judgment of Middleton J. The respondent Annie Singer upholds the judgment of the Appellate Division. The other respondents, represented by Mr. Holman, maintain that the interest of Annie Singer is absolute; that any obligation imposed upon her is not in the nature of a trust, but is purely moral; and that the children have no interest legally enforceable. The difference between the respective orders made by Middleton J. and by the Appellate Division (apart from the exclusion of children married, or otherwise forisfamiliated) would seem to be that, under the latter, the discretion of the mother is wider and enables her, for reasons that seem to her sufficient, to exclude any child from maintenance. Interference of the court is limited to a case of *mala fides* in the exercise of her discretion.

With Sir George Mellish L.J.:—

> I do not understand how a Court of Equity can execute a trust where the testator says that he has such confidence in his widow that he wishes her, and not the Court of Chancery, to say what share she shall have and what share the children shall have. *Lambe* v. *Eames*(1).

According to many authorities language such as that used by the testator does not create a complete trust in the strict sense; *Bond* v. *Dickinson*(2); *Lambe* v. *Eames*(1); *Mackett* v. *Mackett*(3); *Allen* v. *Furness*(4); *Re Shortreed*(5); *Atkinson* v. *Atkinson*(6). But there are, no doubt, other authorities in which the contrary has been held, *e.g.*, *Scott* v. *Key* (7); *Woods* v. *Woods*(8); *Longmore* v. *Elcum*(9).

(1) 6 Ch. App. 597, at p. 601
(2) 33 L.T. 221.
(3) L.R. 14 Eq. 49.
(4) 20 Ont. App. R. 34.
(5) 2 Ont. W.R. 318.
(6) 80 L.J. Ch. 370-372.
(7) 35 Beav. 291.
(8) 1 My. & Cr. 401.
(9) 2 Y. & C. Ch. 363.

The line is difficult to draw. But the cases rather seem to indicate that a bequest of income will more readily be held to impose a trust, especially if given to the mother, than a similarly phrased gift of the corpus. Eversley on Domestic Relations (3 ed.), p. 688. Yet whether she should, or should not, be held to be a trustee, the authorities seem to establish that there is an obligation toward the children imposed upon a widow to whom money is bequeathed for the support of herself and her children, which the court will, under certain circumstances, enforce. *Allan* v. *Furness*(1), and *Booth* v. *Booth*(2), are instances in which the court interfered to protect the fund in the interests of the children against creditors of a legatee subject to an obligation of maintenance. *In re G. Infants*(3) is a case in which the court interfered on an admission of obligation made by an immoral mother. *Thorp* v. *Owen*(4) was a case of admitted trust. But there are other cases in which, without holding that a trust had been created, the courts have, as against the parent, asserted the existence of an obligation in favour of the children which they would enforce. *Re Robertson's Trust*(5); *Raikes* v. *Ward* (6); *Castle* v. *Castle*(7); *Browne* v. *Paull*(8); *In re Pollock*(9). *A fortiori,* if there be a trust, however wide the discretion, the court will interfere in the event of failure or refusal to exercise it honestly.

As Theobald says (7 ed.), p. 491:—

(1) 20 Ont. App. R. 34.
(2) [1894] 2 Ch. 282.
(3) [1899] 1 Ch. 719.
(4) 2 Hare 607.
(5) 6 W.R. 405.
(6) 1 Hare 445.
(7) 1 De G. & J. 352.
(8) 1 Sim. N.S. 92, at p. 103.
(9) [1906] 1 Ch. 146.

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The decisions upon gifts to a parent for the benefit of himself and his children run into fine distinctions.

See cases collected in Lewin on Trusts (10 ed), at p. 157, and Jarman on Wills (10 ed.), pp. 890 *et seq.*

After fully considering all the provisions of Jacob Singer's will, I agree with the view expressed by Middleton J., when, speaking of the testator's intention, he said:—

> Mr. Singer undoubtedly had unbounded confidence in his wife. Many expressions in the will point in that direction; and I think that his dominant intention was that during the lifetime of the wife, so long as she remained his widow, she should occupy substantially the same position towards the children as he occupied himself.

In that view there would be no trust properly so called. The obligation of the mother would be almost purely moral. The only right enforceable against her in the courts would be the right to support which the law gives to minor children against their father, commensurate with his means and station in life, subject to the further limitation, that the court will not interfere to enforce that right against the mother if she should, in the *bonâ fide* exercise of her discretion, determine that the circumstances warrant her withholding maintenance in part or in whole in the case of any child. That, I take it, is the measure of the children's right which the judgment of the Appellate Division accords.

This wide discretion the mother appears to have under such a provision as that with which we are dealing, which involves determining from time to time and under varying circumstances how much of the income should be used for each and any of the purposes indicated, and it is subject to curial interference or control only when it is shewn that she has not exer-

cised it fairly and honestly; *Costabadie* v. *Costabadie* (1); *Tabor* v. *Brooks* (2); *Re Roper's Trusts* (3).

I am, with respect, of the opinion that this is the correct interpretation of the disposition made by the testator of the income of his estate. I desire, however, not to be understood as dissenting from the view expressed in the Appellate Division that, under the doctrine *stare decisis,* whatever may be the view now prevailing in England (Theobald (7 ed.), 495; Lewin on Trusts (10 ed.), p. 159), in Ontario the view expressed in *Cook* v. *Noble* (4), that married and otherwise forisfamiliated children are not entitled to share in a gift for maintenance such as this should be adhered to. But there is nothing to prevent the mother applying a part of the income for the benefit of adult and married children who may need assistance, if she can do so consistently with her duty to herself and her unmarried minor children.

I question the jurisdiction on an originating notice to determine the issue of good or bad faith on the part of the widow. At all events, if such a jurisdiction exists, I think the better course is that which has been taken in the Appellate Division, viz., in the first instance to dispose of the questions of construction and to determine finally the rights of the parties under the will, leaving it to the children, after that has been done, to proceed, if they should deem it necessary and proper, to seek the aid of the court to enforce the rights so declared.

I would, for these reasons, maintain the judgment of the Appellate Division on the first branch of the appeal.

(1) 6 Hare 410.
(2) 10 Ch. D. 273, at p. 277
(3) 11 Ch. D. 272.
(4) 12 O.R. 81.

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The next question is whether the provision of the will which directs the trustees

> to pay to each of my sons who shall reach the age of thirty years a sum equal to half that portion of my estate to which that son is entitled under this my will upon the death of his mother, such portion to be valued at the time of each son attaining his thirtieth year, the valuation to be made by my executors and trustees and shall be final. Such payment to be considered as a loan from the estate,

is affected by clause 10 of the codicil.

> 10. I hereby further direct that my real property shall not be divided among the beneficiaries as directed by my will until after the lapse of ten years from my death, and I further direct that the business of managing my real estate shall be carried on by my sons as it has been carried on heretofore, and I direct that my sons shall receive such salaries as shall seem just in the discretion of my executors in remuneration for their services.

The will provided for the distribution of the estate on the death or remarriage of the widow, any advances previously made being brought into hotchpot. The appellant contends that it is only to this final distribution that the provision of the codicil applies and that it does not control or affect the right of the sons to advancements under the clause above quoted.

The will was made in 1904; the codicil in 1911, a month before the testator died. At his death his estate consisted almost entirely of real property. Up to five years before his death he had carried on the business of a watchmaker, jeweller, and money lender. The capital invested in that business appears upon its discontinuance to have been used in acquiring lands and houses. The condition of the testator's estate, as it existed in 1904, when his will was made, had, therefore, been materially changed when he made the codicil in 1911. Assets of other kinds, no doubt consider-

able in amount, and out of which the advancements to the sons might have been made, had in the interval been converted into real estate. This circumstance must be borne in mind in considering the effect of the codicil, which not only postpones a division of the real estate for a period of ten years, but directs that the business of managing it shall be carried on as theretofore. I am of opinion that the dominant purpose disclosed by this codicil was that, saving the power to make sales demanded by good management, the real estate should be kept intact for a period of ten years, and that any provision of the will in favour of beneficiaries, other than specific or pecuniary legatees, inconsistent with that purpose should yield to it. For the purpose of this provision of the codicil advancements to the sons which would entail a disposition of the real estate would, in my opinion, be in the nature of a division which the testator meant to prohibit. It has been suggested that the portions to be advanced might be raised under the trustees' power to mortgage. But, apart from the fact that the existence of mortgage incumbrances on the estate to the extent of $360,000 might well render that method of procuring money impracticable, it might entail the defeat of the very purpose which the testator had in view in making the codicil and would be an indirect method of accomplishing that which I cannot but think he intended to provide against. For these reasons and for those stated by Mr. Justice Middleton and the Chief Justice of Ontario, I would affirm the judgment in appeal on this question.

I have no doubt that by the 11th clause of the codicil directing that no salary shall be paid to the execu-

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tors for their services as executors, the testator meant to deprive them of all right to remuneration in any form for their services in the administration of his estate.

I would dismiss the appeal with costs. Having had the opinion of two courts against them on the main question — their right to immediate advancements—the appellants should, I think, have been satisfied. The slight difference in opinion between Mr. Justice Middleton and the Appellate Division as to the extent of the widow's discretion and the propriety of curial interference would not, in my opinion, justify our encouraging the carrying of appeals in cases such as this beyond the provincial courts, as we would do were we to award the appellants costs out of the estate or relieve them from payment of the costs of the respondents.

BRODEUR J.—After a great deal of hesitation I have come to the conclusion that this appeal should be dismissed.

In directing his trustees to pay to his wife the annual income arising from his estate, the testator intended to give her discretion as to the way she would dispose of that money for the maintenance of their children. She is expected to exercise that discretion with impartiality and wisdom. It may be that in the past the mandate imposed upon her has not been discharged in a satisfactory way, but it is expected that she will in the future treat all her children in a most just, equitable and impartial way.

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On the other point in issue, I agree with the construction put on the will by the Appellate Division.

Appeal dismissed with costs.

Solicitors for the appellant Moses Joel Singer: *Dewart, May & Hodgson.*

Solicitors for the other appellants: *Beatty, Blackstock, Fasken, Cowan & Chadwick.*

Solicitors for the respondent Annie Singer: *Watson, Smoke, Smith & Sinclair.*

Solicitor for the other respondents: *Charles J. Holman.*

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*Feb. 14.

THE TOWNSHIP OF CORNWALL....APPELLANT;

AND

THE OTTAWA AND NEW YORK RAILWAY COMPANY AND OTHERS. } RESPONDENTS.

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

Appeal — Jurisdiction of provincial tribunal — Consent of parties — Estoppel — Assessment — Railway bridge over navigable river— R.S.O. [1914] *c.* 195—*R.S.O.* [1914] *c.* 186.

By the Ontario Assessment Act an appeal is given from a decision of the Court of Revision to the county court judge with, in certain cases, a further appeal to the Railway and Municipal Board. A railway company took an appeal direct from the Court of Revision to the Board. When the appeal came up for hearing the chairman stated that the Board was without jurisdiction and the parties joined in a consent to its being heard as if on appeal from the county court judge. The Board then heard the appeal and gave judgment dismissing it. The companies applied for and obtained leave to appeal from said judgment, under section 80 of the "Assessment Act," which allows an appeal on a question of law only, to the Appellate Division which reversed it. On appeal from the last mentioned judgment to the Supreme Court of Canada,

Held, Fitzpatrick C.J. and Idington J. dissenting, that the case was not adjudicated upon by the Board *extra cursum curiæ;* that it came before the Appellate Division and was heard and decided in the ordinary way; an appeal would therefore lie to the Supreme Court under section 41 of the "Supreme Court Act."

Per Duff J.—The decision of the Board that the objection to its jurisdiction could be waived and that it could lawfully hear the appeal from the Court of Revision direct (and affirm or amend the assessment) given at the invitation of both parties pursuant to an agreement between them and acted upon by the Board in hearing the appeal on the merits, and acted on by the Appellate Division, is binding on the parties and not open to

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

question on this appeal: *Ex parte Pratt* (12 Q.B.D. 334); *Forrest* v. *Harvey* (4 Bell App. Cas. 197); *Gandy* v. *Gandy* (30 Ch. D. 57); *Roe* v. *Mutual Loan Fund Association* (19 Q.B.D. 347); and, consequently, the appellant municipality is precluded from contending on appeal to the Supreme Court of Canada that, in the circumstances, the Appellate Division had no authority under the "Assessment Act" to declare the assessment illegal.

A railway company, under authority of the Parliament of Canada, built an international bridge over the St. Lawrence River at Cornwall and have since run trains over it.

Held, that such superstructure supported by piers resting on Crown soil and licensed for railway purposes was not included in the railway property assessable under sec. 47 of the "Ontario Assessment Act" (R.S.O. [1914] ch. 195); if it is included it is exempt from taxation under sub-sec. 3 of sec. 47.

Judgment appealed against (34 Ont. L.R. 55) affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), reversing the ruling of the Ontario Railway and Municipal Board and quashing the assessment of the respondents' bridge over the St. Lawrence.

Two questions arose on the appeal. First, had the Railway and Municipal Board jurisdiction to deal with the matter except on appeal from a decision of the county court judge? Secondly, had the Township of Cornwall a right to assess the respondents for the Canadian portion of their bridge over the St. Lawrence? The Appellate Division decided against the right to assess.

Watson K.C. and *Gogo* for the appellant.

Ewart K.C. and *W. L. Scott* for the respondents.

THE CHIEF JUSTICE (dissenting).—I think this appeal must be allowed on the ground that the Ontario

(1) 34 Ont. L.R. 55.

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Railway and Municipal Board had no jurisdiction to hear the appeal from the Court of Revision of the Township of Cornwall. The judgment of the Board was a complete nullity and the Appellate Division could not vary it.

The "Assessment Act," R.S.O. 1914, ch. 195, contains the following sections:—

72. Sub-sec. 1.—An appeal to the county judge shall lie at the instance of the municipal corporation, or at the instance of the assessor, or assessment commissioner, or at the instance of any municipal elector of the municipality not only against a decision of the Court of Revision on an appeal to the said court, but also against any omission, neglect or refusal of the said court to hear or decide an appeal.

79. The decision or judgment of the judge or acting judge shall be final and conclusive in every case adjudicated upon.

80. (1) Where a person is assessed to an amount aggregating in a municipality in territory without county organization $10,000 or upwards, an appeal shall lie from the decision of the judge to the Ontario Railway and Municipal Board and any person who had appealed or was entitled to appeal from the Court of Revision to the judge shall be entitled to make the appeal to the Board.

(2) An appeal to the Board shall also lie where the amount, though originally less than the sum mentioned in the next preceding sub-section, has been increased by the Court of Revision or by the judge so that it equals or exceeds that sum.

(6) An appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law, but such appeal shall not lie unless leave to appeal is given by the said court upon application of any party and upon hearing the parties and the Board.

At the opening of the proceedings before the Ontario Railway and Municipal Board the Chairman said:—

The Board has already held that it has no jurisdiction to entertain an appeal from the Court of Revision; an appeal only lies to the Board from the county judge.

Nevertheless the Board by consent of the parties proceeded to hear and adjudicate upon the matter.

It is perfectly clear that no consent of the parties

can give to the court a jurisdiction which it does not possess. In the case of *In re Aylmer*(1), at p. 262, Lord Esher M.R. said:—

> If on the other hand it is an attempt to give to the court a similar power resting on the consent of the parties, the well known rule applies that the consent of parties cannot give the court a jurisdiction which it does not otherwise possess.

In the American and English Encyc. of Law and Practice, vol. 4, under the title "Appeal," it is said in a note on p. 44:—

> When an appeal should have been taken to an intermediate appellate court, consent cannot give the Supreme Court jurisdiction of it.

The statute having ordained the means by which an appeal may be brought against an assessment and prescribed the courts which shall have power to entertain such appeal, the parties cannot at their own pleasure agree on a different procedure. This is no mere question of formality or abbreviation of procedure. In every legal proceeding it would certainly be simpler to go *per saltum* direct to the final court of appeal. If this course had been permissible the parties need never have gone to the Railway and Municipal Board at all, but might have carried an appeal direct from the Court of Revision to the Appellate Division or even this court if we had been willing to entertain it.

If the court has no jurisdiction to hear a cause, its proceedings cannot, of course, be in any way validated by an appeal from the judgment, neither can the court to which the appeal is carried entertain the same. Encyc. of Law and Practice, vol. 4, p. 46:—

> Though an appeal will lie to the Supreme Court from a decision of an appellate court in a case in which the court has no juris-

(1) 20 Q.B.D. 258.

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diction by reason of any of the questions involved, the appeal cannot be entertained by the Supreme Court for the purpose of passing upon the merits of the case, but only for the purpose of reversing or vacating the judgment of the Appellate Court and remanding the cause to that court with direction to dismiss the appeal.

I think it is only necessary to point out in addition that the rules which would ordinarily govern in cases between private individuals do so with greater force in one in which the public has an interest. In the present case we have a court without jurisdiction undertaking to direct the alteration of a municipal assessment roll. This it certainly can obtain no authority to do from any consent of parties.

DAVIES J.—The competency of this court to entertain this appeal was first challenged on the ground that the parties had agreed during the course of the litigation to skip the statutory appeal to the county judge from the Court of Revision and appeal directly from the latter court to the Board of Railway Commissioners.

At the hearing, the Board called attention to this deviation from the course of the statutory proceedings, but as it would appear to have been then the desire of both parties, in order to abbreviate procedure and save expense, went on and heard and dismissed the appeal.

On that hearing after some discussion between counsel on the question of the necessity of an appeal to the county judge before coming to the Board of Railway Commissioners, Mr. Scott for the railway company said:—

Then this appeal will be taken as if it had gone before the county judge and we are appealing against an adverse decision of the county judge,

which apparently was accepted as the correct statement of the fact, whereupon the chairman said:—

> Your contention is that under the provisions of the "Assessment Act" the property is not assessable.

There is not anything, however, in the proceedings before the Railway Board indicating any intention upon the part of either party to treat the proceeding as one *extra cursum curiæ* and to ask the Board to act as arbitrators merely. On the contrary, it was to be treated

> as if there had been an appeal to the county judge and the railway company was appealing against an adverse decision of his.

The question both parties desired to have decided was that stated by the chairman: Was or was not the bridge over the St. Lawrence River assessable property?

It is only fair to say that counsel for the municipality followed the chairman's statement with a claim that counsel for the railway should admit that the bridge "was not on railway lands," apparently to exclude a claim that it was exempted under sub-section 3 of section 47 of the "Assessment Act," which admission counsel for the railway company, evidently acting upon an understanding which had been reached, immediately made qualifying the admission afterwards with the statement that

> some portions of the bridge might be on railway lands, but the whole bridge is over the St. Lawrence River.

As a fact, the bridge is one known as a cantilever bridge which crossed the St. Lawrence, an international public river. It was contended at bar that this admission, when read with the concurrent statements, was a concession as to the facts only, leaving the

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broad question open as one of law whether such a bridge "not on the lands of the railway," but crossing the St. Lawrence River came within the provisions of the "Assessment Act."

It is well to note that while section 48 of the "Railway and Municipal Board Act," ch. 186, R.S.O., gives an appeal from the Board to a Divisional Court upon a question of jurisdiction or upon any question of law, sub-section 6 of section 80 of the "Assessment Act," ch. 195, R.S.O., enacts:—

> An appeal shall lie from the decision of the Board under this section to a Divisional Court upon the questions of law,

omitting any reference to questions of jurisdiction. Under both Acts, the appeals are dependent upon leave being obtained from the Divisional Court, but under the "Assessment Act" they are confined to appeals "upon questions of law," while under the "Board Act" they expressly embrace questions of jurisdiction as well as of law. I conceive the legislature intended that in all cases where the Board had original jurisdiction under the Act constituting it, leave to appeal might be granted either on questions of jurisdiction or of law while such leave could only be granted from the Board's decisions when acting under the "Assessment Act" as a court of appeal, on questions of law.

Leave on this appeal was only granted as it could only be granted under the provisions of the "Assessment Act" on a question of law, which in this particular case was whether the particular bridge was or was not within the "Assessment Act" and liable to be assessed.

On the question of jurisdiction I have reached the conclusion that the Divisional Court of Appeal had jurisdiction to grant leave to appeal from the judg-

ment of the Railway Board and to hear and determine the question of law raised, and that the appeal to this court from their judgment is competent.

I so hold upon the broad grounds that the parties to the appeal were within the jurisdiction of the Railway Board, that the subject matter of the appeal was one within the competence of that Board to decide upon and that while the agreed departure by the parties from the regular procedure to bring the matter before the Board was, it is true, a deviation from the *cursus curiæ*, it was not an attempt to give the Board a jurisdiction over the subject matter and the parties it did not possess, or such a departure from the ordinary practice by consent as would deprive either of the parties of the right of appeal from the Board's decision. No objection was taken to the jurisdiction of the Appellate Division to grant leave to appeal to that court. No objection to the Appellate Division's jurisdiction was raised before that court on the argument of the appeal. It is clear that all parties thought such an appeal would lie, and it hardly seems to me open to argument that the Court of Appeal acted as arbitrators only and not as a competent court believing it had full jurisdiction over the subject matter and the parties.

The judgments of their Lordships of the Judicial Committee in the appeal of *Pisani* v. *The Attorney-General for Gibraltar*(1), in which Sir Montague Smith reviews *Bickett* v. *Morris*(2), and other cases upon the question I am discussing seems to me to lay down at p. 522 the true principle upon which deviations from the *cursus curiæ* should be determined.

(1) L.R. 5 P.C. 516. (2) L.R. 1 H.L. Sc. 47.

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It is true that there was a deviation from the *cursus curiæ*, but the court had jurisdiction over the subject, and the assumption of the duty of another tribunal is not involved in the question. Departures from ordinary practice by consent are of every day occurrence; but unless there is an attempt to give the court a jurisdiction which it does not possess, or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of Appeal cannot properly review the decision, such departures have never been held to deprive either of the parties of the right of appeal.

As to the merits, I have had much difficulty in construing and reconciling the several provisions and sub-sections of section 47 of the "Assessment Act," but I agree that the language of sub-section 3, beginning with the words: *"Notwithstanding anything in this Act contained,"* makes it clear that the superstructures, etc., "on railway lands" (outside of the specified exceptions named in sub-section 2 within which this bridge does not admittedly come) "shall not be assessed."

This railway cantilever bridge spanning the St. Lawrence, it was claimed by respondent was admitted by Mr. Scott before the Board "not to be on railway lands" and so it was claimed not to be within the exemption of sub-section 3. Apart from such admission, I would feel strongly inclined to hold that as a matter of law this bridge was on railway lands and was exempt.

For me, however, a larger and broader question arises than the meaning of the exempting clause read in connection with the admission referred to or irrespective of that admission and that is whether such a bridge as this comes within section 47 at all.

It is not enough to satisfy the court that under the circumstances and in view of the admission of Mr. Scott the bridge does not come within the exempting

clause of the Act. The appellant must go further and shew that it comes with reasonable clearness within the provisions authorizing the assessment of railway property.

Where is the language to be found evidencing an intention on the part of the legislature to authorize the assessment of such a bridge or that part of it within Dominion territory? The soil of the river to the international line is in the Crown, the abutments supporting the bridge are built in and upon the soil. The river is a public international river, and I agree with the Divisional Court that the bridge over that soil authorized to be so constructed by the Dominion Parliament should be held, as the Divisional Court held, to be in one sense a part of the soil itself. It is a unique structure not provided for by the clauses of the "Assessment Act" authorizing the assessment of property.

Built under the authority and with the licence of the Dominion Parliament over a public international river the soil of which to the boundary line is in the Crown, with supporting piers in this Crown soil, this "superstructure" is then licensed by legislative authority for railway purposes and, as I have said, is part of that soil. I am unable to conclude that the word "highway" used in connection with the words "street or road" in clause (*c*) of sub-section 2 of section 47 includes this public international river. I am not able to find any words in the clauses authorizing assessments of bridges or superstructures on railways which would include such a unique structure as this and being unable to find language authorizing with reasonable clearness such an inclusion I must, of course, hold the bridge not be assessable. As was

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said by Lord Chancellor Loreburn in *Banknock Coal Co.* v. *Lawrie*(1), at pp. 110-11, quoted at p. 737 of Mr. Chartres's Book on the Judicial Interpretations of Workmen's Compensation Law:—

> We are not at liberty to amplify an enactment so as to include within its ambit matters which upon the plain meaning of the language are not included, even if convinced that the omission was inadvertent and undesigned.

I would, therefore, dismiss the appeal with costs.

IDINGTON J. (dissenting).—This appeal comes to us under somewhat peculiar circumstances, by virtue of section 41 of the "Supreme Court Act," which I shall presently refer to and examine. The respondents appealed against their assessment, for the year 1914, in respect of a bridge over part of the St. Lawrence River, by the township assessor, to the Court of Revision to which no evidence was presented and thereupon the appeal was dismissed.

Section 70 of the Assessment Act provides in such case that:—

> The roll as finally passed by the court, and certified by the clerk as passed, shall, except in so far as the same may be further amended on appeal to the judge of the county court be valid, and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, etc., etc.

There was no appeal taken to the county judge as provided by the Act against the judgment of dismissal by the Court of Revision.

The Act provides for such an appeal and what the judge in such case is to do and thereupon declares as follows:—

> The decision and judgment of the judge or acting judge shall be final and conclusive in every case adjudicated upon.

(1) [1912] A.C. 105.

No such appeal was taken.

Section 80 of said Act provides in cases of which this might have been one that

an appeal shall lie from the decision of the judge to the Ontario Railway and Municipal Board, and any person who had appealed or was entitled to appeal from the Court of Revision to the judge shall be entitled to make the appeal to the Board.

The respondents gave notice of an appeal to said Board in the following terms:—

Take notice that the Ottawa and New York Railway Company, the New York and Ottawa Railway Company and New York Central Lines intend to appeal and hereby appeal against the decision of the Court of Revision for the Township of Cornwall rendered on the 25th day of May, 1914, confirming the assessment of the International Bridge between Canada and the United States No. 1295 on the roll and amounting to $300,000 on the ground that the said bridge is not under the provisions of the "Assessment Act" properly assessable at all.

The Board met on 23rd September, 1914, when the chairman thereof pointed out, that it had held it had no jurisdiction to hear any such appeal, but only appeals from the county judge, and asked counsel for the present appellant if he intended to raise that objection. Counsel replied he would raise all the objections possible.

Then a discussion ensued between counsel and the chairman which shews that for some reason or other in the nature of a personal or professional reciprocity the counsel for appellant (then respondent) seemed to assent to trying the matter on its merits and then the following appears of record:—

Mr. Scott: I appreciate the position you take. Then this appeal will be taken as if it had gone before the county judge, and we are appealing against an adverse decision of the county judge.

The Chairman: Your contention is that under the provisions of the "Assessment Act," the property is not assessable?

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Mr. Scott: Yes, we have no complaint as to the amount.

Mr. Gogo: Before the argument proceeds, I think my learned friend will concede that the railway bridge is not on railway lands.

Mr. Scott: Yes, there is no dispute as to the facts. It is purely a question of law. To begin with, I put in the assessment notice which is addressed to the Ottawa and New York Railway, the New York and Ottawa Railway and the New York Central Lines. There are a number of items on it, but the only one from which we appeal is the assessment of $300,000 on the International Bridge.

(Assessment notice marked Exhibit No. 1.)

The Chairman: This is a copy of the Assessment Roll?

Mr. Scott: Yes, nothing turns on the question of the parties; I represent them all.

Mr. Gogo: There is another question involved in this case, and that is that it is not a railway company who are operating the bridge. The railway company simply have running rights over the bridge.

Mr. Scott: The facts with regard to this bridge are as follows: The bridge was built and is owned by the Ottawa and New York Railway Company under the provisions of certain Acts of Parliament which I have set out in this memorandum that I propose to hand in.

The parties proceeded to argue the appeal, and in the course of that argument to state the supposed relevant facts.

The memorandum which appellant's counsel refers to therein I infer was supplied later. That memorandum appears in the case before us and a lease which also appears in the case is before us, but when the latter was introduced does not appear. Inasmuch as the two first exhibits in the record are apparently stamped by the clerk of the board, but the copy of lease in the record is not so marked, I infer it was not before the Board.

This argument before the Board appears in the case, apparently, as if taken down by the stenographer of the Board.

From that argument it seems quite clear that counsel for respondents (then appellants) never withdrew the concession he had made, or relied upon anything

in what either of law or fact it clearly covers. Apart from that, he took and seemed chiefly to rely upon, the distinct ground, that inasmuch as the bridge in question was over a navigable river it was, therefore, within the exemption in favour of the railway companies in respect of bridges over public highways. He failed in this contention before the Board, which held that such a public highway as a navigable river was not the kind of highway referred to in the Act, in providing for exemptions from taxation of bridges over highways.

The matter is thus stated by the Board:—

> The exceptions are (1) structures, etc., which are affixed to a highway, street or road merely crossed by a railway, and (2) bridges and tunnels in, out, under or forming part of any highway. Mr. Scott, for the appellants, contends that the River St. Lawrence is a "highway," that the bridge is over it, and, therefore, exempt under the last named exception; further, the river being such a highway, and being merely crossed by the railway, the bridge (a structure or superstructure) is exempt under the first named exception. To this contention the Board cannot accede.

The Board then proceeds to demonstrate why it cannot accede thereto and ends by stating:—

> It is admitted that sub-section (3) of section 47 has no application, the bridge in question not being on railway lands.

Hence, agreeing with Mr. Justice Britton's opinion in a previous case(1), between same parties the Board dismissed the appeal.

It is quite clear to me not only that the whole submission to the Board was irregular and a something never contemplated by the Act, unless and until the matter had been passed upon by the county judge, after a proper trial which should have elicited and

(1) *New York and Ottawa Railway Co.* v. *Township of Cornwall*, 29 Ont. L.R. 522.

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made clear all the relevant facts, but was also a limited submission proceeding upon the elimination of any claim to exemption on the ground of the bridge being on or over railway lands as provided for in section 47, sub-section (3) of the Act.

It puzzles one to understand why such a course should have been pursued. Assuming the Board had decided the other way I am at a loss to understand how such a proceeding and possible judgment could have overridden the plain terms of section 70 of the Act as quoted above, making the roll as certified by the clerk, after the Court of Revision, final and binding upon all concerned.

The five gentlemen composing the Court of Revision are the same who presumably chose to make that submission. They had no power thus to interfere with the legal product of their own work thus validated by section 70.

A judgment of the Board under such circumstances was clearly not appealable to the Appellate Divisional Court.

It would be difficult to conceive of its being appealable, even if the language providing for an appeal from the Board to the Appellate Division had been much more comprehensive than it is; unless for the limited purpose of having it declared to have been made without jurisdiction.

Moreover, the appeal provided in assessment cases coming before the Board to the Appellate Division is of a very limited character. It is somewhat analogous to that provided in the way of appeals to this court from the Board of Railway Commissioners for Canada. It is limited to questions of jurisdiction and questions of law.

Sub-section 6 of section 80 (already referred to) of the "Assessment Act," provides as follows:—

(6) An appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law, but such appeal shall not lie unless leave to appeal is given by the said court upon application of any party and upon hearing the parties and the Board.

The next sub-section provides for the practice and procedure on such appeals following that prescribed in county court appeals.

The whole jurisdiction rests entirely upon section 80 restricted by sub-section 6 just quoted unless, as may be arguable, aided by section 48 of the "Ontario Railway and Municipal Board Act," ch. 186, R.S.O., 1914.

Sub-section 1 of that section seems to give the Divisional Court express power to hear appeals from the Board upon any question of its jurisdiction as well as upon any question of law.

As the appeal in any case is only upon leave being given one might have expected the order giving leave to define what is to be dealt with. We get no aid in that regard from the order made herein giving leave.

Sub-section 3 of section 48, aforesaid, provides as follows:—

(3) On the hearing of any appeal the court may draw all such inferences as are not inconsistent with the facts expressly found by the Board and are necessary for determining the question of jurisdiction or law, as the case may be, and shall certify its opinion to the Board and the Board shall make an order in accordance with such opinion.

I shall assume for our present purposes that these two sub-sections are applicable to such appeals as contemplated and provided for by sub-section 6 of section 80 of the "Assessment Act."

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It is possible by doing so to give that some wider meaning than it might otherwise have in itself, and hence due to the Appellate Division, possibly taking that view to so consider it.

In view of the course of the argument herein before us I should not express any definite opinion as to their applicability. I only desire, for argument's sake, to assume that as far as jurisdiction of the Board came in question that may have been appealable and that inferences of fact, from facts found by the Board, might on such an appeal be drawn.

The Appellate Division seems not only to have set aside, or at all events overlooked, the terms of the submission, and proceeded as if the whole of the questions of both law and fact possible to have been originally raised were open for it to deal with, as might be done in an ordinary appeal and that notwithstanding the express concession of counsel as quoted above emphasized by the express statement of the Board also quoted above, and by the meaning evidently attached by him at the time, as the course of his argument before the Board indicates, to the concession he had made.

I am unable to understand why, under the circumstances, the matter should have been again agitated, or permitted to be so, before the Appellate Division.

Not only that but further evidence was introduced, a plan was filed, and correspondence between the Registrar of the Court and counsel had, explanatory thereof. As the result of doing so the Appellate Division has discarded the ground taken by respondents, when before the Board as appellants, and adopted the ground deliberately abandoned before the Board, as

the basis of an opinion which should, if competent, lead to the Board reversing its judgment.

We have not been helped much by anything appearing upon the record to understand such a result as springing from a mere submission by the parties concerned to a tribunal chosen by them, and acting entirely beyond the course defined by statute for such a tribunal to follow, when discharging its statutory duties.

I am driven to the conclusion that the Appellate Division must have inadvertently overlooked the fact that the Board was acting and could not properly act in any other way than as the result of such a submission, and in such a case its deliverance was not appealable.

In such explanation as Mr. Scott offered us he frankly stated that at some stage in the proceedings before the Appellate Division, Mr. Gogo, as counsel for respondent, called attention to the limiting effect of the concession which had been made, and something ensued as result which is not clear. The court has not dealt at all with that aspect of the case.

Mr. Ewart properly declined to enter upon any discussion of the disputed facts upon or in regard to which a misunderstanding (to which he was no party) had evidently arisen, but submitted to us in argument that the question was only one of law and involved no matter of fact.

For two reasons I cannot accede to that view. In the first place as already stated, both questions of law and fact were taken and treated by the Board as taken out of the case submitted to them. It is their understanding of what it was they complaisantly had undertaken to decide, which must govern, and I re-

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spectfully submit ought to have governed all concerned.

In the next place it is impossible as the Appellate Division found, to treat the whole question involved as one of law. The course of calling for evidence of fact upon which to proceed puts aside Mr. Ewart's submission on that head. The basic facts upon which to found and frame any opinion of the law to govern are disputed unless confined to what the Board expressly states was admitted and acted upon by it. There is no room left therein to draw inferences of fact found in the lease and plan filed in the Appellate Division.

Indeed, the lease alone now appearing in the case, presents many arguable questions of law as to the legal result thereof before applying the provisions therein as fact to the determination of the rights of the parties hereto under the "Assessment Act."

The lease to the holding company is for ninety-nine years and it is by the terms thereof that company which must bear the burden of taxation. And the assessment roll, but for the curative clause already referred to is, I incline to think, defective in form in that connection.

Whether the contracting parties sought to avoid by the form of the provision in the lease relative to taxes, the claims of direct taxation of the holding company as being more favourable for all concerned than a taxation of the reversions, I know not.

Then, again, evidently there was in contemplation some improvements and additions to the structures to be made by the holding company and respectively become the respective properties of the leasing companies at the expiration of the term.

Are such improvements and additions taxable, and if so against whom ?

I am not concerned with all these things further than to point out the involved nature of the facts to be determined before the "Assessment Act" can be properly applied. And I express no opinion upon their effect in that regard.

I may be permitted, however, most respectfully to suggest, from what appears in the case, that if the Appellate Division had refused, as I submit it should have done, to entertain such an irregular appeal, the facts might have been better ascertained by the investigation in due course of law before the county judge and then and thereafter fully considered and given due effect to.

These considerations, moreover, suggest to me that the Appellate Division so far as it did go into an examination of the facts, went beyond its jurisdiction which was confined by the very terms of the Act enabling it to entertain any appeal to mere questions of law, even if the case could otherwise have been held appealable.

The case thus presented for our consideration in appeal is clearly one in which we cannot deal with the merits.

It falls in principle within what the House of Lords had to consider in the case of *Burgess* v. *Morton* (1). There the court had determined, at the request of the parties, upon a submission to the said court of an imperfectly stated case, and thereupon an appellate court had heard an appeal from such determination on the like material and the House of Lords

(1) [1896] A.C. 136.

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declined to go into the merits and confined itself to declaring that the Appellate Court had no jurisdiction and to reverse it accordingly.

There are numerous cases upon the subject, but this one seems in principle, in its essential features, as nearly on all fours, as one might expect to find, with what happened and is involved herein.

But the question that has puzzled me most and in which we have not been able to elicit assistance from counsel is whether or not this court can be said to stand in relation to the courts below in the same position as the House of Lords stood in that case and numerous others to the courts appealed from.

We must never forget that we are not, as the Court of Queen's Bench formerly in England was, and its successors still are, possessed of an inherent jurisdiction in many ways to keep other courts within the limits of the jurisdiction assigned them.

Our duties in this case are confined within the terms of section 41 of the "Supreme Court Act," as follows:—

> An appeal shall lie to the Supreme Court from the judgment of any court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such court is or are by provincial or municipal authority authoized to adjudicate, and the judgment appealed from involves the assessment of property at a value of not less than ten thousand dollars. 52 Vict., ch. 37, sec. 2.

It is quite clear that the Appellate Division is a court of last resort and answers all the requirements of the section in any ordinary case involving an assessment of not less than ten thousand dollars.

Do the words,

in cases where the person or persons presiding over such court is or are by provincial or municipal authority authorized to adjudicate, eliminate such a case as this ?

At first blush it seems incongruous for us to hold by virtue only of this section that the court appealed from had no jurisdiction and that we are entitled not only to so hold as a matter of opinion, but also to reverse on that ground.

Though counsel were invited to consider the section and aid us in regard to its construction no one has remarked upon this difficulty, and I, therefore, am content to assume the difficulty I suggest as possibly in our way does not exist. Inded, we have heard no argument on the section, though it was invited.

I have also observed since the argument the use in said section of the words "or municipal" therein which suggest the possibility of municipalities in some of the provinces being empowered by statute to submit to the court of last resort in the province a question needing determination. I know of none in Ontario and assume if any other power given than what I have referred to it would have been cited.

I may also add that I have considered whether the mere power to express an opinion can be held an authority "to adjudicate" within the meaning of the words of the section. I conceive so, if the opinion is intended to be imperative when confined as it ought to be to a question of law, and hence there may be herein an adjudication within the meaning of the section.

Moreover, on due reflection, the authorization dealt with in these words is that over the subject matter involved in the section as a whole, and not only over such merely incidental matter as arising in its application. Many variations of that which has occurred

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herein or of an accidental excess of the jurisdiction of the court might in course of time arise. It would seem as if to give effect to any of the objections I suggest might be too much in line with the microscopical method of analyzing a statute and thereby laying a foundation for frittering it away instead of fitting the whole to what it was intended for. In this case the attempting to do so would disappoint what I think was the evident purpose of Parliament in assigning to us the jurisdiction it has by the enactment in section 41.

Assuredly neither the formal judgment nor the opinion judgment gives us any right to assume that the Appellate Division imagined it was acting upon or pursuant to a submission by consent to obtain its opinion, or doing anything but determining as the court of last resort in a province what it supposed it had power to determine.

I do not see how we can escape from declaring our opinion that it is because of the incompetency of the Appellate Division to review and in effect reverse the Board that we are debarred from examining the case on its merits and as a logical result must give as far as we can effect to such opinion.

Such a mode of dealing with appeals calling in question the jurisdiction of the court appealed from by merely expressing an opinion that the court below had no jurisdiction was in vogue in Ontario (then Upper Canada) at an early date. See the remarks of Chief Justice Hagarty speaking for the Queen's Bench in *Ferguson* v. *Township of Howick*(1), at page 553, in the year 1866.

(1) 25 U.C.Q.B. 547.

The later development of the law in Ontario appears in *Howard* v. *Herrington*(1), aided, I think, then by legislative enactment.

It seems to me that we should not only declare the Appellate Division incompetent to pass upon the judgment of the Board, but also give the judgment that court should have given. To do so is to reverse its judgment.

There is a question suggested by the case of *Bickett* v. *Morris*(2), and the course of appellant in the court below. In that case the judge ordinary deviated from the *cursus curiæ* and the party against whom he had decided appealed and succeeded, whereupon the unsuccessful party appealed to the House of Lords when the objection of assent was taken. The court held it was not disabled from pronouncing judgment. Though it was intimated that if the pursuer had been appealing his doing so might have been an answer to him, but not to one who had not acquiesced.

I cannot say that appellant acquiesced for its counsel raised the objection, though perhaps he did not take as determined a stand as some others might have done. Indeed, I doubt much if it ever was competent for the present appellants to acquiesce in anything depriving or tending to deprive the municipality of its taxes to which its legal right was established by the "Assessment Act" until the liability of appellant therefor had been got rid of by due course of law.

In view of both parties having pursued the course taken in this case, I do not think costs should be allowed.

(1) 20 Ont. App. R. 175. (2) L.R. 1 H.L. Sc. 47.

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The only justification for such litigation as has been followed herein might be the hope of a final and binding decision upon the questions raised and that was hopeless from the start if due regard had been had to the recognized state of the law.

In any result got or likely to be got it would not bind either party in future years. Indeed, even as to the year involved herein such a decision as either the Board or Appellate Division or this court might render as against the appellant might be tested by litigation rested upon the prior validation of the roll by the "Assessment Act" and the result in the Court of Revision.

I, therefore, think the appeal should be allowed on the ground that the court appealed from had no jurisdiction to pronounce the judgment it did or award the costs awarded.

DUFF J.—This appeal concerns the assessability under the provisions of the "Ontario Assessment Act" (R.S.O., ch. 195, secs. 47 and 48) of part of a railway bridge owned and occupied by the respondents, the Ottawa and New York Railway Co., crossing the St. Lawrence River near Cornwall. Part of this bridge is within the territorial limits of the Township of Cornwall and was entered in the assessment roll for the year 1914 of the appellant township and assessed at the sum of $300,000.

Before coming to the merits of the question of the legality of the assessment there are two technical points which it will be convenient to consider together. The first concerns the competence of the present appeal, or, as I prefer to put it, the appealability of the

judgment of the Court of Appeal; and the second is the question whether assuming that judgment to be appealable to this court, it ought to be reversed on the ground that in the particular circumstances in which it was pronounced, the Court of Appeal had no authority to give judgment on the validity of an assessment under the statutory enactment or enactments, sec. 80, "Assessment Act," ch. 95, R.S.O., 1914; sec. 48, "Railway and Municipal Board Act," ch. 186, R.S.O., 1914, under which it professed to act because the essential statutory prerequisites of that authority were wanting.

The proceedings must be briefly noticed. The respondent gave notice of appeal from the assessment to the Court of Revision, and on that appeal the assessment was confirmed. No notice of appeal to the county court judge was given under section 72 of the "Assessment Act," but on the 25th of May, 1914, the respondent gave notice of appeal direct from the Court of Revision to the Ontario Railway and Municipal Board, and on the 7th October of the same year judgment was pronounced dismissing the appeal. On the 4th of December, 1914, leave was obtained by the respondent to appeal to the Appellate Division under section 80 of the "Assessment Act," and on this appeal judgment was pronounced on the 26th of April, 1915, declaring the assessment to be invalid. Both parties appear to have concurred in the view that as the right of appeal expressly given by the "Assessment Act" to the Railway and Municipal Board was a right of appeal from a decision of a county court judge pronounced under the authority of section 72, and that the respondents could not without the consent of the appellant municipality bring the question

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disputed between them before the Board by way of direct appeal from the Court of Revision; at the same time they appear also to have concurred in the view that the objection to the competence of such an appeal direct could be effectively waived by the appellant municipality.

The objection was waived and the Board acting obviously on the view of the parties that the effect of the waiver was to bring the provisions of section 80 of the "Assessment Act" into play just as if there had been a judgment by the county court judge and they were hearing an appeal from that judgment, heard the appeal and pronounced judgment in favour of the municipality dismissing the appeal on the merits.

It is now said against the appellant municipality that this order was not an order of the Board pronounced in exercise of its statutory jurisdiction and consequently that it was not appealable to the Court of Appeal under section 80 of the "Assessment Act," or section 48 of the "Ontario Municipal and Railway Board Act"; and that in consequence the judgment of the Court of Appeal must be deemed to have been a judgment pronounced in an appeal heard pursuant to a *directio personarun* and not in exercise of any authority given by law with the result, of course, that it is not appealable to this court on the authority of *Burgess* v. *Morton*(1), and the decisions referred to in the judgments of the Law Lords in that case. While on behalf of the appellant municipality it is said that the judgment of the Court of Appeal declaring the assessment in question invalid was a judgment which

(1) [1896] A.C. 136.

the Court of Appeal had no legal authority to pronounce; because the authority of the Court of Appeal in respect of such matters arises only when there is an appeal before that court from an order made by the Board in a proceeding in which the Board itself would have had authority to deal with an assessment by pronouncing it valid or invalid, and that the Board in this instance had no such authority because the objection referred to above going to the statutory conditions of the Board's authority was an objection of the kind that cannot be waived. The judgment of the Court of Appeal nevertheless, it was argued on behalf of the appellant municipality, is a judgment of a court of general jurisdiction having *inter alia* authority—certain conditions being satisfied — to pronounce a judgment of the character of that now appealed from; that the judgment necessarily involves a decision that the conditions of jurisdiction existed, a decision appealable to this court as being a judgment of a court of last resort in an assessment matter within the meaning of section 41 of the "Supreme Court Act."

I have no difficulty in holding that the appeal lies. The judgment of the Court of Appeal is *ex facie* a judgment pronounced in an appeal regularly before the court after leave given under section 80 of the "Assessment Act." There is not a suggestion in the formal judgment, in the reasons for judgment, in the order giving leave to appeal that the court was acting otherwise than in the normal course. It must, therefore, be taken in the absence of evidence to the contrary, and there is none, that the appeal was heard and judgment was pronounced in the ordinary course of jurisdiction.

That being so the point as to the appealability of

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this judgment is, I think, disposed of by the judgment of the Court of Appeal in an appeal from a winding-up order made in exercise of the jurisdiction given by the "Companies Act, 1862." *In re Padstow Total Loss and Collision Assurance Association*(1). At page 142, Sir Geo. Jessel M.R. puts the matter in a sentence:—

> The first point to be considered is whether, assuming that the association was an unlawful one, and that the court had no jurisdiction to make the order, an appeal is the proper mode of getting rid of that order. I think that it is. I think that an order made by a court of competent jurisdiction which has authority to decide as to its own competency must be taken to be a decision by the court that it has jurisdiction to make the order, and consequently you may appeal from it on the ground that such decision is erroneous.

In this conection three other decisions may usefully be referred to. In *Pisani* v. *Attorney-General for Gibraltar*(2) it was in substance held that even where there was a deviation from the *cursus curiæ* unless there was an attempt to give the court a jurisdiction which it did not possess or a strain upon its procedure putting it so entirely out of its course that the decision could not properly be reviewed, such a departure does not deprive either party of the right of appeal. I refer particularly to the judgment of Sir Montague Smith at page 522.

Then there is *Morris* v. *Davies*(3), the effect of which is summarized in Sir Montague Smith's judgment at page 524. A new trial having been ordered, Lord Lyndhurst instead of sending the case back to a jury by consent of the parties heard and disposed of it himself. In the House of Lords the objection taken to the competence of an appeal from Lord

(1) 20 Ch. D. 137. (2) L.R. 5 P.C. 516.
(3) 5 Cl. & F. 163.

Lyndhurst's decision was rejected by their Lordships on the ground that it was never intended that Lord Lyndhurst should try the case otherwise than as a judge or that it was not to go on subject to all the incidents of a cause regularly heard in court, including an appeal, if the parties so desired.

In *Low* v. *General Steam Fishing Co.* (1) the House of Lords had to consider the appealability of a judgment by the Second Division of the Court of Session, in these circumstances. On the hearing of a claim under the "Workmen's Compensation Act" by a sheriff substitute, the sheriff substitute refused to state a case upon a question which was afterwards held to be a question of law. On appeal, the Second Division after intimating their view that the arbitrator was bound to state a case suggested that counsel should concur in a minute, the effect of which was that the case should be disposed of by the Second Division as if upon a case stated by sheriff substitute in terms of the statute, which was accordingly done. On appeal it was held by their Lordships that what was done merely amounted to an abbreviation of procedure and was not such a departure from the *cursus curiæ* as to deprive the parties of their appeal. In the first and fourth of these cases it may be noted that the jurisdiction in dispute was a special statutory jurisdiction.

The contention of the appellant municipality presents a more difficult question. The first step is to consider the character of the order of the Board. There is sufficient evidence in the form of the order itself and in the reasons for judgment that the order

(1) [1909] A.C. 523, at p. 528.

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was intended to be and was pronounced in exercise of the corporate authority of the Board. The members of the Board were not as individuals arbitrating in a matter before them by consent; the order was pronounced upon a matter in respect of which it must be assumed they held themselves to have jurisdiction by reason of the fact that the objection above referred to had been waived.

The view of the Board and of the parties was that waiver by the appellant municipality of the objection that no appeal lies to the Board from the Court of Revision *per saltum* and consent that the appeal should be treated as an appeal from the county judge was sufficient to give the Board power to grant the relief asked in exercise of its statutory authority; and it is manifest that the court of appeal treated the appeal before them as an appeal in the ordinary course, and that they had no thought of exercising a jurisdiction resting upon consent alone.

In the view I take it is unnecessary to say whether or not the Board rightly decided that the objection to the appeal could be overcome by waiver. I have no difficulty in holding that by its conduct in concurring with the respondent company's invitation to the Board to hold that the objection could be waived and in taking part in the appeal to the court of appeal which followed without objection the appellant municipality has precluded itself from contending on this appeal that the decision of the Board upon the point of competence was erroneous.

Two considerations weighing against this view have to be examined. First, it is said to be a case for the application of the maxim consent cannot give juris-

diction. This, of course, simply begs the question. Consent can give jurisdiction when it consists only in waiver of a condition which the law permits to be waived, otherwise it cannot. Where want of jurisdiction touches the subject matter of the controversy or where the proceeding is of a kind which by law or custom has been appropriated to another tribunal then mere consent of the parties is inoperative. No consent, for example, could give the Supreme Court of Ontario jurisdiction to hear a petition for determining the right to a seat in Parliament. But the question before us is not whether the consent of the municipality did in point of law give the Board jurisdiction, but whether the municipality having concurred with the respondents in asking the Board to hold that such was the effect of consent, and the Board having so held and acted upon its holding, and the municipality having taken chances of a favourable decision by the Board, and by the court of appeal on that footing, can now, on appeal, dispute the Board's decision on the point of jurisdiction. Generally speaking, where the proceeding is of a character appropriate to a tribunal which has, in given conditions, jurisdiction over the subject-matter and is competent to decide the question whether such conditions can be waived, it is competent to the parties to agree to recognize the validity of the tribunal's judgment and thereby (if the tribunal decide that it may act upon such an agreement and do so) to preclude themselves from raising afterwards the objection that, in the particular case, some condition of jurisdiction was wanting in fact.

Reverting to the case before us, the question brought before the Board was in itself precisely the

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kind of question which it would be the Board's duty to determine under section 80 of the "Assessment Act," and the object of the parties in omitting what in the circumstances they no doubt, without any disrespect regarded as the formality of an appeal to the county court judge was, to use an expression taken from a reported case to which I have referred, merely the abbreviating procedure and saving expense. The effect of such an agreement has been considered in a number of cases, to some of which it will be useful to refer. In *Forrest* v. *Harvey*(1), the House of Lords had to consider the effect of a defendant appearing before the Magistrates of Leith in answer to an application under a statute conferring jurisdiction with respect to small debts. It was admitted that the jurisdiction of the magistrate might have been successfully objected to on the ground of non-observance of certain essential formalities, and the principal question their Lordships had to consider was whether this defect had been cured by waiver. Lord Brougham appears to have taken the view, although it was not strictly necessary to the decision that the defect could not have been cured by any agreement to waive the objection, and Lord Cottenham agreed that the mere failure to take the objection at the earliest moment was not an answer to it. Lord Cottenham and Lord Campbell, however, concurred in holding that the parties might contract together in such a way as to prevent them disputing the competence of a tribunal which had assumed jurisdiction, although some otherwise essential statutory condition of jurisdiction were wanting.

(1) 4 Bell App. Cas. 197.

In *Ex parte Pratt*(1), at p. 341, the same principle, the primary court being a superior court, is expressed by Lord Justice Bowen in these words:—

> There is a good old-fashioned rule that no one has a right so to conduct himself before a tribunal as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him, to turn round and say, "You have no jurisdiction." You ought not to lead a tribunal to exercise jurisdiction wrongfully.

It is not disputed that there was an express agreement between the municipality and the respondents to submit the point of competence to the judgment of the Board; to invite the Board to hold that it had jurisdiction; and I think the proper conclusion is that it is not open to the appellant municipality to raise by way of appeal this objection which I am now considering.

The second point touches the effect of the "Ontario Assessment Act" and the "Railway and Municipal Board Act." It is said that the effect of section 70 of the "Assessment Act" is that the assessment roll is binding as finally passed by the Court of Revision except as altered on appeal to the judge of the county court and that this provision in fact forbids any exercise of jurisdiction by the Board or the court of appeal in the absence of an appeal to the county court.

I agree that if on the true construction of those statutes an agreement not to dispute the jurisdiction of the Board in the circumstances in question here is in conflict with the policy of the law, effect cannot be given to such an agreement. I do not think such is the effect of the statutes.

The provisions of the "Railway and Municipal Board Act" and the "Assessment Act" relating to the

(1) 12 Q.B.D. 334.

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powers and character of the Board as a tribunal evidence an intention on the part of the legislature that the Board should have jurisdiction, subject to review, to pass upon any question whether as regards any appeal touching a subject-matter within its competence the conditions precedent of its authority had been fulfilled.

The following provisions are relevant:—

R.S.O., ch. 186, 1914.

Sec. 5, sub-sec. 4.—The Board shall have all the powers of a Court of Record and shall have an official seal which shall be judicially noticed.

Sec. 5, sub-sec. 5 (*b*).—The Chairman of the Board, if at the time of his appointment a barrister of at least ten years' standing at the bar, shall not be removed at any time by the Lieutenant-Governor in Council, except upon an address of the Assembly.

Sec. 7.—Whenever in any Act it is provided that any railway company shall, during construction of any line of railway, furnish such information as to the location and plans of passenger or freight stations as may from time to time be required by the Lieutenant-Governor or any of his Ministers, or that such company shall comply with any directions that may be given for the erection of stations or the number of them, such information shall be furnished to the Board and its directions shall be complied with by the company. 3-4 Geo. V., ch. 37, sec. 5.

Sec. 21, sub-sec. 3.—The Board shall, as to all matters within its jurisdiction, have authority to hear and determine all questions of law or of fact.

Sec. 21, sub-sec. 4.—The Board shall, as respects the amendment of proceedings, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of its jurisdiction, or otherwise for carrying this Act or any other general or special Act into effect, have all such powers, rights and privileges as are vested in the Supreme Court.

Sec. 22.—The Board shall have exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or special Act. 3-4 Geo. V., ch. 37, sec. 22.

Sec. 38.—(1) A certified copy of any order or decision made by the Board under this Act or any general or special Act may be filed in the office of the Clerk of Records and writs, and shall thereupon

become and be enforceable as a judgment or order of the Supreme Court to the same effect, but the order or decision may be nevertheless rescinded or varied by the Board.

(2) It shall be optional with the Board to adopt the method provided by this section for enforcing its orders or decisions or to enforce them by its own action. 3-4 Geo. V., ch. 37, sec. 38.

Sec. 43.—The Board may make general rules regulating its practice and procedure. 3-4 Geo. V., ch. 37, sec. 43.

Sec. 48(1).—An appeal shall lie from the Board to a Divisional Court upon a question of jurisdiction or upon any question of law, but such appeal shall not lie unless leave to appeal is obtained from the court within one month after the making of the order or decision sought to be appealed from or within such further time as the court, under the special circumstances of the case, shall allow after notice to the opposite party stating the grounds of appeal.

Sec. 48, sub-sec. (8).—Save as provided in section 47,

(*a*) Every decision or order of the Board shall be final; and

(*b*) No order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari or any other process or proceeding in any court. 3-4 Geo. V., ch. 37, sec. 48.

"Assessment Act," ch. 195, R.S.O. 1914.

Sec. 80(5).—The Board shall have power upon such appeal to decide not only as to the amount at which the property in question shall be assessed, but also all questions as to whether any persons or things are liable to assessment or exempt from assessment under the provisions of this Act.

(6) An appeal shall lie from the decision of the Board under this section to a Divisional Court upon all questions of law, but such appeal shall not lie unless leave to appeal is given by the said court upon application of any party and upon hearing the parties and the Board.

Section 21, sub-section 4, indicates an intention on the part of the legislature that it should be the duty of the Board to decide whether or not the conditions essential to its jurisdiction as regards any subject-matter within its competence have or have not been fulfilled, and I think the proper conclusion having regard to the quoted provisions as a whole, is, for all relevant purposes, independently of section 48, sub-section 8(*b*), that a decision of the Board upon such a question is equivalent to a decision of

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a superior court. In so far as the decision relates to a question of fact it is final, in so far as it depends upon questions of law, then an appeal lies under section 48. It is not necessary to decide whether section 48, sub-section 8(*b*), applies to orders made by the Board in professed exercise of the jurisdiction given by some statute other than the "Railway and Municipal Board Act." It is clear to my mind that a decision of the Board that the conditions of jurisdiction under section 80 of the "Assessment Act" have been observed, in so far as it is not a decision upon a mere question of fact, is a decision upon a question of law within that section and appealable as such. In these circumstances I see no reason why the parties to an appeal may not competently contract to accept the judgment of the Board on any such question as final; and, if so, it would follow that a party inviting the Board to find on a certain state of facts that it had jurisdiction to deal with a subject-matter which is in given conditions within the cognizance of the Board and having had the advantage of the Board's decision that it had jurisdiction by getting a hearing on the merits of a question which it desired to have disposed of, could not afterwards be heard to say by way of appeal that the facts did not exist which were necessary in point of law to give the Board jurisdiction.

Gandy v. *Gandy*(1), at page 82; *Roe* v. *The Mutual Loan Fund*(2). See Everest & Strode, "Estoppel."

Is the bridge assessable under sections 47 and 48 of the "Ontario Assessment Act?" It is convenient

(1) 30 Ch. D. 57. (2) 19 Q.B.D. 347.

to set out the first of these enactments in full. Section 47 as follows:—

47. (1).—Every steam railway company shall annually transmit on or before the first day of February to the clerk of every municipality in which any part of the roadway or other real property of the company is situate, a statement shewing:—

(*a*) The quantity of land occupied by the roadway, and the actual value thereof (according to the average value of land in the locality) as rated on the assessment roll of the previous year;

(*b*) The vacant land not in actual use by the company and the value thereof;

(*c*) The quantity of land occupied by the railway and being part of the highway, street, road or other public land (but not being a highway, street or road which is merely crossed by the line of railway) and the assessable value as hereinafter mentioned of all the property belonging to or used by the company upon, in, over, under, or affixed to the same;

(*d*) The real property, other than aforesaid, in actual use and occupation by the company, and its assessable value as hereinafter mentioned; and the clerk of the municipality shall communicate such statement to the assessor. 4 Edw. VII., ch. 23, sec. 44(1).

(2) The assessor shall assess the land and property aforesaid as follows:—

(*a*) The roadway or right of way at the actual value thereof according to the average value of land in the locality; but not including the structures, sub-structures and superstructures, rails, ties, poles and other property thereon;

(*b*) The said vacant land, and its value as other vacant lands are assessed under this Act;

(*c*) The structures, sub-structures, superstructures, rails, ties, poles, and other property belonging to or used by the company (not including rolling stock and not including tunnels or bridges in, over, under, or forming part of any highway), upon, in, over, under or affixed to any highway, street or road (not being a highway, street or road merely crossed by the line of railway) at their actual cash value as the same would be appraised upon a sale to another company possessing similar powers, rights and franchises, regard being had to all circumstances adversely affecting the value, including the non-user of such property; and

(*d*) The real property not designated in clauses (*a*), (*b*) and (*c*) of this sub-section in actual use and occupation by the company, at its actual cash value as the same would be appraised upon a sale to another company possessing similar powers, rights and franchises. 4 Edw. VII., ch. 23, sec. 44(2).

(3) Notwithstanding anything in this Act contained, the structures, sub-structures, superstructures, rails, ties, poles, wires and

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other property on railway lands and used exclusively for railway purposes or incidental thereto (except stations, freight sheds, offices, warehouses, elevators, hotels, roundhouses and machine repair and other shops) shall not be assessed. 6 Edw. VII., ch. 36, sec. 13.

(4) The assessor shall deliver at, or transmit by post to, any station or office of the company a notice, addressed to the company, of the total amount at which he has assessed the said land and property of the company in his municipality or ward shewing the amount for each description of property mentioned in the above statement of the company; and such statement and notice respectively shall be held to be the assessment return and notice of assessment required by sections 18 and 49.

(5) A railway company assessed under this section shall be exempt from assessment in any other manner for municipal purposes except for local improvements. 4 Edw. VII., ch. 23, sec. 44(3-4).

These provisions are perhaps a little wanting in precision, but one thing is not doubtful, and that is that "structures, substructures and superstructures" on "the roadway or right-of-way" are not assessable; it being understood that this does not apply to "structures, substructures and superstructures * * * upon, in, over, under or affixed to any highway, street or road" except in the case of a mere crossing. It is also clear that all such "structures, sub-structures and superstructures" which are on "railway lands" and are used exclusively for railway purposes or incidental thereto are (with certain exceptions not material at present) not assessable. By sub-section 5(*h*) of the interpretation section (section 2), all structures and fixtures

erected or placed upon, in, over, under or affixed to any highway, lane or other public communication or water,

are comprehended under the word "land." It was admitted on the hearing before the Board by the respondents that the part of the bridge, the assessment of which is now in question, is supported by piers resting on the bed of the St. Lawrence River, which is the

property of the Crown; and I propose to consider the construction and application of the Act in view of this admission of fact and afterwards to discuss the point made on behalf of the appellant municipality that the admission was of such a character as to preclude the respondent from invoking sub-section 3 of section 47 for any purpose whatever. I should add, however, that it seems to me to be perfectly clear that both parties intended that the hearing before the Board should proceed and that the hearing did proceed upon the assumption that the bridge is lawfully where it is.

In these circumstances, I have reached the conclusion that on this question of the assessability of the bridge the appellant municipality must fail. It is a long settled rule that a given subject is not to be held to be a subject of taxation unless the intention to include it among the subjects of taxation is expressed in "clear and unambiguous language."

Oriental Bank Corporation v. *Wright*(1), at p. 856; *Simms* v. *Registrar of Probates*(2), at p. 337.

The rule is so well settled and so well known that it is right to read every taxing Act on the assumption that it has been framed in view of the rule. I am not disposed to go so far as to say that the intention to exclude such property as that in question is clearly expressed in section 47. But on the other hand "railway" in my judgment in sub-section 2(*a*) is capable of being read as including a viaduct resting by piers upon land occupied solely under authority of a licence to occupy, and if it be right to read it in that broad sense there can be no question that this bridge is excluded by the last sentence of that clause.

(1) 5 App. Cas. 842. (2) [1900] A.C. 323.

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Nor have I any doubt (having regard to the part of the interpretation section quoted above) that sub-section 3 of section 47 can reasonably be read as extending to structures such as this bridge.

These views of these provisions are not free from objection; but it is sufficient to find that, on a reasonable construction of the enactment upon which the appellant municipality relies, the bridge is excluded. That is sufficient on the principle above indicated for holding it to be non-assessable. And that is the conclusion to which, I think, effect should be given.

I must add a word upon the effect of the admission made before the Board. Counsel who appeared for the respondent company assumed that sub-section 3 had no application to the question before the Board and said so. In this he was a little precipitate. But reading the proceedings as a whole I am quite convinced that it would be doing him an injustice to construe what was said during the course of the argument by him as amounting to an agreement (as one of the terms of the consent for the hearing of the appeal) that consideration of sub-section 3 should be entirely eliminated.

It is quite plain, I think, that the admission went to the point of fact and to that only, that the piers supporting the bridge rested on the bed of the river which was public property. I do not think that anybody was misled by that admission into thinking that counsel was conceding that the bridge was wrongfully there or that he was consenting to a hearing of the appeal upon that footing; and I see no reason to suppose, and I cannot suppose, that counsel for the appellant municipality assumed that any such consent was being given.

I entirely agree with Mr. Watson that the court ought not to tolerate any attempt, if such an attempt were made, to recede from the admission of fact which undoubtedly was given whatever the consequences might be; but giving full effect to that admission fairly construed from the point of view of both parties, I can see nothing which precludes us from considering and giving effect to sub-section 3 upon the basis of fact above indicated.

In the result I think the appeal fails and should be dismissed with costs.

ANGLIN J.—At the threshold of this appeal we are confronted by two questions of jurisdiction—one a question of the jurisdiction of the Appellate Division raised by the appellants; the other a question of the jurisdiction of this court, raised not by the respondents but by the court itself.

In *Re Ontario and Minnesota Power Company and The Town of Fort Frances*(1), the Appellate Division, on the 27th November, 1914, held that the Ontario Railway and Municipal Board had no jurisdiction to entertain an appeal brought to it directly from a court of revision. In that case the question of jurisdiction arose on an application for leave to appeal, made under R.S.O., 1914, ch. 195, sec. 80, sub-sec. 6 (then 3 & 4 Geo. V., ch. 46, sec 13), from the decision of the Board that an appeal did not lie to it directly from the Court of Revision.

In the present case, decided in the Appellate Division on the 26th April, 1915, leave had been sought and obtained for an appeal, and, although the fact

(1) 32 Ont. L.R. 235.

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that the appeal to the Railway Board had been taken directly from the Court of Revision appeared on the face of the order of the Board and cannot conceivably have escaped the attention of the Appellate Court, it proceeded to hear the appeal and to deal with it, so far as the certificate of its judgment shews, in the ordinary course, as from a decision of the Board made in the exercise of its jurisdiction under section 80 of the "Assessment Act" Why ? Certainly neither because the court had forgotten that within six months it had affirmed the decision of the Railway Board that no appeal lay to it directly from the Court of Revision, nor because it meant to reverse that recent judgment without alluding to it. That is to me inconceivable. Then why? Either because the court regarded the consent or waiver upon which the Board had proceeded as involving an agreement that its decision should be subject to an appeal to the Appellate Division—that court thus itself proceeding by consent; or because, applying the ratio of the decision in *Morris* v. *Davies*(1), and giving effect to the consent or waiver according to the intention of the parties, it allowed it to operate so as to make the decision of the Board regular and subject to the right of appeal conferred by the statute. That such a consent may be given that effect was the basis of the decision of the Judicial Committee in *Pisani* v. *Attorney-General for Gibraltar*(2), at pages 521 *et seq.*

If the Appellate Division proceeded upon the former assumption its opinion as certified would not be a

judgment of the court of last resort

(1) 5 Cl. & F. 163. (2) L.R. 5 P.C. 516.

within section 41 of the "Supreme Court Act." Its validity and binding effect would depend wholly upon the consent on which it was based; it would not be for any purpose appealable to this court; and this appeal should be quashed.

But if the Appellate Division had proceeded by consent that fact would almost certainly have appeared on the face of the certificate of its judgment. The certificate is silent as to consent and is in the form usual upon appeals from the Railway Board. It would, therefore, seem to me more probable that the court dealt with the order of the Board as appealable to it under section 80 of the "Assessment Act." As already pointed out it cannot have made the mistake of considering that the Board had jurisdiction apart from consent or waiver to entertain an appeal directly from the Court of Revision. It follows that, if the Appellate Division did not itself proceed by consent, it must have deemed the question of jurisdiction concluded.

But, it may be said, the jurisdiction of the Appellate Division was purely statutory and the principle of the judgments in *Morris* v. *Davies*(1), and *Pisani* v. *Attorney-General for Gibraltar*(2), is inapplicable. Without at all acceding to that contention, if it be sound, the parties having both acquiesced in that court hearing and disposing of the appeal to it in the exercise of its curial function, and not as a body proceeding by consent only and discharging the function of quasi-arbitrators, upon the principle of the decision in *Bickett* v. *Morris*(3), there is a personal bar against

(1) 5 Cl. & F. 163. (2) L.R. 5 P.C. 516.
(3) L.R. 1 H.L. Sc. 47.

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either of them taking the ground, whether for the purpose of entirely precluding an appeal to this court, or of preventing an appeal upon the merits, that the decision of the Appellate Division is not a final judgment of the court of last resort in the province, made in the exercise of its jurisdiction under section 80 of the "Assessment Act," and, therefore, appealable to this court under section 41 of the "Supreme Court Act." That this court has jurisdiction to entertain this appeal, if only for the purpose of determining that the judgment of the Appellate Division was pronounced without jurisdiction, is the appellants' contention. But upon the authority of *Bickett* v. *Morris*(1) they cannot be heard to urge that ground of appeal. If the Appellate Division proceeded by consent, there would be no appeal whatever from its order; if it did not proceed by consent, its judgment is subject to appeal and, its jurisdiction not being open to question, the appeal must be disposed of on the merits.

Section 48 of the "Ontario Railway and Municipal Board Act" in my opinion has no application to appeals under section 80 of the "Assessment Act." If it had, its 8th sub-section would have concluded against the appellants the question of jurisdiction raised by them.

On the merits I agree that the authorization by Parliament, in the exercise of the paramount jurisdiction conferred upon it in regard to railways extending beyond the limits of a province, of the construction of the bridge in question not only renders the occupation by it of the land upon and over which it is erected

(1) L.R. 1 H.L. Sc. 47.

lawful, but vests in the railway company owning the bridge such an interest in that land that it may be deemed for the purpose of sub-section 3 of section 47 of the "Assessment Act" (R.S.O., 1914, ch. 195), railway land upon which a superstructure is erected, and that such superstructure is, therefore, exempt from assessment.

It was very strongly argued either that it was made a condition of the consent of counsel for the municipality to the Railway Board hearing the appeal to it from the Court of Revision, that the appeal should be dealt with on the footing, or that there was an admission of counsel for the railway company binding upon his clients, that the bridge in question does not stand on railway lands. So far as such a condition can be established, it must be strictly observed; so far as any such admission is an admission of fact it is undoubtedly conclusive. But a mere admission upon a matter of law is equally clearly not binding, and, if erroneous, may, and should, be ignored by the court.

An examination of the record makes it clear that counsel for the municipality did not ask for, and counsel for the company did not assent to, any such admission being made as a condition of the Board proceeding to hear the appeal as if it had been brought from a decision of the county judge. The question of jurisdiction owing to the appeal having been brought directly from the Court of Revision having been raised, the following discussion ensued:—

The Chairman: This point has been up in two or three cases and I do not see any other interpretation that can be given to the statute. The procedure is apparently clear; there must be an appeal from the Court of Revision to the county judge or district judge, and then from the judge to this Board. The notice of appeal to this Board is dated 24th of May, 1914.

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Mr. Scott: I was ready to come here and have this tried on the 3rd June, and it was adjourned to accommodate my learned friend.

Mr. Gogo: I do not want to take any advantage.

Mr. Scott: When I did that to accommodate you, you should not take advantage of the position now.

Mr. Gogo: I would rather fight the matter out on its merits.

Mr. Scott: You were served with a written notice of our intention to appeal, and surely that can be amended and made as an appeal to the county judge.

Mr. Gogo: If you think you are in any way prejudiced, I will concede your right, and we can go on now.

Mr. Scott: I think that would be a fair thing to do. It is a solicitor's slip and the matter will have to be tried out sooner or later.

Mr. Gogo: I am willing to have it tried out now.

Mr. Scott: I appreciate the position you take. Then this appeal will be taken as if it had gone before the county judge, and we are appealing against an adverse decision of the county judge.

The Chairman: Your contention is that under the provisions of the "Assessment Act," the property is not assessable?

No doubt counsel for the company almost immediately afterwards stated that he

conceded that the railway bridge is not on railway lands;

adding, however,

there is no dispute as to the facts; it is purely a question of law.

Later on he said:—

There may be some portions of the bridge on our lands, but the whole bridge is over the St. Lawrence River * * * a public river;

and again:—

The test is not whether it is on railway lands. We are there with the permission of the Crown, and to that extent I suppose we are rightfully there. Undoubtedly the title is in the Crown; it is a public river that we are crossing, but it may be said to be public railway land.

Finally he said.

sub-section 3 (of section 47) does not apply.

The only admission in all this that is binding is that the bridge is over the St. Lawrence River and is there with the permission of the Crown. The state-

ments that it is not on railway lands and that sub-section 3 of section 47 does not apply are merely mistaken admissions of legal consequences which were not asked for as conditions of the Board being allowed to assume jurisdiction and are, therefore, not binding upon the company.

If I had not reached the conclusion that the respondents' bridge is exempt under sub-section 3 of section 47, and that there is nothing to preclude their invoking that sub-section, I should be prepared to sustain the judgment of the Appellate Division on the ground that a bridge situated as is that in question, is not declared by the statute to be a subject of taxation with sufficient clearness and certainty to justify its being assessed.

I would, for these reasons, dismiss this appeal.

Appeal dimissed with costs.

Solicitors for the appellant: *Gogo & Harkness.*

Solicitors for the respondents: *Ewart, Scott, Maclaren & Kelly.*

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*Dec. 10
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*Feb. 14

JACOB KOHLER AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

THE THOROLD NATURAL GAS COMPANY (DEFENDANTS) ..... } RESPONDENTS.

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

Contract—Construction—Conditions—Mutual performance—Damages.

In a contract for the sale and delivery of gas if the vendor, not being in default, is prevented, by the wrongful act of the purchaser, from fulfilling his obligation to deliver he is entitled to the compensation he would have received but for such wrongfull act. *Mackay* v. *Dick* (6 App. Cas. 251) and *Wilson* v. *Northampton and Banbury Junction Railway Co.* (9 Ch. App. 279) applied.

Anglin J. dissented on the quantum of damages.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment at the trial in favour of the plaintiffs and dismissing their action.

The plaintiffs own gas wells in the County of Haldimand and entered into a contract whereby they agreed to supply gas to the defendants at their meterhouse in Dunnville "against the line pressure from time to time in the company's line at that point." The contract recited agreements with other parties to deliver gas through the company's line at Dunnville at a pressure of fifty pounds to the square inch. The plaintiffs' complaint was that the company had placed a

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

regulator on its line at that place and by its use had prevented plaintiffs from delivering at the pressure agreed upon and they claimed the amount that would have been delivered but for the interference according to the daily records on their own line. The contract is set out in full in the opinion of Mr. Justice Duff.

The case was heard by the Chancellor, who held that the company was liable and referred it to the Judge of the County Court to have the damages ascertained. The referee awarded plaintiffs all they claimed and his award was maintained by the Chancellor. The Appellate Division reversed and dismissed the action.

Tilley K.C. and *W. T. Henderson K.C.* for the appellants.

Collier K.C. for the respondents.

DAVIES J.—I concur in the judgment of Mr. Justice Duff.

IDINGTON J.—The appellants by an agreement dated 14th October, 1911 (wherein they were called the contractors), agreed with the respondent as follows:—

1. The contractors agree to sell and deliver to the company, at its meter house in the Town of Dunnville, in the County of Haldimand, against the line pressure, from time to time in the company's line at that point, having regard to the contracts aforesaid, all the natural gas of a quality and purity suitable for domestic consumption which is now being, or which may be hereafter obtained from the lands now leased or controlled by the contractors in the Township of Canboro, particulars of which are set forth in the schedule hereto attached marked "A," or hereafter acquired or controlled by them in the said township, in such amounts as they shall have available for delivery at the rate of twenty cents per thousand cubic feet up to April 1st, 1912, and after that date at the rate of sixteen cents

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per thousand cubic feet to May 1st, 1913, and thereafter at the rate of twenty cents per thousand cubic feet.

The respondent therein agreed as follows:—

2. The company agrees to purchase from the contractors the said gas in the last paragraph mentioned at the prices aforesaid.

The next clause partly exonerated appellants from the comprehensive terms of said agreement by permitting them to use some of said gas obtained from said field for specified purposes incidental to their business operations.

By clause 10 the agreement was to remain in force and effect so long and so long only as gas could be found in paying quantities in the territory then leased or otherwise acquired by the contractors in the said township and they are able to deliver it at a pressure sufficient to enable the company to transmit it as specified.

I should have supposed that the contract was tolerably plain but for the difference of judicial opinion which must make one pause.

The respondent had directly or indirectly prior contracts whereby it was bound to take, in the same transmission line from each of two other contractors respectively, a supply of a specified annual quantity of gas to be delivered.

The transmission line at Dunnville, to be used by the contractors respectively operating, under said prior contracts, apparently was contemplated to be the same line as that to be used for delivery by the appellants in fulfilling their contract.

There is not in appellants' contract any restriction upon the quantity to be supplied per annum or otherwise as there was in each of the other prior contracts.

There is the following provision in clause 9 of appellants' contract:—

9. The contractors shall not at any time or times turn in any gas into the company's main without giving reasonable notice to the company, nor turn off any gas which shall have been turned into the company's main without the consent of the company first having been obtained.

There is not in appellants' contract any obligation to maintain any specified degree of pressure or any express limit upon the pressure permissible for appellants' gas.

The gas therefrom was to be conducted for eight miles by a 4½ inch pipe. To enable the construction of that pipe by appellants the respondent contributed a loan of $5,000 without interest until the 1st of April, 1912, when that was to be repaid. There is nothing in the contract making the supply dependent upon the consuming capacity of the respondent or its customers.

The transmission line was of eight inches in diameter and capacity; and from Winger to St. Catharines was some twenty-two miles in length.

The appellants had in April, 1912, fifteen wells and drilled two more afterwards. Exactly how many existed at the date of the contract does not accurately appear.

In the first of the prior contracts in question (which I shall hereinafter call the Waines' contract) there was imposed upon the contractors an obligation to deliver their gas through respondent's line as then laid to Dunnville at a pressure of fifty pounds to the square inch, provided that the respondent should not maintain a pressure of greater than fifty pounds in its own line at the said point. There was nothing in

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it preventing a delivery at a greater pressure if the company chose to assent thereto.

The appellants took, by the plain terms of the contract, the risk of being able to deliver against the line pressure from time to time in the company's line at Dunnville.

That if supplied at fifty pounds pressure by a pipe in the Waines' system of equal dimensions to the eight-inch line of respondent's would obviously supply all the respondent needed if kept up continuously. But I infer the Waines' delivery pipe being only five and five-eighths inches diameter could not thereby shut out by its resistance another supply pipe's product. Nor could the product delivered through that and the delivery through another pipe of same dimensions combined shut out the appellants' product entirely. How much it would have permitted I cannot say.

The problem so presented has not been scientifically dealt with in any such way as it should have been; and I do not venture to speculate. I merely desire to point out by this illustration what I think were the possibilities the appellants faced in their contract.

Instead of letting, as I think the contract intended, the resistent forces in the line of the respondent created by the pressure resulting from the deliveries from both the Waines' and Aikens' supply pipes combined, however great that might be, to determine the matter, the respondent applied to the appellants' delivery pipe a regulator it had never contracted for being so applied.

I do not think it had any such right, nor do I think

such a thing was ever in the contemplation of the parties. Having departed from the plain terms of the contract and adopted a test not provided for in the contract, the onus rested upon it of demonstrating, much more clearly than has been shewn herein, that the result obtained by the use of the regulator must of necessity have been the same as, or at least no more detrimental to the appellants than, the application of the test which the contract plainly expresses.

For example, I am unable to explain why, the average pressure in the respondent's line, nearly always during the eight months at least, in question herein, was below, and most markedly below, the fifty pound pressure, which the respondent would have us believe the regulator continuously provided against, although for the most part the average pressure in appellants' pipe during the same period exceeded fifty pounds pressure.

The only answer counsel for respondent could suggest as to this was that the hourly pressure forming the basis for the tables produced and sworn to, might not produce an accurate result. He suggested the average is derived from the hours by day as well as by night, when the pressure might have materially varied by reason of the use of gas being much greater in the day than during the night.

I agree there is a possibility of discrepancies arising out of that, but I cannot think that it entirely accounts for the remarkable result that the evidence shews. And it is to be remarked that this is the basis upon which, as it seems to me, the payments under the contract for the supply of gas seem to have rested.

Again, this is only by way of illustration, for it

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devolved upon the respondent to have demonstrated and made clear, when it departed from the terms of the contract, how such results were possible.

It is said that the words "having regard to the contracts aforesaid" cover the whole thing, and mean that a regulator was to be applied.

If so, assuredly it was a very simple thing to have had it so expressed. It is neither so expressed in this contract nor in the Aikens' contract which was made two years later than the Waines' contract, and three to four months before the appellants' contract and subject to the obligations in the Waines' contract.

I am driven to the conclusion that the device of a regulator was entirely an afterthought and never present to the mind of any one at the time of making the contract.

It is said appellants must have known of its existence, and yet never remonstrated, but that is not proven. And on the other side we have the distinct claim put forward on the 23rd of January, 1913, reiterating complaints that appellants' gas was not being taken according to contract, and stating in letter of that date to the respondent's manager amongst other things, as follows:—

> Contrary to the terms of our contract you have maintained a regulator for the purpose of creating an artificial pressure against which we cannot feed and against which we beg to protest.

To this we have no reply in the evidence. Throughout the evidence there is a most remarkable absence of reference to proof relative to the regulator except the fact of its existence. And the results seem to destroy the alleged fact as to its proper setting.

There is quite apparent, in this case, the fact that Mr. Aikens was a contractor in one of the prior con-

tracts as well as in that in question, and thus perhaps not personally so damaged as to induce him to cry out as much as otherwise he might have done on the score of this device.

But the respondent took the very unjustifiable course of contracting for and obtaining another contract for further supply and packing the pipes with the product thereof.

It looks as if respondent desired to lay hands upon as much territory as possible against the day when gas might be running short, and was content, therefore, to run the risk of paying for more than it could consume.

So much as can be gathered by way of the conduct of the parties interpreting the contract, as was suggested by respondent as of some weight, I think it operates entirely against the respondent when all the circumstances are considered.

I think the construction of the contract is that put upon it by the learned referee and maintained in appeal by the Chancellor.

And as to the damage I see no reason for interfering with same so ascertained and so maintained.

If, however, the assessment of damages had of necessity to turn alone upon the assumption of fact that the appellants' field had been depleted by the rivals referred to in the case, I should hesitate much to accept that alone as sufficient basis for such substantial damages.

The evidence put forward by each party on this head falls singularly short of what I should have liked to hear in a case turning upon the solution of problems respecting which none of the witnesses seem to me to have had either the knowledge or experi-

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ence which if possessed might have rendered their evidence very helpful.

For example, how can the daily experience of a man boring in the wrong place help us ?

They, however, tell us enough to suggest the possibility that the man who postpones the reaping of his crop on such a field, runs imminent risk of losing a great part of it.

But it is not alone, from the supposed rivals in the immediate vicinity reaping that crop, as it were, that the risk is run.

What the appellants call their field is perhaps but a very narrow part of a much wider field which may be so developed beyond it to their detriment pending delay in operations.

Fortunately we are not driven to rely upon such speculations alone. There may be in the evidence enough to found an assessment of a substantial sum based upon reasonable possibilities alone, but it does not strike me it would, necessarily, reach so far as the sum assessed.

There is in the case coupled with that a much more substantial element in the loss from a large fraction of unproductive capital invested, lying waste, as it were, by reason of the breach of the contract. But again we have nothing to shew how much.

And again, what is much more palpable is the fact that the respondent instead of taking from the appellants what they tendered, chose to discard their legitimate claims and take from the Waines' contractors what they were not entitled to insist upon, and from yet others who should never have been brought into competition with appellants, that from which appel-

lants should have obtained most substantial returns. The extent to which this was done to appellants' detriment is entered into and well demonstrated in Mr. Tilley's factum.

The result reached is one I cannot feel at liberty to interfere with and be assured I can do any better than the learned referee.

The appeal should be allowed and the judgment of the referee and the Chancellor be restored with costs.

DUFF J.—The first question concerns the construction of the agreement of October, 1911. The material passages are in the following words:—

Whereas in a contract made between the United Gas Companies, Limited, and one Frederick M. Waines, on the 13th day of February, 1909, and amended on the 19th day of July, 1909, the said United Gas Companies, Limited, agreed to purchase from Waines gas as therein stated, to be delivered through the company's line as now laid to Dunnville, at a pressure of fifty pounds to the square inch, provided that a greater pressure is not maintained in the company's line between Dunnville and Winger;

And whereas the company agreed with the United Gas Companies, Limited, to transmit the gas so purchased from Waines through its said line for delivery into the lines of the United Gas Companies, Limited, in the Township of Wainfleet;

And whereas by a contract made between William J. Aikens, Frank R. Lalor and S. A. Beck, of the one part, and the company of the other part, bearing date the 28th day of June, 1911, the company agreed to purchase gas from the said Aikens, Lalor and Beck as therein stated;

And whereas the company desires to recognize the obligations of the United Gas Companies, Limited, binding upon it under said Waines' contract in so far as the transmission of the Waines' gas through its lines is concerned; and also to recognize its obligations to the said Aikens, Lalor and Beck to purchase and transmit gas pursuant to the said contract with them;

And whereas the contractors are the owners of a gas field in the Township of Canboro, in the County of Haldimand, and have agreed to sell the gas developed in the said field, and hereafter to be developed therein, to the company, upon the terms and conditions hereinafter set forth;

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Now, therefore, this agreement witnesseth as follows:—

1. The contractors agree to sell and deliver to the company at its meter house in the Town of Dunnville, in the County of Haldimand, against the line pressure from time to time in the company's line at that point, having regard to the contracts aforesaid, all the natural gas of a quality and purity suitable for domestic consumption which is now being, or which may be hereafter obtained from the lands now leased or controlled by the contractors in the Township of Canboro, particulars of which are set forth in the schedule hereto attached and marked "A," or hereafter acquired or controlled by them in the said township, in such amounts as they shall have available for delivery at the rate of twenty cents per thousand cubic feet up to April 1st, 1912, and after that at the rate of sixteen cents per thousand cubic feet to May 1st, 1913, and thereafter at the rate of twenty cents per thousand cubic feet;

2. The company agrees to purchase from the contractors the said gas as in the last paragraph mentioned at the prices aforesaid.

* * * * *

12. The contractors agree to and with the company to lay a 4½-inch line from their wells, in the Township of Canboro aforesaid, to the company's meter house in Dunnville with the utmost possible expedition, so that the connection with the company's line can be made at the earliest possible moment and gas delivered by the contractors to the company under the terms of this agreement, the company advancing to the contractors the sum of five thousand dollars, towards the cost of construction of the said line, to be repaid by the contractors to the company without interest on or before the first day of April, 1912.

The rival constructions are: (1) By the appellants, that the respondent company agrees to take and pay for gas delivered by the appellants at the company's meter at Dunnville "against the line pressure" from time to time in the company's line at that point, such pressure not to exceed that occasioned by the execution of the contracts mentioned in the recitals.

(2) On behalf of the respondent company that the respondent company is to take such gas so delivered when the pressure does not exceed 50 pounds per square inch in the respondent company's line.

The second of these constructions is that which

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was adopted in the Court of Appeal. As I read the judgment of Mr. Justice Hodgins the principal reason upon which this conclusion is based is derived from the fourth paragraph of the recitals. The view seems to be that by the two agreements mentioned in the recitals the respondent company or the United Gas Company assumed an obligation not to maintain a pressure in the respondent company's line greater than fifty pounds per square inch. With respect, I think, that is a misreading of the clause in the Waines' contract (clause 7), which is said to create this obligation:—

> Clause 7.—This said natural gas shall be delivered through a meter or meters into the company's pipe or line it may procure to be built by any other company for the purpose of receiving and transmitting the gas herein agreed to be purchased, hereinafter called the "transmitting company" at or near the west end of Canal Street in the Town of Dunnville, and is to be supplied and maintained at that point at a pressure of at least fifty pounds to the square inch, provided that the company shall not maintain a pressure of greater than fifty pounds in its own line at the said point.

There is a similar provision in the Lalor contract. I read the words beginning "provided that the company" as declaring simply the condition upon the fulfilment of which the contractor's obligation to deliver on the terms prescribed depends. That, I think, is the meaning of the language itself. But, furthermore, I am unable to avoid reading the first paragraph of the recitals in the Lalor contract or the first paragraph of the recitals in the contract we have to construe as giving expression to the interpretation which the parties themselves had put upon the pre-existing contracts and that interpretation seems to me to accord with the view I have formed independently from an examination of the words themselves of these contracts.

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I agree that it must be taken that these recitals are intended as a declaration that the appellants and the respondent company were themselves contracting with reference to the fact that there were these contracts. It does not, however, seem to me that the declaration carries us beyond this point, that the respondent company's line might be expected to be charged with gas to the degree that in the ordinary course would result from the fulfilment by the contractors under the earlier contracts of their obligations to deliver gas at fifty pounds pressure.

What then is the effect of this declaration upon the interpretation of the words "having regard to the contracts aforesaid" in the first paragraph of the operative part of the agreement before us? It cannot, I think, be held to qualify the words "against the line pressure from time to time in the company's line at that point" to the extent of the qualification imported by reading the words "of fifty pounds to the square inch" after "pressure" as the respondent company's argument requires. Nor do I think can they strictly be given the sense contended for by the appellants. It is more reasonable, I think, to explain their presence as arising from the desire to preclude any inference that the company was undertaking obligations incompatible with receiving and transmitting gas delivered to it under the provisions of the two recited contracts. That view is confirmed by the provisions of the preliminary agreement, the first paragraph of which provides that the vendors will deliver the gas at the company's meter house in Dunnville "to be received by it against the pressure in its line at that point."

The result is that the placing of the regulator, the effect of which was automatically to interrupt any access of gas from the appellants' pipe when the pressure in the respondent company's line exceeded fifty pounds to the square inch, was a wrongful act that prevented the appellants performing the condition entitling them to be paid in accordance with the terms of their contract.

It was argued by Mr. Tilley that there was delivery. I do not think it can strictly be said that there was delivery in fact because the gas alleged to have been "delivered" did not pass out of the power and possession of the appellants. I think that strictly it is a case of wrongful prevention of delivery rather than a refusal to pay for gas in fact delivered.

The case is within the principle stated by Lord Blackburn in *Mackay* v. *Dick*(1) in these words:—

> I think I may safely say, as a general rule, that where in a written contract, it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.

What then is the basis on which damages are to be computed? In order to answer that question it is important, I think, to note precisely the nature of the contract into which the appellants had entered.

Their undertaking was in part to construct a pipe line $4\frac{1}{4}$ inches in diameter connecting their wells with the respondent's line at Dunnville. They were, in the words of the contract, to "deliver" gas at Dunnville "against the line pressure" in the respondent's line.

(1) 6 App. Cas. 251.

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But that obviously means that, subject to their right to supply customers along the line of their pipe, they were to have their conduit so connected with their wells and their appliances arranged in such a way that the gas at Dunnville should be actuated by the full pressure available. The intent of the contract was that the contractors should do that. On the respondent company's part, it was to pay for such gas as should enter its line in these conditions, and as I have just said the company came under the implied obligation to do what might be necessary to enable the pressure in the appellant's line to have its natural and normal effect so that the compensation to which the appellants were entitled could be measured in the manner provided by the contract. Now it is perfectly clear that the appellants did everything which they were called upon to do under their contract, and, I think, this question of damages ought to be determined by the application of two well recognized principles.

The first principle is stated in a judgment of Mr. Justice Willes in a passage cited in and made the foundation of the decision of the Privy Council in *Burchell* v. *Gowrie and Blockhouse Collieries*(1), at page 626, which is in the following words:—

> In *Inchbald* v. *Western Neilgherry Coffee, etc., Co.*(2), Willes J. thus lays down the rule of law applicable to such cases: "I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay, is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it.

Their Lordships in that case held that, as the appellant had in substance done everything he was called

(1) [1910] A.C. 614. (2) 17 C.B.N.S. 733.

upon to do to earn his commission (although his right of action was strictly a right of action for damages for wrongful prevention of performance rather than an action for recovery of commission, as such) he was entitled in the circumstances to recover in the form of damages the sum which would have been payable to him as commission had it not been for the wrongful conduct of the respondents. It may be observed in passing that in the case to which reference has already been made—*Mackay* v. *Dick*(1)—Lord Watson at page 270 points out that by the law of Scotland where a debtor bound under a certain condition impedes or prevents the event, the condition is held to be accomplished if the creditor has done everything incumbent upon him. This principle, Lord Watson says, has always been recognized by the law of Scotland, which derived it from the civil law. I do not desire to express any opinion on the question whether that principle is strictly applicable here; although there would appear to be nothing inconsistent with legal principle or with justice in holding that the respondent company (being bound by an obligation not to bar the ingress of the appellants' gas into their pipe) is precluded from taking advantage of its own wrong by denying that in fact the appellants' gas did enter its pipe, as it would have done if the course of events contemplated by the contract had been allowed to proceed without interruption by its officers. I do not find it necessary to put my judgment upon that ground because I think the decision in *Burchell* v. *Gowrie and Blockhouse Collieries*(2) is a sufficient authority for holding that the appellants, having done

(1) 6 App. Cas. 251. (2) [1910] A.C. 614.

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everything incumbent upon them under the contract and their efforts having failed to produce the contemplated effect only because of the wrongful conduct of the respondent company, they are entitled *primâ facie* to the compensation that would have been payable to them had the respondent company not interposed and had the provisions of the contract with respect to compensation become fully operative. Reference may also be had to the judgment of Lord Alverstone C.J. in *Odgens* v. *Nelson*(1), at pp. 296 and 297.

The second principle is this: as against a wrongdoer, and especially where the wrong is of such a character that in itself it is calculated to make and does make the exact ascertainment of damages impossible or extremely difficult and embarrassing, all reasonable presumptions are to be made. The principle in the form in which it is applicable to this case is stated in these words taken from the judgment of Lord Selborne in delivering judgment for himself and the Lords Justices in *Wilson* v. *Northampton and Banbury Junction Railway Co.*(2):—

> We know it to be an established maxim that in assessing damages every reasonable presumption may be made as to the benefit which the other parties might have obtained by the *bonâ fide* performance of the agreement. On the same principle, no doubt, in the celebrated case of the diamond which had disappeared from its setting and was not forthcoming, a great judge directed the jury to presume that the cavity had contained the most valuable stone which could possibly have been put there. I do not say that that analogy is to be followed here to the letter; the principle is to be reasonably applied according to the circumstances of each case."

A number of authorities to the same general effect are referred to in *Lamb* v. *Kincaid*(3). This prin-

(1) [1903] 2 K.B. 287. (2) 9 Ch. App. 279, at p. 286.
(3) 38 Can. S.C.R. 516.

ciple is, I think, properly applied in holding as I do hold, first that the average daily readings are sufficient *primâ facie* evidence for determining the pressure ratios, and secondly, that the onus was upon the respondent company to produce satisfactory evidence of any circumstances upon which it desired to rely as reducing the amount of damages which the appellants are *primâ facie* entitled to recover. It was for them to shew if they desired to rely upon it as effecting the measure of damages that the gas, which otherwise would have passed into their pipe line, is still in the possession and power of the appellants and still available for sale. That appears to me to be an entirely reasonable application of the principle *omnia præsumuntur contra spoliatorem.*

I add a word with reference to the point of view from which this contract seems to have been regarded. It appears to have been treated as a contract for sale and delivery of property simply. In one aspect, it is that, unquestionably; that is to say, the contract unquestionably does contemplate the transfer of property for a money price. But the authorities touching the estimation of damages arising from breach of contract for the sale of goods are almost universally decisions given in contemplation of circumstances so widely different from the circumstances contemplated by this contract that I cannot think they are of much assistance, except in so far as they lay down the broad principle that as a general rule where a contract is broken the injured party is entitled to receive such a sum of money, by way of damages as will, so far as possible, put him in the same position as if the contract had been performed, provided that damages are not recoverable in respect of loss following the breach

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of contract unless the loss was (1) the natural and direct consequence of the breach, or (2) within the contemplation of both parties at the time of making the contract as the probable result of the breach. That is the broad principle which is strictly applicable, and I think the conclusions above indicated are strictly within the principle.

It is quite evident, moreover, that on the reference it was not seriously disputed that but for the regulator the appellants would have delivered, and would have been entitled to be paid for, the amount of gas in respect of which they claim. That is clear enough from the last paragraph of the referee's report which is in the following words:—

It is admitted that plaintiffs, in addition to what was taken by defendant, had for delivery the quantity of gas they allege during the months from April to December, and were it not for the regulator would have delivered, viz., 44,853,170 *ft. at* 16*c. per thousand c. ft., or* $7,176.50.

The plaintiffs, however, with the defendant's consent sold—

1,050,000 c. ft. at 16c	$147.00
250,000 c. ft. at 20c	50.00
	$197.00
The amount to which I find the plaintiffs are entitled is	$7,176.50
Less	197.00
	$6,979.50

And there should be judgment for the plaintiffs for $6,979.50.

The evidence of Mr. Price, the respondent's manager, cited in Mr. Tilley's factum at p. 10, is quite sufficient to justify this paragraph.

The appeal should be allowed and the judgment of the Chancellor restored with costs in both courts.

ANGLIN, J.—After careful consideration of the several contracts in evidence in this case, I have

reached the conclusion that the "proviso" in the Waines contract did not merely state a condition to which the obligation of delivery under that contract was subject, but also imposed on the purchasers an obligation (within the meaning of the clauses in the Kohler contract which make it subject to the purchasers' obligations under the Waines contract) to prevent the pressure in their transmission line exceeding fifty pounds, whenever and so long as Waines was prepared to deliver gas at a pressure of fifty pounds. The defendant company admits that, in order to ensure the fulfilment of that obligation towards Waines, it resorted to the use of a regulator designed automatically to exclude the plaintiffs' gas whenever the pressure in the defendants' transmission line should exceed fifty pounds, and to admit such gas freely when that pressure should be less than fifty pounds. While the use of a device operating in this way may not have been beyond the defendants' rights so long as Waines was delivering at a fifty-pound pressure, they used it at their peril if in fact—whether by accident or by design, whether through a defect discoverable or remediable, or latent and impossible to overcome—it should exclude the plaintiffs' gas when the pressure in the transmission pipe was less than fifty pounds or when the Waines pressure fell below fifty pounds. The plaintiffs were entitled at all times to deliver against the pressure in the defendants' transmission line subject to the defendants' obligation to Waines to prevent that pressure excluding his gas delivered at fifty pounds. The plaintiffs had not the right to deliver gas in quantities which would increase that pressure beyond fifty pounds at a time when delivery under the Waines contract at fifty pounds pressure would be

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thereby interfered with. That, I think, is the effect of the contract between the parties.

There would appear to have been some uncertainty at the trial as to the function which the regulator was intended to perform and as to its actual operation. I take the following extracts from the opinion delivered by the learned referee as printed in the appeal case:—

> It was contended by the defendant that while the contract did not in words provide for the placing of this regulator, still in order to keep faith with Waines and Lalor, Beck and Aikens under their contracts, the company was bound to prevent gas coming from the plaintiffs into their line at a greater pressure than 50 pounds to the square inch, and so placed the regulator fixed so that the gas could not come from plaintiffs' line at a pressure less (*sic*) than 50 pounds.

Later on he says:—

> An examination of the records during the period from April 1st, 1912, until December 31st, 1912, shews that the average pressure in the plaintiff's line was in some months in excess of the average pressure in the defendant's line, and in some months greatly in excess; and this was so notwithstanding the fact that the plaintiffs were compelled to shut off a number of their gas wells in the field.
>
> This would indicate that it was the regulator (and if these records are correct the regulator must have been fixed at more than 50 pounds) placed by the defendant in their line, and not the pressure from the gas supplied under the two other contracts that prevented the plaintiffs from delivering all their available gas into the defendant's pipe line, and was, I think, a breach of their contract, for which the defendant is responsible in damages, if any can be shewn.

The impression of the learned referee would seem to have been that the operation of the regulator was meant to depend, and did in fact depend, not upon the pressure in the defendants' transmission line, but upon that in the plaintiffs' supply pipe. The case may have been so presented to him in argument and it may be, although the oral testimony is to the contrary, that the pressure returns warrant the conclusion that, as a matter of fact, the opening and closing of the regu-

lator valve depended upon the pressure in the plaintiffs' supply pipe. If so, the use of the regulator was a clear breach of contract and the conclusion that it was "fixed at more than fifty pounds" would seem to be incontrovertible.

In view of the course of the argument in this court, there would seem to have been some misapprehension in this regard at the trial, and the conclusion there reached as to the extent of the defendants' liability is thus rendered less dependable than it otherwise would be. Counsel for both parties were in accord in this court upon the fact that the operation of the regulator was governed by the pressure in the defendants' transmission line, and the argument in the appellants' factum proceeds on that assumption.

Although by no means as satisfactory as it might have been made, the evidence afforded by the returns of average daily pressures put in seems to me to establish that, from some cause not made clear, the effect of the operation of the regulator placed by the defendants on the supply pipe carrying the plaintiffs' gas was to exclude that gas from entering the defendants' transmission line when the pressure in it was less than fifty pounds during at least a very considerable part of the period between the 1st of April, 1912, and the 31st December, 1912. Moreover, it would seem that during a great part of that period the Waines' pressure was below fifty pounds. But this evidence does not enable us to say for how many hours on any day the wrongful exclusion of the plaintiffs' gas continued, or to determine how much of that gas available for delivery and not taken might have been delivered during that period without raising the pres-

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sure in the transmission line above fifty pounds, when the right to have it enter would cease, if, and so long as, Waines should be delivering at a pressure of fifty pounds. But the defendants having seen fit to place a regulating device upon the plaintiffs' supply line, and having had that device under their exclusive control, I think the burden was upon them to shew that it did not operate prejudicially to the plaintiffs' rights under their contract, or, if that could not be established, to shew the times and periods during which, and the extent to which it did not so operate. That they have failed to do, and they are, therefore, chargeable, in my opinion, with the consequences, whatever they may be, of having excluded the plaintiffs' gas during the whole period in question. Moreover, from the 19th December to the 31st December, it seems to be very clearly proved that the defendants took from contractors who had not priority over the plaintiffs 6,762,127 c. ft. of gas, much of which the plaintiffs might otherwise have delivered. They also appear to have taken under a contract with one Kindy (made subsequently to the contract with the plaintiffs) between August and December, 5,975,888 c. ft. of gas, the greater part of which the plaintiffs were entitled to supply.

But it is claimed on behalf of the defendants that the gas not taken by them has not been lost to the plaintiffs—that they still have it and have merely been delayed in marketing it. For the plaintiffs it is urged, on the other hand, that there were gas wells in operation in the same field as theirs belonging to other persons, and that the gas which the defendants excluded by the regulating device placed on their supply

pipe has passed away through such other wells and has been wholly lost to them. This was the conclusion reached by the learned referee; whereas the Appellate Division deemed the evidence insufficient to support it. With respect I am of the opinion that, subject to what I am about to say, there was evidence in the record sufficient to support this conclusion of the referee.

But it is at the same time my view that it is not established that the loss of this gas is wholly attributable to wrongful conduct on the part of the defendants. Their manager, no doubt, said, in the course of his testimony, that if the regulator had not been placed upon their pipe the plaintiffs would have delivered during the period in question the quantity of gas for which they claim. But he did not admit that such gas was excluded from the transmission line in breach of contract. It may be that as against the plaintiffs the defendants were bound to prove that the exclusion was rightful and that in the absence of evidence it should be assumed that conditions never existed which would have entitled them to exclude the plaintiffs' gas under the clause in the Waines' contract. Yet we cannot shut our eyes to the fact that during the summer months the consumption of gas for heating and domestic purposes is much smaller than in the winter, and that, had there been no regulator set against them, it is more than probable that all the gas which the plaintiffs had available for delivery during the summer season could not have entered the defendants' pipe unless the latter had allowed gas to go to waste. As Mr. Justice Hodgins points out, the defendants did not undertake to find customers for all the gas the plaintiffs should have available for delivery. The

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plaintiffs' right of delivery was limited to delivery against the pressure in the defendants' transmission line. It was, therefore, from its very nature subject to whatever restriction the limitations of the defendants' business should entail. Under these circumstances had there been no regulator used it seems tolerably clear that during the summer months a considerable quantity of the plaintiffs' gas available for delivery could not have been taken, and for gas held back on that account the defendants cannot be held responsible.

We have no records of the quantity of gas from all sources used by the defendants during these summer months. But we find that during April the plaintiffs delivered 8,609,495 c. ft.; from May to September the average monthly delivery was 4,672,076 c. ft.; in October it rose again to 7,522,787 c. ft. These figures indicate a lessening in the deliveries during the summer months, for which it is not unreasonable to assume that diminished consumption by the defendants' customers at least partly accounts. Moreover, as the other wells operating in the field were probably subject to similar conditions, it may be that gas held back at this season was not lost to the plaintiffs.

It is also noteworthy that from the 2nd to the 12th August, omitting the 3rd, for which the return is blank, the plaintiffs' average pressure was only 17.8 lbs. It was one pound on the 11th and 1.5 lbs. on the 10th.

The plaintiffs' claim is for 44,853,170 c. ft. Of this 31,863,414 c. ft. represents gas not taken during May, June, July, August and September. It is probably quite impossible to determine with even ap-

proximate accuracy how much of that gas the plaintiffs would have been able to deliver against line pressure in the defendants' pipe. But dealing with the matter as a jury probably would, I should say that at least one-half of it could not have been taken. I would, therefore, deduct from the amount of the damages assessed at the trial $2,560.57 (the value of 15,931,707 c. ft., at 16 cents per M.), leaving a balance of $4,418.93, for which the plaintiffs should have judgment.

In the Appellate Division attention is drawn to the fact that the defendants paid the same price for the Waines' gas as for the plaintiffs' gas, viz., 16 cents per M. But another fact is apparently overlooked, namely, that under the Aikens-Lalor-Beck contract, the price was only 13 cents per M., and the holding back of the plaintiffs' gas may have enabled the defendants to obtain under that contract at a cheaper rate gas which the plaintiffs would otherwise have delivered.

The monthly settlements of accounts between the plaintiffs and defendants made as provided for by the contract were set up in answer to the plaintiffs' claim. But there is nothing to shew that when these settlements were made the plaintiffs knew that their gas was being wrongfully excluded from the defendants' transmission line.

No doubt loss of profit is ordinarily the measure of damages on breach of a contract of sale and purchase of a commodity. But in the present case there is nothing to suggest that delivery of the gas wrongly excluded by the defendants would have entailed any additional expense or outlay to the plaintiffs. They

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lost in its entirety the price to which they would have been entitled had that gas been taken by the defendants.

I am unable, on the other hand, to construe the contract as entitling the plaintiffs to be paid, not as damages for breach of contract, but as purchase money, for all gas available for delivery whether taken or not.

The appellants are entitled to their costs of the appeal to this court, and of the proceedings in the High Court Division.

BRODEUR J.—I concur with Mr. Justice Idington.

Appeal allowed with costs.

Solicitors for the appellants: *Wilkes & Henderson.*

Solicitor for the respondents: *H. H. Collier.*

ONTARIO ASPHALT BLOCK COMPANY (PLAINTIFFS) ..... APPELLANTS;

AND

LUKE MONTREUIL (DEFENDANT) .... RESPONDENT.

1915
*Dec. 3.

1916
*Feb. 21.

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

Specific performance—Agreement for sale of land—Inability to perform—Liability to damages—Diminution in price.

A lease of land for ten years provided that on its termination the lessee could by giving notice, purchase the fee for $22,000. In a suit for specific performance of this agreement.

Held, applying the rule in *Bain* v. *Fothergill* (L.R. 7 H.L. 158), Fitzpatrick C.J. and Davies J. dissenting, that if the lessor, without fault, was unable to give title in fee to the land the lessee was not entitled to damages for loss of his bargain.

Per Fitzpatrick C.J. and Davies J.—The above rule should not be applied in a case like this where the lease contained onerous conditions binding the lessee to expend large sums in improving the property and it must have been contemplated by the parties that such expenditure would have caused him special damage if he could not purchase the fee.

Judgment appealed against (32 Ont. L.R. 243) affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), varying the judgment at the trial(2) in favour of the plaintiffs.

On the 2nd day of February, 1903, the respondent leased to the appellants a certain parcel of land in the Township of Sandwich East, and extending from

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

(1) 32 Ont. L.R. 243. (2) 29 Ont. L.R. 534.

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the front River Road to the water's edge and from there to the channel bank of the Detroit River, for a term of ten years at a rental of $1,000 a year. The lease contained a provision giving the appellants the right to purchase the premises at the end of the term of ten years for $22,000, provided the company gave six months previous notice in writing of its intention to do so.

The appellant company was incorporated for the purpose of manufacturing asphalt blocks, and upon entering the premises under the lease they erected a large expensive manufacturing plant and built expensive docks, partly on the land and partly on the water lot, the whole of the expenditure amounting to about $200,000, and from year to year the company spent some $8,000 to $12,000 a year for betterments and improvements, including the necessary repairs.

The company gave the required six months notice in pursuance of the terms of the lease, and on the 2nd day of February, 1913, at the end of the said term granted by the lease, tendered to the respondent the sum of $22,000 demanding a conveyance of the lands and premises. But the respondent refused to accept said sum and refused to make the conveyance as provided under the terms of the lease.

The company commenced an action on the 10th day of February, 1913, claiming specific performance of the covenant contained in the lease, and damages.

The action came on for trial before the Honourable Mr. Justice Lennox without a jury on the 27th day of May, 1913, and it appeared at the trial from the evidence of the respondent, Montreuil, that he had made the lease in question under the assumption that he was the owner in fee simple of the property set out

in the lease, but that he discovered in 1908 that he only had a life estate in the property.

The respondent was advised by counsel at that time that the property went to his children after his death, but no evidence was offered of any effort being made by the respondent to get in a title to the property, nor was any evidence offered of any refusal by the respondent's children to join in a conveyance of the property to the appellant company under the terms of the lease. But there is evidence that they did join with him in the conveyance of other portions of the property.

Evidence was given that the property had increased enormously in value since the making of the lease.

The learned trial judge reserved judgment, and subsequently on the 19th day of June, 1913, delivered judgment decreeing specific performance of the agreement for the interest of the defendant in all the demised lands and an abatement in the purchase money for the difference in value on the 2nd day of February, 1913, of an estate in fee simple and an estate for the life of the defendant in respect of so much of the land as the defendant was not able to convey in fee, and also in respect of the damages which the plaintiffs might suffer by reason of such breach of contract over and above the difference in value of an estate in fee simple and for the life of the defendant; and directed reference to the master of the court at Sandwich.

The respondent appealed to the Appellate Division of the Supreme Court of Ontario, which gave judgment on the 27th day of November, 1914, varying the judgment of the trial judge by directing that the abatement in the purchase money should be based upon the assumption that the value of the fee simple

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was, at the date of expiry of the term, the proportionate part of the purchase price agreed upon attributable to the land in which the lessor had only a life estate and by directing further that the plaintiff company should have no damages for any loss sustained by reason of the money expended upon the property or by reason of any other matter except the abatement aforesaid.

From this judgment the appellants now appeal to the Supreme Court of Canada.

D. L. McCarthy K.C. and *Rodd* for the appellants. The appellants expended large sums in carrying out the object for which the purchase was intended and should recover back the same as damages even under the rule in *Bain* v. *Fothergill*(1).

The respondent was bound to do all in his power to enable him to give us a title and has done nothing. See *Day* v. *Singleton*(2); *Engell* v. *Fitch*(3); *Lehmann* v. *McArthur*(4); *Jones* v. *Gardiner*(5).

Cowan K.C. for the respondent. The respondent was in good faith and is not liable to damages. *Flureau* v. *Thornhill*(6); *Bain* v. *Fothergill*(1).

THE CHIEF JUSTICE (dissenting).—The respondent granted to the appellant a lease dated 2nd February, 1903, of certain parcels of land in the Township of Sandwich East fronting on the Detroit River for the term of ten years at the rents and subject to the

(1) L.R. 7 H.L. 158.
(2) [1899] 2 Ch. 320.
(3) L.R. 4 Q.B. 659.
(4) 3 Ch. App. 496.
(5) [1902] 1 Ch. 191.
(6) 2 W. Bl. 1078.

covenants and conditions therein mentioned. The lease contained the following (amongst other) provisions:—

It is agreed between the parties hereto that the lessee, its successors and assigns shall have the right to purchase the demised premises at the end of the demised term of ten years for the cash sum of $22,000, provided it shall have given six months' previous notice in writing of its intention so to do.

And the said lessor for himself, his heirs, administrators, executors and assigns, covenants that he will on the exercise by the lessee of said option to purchase and on payment of said sum of $22,000 execute and deliver to the lessee, its successors and assigns, a good and sufficient deed in fee simple free of incumbrances of the land hereinbefore described.

It is also agreed that in case said lessee fails to exercise said option to purchase by giving said notice it may on giving three months' notice in writing before the expiration of the demised term have a renewal of this lease for a further term of ten years on the same terms as to rent, payment of taxes and water rates.

The lessee for itself, its successors and assigns agrees to build a dock on the demised premises within one year from the date hereof at a cost of at least $6,000, which dock is to become the property of the lessor at the end of the demised term or after the renewal term in case of renewal as aforesaid unless in the exercise of the option the lessee purchases the said lands.

The appellant constructed the dock stipulated for in the lease and during its currency expended many thousand dollars in buildings on and improvements to the property.

The appellant duly gave the requisite notice to purchase the demised premises. It then appeared that the respondent was not possessed of the fee simple of the premises and was consequently unable to carry out his agreement to sell. Such title as the respondent had was derived from the will of his father, Luc X. Montreuil.

The devise which covers the lands in question in this suit is in the following terms:—

I give and devise to my son Luc all that, etc., * * * to him said Luc during his natural life, then to his children, should he

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marry and have issue share and share alike their heirs and assigns forever.

The respondent had nine children.

The appellant claimed:—

1. Specific performance of the covenant to convey contained in the indenture of lease.

2. Damages.

The judgment of the appeal court proceeds on the rule established by the jurisprudence of the English courts that the contract for sale of real property is an exception to the ordinary rules of law applicable to the question of the damages recoverable upon a breach of contract.

This rule, first laid down in the case of *Flureau* v. *Thornhill*(1), is that upon a contract for the purchase of real estate if the vendor, without fraud, is incapable of making a good title the intended purchaser is not entitled to any compensation for the loss of his bargain.

Flureau v. *Thornhill*(1) was much disputed and in several cases held open to exceptions. It was, however, discussed and approved in the case of *Bain* v. *Fothergill*(2) in the House of Lords when the judges were summoned to advise the House.

Though it is claimed to have been introduced from the civil law it has been said that the exception to the general rule as to damages established by *Flureau* v. *Thornhill*(1) is not founded upon any principle. In the case of *Engell* v. *Fitch*(3) Lord Chief Baron Kelly speaks of the rule as a

qualification of the rule of common law, * * *. founded entirely on the difficulty that a vendor often finds in making a title to real estate.

(1) 2 W. Bl. 1078. (2) L.R. 7 H.L. 158.
(3) L.R. 4 Q.B. 659, at p. 666.

not from any default on his part, but from his ignorance of the strict legal state of his title.

Where the condition for this reason for the rule does not exist, at any rate to the same extent, it would seem that the latter would have a more limited application. The state of the title to real estate in England is undoubtedly vastly more complicated than in this country. The defect in the title in the present case is so obvious that it does not require a lawyer to discover it; the property is left to the devisee

during his natural life, then to his children;

if the respondent had looked to his title at all he could hardly have thought himself the absolute owner of the property to dispose of as he alone pleased.

There is another ground which distinguishes this case from *Flureau* v. *Thornhill*(1). It was held that the case of *Hopkins* v. *Grazebrook*(2) provided an exception to the rule in the former case and one of the grounds on which the decision was based was that the defendant expressly undertook to make a good title. The respondent in this case expressly undertook to execute a conveyance in fee simple.

The rule in *Flureau* v. *Thornhill*(1) finds little favour in the United States. In Sedgwick on Damages, 9th ed, vol. 3, at p. 2121, we read:—

If the defendant fails to convey because he has not a good title, he is always liable in substantial damages. This is commonly called the United States Supreme Court Rule, and represents one extreme of the series of principles of which the highest English court has adopted the other extreme. It seems to be the correct one on principle.

I have thought it well to make the foregoing remarks as perhaps affording support to the appeal, but

(1) 2 W. Bl. 1078. (2) 6 B. & C. 31.

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the real ground on which I rest my judgment is that in any event this case is outside the transactions to which in its widest interpretation the rule making exception to the general law of contracts has any application.

The rule deals solely with a simple contract for an immediate sale of real estate. According to the English practice this is directly followed by the delivery by the vendor to the purchaser of the abstract of title. If it then appears that the title is defective the expenses to which the purchaser has been put are ordinarily little more than for the investigation of the title and these he is entitled to recover; beyond this actual outlay he has lost nothing but the fancied goodness of his bargain and for this he is not entitled to damages.

It must be remembered that the practice of giving options does not obtain to any great extent in England and there is very little to be found in the books on the subject.

Now in *Bain* v. *Fothergill*(1) Mr. Justice Denman speaking of the case of *Engell* v. *Fitch*(2), in which it was held that the rule in *Flureau* v. *Thornhill*(3) did not apply, said:—

> The case is of great value as shewing beyond all question that the rule in *Flureau* v. *Thornhill*(3) is a rule wholly confined to cases of inability to make a title, and not to breaches of contract in respect of the sale of real property from whatever cause arising.

And criticising the judgment in *Hopkins* v. *Grazebrook*(4), he says:—

> When carefully examined, I think that all the observations of the learned judges in that case, read with reference to the facts of the case, amount to no more than a decision that mere inability to

(1) L.R. 7 H.L. 158.
(2) L.R. 4 Q.B. 659.
(3) 2 W. Bl. 1078.
(4) 6 B. & C. 31.

make a good title does not, of itself, bring a vendor within the rule laid down in *Flureau* v. *Thornhill*(1) as to damages; but that it depends upon the nature of the contract, and also upon the reasons for the inability, whether he can avail himself of that rule: and that in such a case as that of *Hopkins* v. *Grazebrook*(2) a vendor was not within the rule. * * * In my opinion the judgments are to be read as only containing some of the reasons for holding that whether *Flureau* v. *Thornhill*(1) was correctly decided or not, it certainly was no authority for the proposition that under all circumstances, and whatever the cause of the default, a vendor unable to make a good title should have a right to break his contract, subject to a certain limited amount of damages.

In Mayne on Damages (8 ed.), p. 245, we read:—

It has also been held that the rule in *Flureau* v. *Thornhill*(1) does not apply in cases where the agreement shews upon its face that the vendor has not as yet got and, therefore, possibly may never get the title which he undertakes to convey; yet he expressly undertakes at once, or on a given date, to put the purchaser in possession; and the purchaser, in consideration of such agreement, undertakes to do, and does, something which cannot be undone, and which is of permanent benefit to the vendor; for the very nature of the undertaking, on both sides, shews that it is not dependent on the contingency of a good title being made out. In such a case damages for breach of agreement will not be merely nominal. The purchaser will be entitled, under the general rule of common law, to such a pecuniary amount as is the difference between the present state of things, and what it would have been if the contract had been duly carried out.

A case in support of this is *Wall* v. *City of London Real Property Co.*(3).

Now what is the contract in this case? The respondent leases to the appellant for ten years at $1,000 a year with onerous covenants by the lessee; it is agreed that the lessee shall at the expiration of the term have the option to purchase for $22,000, the lessor covenanting to execute a good and sufficient deed in fee simple; in case the lessee fails to exercise the option to purchase it may have a renewal of the

(1) 2 W. Bl. 1078. (2) 6 B. & C. 31.
(3) L.R. 9 Q.B. 249.

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lease for a further ten years; the lessee agrees to build a dock at a cost of at least $6,000 to become the property of the lessor unless the lessee purchases.

The lessee has not only fulfilled all the agreements in the lease and done everything requisite to obtain a conveyance in fee simple, but has expended further large sums in improvement of the property, of course, in anticipation of becoming the owner at the expiration of the lease.

Is it not obvious that the damages sustained by the appellant by reason of the failure of the respondent to implement his agreement are altogether special and by no means such loss of a bargain as alone is contemplated by the rule in *Flureau* v. *Thornhill*(1) ?

I think it is impossible to hold that such an agreement is to be governed by an admittedly anomalous rule of law in England, one based on reasons which may have little application here; presupposing entirely different conditions and intended to have application not to any damage sustained by the purchaser, but solely to the possible loss of his prospective profit on a resale of the property.

It cannot, I think, be necessary to treat this very special rule as absolutely inflexible regardless of all attendant conditions. I am not quite able to follow the learned judge of the Appellate Division in what he says as to the anomaly of a purchaser who has elected to take what the vendor can convey recovering damages as well. He states that he has not found any cases in which such damages have been awarded. Inasmuch as the rule provides that no damages can be recovered even if partial performance of the contract

(1) 2 W. Bl. 1078.

is not decreed, this would appear to be only natural since the decision of *Flureau* v. *Thornhill*(1). I think before this time cases might be found. In *Cleaton* v. *Gower*(2), the defendant agreed to lease to the plaintiff for ten years with the right to take out coal and other minerals, and in his defence pleaded that he was only tenant for life and, therefore, he could not execute the agreement because

'tis inconsistent with his power so to do.

The court decreed that Gower should execute his agreement in specie as far as he was capable of doing it, and likewise shall satisfy the plaintiff, such damages as he hath sustained in not enjoying the premises according to the agreement, and seal a lease for ten years, etc.

There is no objection to the court in a proper case decreeing specific performance and also awarding damages. In the head-note in *Phelps* v. *Prothero*(3), we read:—

In a case decided before 21 & 22 Vict., ch. 27, came into operation, *held* that the court has jurisdiction to award damages for the want of a literal performance of a contract of which it directs the specific performance and will in general do so.

Of course the "Chancery Amendment Act," 21 & 22 Vict., ch. 27 ("Lord Cairns' Act") gave express power to the court to award damages either in addition to or in substitution for specific performance.

Then as to the remarks of Chief Justice Meredith concerning the appellants' means of knowledge of the respondent's title. The latter being only tenant for life could, of course, make no demise to endure be-

(1) 2 W. Bl. 1078. (2) Finch 164.
(3) 7 De G. M. & G. 722.

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yond his own life and, therefore, was in no position to make the lease for ten years, still less to covenant for its renewal for a further term of ten years. The lessee could not call for or dispute the lessor's title and until the option to purchase was exercised there was no contract for sale which would have entitled the appellant to call for the title.

The Chief Justice says that the appellant had the same opportunity of knowing what the nature of the respondent's title was as the respondent himself had. I think this must be going too far in any case; the respondent must surely as devisee under the will of his father be credited with better knowledge than the appellant. But in any case such knowledge would have been accidental in this particular case and cannot, I think, affect the principle involved.

That it would have been the more prudent course for the appellant when making the contract to have insisted on immediate preliminary proof of the respondent's title may be admitted and perhaps the company may have to suffer loss in any event as a consequence of not doing so, but that is no reason for relieving the respondent from liability for failure to fulfil his contractual obligations. Chief Justice Meredith says that it may seem a hardship that the rights of the appellants should be limited to the relief to which his judgment holds them entitled. I think myself the appellant would suffer a great wrong in such case and am glad to think that there is no absolute rule of law which deprives them of their remedy.

As regards the damages to which the appellant is entitled I do not know that I can do better than refer to the case above cited of *Wall* v. *City of Lon-*

don Real Property Co.(1). The questions in that case were:—

1st. Whether the plaintiff is entitled to nominal damages only ?
2nd. On what principle the damages are to be assessed ?

And the Court:—

We answer the first question by saying that the plaintiff is not confined to nominal damages only. To the second we answer that the arbitrator must apply the general rule of common law, and ascertain as well as he can what the pecuniary amount is of the difference between the present state of things and what it would have been if the contract had been performed and the plaintiff had got a title.

The only difference in the present case is that the Master must ascertain as well as he can what is the pecuniary amount of the difference between the state of things as it will be under the limited estate which the appellant takes in accordance with the judgment and what it would have been if the contract had been performed.

I would allow the appeal with costs.

DAVIES J. (dissenting).—The question in this case to be determined is whether the facts bring it within the rule of law laid down in *Bain* v. *Fothergill*(2), that if a vendor of land without fraud is incapable of making a good title the intending purchaser is not entitled to recover compensation in damages for the loss of his bargain.

That rule has for many years been adopted as part of their jurisprudence by the Ontario courts and it is not my desire or intention to call that adoption in question.

The question arising in this appeal is not whether

(1) L.R. 9 Q.B. 249. (2) L.R. 7 H.L. 158.

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that rule is in force in Ontario, but whether the facts of this case bring it within the rule.

I understand a majority of the court holds that the rule applies and I desire to state very shortly my reasons for dissenting.

In the case of *Day* v. *Singleton* (1) the Court of Appeal held that:—

> A purchaser of leasehold property which the vendor cannot assign without a licence from his lessor, is entitled to damages (beyond return of the deposit, with interest and expenses) for loss of his bargain by reason of the vendor's omission to do his best to procure such licence.

In delivering the judgment of the court, Lord Lindley M.R. said, p. 328:—

> Singleton never asked the lessors to accept Day as their tenant without a bar and consequently it would be for him, Singleton, to shew that if he had asked them they would have refused.

Now, in the present case, it is contended that when the respondent Montreuil ascertained that he could not give the Ontario Asphalt Company a good title and that he had only a life estate, the remainder being in his children, it became his duty as between him and the Asphalt Company with whom he had covenanted to give a good title to do all that lay in his power to enable him to carry out his contract and to shew that he had applied to his children to join with him in conveying to the Asphalt Company and that they had refused to do so.

There was evidence that they did join with him upon request in the conveyance of other portions of the same property, but no evidence that he had applied to them to do so with respect to the property in dispute.

(1) [1899] 2 Ch. 320.

I confess I was much struck with this argument. If it was Montreuil's duty "to do all that lay in his power" to give appellants a good title, then it seems reasonable to say that it would be part of his duty to the Asphalt Company under the peculiar facts of this case to try and obtain the signature of his children to the deed and so complete his contracts with them. *Lehmann* v. *McArthur*(1), at pp. 500 and 503; *Williams* v. *Glenton*(2), at pp. 208-9, and *Godwin* v. *Francis*(3), at p. 306.

I do not desire, however, to rest my judgment upon that ground, but rather upon the ground that the special facts of this case and the special terms of the lease to the company with the option of purchase at the end of the term of ten years, provided six months' notice of the lessee's intention to purchase was given, together with the covenant on the lessor, Montreuil's part to convey a good title in fee simple, and a covenant from the lessee to build a dock on the demised premises within a year from the granting of the lease at a cost of *at least* $6,000, which dock was to become the property of the lessor at the end of the demised term, unless the lessee purchased under his option, all combine to convince me that this is not a case in which the rule in *Bain* v. *Fothergill*(4) should be applied, but rather one in which on the neglect, refusal or inability of the lessor to comply with his covenant to give a good title free from incumbrance substantial damages should be awarded.

The evidence shewed that the company had after entering upon the lands under the lease erected an

(1) 3 Ch. App. 496.
(2) 1 Ch. App. 200.
(3) L.R. 5 C.P. 295.
(4) L.R. 7 H.L. 158.

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expensive manufacturing plant and docks partly on the leased upland and partly on the water lot in front of it as to which latter lot Montreuil had obtained a grant from the Crown, the whole expenditure aggregating $200,000, besides yearly betterments and improvements. A part of this expenditure at least was made in pursuance of respondent's covenant in the lease to expend at least $6,000 in dock construction.

The Appellate Division, reversing the trial judge, who had decreed specific performance and an abatement in the price amounting to substantial damages the latter to be determined on a reference, directed that the abatement in the purchase money should be based upon the value of the interest in the lands which the defendant could convey, having regard to the "purchase price" of the whole and refusing other damages beyond the abatement.

I cannot accede to the principle on which the Appellate Court has directed the abatement, basing it upon the stipulated purchase price and limiting it to that while ignoring the expenditure which as part of the consideration for the granting of the lease the lessees covenanted to make in building a dock on the lands.

This expenditure, the minimum amount of which was placed at $6,000 and the maximum of which might reach $60,000 or more, was really and substantially as much a part of the purchase price as the $22,000 mentioned and has just as much right to be considered in determining what abatement should be made as the latter sum.

But over and beyond that I do not think the case

is one within the principle of *Bain* v. *Fothergill*(1), nor that substantial damages should be denied the vendee. That principle is as Lindley M.R. says in *Day* v. *Singleton*(2),

> an anomalous rule based upon and justified by difficulties in shewing a good title to real property in this country, *but one which ought not to be extended in cases to which the reasons on which it is based do not apply.*

Now, I take it that one of the reasons on which the rule is based is that it is not within the contemplation of both parties in the ordinary case of a contract for sale of land, that if the vendor is incapable of making a good title the intending purchaser is to receive compensation for the loss of his bargain beyond the expenses he has incurred.

But if there are special facts in the case shewing that it was and must have been in contemplation of both parties that failure on the part of the vendor to carry out his covenant to

> execute and deliver to the purchaser a good and sufficient deed in fee simple of the land

must inevitably cause the intending purchaser great damage, as was the case here; and if, in addition, the purchaser has bound himself on the faith of this covenant to expend very large sums of money on dock and other improvements as the purchaser did here, then I say in the event of the vendor failing to give the good title he covenanted to give, the common law rule as to damages for breach of contract applies and the "anomalous rule" laid down in *Bain* v. *Fothergill*(1), relating to ordinary contracts between vendor and vendee with respect to the sale of lands does not apply.

(1) L.R. 7 H.L. 158. (2) [1899] 2 Ch. 320.

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I do not contend that any damages can be recovered in respect of anything that the purchaser did or incurred after he discovered the defect in the title; I limit my observations to those incurred by him before such discovery.

For these reasons, I would allow the appeal.

IDINGTON J.—I think the judgment appealed from is right for the reasons assigned in support thereof by the learned Chief Justice for Ontario.

The case seems a hard one, but that is no reason for our adopting bad law and disturbing the minds of those who prefer that well-settled law should be upheld.

In truth we are asked to assess damages besides giving such relief in way of specific performance as can be given.

Assuming for argument's sake damages recoverable at all in such a case (which I do not admit) the basis therefor must be proved as in any other claim for damages. It is not enough to rouse mere suspicion.

The respondent was a witness and counsel for appellant refrained from asking him a single question, much less anything tending to shew he had acted in bad faith or failed in any regard to do what his contract bound him to do. It can only be in such a case as shews a failure of duty on a defendant's part that damages would be assessable even if all questions relative to specific performance were out of the case. The circumstances relied on do not supply such proof as required.

The appeal should be dismissed with costs.

DUFF J.—I concur in the judgment of the court dismissing the appeal.

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ANGLIN J.—Admitting the applicability of the rule laid down in *Bain* v. *Fothergill*(1), to the original option in this case, the appellants have sought to bring it within the qualification upon that rule recognized in *Day* v. *Singleton*(2). But in the latter case the Court of Appeal, as the judgment of Lord Lindley shews (p. 328), took the view that the correspondence between Singleton's solicitors and the lessor established that if Singleton (the vendor of the leasehold) did not actually procure the refusal of the lessors' assent to the assignment to Day, he

> certainly made no effort to obtain it * * * as it was his duty to do * * * and it ought to be inferred as against Singleton that the lessors would have accepted Day if Singleton had asked them to do so.

The decision there proceeded upon the fact, held to have been sufficiently proven, that it was within the vendor's power to carry out his contract and that he refused or neglected to take the means available. Here the plaintiffs rely upon the fact that the defendant maintained silence after his inability to make title had become known and they had asked him to obtain confirmation of the option from the remaindermen, the fact that the remaindermen had (under what circumstances, or for what consideration does not appear) confirmed the title of some other grantees of the defendant who were in like plight with the plaintiffs, and the further fact that, in answer to the plaintiff's suit for specific performance, other defences were set up in addition to that of inability to make title. I am quite unable to find in these bald facts—and the plaintiffs have nothing else—enough

(1) L.R. 7 H.L. 175. (2) [1899] 2 Ch. 320.

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to warrant an inference that the defendant after discovery of the defect in his title made no effort to procure the concurrence of the remaindermen; still less do I find enough to warrant the inference that such an effort, if made, would have been successful.

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

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

Appeal dismissed with costs.

Solicitors for the appellants: *Rodd, Wigle & McHugh.*
Solicitors for the respondent: *Kenning & Cleary.*

THE DOME OIL COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

THE ALBERTA DRILLING COMPANY (PLAINTIFFS) ..... } RESPONDENTS.

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*Oct. 25.
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*Feb. 1.

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

Mining company—Corporate powers—"Digging for minerals"—Drilling oil wells—Carrying on operations—Becoming contractors for such works.

A mining company incorporated under the "Companies Ordinance," ch. 61, N.-W. Terr. Con. Ord., 1905, and certified, according to section 16 of the ordinance, to have limited liability under the provisions of section 63 thereof, has, in virtue of the authority given to such companies by section 63*a* "to dig for * * * minerals * * * whether belonging to the company or not," power to drill wells for mineral oils on its own property and also to carry on similar work as a contractor on lands belonging to other persons. Idington and Duff JJ. dissented.

Per curiam.—Rock oil is a "mineral" within the meaning of section 63 of the "Companies Ordinance."

Per Duff J.—Drilling for oil is not a mining operation within the contemplation of sections 63 and 63*a* of the "Companies Ordinance."

Judgment appealed from (8 West. W.R. 996) affirmed, Idington and Duff JJ. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta(1), affirming the judgment of Hyndman J., at the trial, by which the plaintiffs' action was maintained with costs.

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

(1) 8 West. W.R. 996.

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The issues raised on the appeal are stated in the judgments now reported.

Geo. H. Ross K.C. for the appellants.

A. H. Clarke K.C. for the respondents.

THE CHIEF JUSTICE.—I am of opinion that the judgment in this case which was unanimously approved by the judges of the Alberta appeal court is right. I agree with Chief Justice Harvey that

there is ample evidence for thinking that the seizure was not honestly made.

The only question calling for remark is the defence that the contract was *ultra vires* of the respondents. The powers given to companies by section 63*a* of the "Companies Ordinance" include power

(2) to dig for * * * minerals * * * *whether belonging to the company or not.*

The words "to dig for" may not in the popular sense appear very apt to describe the process of boring an oil well of some thousands of feet deep, but the words as used must clearly receive a wide and special interpretation as they would be understood by those concerned with mining. Obviously you cannot obtain the mineral oil by digging with a spade, as the literal meaning might perhaps suggest, but the same is also true as regards all other minerals for mining which modern machinery is employed. It could hardly be suggested that under this power the company is not entitled to bore for oil on its own property. The words, I think, cover any process by which the earth is broken into for the extraction of the minerals.

Chief Justice Harvey says that

one of the objects of the company is to bore for oil as a contractor.

He concludes assuming that if the company is not one which comes within section 63 it is incorporated under section 16 and if the certificate of incorporation states that it is within section 63 it is in error to that extent, but no farther.

The object as stated by the Chief Justice does not appear in so many words in the memorandum of association which, however, does contain the same power as the above quoted paragraph (2) of section 63*a* of the Act.

I am of opinion that the company is limited under section 63, but has power under section 63*a* to enter into the contract.

The appeal should be dismissed with costs.

IDINGTON J. (dissenting).—The respondent company entered into a contract with the appellant to drill two wells on the latter's holdings at such places as it might select to a total depth of 2,500 feet each or, upon its request, to drill 500 feet further; to furnish engine, boiler and fuel, camp, provisions, lumber, labour and all tools and supplies necessary to do the work subject to provisions thereinafter contained; upon the completion of each well to clean out and properly cap same; to extinguish any fire resulting through negligence of the respondent or its servants or agents; to use the best materials and labour available; to proceed continuously in a workmanlike manner; to have in charge of the work during continuance thereof competent drillers; in certain events specified, rendering work abortive, at respondent's expense to set the equipment over to a place to be selected by appellant, and drill, free of cost to it, a hole of same size and depth; to insure against accident each and

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every one of the men employed in said work, in a sum sufficient to cover any damages, and indemnify appellant; to remove from the well all casing therein not required by appellant to be left there; to procure the strata drilled and keep a log of drilling; and not to open same to inspection by any person other than appellants, or give information as to the work to any one else.

Such is a fair general outline of what the respondent undertook and for which it was to get $8.50 per foot, and beyond the specified 2,500 feet $10 per foot.

There are a number of other things agreed to on each side providing for varying and various contingencies in the course of executing the contract or stopping its further prosecution. The parties disagreed, and the appellant took possession of the respondent's plant and dismissed the respondent from the further prosecution of the work. The respondent sued the appellant therefor. The latter set up, amongst other defences, that the contract so entered into was *ultra vires* the respondent company.

The courts below overruled this as well as other defences and entered judgment for respondent.

I incline to think, in all other regards than that relative to the question of *ultra vires*, that the court of appeal was right, but the opinion I have formed relative to this question renders it unnecessary I should form or express any definite opinion as to the other defences.

The opinion of Chief Justice Harvey, concurred in by the other members of the court, contains the following:—

> I am of opinion that it is not necessary to determine whether this company is one which comes within the terms of section 63 or not.

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for it is not by virtue of section 63 that it is incorporated. It is incorporated as any other company under the general provisions of the Ordinance. There is no doubt that its object comes within the legislative authority of the province and that, therefore, it may be duly incorporated under the Ordinance. If the certificate of incorporation which, as section 63 says, is issued under section 16 and not under section 63, states that the liability of the company is specially limited under that section when the company is in fact one that does not come within the terms of that section and whose liability, therefore, is not limited under that section, the certificate is in error to that extent, but not necessarily any farther. The company is incorporated because it has complied with the provisions of the Ordinance and obtained a certificate of incorporation and has the powers necessarily incident to a company with its object. One of the objects of the plaintiff is to bore for oil as a contractor.

Clearly, therefore, this contract is within its powers. Section 3 is for the express purpose of limiting the liability of the members. The question of liability does not arise here and it is, therefore, unnecessary to decide whether the company is within section 63 or not.

This extract contains, I think, a fair presentation of the point of view taken by the court of appeal in which I was at first inclined to agree as, possibly, the correct construction of a statute with which I was not familiar.

I find, however, on an examination of the provisions of the Alberta ordinance, known as the "Companies Ordinance," under which the respondent became incorporated, if it ever so became, that I cannot agree either in the view so expressed or the reasoning upon which it proceeds. I assume the section 3 referred to in the extract is a clerical error for section 63.

The "Companies Ordinance" provides, by section 5, as follows:—

5. Any three or more persons associated for any lawful purpose to which the authority of the legislature extends, except for the purpose of the construction or operation of railways or of telegraph lines or the business of insurance, except hail-insurance, may by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration

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form an incorporated company with or without limited liability. 1911-12, ch. 4, sec. 4.

If this company had become incorporated under that provision alone and in the memorandum of association had named one of its objects to be that of carrying on the business of a driller or of a contractor for drilling wells or any such apt terms as covering the business involved in the contract in question herein, there could be no question herein of its powers.

It abandoned any such ground when it chose to become incorporated not by that provision alone, but by virtue of entirely different provisions containing a limitation of that general power and expressly restricting the possible objects of the company within the ambit of what sections 63 and 63*a* provide.

Section 63, in the first part, is as follows:—

63. The memorandum of association of a company incorporated or re-incorporated under this Ordinance, the objects whereof are restricted to acquiring, managing, developing, working and selling mines, mineral claims and mining properties and petroleum claims and lands and natural gas claims and lands and the winning, getting, treating, refining and marketing of mineral therefrom, may contain a provision that no liability beyond the amount actually paid upon shares and stocks in such company by the subscribers thereto or holders thereof shall attach to such subscriber or holder; and the certificate of incorporation issued under section 16 of this Ordinance shall state that the company is specially limited under this section. 1901, ch. 20, sec. 63; 1914, ch. 10, secs. 10, 11.

The memorandum of association certified by the registrar is in the case, but I do not find therein the certificate of incorporation.

The memorandum, by clause (*c*) thereof, states as follows:—

(*c*) The liability of the members is specially limited under section 63, C.O., 1901, ch. 20.

The resolutions contained in "Table A" are excluded. The name and description of the company at

the head of the memorandum indicate it falls, and was intended to fall, under section 63.

The objects specified therein are copied from the twelve objects specified in section 63*a* with one or two omissions in way of clerical errors, I think, in copying No. 1 thereof; and, in addition to No. 3 of the words

especially to refine oil and the by-products of petroleum.

This addition cannot help here and the omitted words in No. 1 rather weaken, if anything, the company's position herein.

Then, these statutory objects are followed by five others which, in my opinion, in no way help, even if operative at all, the respondent in relation to what is involved herein. I shall presently set out these and deal with them in detail.

I am quite clear that the whole purpose of the incorporation was to conform with the provisions of sections 63 and 63*a* in order to get the benefits thereof. The added objects must, therefore, be treated as null so far as, if at all, in conflict with the twelve objects specified in the section 63*a*.

If authority is needed for this proposition, see the somewhat analogous cases of *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate*(1); *Payne* v. *The Cork Co.*(2); where the articles of association were so attempted to be changed as thereby to conflict with or vary the statutory provisions protecting shareholders.

Can any one read the contract in question herein and realize what the respondent was trying to do

(1) [1899] 2 Ch. 80. (2) (1900) 1 Ch. 308.

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thereby and compare it with the evident scope and purpose of the entire section 63*a* without feeling that the respondent in embarking upon the business of a contractor for drilling wells for others was attempting something never contemplated as within the objects defined in that section.

Let us read section 63*a* which prohibits the use of greater powers as follows:—

> 63*a*. Every company, the objects whereof are restricted as aforesaid, shall be deemed to have the following but, except as in this Ordinance otherwise expressed, no greater powers, that is to say * * *.

Surely the language of these sections 63 and 63*a* exclude the possibility of anything else except the twelve specified objects which follow being *intra vires* the respondent's corporate powers.

The expression "except as in this ordinance otherwise expressed" is not, perhaps, all that it might have been, but clearly was intended to reserve to the company only such other powers as consistent with the existence of a corporate creation with limited objects to be pursued, and liability for the shareholders. Certainly other objects of pursuit were not intended to be reserved by this exception.

Then, do these twelve specified objects cover the business of a contractor for hire, drilling upon the lands of others? The keynote of the whole series is found in the first, which reads as follows:—

> 1. To obtain by purchase, lease, hire, discovery, location, or otherwise, and hold within the province, mines, mineral claims, mineral leases, prospects, mining lands and mining rights of every description, and to work, develop, operate and turn the same to account and to sell or otherwise dispose of the same or any of them, or any interest therein.

It is a proprietary company that is contemplated thereby.

True, when it comes to the business of smelting it may have to deal with the minerals of others and that is provided for. And, in relation to such like work or that done by its vessels, it can take compensation for work done.

From beginning to end of the section there is only the very inapt expression "to dig for" that can by any straining of the language be made to fit what this contract involves.

It is a mining company, as the Act elsewhere expresses it, that is had in view, not a drilling company or contracting company, that is intended to be given these special powers.

The following passage condensed from judicial opinions, and appearing on page 9 of Buckley on Joint Stock Companies (9 ed.), in which I parenthetically incorporate his foot-note references, may be safely taken as our guide.

The memorandum of association of the company is its charter, and defines the limitation of its powers (*per* Cairns L.C., *Ashbury Co.* v. *Riche*(1), and the destination of its capital (*Guinness* v. *Land Corporation of Ireland*(2)). A statutory corporation created by Act of Parliament for a particular purpose is limited as to all its powers by the purposes of its incorporation as defined by that Act. The memorandum of association is under this Act the fundamental and (except in certain specified particulars) the unalterable law of companies incorporated by virtue of it. (*Per* Lord Selborne(3).)

But the doctrine that any act *ultra vires* the memorandum is void is to be applied reasonably. Anything fairly incidental to the company's objects as defined is not (unless expressly prohibited) to be held as *ultra vires* (*Attorney-General* v. *Great Eastern Railway Co.* (4); *London and North Western Railway Co.* v. *Price*(5); *Foster* v. *London, Chatham and Dover Railway Co.*(6); *Attorney-General* v.

(1) L.R. 7 H.L. 668.
(2) 22 Ch. D. 349.
(3) L.R. 7 H.L. 693.
(4) 11 Ch. D. 449, 480; 5 App. Cas. 473.
(5) 11 Q.B.D. 485.
(6) [1895] 1 Q.B. 711.

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London County Council(1); *Attorney-General* v. *North Eastern Railway Co.*(2); *Attorney-General* v. *Mersey Railway Co.*(3). * * *

A contract made by the directors upon a matter not included in the memorandum is *ultra vires* of the company and, therefore, of the directors. It is not binding on the company, and cannot be rendered binding even by the assent of every individual shareholder. (*Ashbury Co.* v. *Riche*(4); *Wenlock* v. *River Dee Co.*(5).

The cases cited in support of these respective propositions amply bear them out.

The application of these authorities to the case in hand deserves some attentive care.

The learned Chief Justice of the court of appeal says

one of the objects of the plaintiff is to bore for oil as a contractor.

I have read many times the objects as set forth in the memorandum of association to find what the court rests that upon. There is nothing of that kind expressed therein in so many words, and I assume it is an inference drawn from what does appear that is relied on.

With great respect I submit the inference is not well founded.

There is clearly contemplated in object No. 5 a conditional dealing, and in objects Nos. 8 and 9 a dealing with other companies. These, however, are far from being in the way of contracting to drill wells for others.

I can, however, conceive in the manifold complications which might arise out of or incidental to such dealings, a need of power to contract for the drilling of a well.

(1) (1901) 1 Ch. 781; (1902) A.C. 165.
(2) (1906) 2 Ch. 675.
(3) (1907) 1 Ch. 81; (1907) A.C. 415.
(4) L.R. 7 H.L. 653.
(5) 36 Ch. D. 675*n*.

In the execution of such a purpose it might be fairly argued that it fell within the principle of what was involved in the cases of *The Attorney-General* v. *The Great Eastern Railway Co.*(1), or *London and North Western Railway Co.* v. *Price & Son*(2), or *Foster* v. *London, Chatham and Dover Railway Co.*(3), or *Attorney-General* v. *The North Eastern Railway Co.*(4), cited above.

But all these and analogous cases are very far from covering what is involved in this case and is broadly put as a right to bore for oil as a contractor.

All such incidental powers have to be interpreted reasonably. This case goes, in my opinion, far beyond what was held, for example, in the case of *London County Council* v. *The Attorney-General*(5), or the case of *The Attorney-General* v. *Mersey Railway Co.*(6) cited above.

Numerous other cases are to be found drawing the distinction as to what is reasonably incidental. None I have been able to find reach as far as needed to support the respondent in this case.

One difficulty in finding authority directly bearing upon this case is the anomalous nature of the power given to create such a corporation as was, evidently, had in view in the amendment brought into the "Companies Ordinance" which is an Act founded upon and largely copied from the English "Companies' Act," but which has no provision exactly like this amendment.

(1) 11 Ch. D. 449, at p. 480; 5 App. Cas. 473.
(2) 11 Q.B.D. 485.
(3) (1895) 1 Q.B. 711.
(4) [1906] 2 Ch. 675.
(5) (1901) 1 Ch. 781; (1902) A.C. 165.
(6) (1907) 1 Ch. 81; (1907) A.C. 415.

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It evidently stands by itself and must be treated as an attempt to enable the creation of corporations with the objects specified in 63(*a*) and not going beyond them.

The court of appeal suggests the company is incorporated by virtue of the Act and the limitations of section 63 only affect the liability of the shareholders. I submit every company that is incorporated by virtue of such Acts as this is only incorporated for the objects set out in its memorandum of association, and as above authorities shew, cannot do any act as a corporation which goes beyond the scope and purposes of the expressed objects for which it has been incorporated, or that fairly incidental thereto.

If there is any room for misapprehension in this regard, besides what I have already said, and am about to say, I would call attention to the language of the 2nd sub-section of section 63, which reads as follows:—

> (2) This amendment (1914, ch. 10, sec. 10(1)) shall apply to all companies heretofore incorporated under section 63 of the "Companies Ordinance." 1914, ch. 10, sec. 10(2).

That shews the legislature assumed, so late as 1914, that the incorporation took place under section 63, and to make that clear amended the Act by section 63(*a*).

The case of *Baroness Wenlock* v. *River Dee Co.*(1), and in appeal reported in the note thereto, pp. 675 *et seq.* (cited by Buckley for the support of his proposition lastly quoted above) furnishes something of value beyond the main point of *ultra vires* in its bearing upon the reliance put in the above extract from the

(1) 36 Ch. D. 674.

judgment from the court of appeal for Alberta upon the certificate of incorporation. In that case the incorporation was by an Act of Parliament for a specific purpose empowering the borrowing upon mortgage of £25,000. It borrowed more; and the power given the Lands Improvement Company (which lent the money) to advance was relied upon and especially by reason of a clause in one of its Acts making the certificate of the Inclosure Commissioners conclusive evidence of a valid charge under the Act.

It was held the certificate could not enlarge the powers of the defendant company and that the statutory validating certificate was of no avail.

It becomes us, therefore, I submit, not to rely upon the registrar's certificate of respondent's incorporation if it was that which he had no right in law to grant.

Assuming for the moment that he presumed to certify otherwise than specially provided for in section 16, generally to the incorporation of a company as if unrestricted in its objects, when the parties were plainly proceeding by the express terms in the memorandum of association for the incorporation of a company limited as to the liability of its members by section 63, then he clearly did that which he had no warrant in law for doing.

There is no provision made for the incorporation of a company having this limited liability, had in view in section 63, with objects beyond those specified in section 63*a*, by the "Companies Ordinance." And if that is to be taken as accomplished in this case, as the court of appeal has apparently taken it, then I have no hesitation in holding that there has been no

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incorporation of the respondent company and the appellant is entitled to succeed.

In such a case we ought to see that the law is not thus abused and to do so should give effect to the statement of defence in that regard and if not sufficiently explicit, leave to amend accordingly should be given as the court below should have done if necessary. As the company sues and in suing asserts its due incorporation, and that is sufficiently denied, there should be no need for amendment.

I am not, however, for my part able to presume that any officer could venture upon giving any such unconditional certificate, but, on the contrary, presume that he gave a certificate in conformity with section 16 of the Act, which shewed the company to be limited in its character and powers by sections 63 and 63*a*.

Lest it may be said, though not so argued before us, that the words (in the second and third lines of section 63) "the objects whereof are restricted to," etc., may render the foregoing reasoning inapplicable because there were five enumerated objects following the statutory twelve, and hence the objects not restricted, I will briefly examine same and indicate what I think the effect thereof.

They are as follows:—

(13) To obtain any provisional order or Act of Parliament for enabling the company to carry any of its objects into effect, or for effecting any modification of the company's constitution or for any purpose which may seem expedient, and to oppose any proceedings or applications which may seem calculated, directly or indirectly, to prejudice the company's interests.

(14) To procure the company to be registered or recognized in any foreign country or place.

(15) To sell, improve, manage, develop, exchange, lease, mort-

gage, dispose of, turn to account, or otherwise deal with all or any part of the property and rights of the company.

(16) To do all or any of the above things as principals, agents, contractors, trustees or otherwise, and by or through trustees, agents or otherwise and either alone or in conjunction with others.

(17) To do all such other things as are incidental or conducive to the attainment of the above objects.

These clearly add nothing to cover the business of a well borer and contractor. They also may be held if reasonably interpreted to add nothing but what might be implied in the foregoing statutory objects, Nos. 1 to 12 inclusive, as incidental thereto.

The first, however, is of the nature of what was held as to the articles of association in the cases cited on pp. 18 and 34 of Hamilton and Parker's Company Law, to be in conflict with the memorandum of association, and hence to be invalid. The same reasoning may render it futile here when the Act is looked at as a whole and its scope and purpose shewn.

If it refers to the Dominion Parliament it certainly seems out of place, and if to the Legislature of Alberta, still more so. The former should not interfere, but the latter can, and the subject matter does not seem to consist of what one would expect to find as the object of a corporation.

No. 14, the second of these, certainly is rather curious in light of the recent discussion so much agitated in the *Companies' Case*(1), and a curious commentary on, or display of ignorance of, all implied therein. Certainly it is otherwise of little use and possibly itself *ultra vires*.

The No. 15 seems also useless in light of the provisions of the statute.

(1) 48 Can. S.C.R. 331.

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Again, however, I submit, if effective to take the company out of the operation of section 63, the result is the company never was incorporated.

There is no place in this statute where the hybrid sort of thing having the combined objects of pursuit resting upon the other incorporating powers and also those in section 63 combined, is provided for.

These criticisms of what the supplementary objects may be worth are in my own view of the statute in a sense beside the question.

Looked at comprehensively and endeavouring to give the statute a reasonable meaning in accord with its scope and purpose, there is provided an incorporating power almost as extensive as the legislature had power to confer, and a procedure to accomplish such results as the power aims at.

Then there is within that a power to incorporate, but only for specific objects named in section 63*a* with unusual powers suitable to the pursuit of such objects, but which the legislature deemed it inexpedient to confer on companies for the pursuit of other objects. If those seeking incorporation desired a general incorporation and did not desire such unusual powers, they could pursue the same objects in the ordinary way and subject to the law governing such methods.

It is left for the parties concerned to declare in their memorandum of association when proceeding to procure incorporation which of those distinctly different kinds of incorporation they wish to obtain.

When they elect to obtain that proffered under section 63, they are limited to the objects named in section 63(*a*), and cannot add others.

If they specified others those others must be

treated as null if in conflict with or expanding the objects so prescribed in section 63(*a*) of the statute.

If we will only apply reasoning analogous to that which Lord Cairns applied in the case of *Ashbury Railway, etc., Co.* v. *Riche*(1), cited above at 670 *et seq.* when he demonstrated the ambit of the memorandum of association to be the dominant factor for consideration and the articles of association in conflict therewith null I submit substituting statute for memorandum of association we may see that the inevitable result is any departure from statute or memorandum of association must be treated as null.

It so happens in my view that the memorandum of association is but an expression of that which is required by the statute as I interpret and construe it, and is required by the statute to be so expressed.

That being so these supplementary objects so called are of no effect, should never have been permitted if at all in conflict with those which preceded it copying the statute. And I am inclined to think they should not have been permitted.

The result of my construction would be, if acted upon here, to deprive respondent of its present judgment, but, if I understand the facts aright, the appellant has taken possession of the respondent's property by virtue of the terms of an *ultra vires* contract.

That contract is, by reason thereof, void, but that fact does not deprive it of its property even if acquired for use in a purpose *ultra vires*. And certainly it did not warrant appellant taking it and despoiling respondent thereof either temporarily or permanently.

(1) L.R. 7 H.L. 653.

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See the cases *Ayres* v. *South Australian Banking Co.*(1), at page 559; and *National Telephone Co.* v. *Constables of St. Peter Port*(2), at page 321. *Cf. Great Eastern Railway Co.* v. *Turner*(3).

I think, therefore, the appeal should be allowed, but under the circumstances without costs, and the judgment below be vacated and judgment rendered for recovery of respondent's property in same plight and condition as when taken, but if that is impossible then there should be a reference to find and report for further consideration bearing upon the question of the property and the damages, if any, done same.

The following cases may, besides those cited above, usefully be referred to:—

Bisgood v. *Henderson's Transvaal Estates*(4); *Attorney-General* v. *Frimley and Farnborough District Water Co.*(5); *In re Crown Bank*(6); *Pedlar* v. *Road Block Gold Mines of India*(7); *Mayor, etc., of Westminster* v. *London and North Western Railway Co.*(8); *Mann* v. *Edinburgh Northern Tramways Co.*(9); *Simpson* v. *Westminster Palace Hotel Co.*(10).

DUFF J. (dissenting).—I have come to the conclusion that the general words of section 63*a* of the "Companies Ordinance" in force in Alberta on the 16th May, 1914 (when the appellant company was incorporated) must be restricted by the application of the principle *noscitur a sociis*. The enactment was borrowed from the statute of British Colum-

(1) L.R. 3 P.C. 548.
(2) [1900] A.C. 317.
(3) 8 Ch. App. 149.
(4) [1908] 1 Ch. 743.
(5) [1908] 1 Ch. 727.
(6) 44 Ch. D. 634.
(7) [1905] 2 Ch. 427.
(8) [1905] A.C. 426.
(9) [1893] A.C. 69.
(10) 8 H.L. Cas. 712.

bia passed in 1897 in circumstances that are well known and with reference to companies carrying on operations which have no relation to exploring for or developing oil wells. The tenor of the enactment as a whole sufficiently indicates this. And, if I were called upon to construe the British Columbia statute, I should not have the slightest hesitation in holding that the Act does not apply to a company carrying on a business of the character which the appellant company appears to have been pursuing.

I am not aware, however, that the question of the scope of the enactment had been passed upon by the courts of British Columbia before its adoption by the Alberta Legislature and the Alberta statute cannot, of course, be construed by reference to the circumstances in which, fifteen years before, the parent enactment was passed. It is stated as a fact, and not disputed, that, at the time the enactment was passed, oil had not been found in Alberta in conditions making the development of oil fields commercially profitable, and that circumstance may be given its proper weight. The ground, however, upon which I rest my construction of the statute is this: The words "mining" and "mineral" are words of very elastic meaning and they are words whose scope has frequently been retricted by the application of the principle *noscitur a sociis*. There is no technical difficulty in the way of so restricting this meaning as to exclude mineral oil and boring for oil; as the general scope of the enactment appears to indicate, with sufficient clearness, that they are not within the contemplation of it. Looking at section 63*a* as a whole, any lawyer experienced in such matters would immediately re-

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cognize that the objects of companies coming within the section are stated in language which is simply that of the common objects' clause in the memorandum of association of a metalliferous mining company. It is not so much from any single phrase or single clause or group of words as from the section as a whole that one draws the inference that such operations as those carried on by the appellant company are outside the contemplation of the section. The restrictive intent, to use the phrase of Holmes J., "breathes from the pores" of the enactment.

The question of substance is whether the judgment of the court below can be sustained on the ground stated in the reasons given by the learned Chief Justice. With great respect, I cannot accept the view to which the court below has given effect. The memorandum of association, by section 10 of the "Companies Ordinance" of Alberta, (ch. 61, "Consolidated Ordinances,") is a contract between the signers and the company. The dominating clause of the memorandum before us is, very clearly to my mind, clause (*c*) which declares in effect that the objects of the company are restricted to those objects authorized by section 63*a*. Every word of the objects' clause in the memorandum must, therefore, be read subject to the qualification

> providing such objects are authorized by the true construction of section 63(*a*).

The premise is negatived, therefore, upon which the court below proceeds, namely, that the objects stated in the memorandum go beyond the field within which companies governed by section 63*a* are permitted to operate, because whatever might be the meaning of the objects' clause taken by itself it cannot be given such

a construction in view of the explicit declaration that the intent of the memorandum is that it shall not have that effect.

There are two reasons why I think this is the right way of reading the memorandum. In the first place there can be no doubt that what the parties at the time decided to do was to incorporate a company on the "non-personal liability" principle. The signers of the memorandum had their own protection to think of, they had the shareholders, with whom they intended to associate themselves, to think of. The design was to represent the company to the world as a company incorporated on that principle, and I think we must impute to the signers an intention to execute a memorandum having the meaning and effect necessary to bring it within the scope of section 63*a*.

Secondly. Any other view would make the statute a trap.

The amendment of 1914 admittedly cannot be invoked in this action.

The appeal should be allowed with costs.

ANGLIN J.—The appellant asks us to hold that, although it is incorporated under the name—"The Dome Oil Company"—it is nevertheless not within the scope of its powers to seek for and win oil from its property, and that it is likewise *ultra vires* of the respondent, "The Alberta Drilling Company," to undertake a contract to drill for oil on the appellant's lands. Counsel based this contention on the construction which he put on sections 63 and 63*a* of the ordinance of the North-West Territories respecting companies, made applicable to these litigants. He argued that oil is not a mineral within the meaning of

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section 63 and clauses 1 and 2 of section 63*a*, and that drilling for oil is not a process authorized by the latter clauses. In my opinion the construction contended for is too narrow. Rock oil is admittedly a mineral within definitions of that word well established and generally accepted. It was something well known as a mineral when the legislation under consideration was passed. There is nothing in the record to justify a finding, such as was made in the *Farquharson Case*(1), relied on by the appellant, that petroleum was not included in the sense in which the word "mineral" was used in the vernacular of the mining world and the commercial world at the date of the instrument under construction.

No sufficient reason has been advanced for excluding it from the purview of sections 63 and 63*a*. The word "minerals" in a statute bears its widest signification unless the context or the nature of the case requires it to be given a restricted meaning. *Lord Provost and Magistrates of Glasgow* v. *Farie*(2), at pages 690, 693; *Hext* v. *Gill*(3), at page 712; *Earl of Jersey* v. *Guardians of the Poor of Neath Poor Law Union*(4); *Ontario Natural Gas Co.* v. *Gosfield*(5). Here the use of the word "minerals" in juxtaposition with, but in contrast to, "metallic substances" affords a strong reason for giving to the former its widest meaning. Why should Parliament in enacting legislation dealing with minerals and mining matters be taken to have used the term "min-

(1) 22 O.L.R. 319; 25 O.L.R. 93; [1912] A.C. 864.
(2) 13 App. Cas. 657.
(3) 7 Ch. App. 699.
(4) 22 Q.B.D. 555.
(5) 19 O.R. 591; 18 Ont. App. R. 626.

erals" subject to a restriction which it has not expressed ?

The word "drilling" is not found in the statute, but an authorized purpose of incorporation under clause 1 of section 63*a* is the winning or getting of mineral from the earth, and under clause 2 "digging for" and "raising" are means expressly authorized, and sufficiently comprehensive, I think, to include drilling, which is a method of digging for, with a view to raising oil.

It may be that the incorporation of a company subject to the provisions of section 63 upon a memorandum expressing wider purposes, but with the intent of confining its operations to the undertaking of drilling contracts upon properties not its own would be such a fraud on the statute as would justify the revocation of the incorporation. But fraud on the statute has not been suggested.

I think it would be very dangerous to hold, as appears to be suggested in the judgment of the Appellate Division, that merely because some of the purposes and powers of a company expressly incorporated subjects to sections 63 and 63*a* happen to exceed what those provisions contemplate, its shareholders are to be denied the protection which section 63 affords and that section and section 63*a* are to be deemed inapplicable to it. I rather think the effect of section 63*a* is to restrict the powers of such a company within the limits which it prescribes notwithstanding any wider language used in the memorandum of association.

Mr. Ross next contended that if the respondent company had power itself to seek for and obtain oil,

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it had not the power to undertake to do so for another person or company. That again, in my opinion, is too narrow a construction and ignores the provisions of clause 2 of section 63(*a*) which extend to minerals, etc., "whether belonging to the company or not," of clause 3, which authorize the carrying on of the business of mining, "in all or any of its branches," and of clause 8, which provide for co-operation, etc.

I am unable to assent to the argument that the existence of a debt by the respondent company for a portion of the purchase price of machinery placed by them on the appellant's lands—a purely personal obligation—constituted a breach of their covenant to place their machinery, etc., on the appellant's premises "free of debt and of all and every lien and incumbrance." There was no lien or incumbrance charged upon the respondent's machinery; it was free of debt; a mere personal debt not creating a charge was, in my opinion, not within the scope of the covenant.

I have found no reason to differ from the conclusion of the provincial courts that there had been no other default on the part of the respondent which would entitle the appellant company to seize under clause 10 of the contract.

The plaintiff's recovery of $5,000 was, I think, warranted, under clause 3 of the contract. The fact that the appellant had committed a wrongful breach of contract cannot, in the absence of an acceptance by the respondent of the breach as a termination of the contract, afford an answer to the appellant's absolute and unqualified undertaking that upon the respondents doing certain things (which they did) it would pay to them a fixed sum of money. The $250 allowed

as damages for the wrongful seizure is not complained of.

I would, for these reasons, dismiss this appeal with costs.

BRODEUR J.—The illegality of the seizure of the plant depended on questions of fact which have been found against the appellant company by the courts below. That finding was absolutely justified by the evidence and we must then decide that the seizure was illegal.

Brodeur J.

The appellants have to pay to the respondents damages for having stopped the work and for having, through that illegal seizure, prevented the respondents from carrying out their contract. The amount granted by the trial judge is perhaps calculated on a wrong basis, but the evidence justifies the amount which has been awarded.

The appellant now contends that the contract in question was *ultra vires* the appellant and the respondent companies. Those two companies were incorporated under the provisions of chapter 20 of the Ordinances of the North-West Territories of 1901 and of the amendments made thereto by the Legislature of Alberta.

It is not disputed that appellant and respondent companies could be legally formed under the provisions of that law for carrying out the oil operations for which they were respectively organized. But as their liability is limited by the mining sections of the Act, the appellants claim that the statute never contemplated including oil as a mineral substance. They rely mostly upon the judgment rendered by the Privy

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Council in the case of *Barnard-Argue-Roth-Stearns Oil and Gas Co.* v. *Farquharson*(1).

In that case, the Privy Council, in construing a deed of 1867 which reserved to the grantor mines and minerals, decided that natural gas was not included in that reservation, because

> at the date of the deed, natural gas had no commercial value and the parties thereto had no intention to except it as being a mine or mineral.

The section 63*a* we have to construe in this case was passed by the Legislature of Alberta at a time when the oil wells of that province were being exploited on a very large scale and it is to be presumed that the legislation was passed with a view of facilitating the development of that mining industry. In applying the principles laid down by the Privy Council in the above case, we must come to the conclusion that the legislature intended to include in the mining companies those dealing with rock oil.

Rock oil in its popular and scientific meaning is a mineral substance. Mineral bodies occur in three physical conditions, solid, liquid and gas; and although the term "mineral" is more frequently applied to substances containing metals, rock oil and petroleum are embraced in that term.

United States v. *Buffalo Natural Gas Fuel Co.*(2); *Ontario Natural Gas Co.* v. *Gosfield*(3), at pages 626-631.

I have come to the conclusion that the companies

(1) [1912] A.C. 864.
(2) 78 Fed. R. 110.
(3) 18 Ont. App. R. 626.

could properly enter into the contract sued on and that the obligations assumed by them can be enforced.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Short, Ross, Selwood, Shaw & Mayhood.*

Solicitors for the respondents: *Gilchrist & O'Rourke.*

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NORTH-WEST THEATRE COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

JAMES A. MACKINNON (DEFENDANT) ..... } RESPONDENT.

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

Construction of statute—Alberta "Assignments Act"—Assignment for benefit of creditors—Occupation of leased premises—Liability of official assignee.

The Alberta "Assignments Act," as amended by the Alberta statutes, ch. 4, sec. 14 of 1909 and ch. 2, sec. 12 of 1912, provides that assignments for the general benefit of creditors must be made to an official assignee appointed under the Act and that the assignment shall vest in such assignee all the assignor's real and personal property, credits and effects which may be seized and sold under execution. The lessee of premises held under a lease from the plaintiffs made an assignment to the defendant who took possession thereof and, on threat of distress, agreed that he would guarantee the rent so long as he remained in occupation. After three months, the defendant quitted the premises and notified the landlord that he would no longer be responsible for or pay the rent. In an action for breach of the covenants of the lease and to recover the rent accruing to the end of the term:

Held, reversing the judgment appealed from (8 Alta. L.R. 226), Idington and Brodeur JJ. dissenting, that by the effect of the assignment and entry into possession the term of the lease passed to the official assignee who, thereupon, became liable for the whole of the rent accruing for the remainder of the term.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta(1), reversing the judgment of Ives J., at the trial(2), and dismissing the plaintiffs' action with costs.

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

(1) 8 Alta. L.R. 226. (2) 8 West. W.R. 237.

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The circumstances of the case are stated in the head-note.

O. M. Biggar K.C. for the appellants.

J. S. Scrimgeour for the respondent.

THE CHIEF JUSTICE. — This action is brought against the defendant as assignee of a lease to recover damages for alleged breach thereof. It is remarkable, therefore, to find that neither the agreement for the lease nor the assignment thereof is before the court.

I am of opinion that this appeal must be allowed. The respondent is the assignee of the lease. If this had been a profitable holding, he could have disposed of it for the benefit of the estate and I do not understand how, in the absence of statute, the rights of the lessors can be dependent on whether the lease is valuable in the hands of the official assignee or not. The fact that the English bankruptcy laws contain a provision enabling the trustee in bankruptcy to disclaim such a lease points, I apprehend, to the fact that without it the lessor's rights could not be dependent on its being of value to the bankrupt's estate in which case it would be retained by the trustee, or unprofitable when it would be disclaimed and the loss fall upon the lessor. It is, however, unnecessary to consider this, as the statute in the present case contains no such provision.

I am disposed to think that the appellant could have pleaded this quality as official assignee and that his liability would then have been limited to the extent of the assets coming to his hands. This, however, he has not done, but has denied the assignment of the

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lease to him and this issue has been decided against him.

He must, I am afraid, abide by the consequences of a possibly mistaken defence and be held to his liability as assignee of the lease.

The appeal must be allowed with costs.

IDINGTON J. (dissenting).—The question this appeal raises must in the last analysis be whether or not an official assignee who is a public officer obliged by law to accept an assignment under the Alberta "Assignments Act," is bound by the terms of that Act to accept an assignment vesting in him a leasehold of his assignor whereby he inevitably must in such case become personally bound to fulfil the obligations of his assignor the lessee, to pay rent and otherwise.

It is clear law as result of such a tenure that one accepting the assignment thereof is bound by the law governing privity of estate and privity of contract to pay the rent and observe all the covenants running with the land by which his assignor was bound.

It is no answer to the naked question as I put it to say that he is pre-supposed to indemnify himself out of the estate for there may be no other estate than the term or at least no adequate estate out of which he can be so indemnified. Indeed, it may be impossible for him by careful examination to determine the question of fact relative to the existence of the means of indemnification until long after he has discharged his public duty as such official assignee by accepting the assignment.

The question must be resolved by the construction of the Act. And thus presented I think the right interpretation and construction thereof must be that

it never was within the scope and purpose of the Act, which is the distribution equitably of the assignor's estate amongst the creditors, that such a consequence must follow the discharge of duty on the part of the officer as to involve him in undertaking such obligations.

From that must flow the right and often the duty owing to those whom the Act was designed to benefit and protect and give a remedy for obtaining their claims against the debtor who is the assignor, or so much thereof as realizable, to inquire and determine whether or not it is to the advantage of those so concerned to accept the term.

It may be said, though the law denies the right of any one to vest in another against his will any estate tendered him, he usually is supposed to have allowed the vesting to take place by assenting to the grant thereof and that is so signified the moment he accepts an assignment under the Act.

All he in fact signifies is an acceptance of that which the statute contemplates should pass to him and which he is to receive in the way of real and personal estate belonging to the assignor out of which or by means of which the creditors may receive some benefit. The pre-supposition must be that he has vested in him and received only that which he reasonably can accept, no more and no less.

It is clearly the equitable distribution of the estate amongst the creditors, which is had in view, as the whole purpose of the Act.

It is surely not to be assumed that as a result thereof a lessor is to become entitled to receive at the expense of the other creditors full compensation for

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his claim as landlord and they go perhaps entirely bare.

Such a result would be in conflict with not only the purpose of this Act but also in conflict with the law governing what landlords may be entitled to receive in the case of executions against their lessees.

It must not be overlooked that this method of dealing with insolvent estates is, as it were, in substitution for the costly and wasteful system of recovery by executions, in all such cases as the debtor chose to signify his assent thereto.

I think this is one of the cases in which we must interpret and construe the statute by looking at the scope and purpose of the Act rather than at the letter of it which latter if strictly observed might frustrate the former.

Moreover, I think the case is covered by the authority of the cases of *Bourdillon* v. *Dalton*(1), which, it is true, was only a *nisi prius* ruling of Lord Kenyon, but followed in the cases of *Turner* v. *Richardson*(2), and *Copeland* v. *Stephens*(3), decided *en banc* with Lord Ellenborough as Chief Justice. The former of these cases was decided before the "Bankruptcy Act" was so amended as to provide expressly for disclaimer of a lease by the assignee.

The latter was decided after that amendment.

It is to be observed that, in each, Lord Ellenborough did not pretend to make much of the language of the enactments or found any distinction thereon.

The language he uses in the latter case, at pages

(1) 1 Peake N.P. 238; 1 Esp. 233.
(2) 7 East 335.
(3) 1 B. & Ald. 593.

604 and 605, is singularly apposite to what we have in hand here.

His authority can never be lightly set aside and the principle upon which he proceeds would justify us in following his mode of treatment of what an assignment by the commissioners should be held to cover.

It occurred to me since the argument that the cases of the executors or administrators taking like assignment by operation of law might help to illustrate the principle applicable. A casual consideration of the reference thereto in Williams on Executors (10 ed.) page 1389, especially note (*m*), seems to indicate that the executor would not, unless entering and holding possession, incur personal liability.

This case having evidently received careful attention from counsel as well as the court below, and as the illustration I suggest was not put forward by any one, probably further investigation, which I have not time to make, would shew nothing is to be gained therefrom inasmuch as in the end the question must depend upon the construction of the statute with which I need not labour further.

I agree with the inferences drawn and conclusions reached by the court of appeal upon the facts presented in evidence and need not repeat because concurring in same reasoning as adopted there.

I may add that the case of *Linton* v. *Imperial Hotel Co.*(1), relied upon in argument in no way conflicts with the conclusion I reach.

I think the appeal should be dismissed with costs.

DUFF J.—It is difficult to state with precision the questions involved in this appeal without a rather full

(1) 16 Ont. App. R. 337.

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statement of the facts and some reference to the course of the proceedings in the Alberta courts. On the 31st of August, 1914, one C. R. McLachlan was the lessee of certain premises in Edmonton where he carried on a jeweller's business under lease from the owner, the appellant company. On the date mentioned McLachlan made an assignment for the benefit of his creditors, under the "Assignments Act" of Alberta, to the respondent. On the third of September the respondent was informed by the solicitor for the appellant company that if he would undertake as assignee to assure payment of the landlord's rental distress for rent could be avoided. On the 5th the respondent answered, as assignee, saying:—

> I will guarantee your client's claim for rent as long as I continue to occupy the building.

The respondent appears to have placed a man in possession who carried on the business for him until the beginning of December, towards the end of September an agreement having been entered into for a sale of the moveable assets *en bloc* to a firm of wholesale jewellers. About the same time the respondent had a conversation with Mr. Sherry, the president of the appellant company, in which Mr. Sherry was informed by the respondent that the rent would be paid as soon as the sale of the goods should be completed, Mr. Sherry, at the same time, informing the respondent that he intended to hold him as assignee of the lease for the rent during the residue of the term. In November, by arrangement between the respondent and the appellant company, the premises were rented at a rental of $110 a month to the purchaser of the goods, the understanding being that the rights of the appel-

lant company were not to be prejudiced by the lease. On the 6th of November the respondent paid the rent for September, October and November and, on the 4th of December, he notified the appellant that he would not be responsible for any further rent in connection with the McLachlan estate.

The appellant company's case at the trial was that the respondent, having gone into possession as assignee of the lease among other effects of McLachlan, was responsible for the rent as assignee of the lease so long as the lease should continue vested in him. The respondent met this by denying that he was the assignee of the lease or that he had entered into possession of the premises.

There is a suggestion in the statement of defence that the respondent's occupation of the premises consisted merely in putting a man in charge of the goods there belonging to the McLachlan estate and that he was there under some agreement with the appellant company. The evidence, however, seems to shew clearly enough that the object of the arrangement was limited to avoiding a distress; it amounted to nothing more than this, that the appellant company would not distrain on the goods on the undertaking of the respondent to pay the rent so long as he occupied the premises. The learned trial judge found as a fact that the respondent took possession of the estate and entered into possession of the premises on the first of September. In appeal it was held that the assignee was not bound until he had done some act signifying his acceptance of the debtor's interest, that the entry into possession was only for the purpose of taking care of the goods, that the payment for rent was under a

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special agreement made with the lessor and that, consequently, there was no liability.

The first question to determine is whether or not the trial judge was right in finding that what was done by the assignee was a taking possession under the lease. With great respect for the opinion of the court below, I am unable to feel any difficulty on that question. I think the position becomes clear when one looks at it from the point of view of the assignor, the original lessee. As between McLachlan and the respondent, would it be open to the respondent to aver that he had not taken possession of the premises under the lease? Nobody, of course, disputes the fact that the assignment was *primâ facie* sufficient to pass the term. Assuming that the respondent was entitled to disclaim or that something must be done by him to signify his acceptance of the lease, what is the proper interpretation of the respondent's conduct having regard to (let us assume it to have been) the offer by McLachlan, through the assignment, of the lease as one of his assets?

Assuming it to be open to the assignee to treat the instrument under which he took possession of the goods as making an offer as regards the lease which he was at liberty to accept or reject, was it open to him to say, at the end of November, after an occupation of the premises for three months, after payment of the rental during that period, I have not been in occupation under the lease, I have not accepted the lease, your grant of the goods in itself gave me by implication a licence to enter and to remain there until the goods were disposed of and the rental was only paid for the purpose of protecting the goods from distress? I must say, with great respect, that it

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appears to me to be sufficient only to state the proposition. To my mind, at all events, it is very clear that if the assignee intended to occupy other than under the lease he should have so declared in explicit terms before taking possession.

The Appellate Division seems to have proceeded upon the ground that occupation is to be attributed not to the exercise by the assignee of his rights under an assignment of the lease, but to a special arrangement with the landlord. Here the fallacy, with great respect, appears to be this. The landlord could only deal with the right of occupation of the property after cancelling or after a surrender of the lease. There is not a suggestion that there was any cancellation or surrender. The assignee's possession or occupation was, therefore, either wrongful or was an occupation under rights derived from McLachlan. Being capable of an explanation which makes it a rightful possession the assignee could not be heard to say that the possession was intentionally wrongful and in fact wrongful.

But the truth is, as I have indicated above, that nothing which happened between the landlord and the assignee justifies an inference to which effect could be given in a court of law that the assignee's occupation was in fact an occupation having its origin in some special arrangement with the landlord. What may have passed in the mind of the assignee is quite immaterial. One may, if one choose, guess that the assignee had no sufficient knowledge of his position. The assignee's legal position must be determined by what he did and what he did was simply this. He took possession of McLachlan's estate under and by virtue of an instrument which gave him the right to enter upon the premises in question and to occupy them as as-

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signee of a subsisting lease; he did enter and contented himself with making an arrangement with the landlord that the landlord should not distrain if he undertook to pay the rent as long as he occupied the premises. He contented himself with this without a suggestion on his part that he was entering into possession in any other character than that of assignee of the lease. I find nothing here upon which to erect an agreement between the landlord and the assignee amounting to a new tenancy involving either a wrongful possession or a surrender of the term.

In this view it is unnecessary to consider the general rule governing the position of the assignee with reference to the lease at the date when the assignment took effect. I may observe, however, that I am not by any means satisfied that the assignee was entitled to sever the assignment of the lease from the assignment of the stock of goods and treat the assignment of the stock of goods as giving him an implied right to enter upon the premises for the purpose of realizing upon them. It is not by any means to my mind an obvious proposition assuming that in general an assignee under the Alberta "Assignments Act" may elect whether or not he will accept leaseholds included in the estate. It is not by any means an obvious result from that, that where the trader who carries on business in premises occupied under a leasehold makes an assignment, the assignee can be allowed to say, when entering into possession for the purpose of realizing upon the goods, that he is entering under some other right than the right to which he is entitled by the express assignment of the lease. It is, however, not necessary to pass upon that point. I must add further that it is not entirely clear to me that the assignee

under the Alberta "Assignments Act" is entitled to accept part of the property comprised in the assignment and to reject the remainder. It is not necessary to decide the point and I do not pass any opinion upon it, but there is one consideration which I think has, perhaps, been lost sight of. The "Assignments Act" of Alberta is substantially a reproduction of the Ontario statute, as is well known. On being attacked as infringing the exclusive Dominion jurisdiction respecting bankruptcy and insolvency that Act was construed as providing for assignments which are purely voluntary. I think it might be argued not without force that under an assignment by a debtor, which takes effect only as a voluntary assignment and which is an assignment of the whole of the debtor's property, it is not open to the assignee to defeat the debtor's intention by accepting the property in part and rejecting it in part. It may further be observed that there are several respects in which the analogy of the bankruptcy law may be misleading where the system in operation is not a true bankruptcy system.

I think the appeal should be allowed.

ANGLIN J.—By his plea the defendant admits the lease to his assignor sued upon and an assignment to him by the lessee for the benefit of creditors, pursuant to the Alberta "Assignments Act," 1907, ch. 6, as amended by 1909, ch. 4, and 1913 (2nd sess.), ch. 2, sec. 12, of "all the estate and effects," in the words of the Act, "of the (assignor) which might be seized or taken in execution." Under sections 6 and 7 of the "Assignments Act," such an assignment "vests the estate * * * thereby assigned in the assignee therein named," if he be, as he was in this instance, an

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official assignee (section 5). Under this legislation the vesting of the assigned property takes place without any act of acceptance by the assignee. *Titterton* v. *Cooper*(1), at pp. 483, 487, 490. He becomes and, in the absence of a provision for disclaimer such as is found in the English "Bankruptcy Act" of 1869 and in the "Bankrupt Law Consolidation Act" of 1849, he remains liable to the landlord, because of privity of estate with him, for the rent which accrues after the assignment under a lease so vested in him. Of that liability he can relieve himself either by obtaining a release from the landlord, or, as to the future, by putting an end to the privity of estate. *White* v. *Hunt* (2); *Hopkinson* v. *Lovering*(3).

In the present instance the defendant has made no attempt to assign the lease and, although the privity of estate was terminated, *pendente lite,* by the landlord's making a lease to one Logan, that lease was made for the purpose of minimizing any claim that the plaintiffs might have against the defendant, and upon a distinct understanding, assented to by the defendant, that his liability, if any, should not be thereby affected except to the extent of reducing it by crediting him with rent payable by Logan. The case must, therefore, be dealt with on the footing that whatever privity of estate had been established between the assignee and the landlord continued until the expiration of the term.

For the defendant, it is urged, however, that an arrangement was come to between him and the plaintiffs by which they took him as tenant under a new

(1) 9 Q.B.D. 473. (2) L.R. 6 Ex. 32.
(3) 11 Q.B.D. 92.

lease for such period as he should require to occupy the premises in order to dispose of the assets of his assignor, and that they thereby accepted a surrender of, and avoided the lease now sued upon, and released him from liability under it. The judgment in appeal, however, is based on the view that, because of his official position and his inability to refuse the assignment, the defendant had an option to accept or to decline to take the lease in question; and what took place between the parties has been examined by the Appellate Division, not with a view to ascertaining whether it amounted to the making of a new lease involving a surrender of the existing term, but whether it established an election by the defendant to accept the existing lease. The cases relied upon by the learned judge who delivered the opinion of the court appear to have been decided upon the "Bankruptcy Law" as it existed in England under the statute 13 Eliz., ch. 7, which gave the commissioners

power and authority to take by their discretions such order and direction with the property of the bankrupt, etc.

Bourdillon v. *Dalton*(1); *Turner* v. *Richardson*(2), and *Copeland* v. *Stephens*(3), are perhaps the best examples of these authorities. As is pointed out in *Cartwright* v. *Glover*(4), at pp. 626-7, under that legislation "nothing vested until the power was exercised," and cases decided upon it do not apply to an assignment made under a statute which explicitly enacts that such assignment shall vest the property assigned in the assignee, even though he

(1) 1 Peake N.P. 312; 1 Esp. 233.
(2) 7 East 335.
(3) 1 B. & Ald. 593.
(4) 2 Giff. 620.

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should have no discretion to refuse the assignment. *Crofts* v. *Pick*(1); *Doe d. Palmer* v. *Andrews*(2), at p. 355; *Bishop* v. *Trustees of Bedford*(3), at p. 716.

Although the question as to the surrender of the existing lease and the acceptance by the landlord of the defendant as a tenant under a new lease was not as fully dealt with at the trial as could be desired—probably because of the fact, as Mr. Biggar pointed out, that this defence is not explicitly pleaded—I think the proper conclusion from the whole evidence —especially from Mr. Sherry's explicit statement that every time he spoke to the defendant in connection with the rent, he told him that he intended to hold him for the full balance of the lease—is that no such surrender took place, but that the defendant entered and took and held possession under the existing lease. It follows that he became liable for the rent sued for.

The appeal should, therefore, be allowed with costs here and in the Appellate Division, and the judgment of the learned trial judge should be restored.

BRODEUR J. (dissenting).—This is an action by a landlord against an official assignee for rent of premises leased to the insolvent.

The lease was made on the 12th November, 1913, and was for a term of two years. On the 31st of August, 1914, the lessee assigned his estate for the benefit of his creditors under the provisions of the "Assignments Act" of Alberta (ch. 6 (1907)).

The assignee (the respondent) took possession of the premises and on the representations of the less that they were going to distrain for rent due by Mc-

(1) 1 Bing. 354. (2) 4 Bing. 348.
(3) 1 El. & El. 714.

Laughlin unless he undertook, as an assignee, to secure payment of that rent, he answered that he would guarantee to pay the rent so long as he continued to occupy the premises.

Later on, on the 2nd December, 1914, he informed the lessor that he would no longer be responsible because he was leaving the premises.

If it was an assignment under the common law, the case would not offer serious difficulties, because it seems to be well settled that where the assignee enters into possession of the premises without clearly disclaiming the lease he is supposed to accept the lease and to become bound by its covenant.

But it is a proceeding under the "Assignments Act." By the provisions of that Act, the assignee is not a voluntary assignee, but insolvents are bound to make assignments to him of whatever estates they have. If these assignments could be made to anybody else, it may be that the provisions of the common law would still apply and that the assignee could be bound. But the acceptance of the assignment is not voluntary on his part. He has to receive the estate from the hands of the insolvents and everything is vested in him.

He must then proceed to the distribution of the estate according to the best interest of the creditors generally and the fact of claiming against him personally the rent seems to me contrary to the principles of that legislation.

Besides, in this case, the lessor knew very well that he took the property and agreed to pay the rent only so long as he would be in possession. This seems to have been accepted by the appellants, the lessors, be-

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cause they did not carry out their intention of distraining. Then the liability ceased when the possession ceased.

For these reasons I think that the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Woods, Sherry, Collisson & Field.*

Solicitors for the respondent: *Lymburn & Scrimgeour.*

THE CONTINENTAL OIL COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFFS) .. } RESPONDENTS.

1915
*Oct. 28

1916
*Feb. 1.

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

Estoppel—Principal and agent—Receipt delivered before payment.

The local agent of the railway company received the personal cheque of the defendants' agent in settlement of freight charges due by the defendants and thereupon receipted the freight bills. By means of these receipted bills the defendants' agent was enabled to obtain the amount of the freight charges from his employers and absconded, leaving no funds to meet his cheque which was dishonoured. In an action for the recovery of the amount of the freight charges,

Held, reversing the judgment appealed from (8 Alta. L.R. 363), Duff and Brodeur JJ. dissenting, that the delivery of the receipts in advance of payment afforded means of inducing the defendants to pay over the amount represented by them to their agent and, consequently, the plaintiffs were estopped from denying actual receipt of payment of the freight charges.

Per Duff J. dissenting.—In the circumstances disclosed by the evidence in the case the principle of estoppel could not be applied. *Gentles* v. *Canadian Pacific Railway Co.* (14 Ont. L.R. 286), distinguished.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta(1), affirming the judgment of McCarthy J., at the trial, by which the plaintiffs' action was maintained with costs.

The material circumstances of the case are stated in the head-note.

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

(1) 8 Alta. L.R. 363.

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The Chief Justice.

Wallace Nesbitt K.C. for the appellants.

O. M. Biggar K.C. and *George A. Walker* for the respondents.

THE CHIEF JUSTICE.—I agree with the judgment of Chief Justice Harvey in the Alberta Appellate Division and would allow this appeal.

I was myself at first somewhat prejudiced in favour of the respondents by the fact that the appellants suspected their agent's honesty and did not communicate that fact to the respondents. There was, however, no occasion for the appellants to make any such communication. They did not hold their agent out to the respondents as a man to be trusted and were not bound to advertise any doubts they might entertain of his honesty to everyone with whom he had to do business. The action of the respondents would have been improper whether the agent was an honest or dishonest man.

The appellants made very proper and business-like arrangements for the transaction of their affairs at their sales branch at Lethbridge. Not desiring to place a large sum of money at their agent's absolute disposal, they only placed in his hands, from time to time as required, a sum of $100 to meet petty disbursements and arranged that larger payments should be made at the local branch of the Molsons Bank whose drafts for such payments they would accept when forwarded with the receipted bill attached.

Subsequently, at the request of their agent, the appellants wrote the Imperial Bank at Lethbridge that they would honour their agent's drafts when receipted railway bills were attached. I do not think

the arrangements with the two banks differed materially. The appellants may have concluded that their agent had arranged with the Imperial Bank to pay these bills or had paid them himself. It was only material as far as the appellants were concerned that they should have been actually paid and what better evidence could be had of this than the receipted bills.

I do not think it makes much difference whether the respondents gave the receipted bills for a mere personal post-dated cheque of the agent or on his assurance that he would pay the money subsequently. It was clearly not the correct thing to give receipts for the appellants' debts in exchange for a cheque which there was no reason to suppose he was authorized to give and which the respondents knew was of doubtful value as several cheques which he had previously given in similar manner, had been dishonoured. If any loss occurred through such irregularity the respondents must be prepared to accept the consequences of their own action.

The law governing the matter as it is to be gathered from decided cases is, I think, clear.

In the case of *Graves* v. *Key*(1), Lord Chief Justice Tenterden said:—

> A receipt is an *admission* only, and the general rule is, that an admission, though *evidence* against the person who made it and those claiming under him, is not *conclusive* evidence, except as to the person who may have been induced by it to alter his condition; *Straton* v. *Rastal*(2); *Wyatt* v. *Marquis of Hertford*(3); *Heane* v. *Rogers*(4), at p. 586.

In the last mentioned case it was said:—

> There is no doubt but that the express admissions of a party to a suit, or admissions implied from his conduct, are evidence, and

(1) 3 B. & Ad. 313, at p. 318 *n*.
(2) 2 T.R. 366.
(3) 3 East 147.
(4) 9 B. & C. 577.

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strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case the party is estopped from disputing their truth with respect to that person * * * and that transaction.

See also the case of *Irwine* v. *Watson*(1), and *Davison* v. *Donaldson*(2).

It is impossible to suggest that the appellants made payment to their agent otherwise than on the faith of the receipted bills. The appellants were indisputably induced by these to alter their condition and the respondents are, therefore, estopped from disputing them with respect to the appellants.

Chief Justice Harvey refers to the case of *Wyatt* v. *The Marquis of Hertford*(3), in which the plaintiff recovered and says that the facts of that case are not very dissimilar to those of the present. What he means, no doubt, is that they are similar with the difference which, if it had been present in the former case, Lord Ellenborough pointed out would have discharged the defendant. This difference is far more emphasized in the present case for Lord Ellenborough can only suggest

that if it had appeared that the defendant had in the interval (*i.e.*, between the giving by the steward of his cheque and its dishonour) inspected the steward's accounts and had in any manner dealt differently with him on the supposition that his demand had been satisfied as the receipt imported no doubt the defendant would have been discharged.

In the present case it is unquestionable that the defendant paid the draft on them solely on the supposition

(1) 5 Q.B.D. 414. (2) 9 Q.B.D. 623, at p. 626.
(3) 3 East 147.

that the railway bills had been discharged as the receipts imported.

The appeal must be allowed with costs.

IDINGTON J.—I so entirely agree herein with the opinion of Chief Justice Harvey, concurred in by Mr. Justice Scott in the court of appeal, that perhaps I should say no more than express my adoption thereof.

In deference to the argument here, I may, however, point out in addition to what has been so well said that when we are asked, for example, to hold the appellant company more to blame than the other, or that Willison was the agent of the appellant and it responsible for his misconduct, I cannot find in the evidence anything to support such positions.

It seems to me when any one departs so far from ordinary rules of business and common sense as to give any one receipts which he could use as Willison did, the onus rests upon the party so acting to prove, to the hilt, that he had some reasonable ground, known to and furnished by the other party sought to be blamed, for taking such a course.

I have sought in vain in the evidence to find any attempt made to shew anything of the kind, beyond the bare fact that Willison was "a salesman and collector" and that he is described in the statement of defence as "manager" at Lethbridge. What the term "manager" means is unexplained, except by the other phrase "salesman and collector" equally and perhaps still more indefinite.

When any one relies upon the acts of an agent as binding his principal he must shew either that the agent has been directly authorized by his principal, to

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do what is relied upon, or that he has been employed by such party in such capacity as necessarily implies the authority to do so, or held out by the principal in some way as having it. Strangers to the actual terms of an agent's engagement, knowing only what the principal may be reasonably presumed to have recognized, may become entitled to say the agent had been held out as having the ostensible authority of his principal for doing as he did. That is not this case.

We have before us the uncontradicted evidence on behalf of appellant as to what both the actual authority was and recognized course of conduct or dealing was so far as shewn; and nothing therein is shewn to justify respondent in acting as it did.

And when it comes to a description of this alleged agent's capacity, it is about as illuminating as if one tried to hold a municipality, for example, liable for the acts of the manager of the town pump if he presumed to act as tax collector. The term "manager" is applied as descriptive of so many things now, that we must ask in what sense it is used and then we are back to the recognized course of conduct which, so far as the evidence goes, fails herein to help.

I should be inclined to suspect that the agent, Willison, was merely a canvasser for customers to buy oil, and a collector to get in proceeds of such sales and deposit in the bank such proceeds. For his conduct in this latter regard the appellant relied on a fidelity insurance bond.

And as to the specific business out of which this action arises, he had been in fact so fenced in and guarded against, and his authority so limited that it was hard to conceive how, if respondent's agents acted

with ordinary sense, he could have defrauded any one.

As to the method of carrying out this very limited authority, I should have desired to know a great deal more than we are told. For example, we have nothing to guide us as to the ordinary course of handling weekly freight bills. Was the railway agent accustomed to call on such customers to receive payment? Or was the shipper expected to call on the freight agent? Again; why was Willison's own personal cheque ever taken? And above all things why was it taken after it had been once protested, and more than once found no good, and no report made to his employers, especially in light of the terms of the latter granting a weekly credit which ended thus:—

Wish to advise you that Mr. Ogden has granted your company a weekly credit account at this station.

Our weeks close the 7th, 14th, 21st and last day of each month. It is absolutely necessary that payment of your account be made on these days, otherwise, credit will be immediately discontinued.

Yours truly,

S. E. MITCHELL, *Agent.*

This omission to act promptly should have been explained; especially in face of the positive evidence of Wilbert, the secretary-treasurer of appellant, who seems never to have heard of such remarkable conduct as had been carried on by Willison to the knowledge and detriment of respondent, without complaint.

Then Wilbert says:—

Q. How were those to be treated?

A. Our arrangement was with the bills of large amount that the railway company take the freight bills to the bank and get their money and the bank in turn should draw on us. Willison would O.K. the bills, get a draft on us and we would honour the draft provided the freight bills were receipted and in order.

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That implies the agent of respondent was to do what he did not apparently do and the matter rests there.

And the evidence from Long, the respondent's local freight agent, is as follows:—

Q. Have you any instructions from your company to accept personal cheques?

A. I do not think that the company would have any objection so long as the cheque was O.K.

Q. Have you any instructions that would allow you to accept a personal cheque and give receipted bills to a company for their freight?

A. No, we have no instructions to that effect.

Q. You had taken personal cheque from Mr. Willison before?

A. Well, I cannot just say whether his cheque were made out similar to that.

Q. Which were protested?

A. Yes, we had several which were protested.

Q. So that you knew his cheques were not liable to be good?

A. Well, we figured the Continental Oil Co. were good enough when we granted them that weekly credit.

Q. So that you could afford to take personal cheques and sign receipts and turn them over.

A. Well, the receipts were just given in the ordinary way, the same as this cheque here.

Q. But you had several cheques of Mr. Willison's turned down?

A. Yes, several had been turned down.

Q. Then when you received a cheque like that what did you do with it?

A. Remitted it to Winnipeg.

Evidently he had no right to act as he did in taking these uncertified personal cheques which turned out so often worthless.

If it had been brought out in evidence that this course of dealing was known and recognized and tolerated by the appellant, there should then have been an end of the defence.

No attempt was made to do so. If the onus rested on appellant, it, of course, should have explained all

these and many other things. But in my view the onus resting upon respondent has not been discharged.

How then can respondent seek to shift the onus resting upon it under such circumstances; or blame the other company instead of its own agents for trusting one so evidently untrustworthy?

I do not think this is a case wherein such authorities as *Lloyd* v. *Grace, Smith & Co.*(1) can be relied upon as at all applicable. They never were intended to protect people discarding the ordinary rules or precautions of business men, as the respondent did in handing over to such an untrustworthy instrument as the agents of the respondent knew Willison to be from their own experience of him.

The authorities needed to be relied upon apart from all this appear in the opinion of Chief Justice Harvey.

I think the appeal should be allowed with costs throughout.

DUFF J. (dissenting).—I concur in the conclusion of the learned trial judge, Mr. Justice McCarthy, as well as in the reasoning upon which his conclusion is based; the litigation, however, has given rise to much difference of judicial opinion and it is perhaps desirable that I should put in my own way the considerations which more particularly influence my mind.

The appellants had their head office at Winnipeg, had branches in Alberta, and, among other places, at Lethbridge, where they were represented by one Willison. They had with the respondent company what is known as a weekly credit account according to which

(1) [1912] A.C. 716.

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shipments were received and delivered for them without concurrent payment of the freight charges, settlements being made weekly. The action is brought for charges on certain shipments in August and September, 1912. It is not disputed that the charges were properly earned and lawfully payable and it is admitted that, in fact, they have not been paid; the appellants' defence to the action being that by reason of certain dealings between their agent Willison and the respondent company (by which it is alleged that the appellants were induced to settle with Willison on the footing of the charges having been paid by him) the respondent company is estopped from denying that they were in fact paid.

On the 21st September, 1912, Willison gave the respondent company his cheque for the amount of these charges, which was afterwards dishonoured and which, for the present, may conveniently be referred to as his personal cheque. This cheque was given in exchange for the freight bills receipted; and these receipted freight bills were attached by Willison to a draft which was discounted by the Imperial Bank and paid by the appellants, the proceeds being placed to Willison's credit. Willison is described in the statement of defence as the *appellants' manager at Lethbridge,* and whatever limitations were in fact imposed upon Willison's liberty of action by instructions from the appellants, it is not, I think, open to doubt that Willison's apparent status was that of local manager of their business. He was salesman for the district, he was collector in the district, he incurred debts on behalf of his principals and paid them. It is quite true that the moneys collected by him were de-

posited in an account in the appellants' name and he had no authority to draw on that account. But although Willison was not in the habit of signing cheques in the appellants' name it is, I think, a fair description of his apparent relation to the appellants as disclosed by the evidence to say, as the statement of defence says, that he was their local manager. Willison, as the learned trial judge has found, was in the habit of paying debts incurred by him on behalf of the appellants by cheques drawn upon an account standing in his own name. This course of business had the sanction of the appellants who remitted him from time to time sums of money to be applied by him in payment of what are called petty cash accounts.

It is also established that, in fact, the weekly settlement of freight charges was made by cheques drawn by Willison on this account. For the present it is immaterial, but I shall give my reasons later for thinking that the appellants have not given convincing evidence to shew that this course of business was not known to, and (at least impliedly) sanctioned by them. Evidence is given, remarkable for vagueness, which is relied upon by the respondents as shewing that Willison was strictly limited by his instructions to pay these freight bills by a particular method and that these instructions were adopted for the purpose of protecting the appellants against Willison's possible frauds and that the appellants were deprived of this protection by the loose methods of the respondent company which enabled Willison to make use of the receipted bills for the purpose of defrauding his principals. This contention I shall have to analyze and comment on in detail; I mention it now for the purpose of saying that, at this point, it is immaterial

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because the first stage in the examination of the appellants' contention is to ascertain whether or not in view of Willison's position as it appeared to the world, the Canadian Pacific Railway Company, as reasonable people of business, ought to have known that the delivery to Willison of the receipted freight bills in exchange for his cheque was calculated to lead the appellants into the belief either that the freight bills had been paid in actual cash or that the railway company had elected to look to Willison instead of the appellants as their debtor. This question is, of course, a question of fact, the onus being on the appellants to establish the proposition that the conduct of the respondent company was calculated to mislead them—this being as I have said the first essential step in the progress of their argument.

I think that question must be answered in the negative. Having regard to the position of Willison the respondent company was, I think, entitled to assume that, in paying by cheque in the way he did pay weekly during the period of about a year's duration, he acted entirely in conformity with his duty as agent of the appellants and, consequently, that his act in paying in that particular way was the appellants' act. I say I think the respondent company was entitled to assume that, for this reason, considerable sums of money such as the amount sued for here are not in the ordinary course of business paid in currency or bank notes. The respondent company was, of course, entitled to assume that some provision for the payment of the freight bills had been made by the appellants and they would be entitled to assume as a matter of business that nobody else (the Molsons Bank, for example) had been made the agent for the purpose of

making such payments; and they were equally entitled to assume that the appellants must be aware that the payments were not being made out of any account standing in the appellants' own name.

That being so, I confess I am quite unable to understand why anybody in the position of the respondent company ought to have supposed that delivery of the receipted bills could in any way mislead the appellants. On the assumption on which, I repeat, the respondent company was entitled to proceed that the appellants were aware of the practice followed by Willison, the delivery of the receipted bills could signify nothing but the fact that Willison's cheque had been accepted as conditional payment in the usual course.

There is another way of putting the respondent company's case and it is this—Willison being the ostensible agent of the appellants what he did within the scope of his ostensible agency, which as I have pointed out extended to payment in the manner in which he did pay, and what came to his knowledge as arising out of the dealings in the execution of his ostensible authority were the acts and the knowledge of the appellants themselves. The appellants, in other words, through Willison, knew the facts; consequently there could be no question of estoppel. This way of putting the case might not be so convincing if it had appeared that the plan of paying with his own cheque was a plan concocted in his own interest for the purpose of enabling him to commit fraud upon the company. There is not the slightest ground for any such suggestion and I shall proceed to give my reasons for thinking that the respondents have quite failed to satisfy the onus on them of shewing that they were not in fact

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aware of the course of business followed by Willison —the onus being, of course, upon them.

To come then to the last mentioned point. The chief evidence is that of Wilbert, the secretary-treasurer of the appellants, which must be examined with some care in view of the general terms and, I am afraid, convenient vagueness in which it is expressed. This witness, no doubt, uses language which is capable of being read as amounting to an asseveration that for the purpose of protecting themselves against the possible dishonesty of Willison, the appellants had instructed Willison *and the Molsons Bank* that all payments made by the respondent company for freight bils were to be made by *the bank* to the respondent company on behalf of the appellants and covered by a draft upon them. Willison's functions were to be limited according to this interpretation of the evidence to the production of the receipted freight bills and passing them as correct. This evidence was not contradicted, but, when read as a whole, it is far from unequivocal and, I think, the overwhelming weight of probability stands against it if read in this sense and that the appellants, on whom the burden of establishing the issue lies, have failed satisfactorily to shew that such instructions were given either to Willison or to the bank. The point of the secretary's story (according to the interpretation relied upon) is, of course, that the instructions specifically provided that the payment of freight bills was to be made by the bank and not by Willison. Against this there are some very significant facts; there is the fact, in the first place, that the railway company was never informed that payments of its freight bills were to be

made by the agents of the Molsons Bank on behalf of the appellants and not by their own local manager. There is the circumstance that, as the learned trial judge has found, no payment to the railway company was in fact made by the bank, and one gathers from the evidence that no draft was ever drawn by the bank on the appellants. There is the fact also that the local manager of the bank was called by the appellants and gave evidence as to instructions respecting their bank account and the correspondence between the appellants and the bank is produced; nevertheless the bank manager (who according to this theory was appointed their agent for the purpose of making these payments) is not examined as to any instructions received by him touching this subject. There is the fact that in September, 1912, when inquiries were made by the Imperial Bank (at the suggestion of Willison be it observed) the Imperial Bank is told the drafts with accepted freight bills attached may be discounted and will be paid on presentation to the respondents. The precaution is not that freight bills should be paid by the bank to the respondent company, but that the agent's draft should be discounted only on the condition that the receipted freight bills were attached. No suggestion is offered in the evidence to explain why, if the appellants had appointed Molsons Bank for the reasons suggested, they should be so readily have given the instructions that were given to the Imperial Bank which contemplated payment by the agent himself. The truth is that when one comes to read Wilbert's evidence closely one finds that his mind is far from fixed upon the point that the bank was to make the payments, or that any other precaution was to be taken by the bank

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other than seeing that receipted freight bills were produced. When he is asked the question whether the appellants had any knowledge that Wilbert was paying freight by his private cheque, he answers:—

> Well, we knew he had to handle it some way; we didn't know whether he used his cheque or whether the bank turned it over to the company, our instructions were to pay it to the company.

He says again that the *instructions given to the Molsons Bank were the same as those given to the Imperial Bank.*

He adds in another place, "the bank was to see to it." The impression one gets from the evidence as a whole, assuming that it can be relied upon at all in the absence of any particulars and in view of the fact that the local manager of the bank was not examined on the point, is that it was left to the local manager of the bank to exercise his discretion as to the manner in which payment was made to the respondent company. If that were in truth the state of affairs it would follow that the local bank manager was put in the place of the appellants to superintend the appellants' local manager in respect of these payments and, consequently, that what the manager of the bank did in the matter was done by the appellants and what the manager of the bank approved was approved by the appellants and, consequently, that the act of their local manager in paying by his own cheque was the act of the appellants. It would follow that, down to the time of the particular payment now in question, the local manager of the appellants had, with the permission of the appellants, been paying the appellants' obligations validly incurred by him with his own cheques; in other words, to pay such obligations with his own cheque was

within the scope of his ostensible authority and, therefore, binding on the appellants as their act notwithstanding any private instructions to the contrary.

To sum up, the defence of estoppel fails for want of satisfactory evidence to shew that, in the circumstances, a receipt amounted to a representation to the effect contended for; secondly, what was done by the local manager was done within the scope of his ostensible authority and was, therefore, an act of the appellants.

A word only as to the decisions relied upon. The truth of the matter is that this appeal involves no question of law. It is simply a question of an application of the principle of estoppel. The disputed questions are questions of fact. The cases referred to really have no bearing except as illustrations of the principle. In *Gentles* v. *Canadian Pacific Railway Co.* (1), for example, the Court of Appeal held that the receipts given were calculated to mislead the principal into thinking and, in fact, did so mislead him, that the accounts had been paid and that he was induced thereby to settle with the agent on that basis. In fact in that case it was not disputed, as the learned trial judge points out, that the receipts were given with that very object. The conclusion of the Court of Appeal was strictly a conclusion of fact and the decision is strictly not within the category of judicial precedent. When the facts of the case are looked at particularly with reference to the status of the agent one sees, beneath a superficial similarity, differences between that case and this which are of decisive importance in their bearing upon that particular point.

(1) 14 Ont. L.R. 286.

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Duff J.

It cannot help us at all in the decision of this case to consider whether or not, if one had had facts of that character to deal with, one would have come to the same conclusion as the Court of Appeal.

The appeal should be dismissed with costs.

ANGLIN J.—I concur in the opinion of my Lord the Chief Justice and would only add that this case seems to me to fall within the language of Lord Cranworth in *Jorden* v. *Money*(1), at pages 210, 212, quoted by Lord Macnaghten in *Balkis Consolidated Company* v. *Tomkinson*(2), at page 410.

BRODEUR J. (dissenting).—A misappropriation of funds has been made by the manager of the branch office of the appellant company at Lethbridge to the detriment of the respondents and we have to determine which of the appellant or the respondent companies should stand the loss.

The facts are these: The appellant company opened a branch office in Lethbridge and appointed as their manager, as they are calling him in their statement of defence, a man named Willison. They were shipping oil by the Canadian Pacific Railway from and to that place and the freight charges were to be paid at Lethbridge every week. When the charges were small they could be paid by the personal cheque of Willison drawn upon his small credit account provided by the appellant. But, in the case of large freight bills, the appellant company made with the Molsons Bank at Lethbridge an arrangement by which the railway company should take the freight bills to

(1) 5 H.L. Cas. 185. (2) [1893] A.C. 396.

the bank, get their money and the bank in turn should draw upon them with the receipted bills attached. Those bills had to be vouched by Willison.

If that arrangement had been carried out there would have been no loss of money. But the oil company failed, which is on its part a very gross piece of negligence, to notify the railway company of that arrangement and then the bills, whether small or large, were paid by the personal cheque of Willison.

Later on, it is not very clear at whose request, the banking arrangements for the payment of those bills were transferred to the branch of the Imperial Bank at Lethbridge. But this time instead of having drafts drawn by the bank itself, it was stipulated that the drafts would be made by Willison himself with the freight bills attached and vouched for by him.

This new arrangement also was not communicated to the railway company. So the railway company continued every week to present its bills to the branch office of the oil company at Lethbridge and was receiving Willison's cheques in payment.

On the 21st September, 1912, a cheque of $1,412.92 was given by Willison, the bills were receipted and handed to him, and with those bills so receipted, without, of course, the knowledge of the Canadian Pacific Railway Co., he drew a draft through the Imperial Bank on his principals.

The amount was put to his credit but was withdrawn by him since; when his cheque came from the Canadian Pacific Railway Company's Winnipeg office, there were no more funds and the man had disappeared.

The question then is: Who is to be liable for that fraud of Willison ?

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It seems to me that the oil company has been acting negligently in not mentioning to the railway company the arrangements which had been made for the payment of those freight bills. The arrangements were certainly good ones; but it was not sufficient to make them, but the railway company should have been notified as to their existence and the way they wanted those bills paid.

Since they had no confidence in their manager, they should have been very careful to see that he would not defraud them or the railway company.

It has been decided by the House of Lords in the case of *Lloyd* v. *Grace, Smith & Co.*(1) that a principal was responsible for the fraud committed by his representative in the course of his employment.

It seems to me only fair that in a case of that kind the principals should be responsible for the misdeeds of their agents, unless there is negligence on the part of the other party or unless that party has by words, or conduct, made a representation of fact either with a knowledge of its falsehood or with the intention that it should be acted upon. Those elements cannot be found in this case and it seems to me inequitable without discussing the cases which have been so fully discussed in the judgment of the courts below, that the railway company should lose in those circumstances.

For these reasons the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *Short, Ross, Selwood, Shaw & Mayhood.*

Solicitor for the respondents: *George A. Walker.*

(1) [1912] A.C. 716.

ANNA SCHEUERMAN (DEFENDANT) . APPELLANT; 1915

AND *Oct. 28, 29.

JOHN SCHEUERMAN (PLAINTIFF) . . RESPONDENT. 1916

*Feb. 1.

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

Title to land—Conveyance in fraud of creditor—Husband and wife—Advancement—Trustee—Equitable relief—Restitution—Evidence—Statute of Frauds.

Lands which, at the time of the transaction, would be exempted from seizure and sale under execution by the Alberta "Exemptions Ordinance", were purchased by S. and, with the intention of protecting them from pursuit by his judgment creditor, he caused them to be conveyed to his wife, on a parol agreement with her that the title should remain in her name until the judgment debt was satisfied. The debt was subsequently paid by S. and he brought suit against his wife for a declaration that she held the lands in trust for him and for reconveyance.

Held per curiam.—That the court should not grant relief to the husband against the consequence of his unlawful attempt to delay and hinder his creditor, although the illegal purpose had not been carried out. *Mucklestone* v. *Brown* (6 Ves. 68); *Taylor* v. *Chester* (L.R. 4 Q.B. 309); followed. *Rochefoucauld* v. *Bousted* ((1897), 1 Ch. 196) referred to. Judgment appealed from (8 Alta. L.R. 417), reversed, Anglin J. dissenting on the ground that the conveyance of exempted lands could not prejudice the rights of creditors and, although it had been made with fraudulent intent, it was not fraudulent as against them. *Mundell* v. *Tinkis* (6 O.R. 625); *Mathews* v. *Feaver* (1 Cox 278); *Rider* v. *Kidder* (10 Ves. 360); *Day* v. *Day* (17 Ont. App. R. 157); *Symes* v. *Hughes* (L.R. 9 Eq. 475), and *Taylor* v. *Bowers* (1 Q.B.D. 291), referred to.

Per Duff J.—In the absence of proof that his creditor had not been prejudiced in consequence of the conveyance being taken in the name of his wife the plaintiff was not entitled to relief.

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

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APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), whereby, on equal division of opinion among the judges, the judgment of Scott J., at the trial (2) stood affirmed.

The circumstances of the case are stated in the head-note and the questions raised on this appeal are stated in the judgments now reported.

F. Ford K.C. for the appellant.

O. M. Biggar K.C. for the respondent.

THE CHIEF JUSTICE—I think the appeal should be allowed.

The trial judge has found that the evidence does not establish a valid agreement between the parties for the reconveyance of the property to the respondent. The respondent in such a case as this can, of course, ask nothing from the court but his strict rights. There seems to me nothing necessarily inconsistent between the idea of his making an absolute gift to his wife and the fact of his having given her the property to keep it from his creditors. The appellant says that the reason for the gift was "because he lose it anyhow." I think that, as between themselves, the presumption of law that the gift to the wife was an absolute one is not rebutted.

But if it were necessary to hold that there was a resulting trust, in favour of the respondent, I do not think he is in a position to ask the court to enforce it. He can only make out his case by alleging his own unlawful intentions in making the conveyance to his wife.

(1) 8 Alta. L.R. 417. (2) 7 Alta. L.R. 380.

In the case of *Muckleston* v. *Brown*(1) at page 68, the Lord Chancellor said:—

Cottington v. *Fletcher*(2) does not affect this case. That case was upon the grant of an advowson contrary to the policy of the law, by a roman catholic in trust for himself. Afterwards he turns protestant; and desires a discovery as to his own act. The defendant put in a plea of the Statute of Frauds; but by answer admitted the trust. Lord Hardwicke is made to say, that upon the admission he would act. I do not know whether he did act upon it; but it is questionable whether he should; for there is a great difference between the case of an heir coming to be relieved against the act of his ancestor, in fraud of the law, and of a man coming upon his own act under such circumstances.

It is there said it might be different if it had come on upon demurrer. The reason given is that, as this assignment was done in fraud of the law, and merely in order to evade the statutes, it was doubtful whether at the hearing the plaintiff could be relieved. Lord Hardwicke means to say that, if the defendant admits the trust, though against the policy of the law, he would relieve, but if he does not admit the trust, but demurs, he would do what does not apply in the least to this case. The plaintiff stating he had been guilty of a fraud upon the law to evade, to disappoint, the provision of the legislature, to which he is bound to submit, and coming to equity to be relieved against his own act, and the defence being dishonest, between the two species of dishonesty the court would not act; but would say, "Let the estate lie, where it falls." That is not this case.

It will be observed that the Lord Chancellor considered it questionable whether the plaintiff ought to have relief even in a case where the defendant admits the trust. In the present case the appellant has denied the trust.

I am prepared to hold that a plaintiff is not entitled to come into court and ask to be relieved of the consequences of his actions done with intent to violate the law, and that though they did not and even could not succeed in such purpose.

I think the maxim quoted by Lord Eldon applies

(1) 6 Ves. 52. (2) 2 Atk. 155.

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in this case and that the court should say "Let the estate lie, where it falls."

IDINGTON J.—The respondent, as plaintiff, alleges in his statement of claim that the defendant, now appellant, who is his wife, was the registered owner of lands described therein but held the same as trustee for him, the plaintiff.

He proceeds in said statement of claim to allege that she, in breach of her said trust, sold the lands and he seeks a declaration of the trust and judgment for the part of the purchase-money she got and other relief.

The lands I will assume, as the learned trial judge has found as a fact, were bought with respondent's money, but the conveyance taken to the appellant when his wife.

Under such a naked state of facts the presumption of law would be that she received same by way of advancement. In short she, in law, thereby became the owner unless proven by other facts she was a trustee.

There was no writing or other evidence of a legal trust upon which he could rely. Therefore, he was of necessity, in order to establish his claim that she was his trustee, driven to prove that he had procured the conveyance to be made to his wife lest a creditor or creditors should reach the land if in his name and that the like reason had obtained for the vesting in her of other property out of the proceeds of the sale of which the land in question was paid for or improved.

Many authorities have been cited which I have, in deference to the argument and divided opinions be-

low, fully considered. But from none of them can I extract authority for the proposition of law that when a man has, out of the sheer necessity to prove anything upon which he can hope to rest the alleged claim of trust, to tell of an illegal purpose as the very basis of his claim, that he may yet be entitled to succeed. I find cases where the man has, accidentally as it were, or incidentally, to the relation of his story told that which he might if skilfully directed both in pleading and in giving evidence have avoided telling, yet has told enough to disclose that he was far from being always guided by the law or morality in his intentions, and still entitled to succeed because he had in fact established, by the untainted part of his story as it were, enough to entitle him to succeed without reliance upon that which was either illegal or immoral.

This is not respondent's case, but the other kind of case I have just referred to is.

Out of the many cases on the subject *Taylor* v. *Chester*(1) furnishes the law applicable to this case, and the case of *Taylor* v. *Bowers*(2) furnishes an apt illustration of the other kind of case.

In this latter all Taylor need have done was to prove that the goods in question were his and they were found in the possession of the defendant who had never bought them or acquired any honest title thereto.

The plaintiff there had never executed the intended assignment in fraud of creditors or any other and if the defendant had set up the facts he relied upon his defence would have been held illegal. That

(1) L.R. 4 Q.B. 309. (2) 1 Q.B.D. 291.

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much is got from an examination of the facts noted and judgments in the case and especially from those in appeal.

The more recent case of *Kearley* v. *Thomson*(1) shews some things said by even eminent authority in the case I have just referred to may not be law.

Had the conveyance been made to a stranger, under such facts and circumstances as might have enabled the respondent to present and rely upon the naked fact of his purchase and payment of the price as producing a resulting trust which the law would imply, the respondent might thereby have escaped telling of his own illegal purpose and succeeded. Here he has to tell the facts disclosing the illegal purpose as his chief, and indeed only, motive for constituting the trust he claims to have existed, and rely thereon, and cannot, as I view the law, successfully do so.

The cases of *Sims* v. *Thomas*(2), and *Symes* v. *Hughes*(3), certainly fall far short of covering this. The real question of law involved and decided in the former was the non-exigibility of the asset in question and the right to sue in such case upon the bond in question despite the provision of an insolvency Act not framed to reach it.

The latter case certainly is not to be extended and it needs extension to cover this case even if binding us, as it does not.

All that was argued and well presented as to the operation of the "Exemptions Ordinance" seems, from my view of the law, as applicable to the facts herein

(1) 24 Q.B.D. 742. (2) 12 A. & E. 536.
(3) L.R. 9 Eq. 475.

irrelevant. On the law and facts the property was hers and the exemption relative thereto hers also.

The appeal should be allowed with costs throughout, and the action dismissed with costs.

DUFF J.—In 1908, the respondent, who was the husband of the appellant, purchased land in Edmonton for which he agreed to pay $700. Shortly afterwards he built a house at a cost of $600 and, from that time until 1912, the appellant and the respondent occupied the property as their home with their children. On the completion of the purchase, in 1907, the transfer was taken in the name of the appellant and, in 1912, during the respondent's absence in the United States the appellant sold the property at the price of $3,500; $2,000 having been paid in cash and the respondent, on discovering the sale, brought the action out of which this appeal arises claiming the property was his and consequently the residue of the purchase price, $1,500 still in the vendee's hands.

The respondent puts his case in this way. He says that the purchase money was paid by him under the agreement of 1907; that the house was built partly by his own labour and partly by labour and materials provided by him; that the transfer was taken to his wife by arrangement between them, the effect of which was that she should hold the property as trustee for him.

On behalf of the appellant it is not disputed that she was to hold the property as trustee for the respondent; but it is said that the explicit arrangement was that the property was to be held by her until a certain debt for the payment of which the respondent was then being pressed had been discharged

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and that the intention of both parties in making the transfer to the wife instead of to the husband was to conceal the fact that the husband was the owner and in that way to protect the property from proceedings by a creditor who, at the time the transfer was taken, had recovered judgment.

The appellant denies that the property was paid for with the respondent's money, but on that point the finding is against the appellant and this appeal must, I think, be decided on the footing that the finding is right.

It is not, I think, seriously open to question that the respondent could only succeed by producing evidence shewing that in directing the transfer to be made to his wife an advancement to her was not intended and the evidence which establishes this is precisely the evidence which shews that the title vested in the wife was intended as a cloak to protect the property from the creditor mentioned. The respondent's case, therefore, rests upon a transaction which if it had in fact the effect contemplated, namely, of delaying or hindering the creditor, would undoubtedly be a transfer void under the Statute of Elizabeth at the instance of the creditor; and in that case the respondent must obviously fail on the principle that a plaintiff cannot recover who is obliged to make out his case through the medium and by the aid of an illegal transaction to which he was himself a party. *Taylor* v. *Chester*(1).

The respondent, however, has succeeded, the Appellate Division of Alberta being equally divided on the ground that the rule has no application where

(1) L.R. 4 Q.B. 309, at p. 314.

nothing has been done in execution of the unlawful purpose beyond payment or delivery of the property itself and that in point of fact the creditor whose debt has since been paid was not defeated, hindered or delayed. By the law of Alberta a house and building occupied by an execution debtor and the lot or lots on which they are situate are exempt from execution to the extent of $1,500. The view which has prevailed is that the evidence appearing to shew the property to have been of no greater value than $1,500, at the time the transfer was taken, the transaction could not be a fraudulent one and impeachable as such under the Statute of Elizabeth because of the well settled rule that the statute only aplies to dealings with property which creditors are entitled by law to have applied in the payment of their claims.

The judgment of Lord Justice Mellish concurred in by Lord Justice Baggallay in *Taylor* v. *Bowers*(1) is relied upon as establishing the proposition that the general principle gives to persons making a payment or delivering goods for an illegal purpose a *locus pœnitentiæ* so long as no part of the illegal purpose has been carried out, and that so long as that has not happened the restitution of the property transferred under such an agreement as that disclosed by the evidence in this case can be enforced. *Taylor* v. *Bowers*(1) was in point of fact not decided upon the principle invoked, Lord Justice James proceeding upon the ground that it was the defendant in that case who was obliged to set up the illegal transaction in order to justify his possession of the goods. Two very eminent judges, however, Lord Jus-

(1) 1 Q.B.D. 291.

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tice Mellish and Lord Justice Baggallay do seem to have put their judgment upon the ground that where goods are delivered under a fictitious assignment, the object of which is to defraud creditors, the delivery and assignment of the goods are not to be regarded as execution in part of the illegal purpose so long as no creditor is in fact prejudiced. It has been seriously doubted whether the general principle stated by Lord Justice Mellish in his judgment was correctly applied to the facts of that case; and the subsequent decisions of *Kearley* v. *Thomson*(1) and *Herman* v. *Jeuchner* (2) afford considerable justification for such doubts.

I do not find it necessary for the purpose of deciding this appeal to pass upon the question whether a proper application of the principle stated above to the facts of this case would be to hold that no part of the illegal purpose had been carried out notwithstanding the fact that the conveyance had been taken in the name of the wife. This case must, I think, be approached from a slightly different point of view. The object, as I have said, of taking the transfer in the name of the wife was that her *ex facie* title should protect the property from pursuit by the husband's creditor, the design being that so long as the debt remained unpaid she should hold the title. Whether or not they had in mind a possible advance in value the scheme necessarily involved the hindering of the creditor in the exercise of his rights in the event of the value of the property reaching a point at which the surplus would become properly exigible. We know that, in 1912, the property had acquired a value of $3,500. It is conceded apparently that some time

(1) 24 Q.B.D. 742. (2) 15 Q.B.D. 561.

before the trial the debt was paid; when, does not appear. If any part of the debt was still unpaid after the value of the property rose beyond $1,500 the presumption would be that the creditor was prejudiced. In these circumstances it is impossible to say that the creditor was not prejudiced. Indeed, having regard to the fact that the respondent must have known the precise date when the debt was paid and offered no information about it there is some presumption of fact the other way. The conclusion I have come to, however, is this: Accepting the rule in the form in which it is stated in *Symes* v. *Hughes*(1), and *Taylor* v. *Bowers*(2) I think the onus in the circumstances of this case was on the respondent to shew that the creditor had not been delayed.

It is true that as the respondent in this case does not ask to recover back the property on the ground only that it was property transferred for an illegal purpose which has not been carried out his position is not entirely the same as the position of the plaintiffs referred to in the judgment of Mr. Justice Scott. His case may be put in the alternative. First, the transfer was taken in the name of the appellant, the consideration having been paid, the presumption of advancement is rebutted by the evidence of the agreement between the husband and wife that the property was to be held for the husband for the purpose of protecting him against a creditor. In point of law he rests upon the position that the wife is trustee for him by reason of the fact that the purchase money was paid by him. But while that is his legal position he is obliged, in order to make out that case, to prove

(1) L.R. 9 Eq. 475. (2) 1 Q.B.D. 291.

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an agreement fraudulent in the purpose under which the transfer was taken, which agreement he does not shew that he repudiated before part of its purpose took effect in the delaying of his creditor.

Secondly. He may allege an express trust arising out of the oral agreement that the property was to be held for him with the object stated. The breach of this express trust, the failure on the part of the wife to carry out the agreement under which she acquired the property being treated in equity as a fraud, constitutes the wife trustee *ex maleficio,* a trustee, that is to say, who is not entitled to invoke the Statute of Frauds as a protection against her own fraud. *Rochefoucauld* v. *Boustead*(1). The respondent does not (be it observed with reference to an argument of Mr. Ford) in this way of putting his case seek to enforce the express oral trust, although the result in this particular case might be the same in the event of success as if he had succeeded in enforcing the express trust. The respondent's right and remedy would have been precisely the same if the arrangement had been that the wife instead of holding the property in trust for him had bound herself to hold it in trust for a third person, orally; to any proceeding by such third person as *cestui que trust* for the enforcement of the express oral trust the 7th section of the Statute of Frauds would have been an effectual answer, but there is no answer to an action on the part of the respondent for *restitutio in integrum* on the ground that the wife's fraudulent refusal to effectuate the express trust under which she acquired the property constitutes her a trustee for the person from whom she

(1) [1897] 1 Ch. 196.

received it. Put in this way, nevertheless, the respondent's case still necessarily rests upon an arrangement which when it is fully disclosed appears to be a fraudulent arrangement, and that arrangement the respondent has not shewn to have failed in effectuating its purpose.

In the result the appeal should be allowed and the action dismissed.

ANGLIN J. (dissenting).—The plaintiff sues to recover from his wife the proceeds of property admittedly placed in her name with the intent that it should be held by her in order to defeat the claim of one of his creditors. When placed in the name of the defendant the property was occupied by the husband and family and was not worth more than $1,500. It was, therefore, exempt from execution under sub-section 10 of section 2 of chapter 27 of the "North-West Territories Consolidated Ordinances, 1898."

In answer to the plaintiff's claim the defendant sets up:—

(*a*) That the purchase money of the property in question was wholly or in great part hers;

(*b*) That the property subsequently ceased to be occupied by the plaintiff and became worth more than $1,500 and the surplus would then have been exigible.

(*c*) That the plaintiff's admitted fraudulent intent debars his recovery;

(*d*) That the plaintiff, in order to succeed, is obliged to establish an express trust which section 7 of the Statute of Frauds renders incapable of proof by parol evidence.

The learned trial judge found explicitly that the

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purchase money all belonged to the plaintiff. He saw the plaintiff in the witness box and believed his story as against that of the defendant whose evidence was taken on commission. This finding was not disturbed on appeal and we are not in a position to say that it is wrong and that the defendant should have been believed rather than the plaintiff.

It is the value and condition of the property at the date of the transfer which must determine its exigibility. To hold that a subsequent change in occupation or increase in value should be taken into account would introduce an element quite too speculative, would unsettle titles and would defeat the purpose of the statute. *Sims* v. *Thomas*(1); *Willoughby* v. *Pope*(2).

The law condemns and penalizes the fraudulent act, not the fraudulent intent. The act must be one which at least may be injurious to persons whom the law protects against it. In *Mundell* v. *Tinkis et al*(3) the transfer dealt with was of this character. However wrongful the intent with which it is done, an act *in se* lawful subjects the person who commits it neither to criminal nor to civil responsibility. The transfer by a debtor of property exempt from seizure is lawful and cannot harm his creditor and, therefore, cannot be fraudulent against him. *Mathews* v. *Feaver* (4); Story's Equity, sec. 367; *Rider* v. *Kidder*(5); *Nichols* v. *Eaton et al*(6) at p. 726. However evil the mind and intent of such a debtor may be, he is amenable only *in foro conscientiæ*. The plaintiff's intent

(1) 12 A. & E. 536.
(2) 58 So. Rep 705.
(3) 6 O.R. 625.
(4) 1 Cox 278.
(5) 10 Ves. 360.
(6) 91 U.S.R. 716.

was fraudulent; his act was not. *Day* v. *Day*(1), at pp. 167, 166, 172; *Symes* v. *Hughes*(2); *Taylor* v. *Bowers*(3); *Cloud* v. *Meyers et al*(4); *Palmer* v. *Bray et al*(5); 20 Cyc., pages 381-4.

Were it not for the presumption of an intention to make a gift by way of an advancement, which ordinarily arises where property belonging to a husband is without consideration transferred to or placed in the name of a wife, proof of the absence of consideration would establish a resulting trust in favour of the plaintiff. The presumption of advancement is, however, readily rebuttable, the sole question being the intent with which the transaction took place (*Marshal* v. *Crutwell*(6); *In re Young*(7), and but for the objection to its admissibility, based on section 7 of the Statute of Frauds, the evidence of the understanding of both husband and wife that the latter should hold as trustee for the former would clearly establish such a trust. That objection cannot prevail, for equity deems it a fraud on the part of a trustee to attempt to withhold trust property from his *cestui qui trust* for his own benefit, and will not permit the statute to be made the instrument for committing such a fraud. *McCormick* v. *Grogan*(8), at p. 97 *per* Lord Westbury; *Rochefoucauld* v. *Boustead* (9); *In re Duke of Marlborough; Davis* v. *Whitehead* (10); *Haigh* v. *Kaye*(11); *Davies* v. *Otty*(12).

I am for these reasons of the opinion that the appeal fails and should be dismissed with costs.

(1) 17 Ont. App. R. 157.
(2) L.R. 9 Eq. 475.
(3) 1 Q.B.D. 291.
(4) 136 Ill. App. 45.
(5) 98 N.W. Rep. 849.
(6) L.R. 20 Eq. 328.
(7) 28 Ch. D. 705.
(8) L.R. 4 H.L. 82.
(9) [1897] 1 Ch. 196.
(10) [1894] 2 Ch. 133.
(11) 7 Ch. App. 469.
(12) 35 Beav. 208.

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BRODEUR J.—The main point to be decided in this case is whether the property in question having been transferred to the appellant for a fraudulent purpose, the respondent could recover that property.

The plaintiff and the defendant are husband and wife.

The husband was very heavily indebted. He owned a homestead for which he had agreed to pay a little over $1,000, and which according to the laws of Alberta was exempt from seizure to the extent of $1,500.

In order to prevent his creditors from seizing that homestead and in order to defeat them the husband (the plaintiff respondent) had that property conveyed to his wife, the appellant.

The husband seeks to recover the property and claims that the wife was holding it as trustee for him.

In order to enable him to recover he had to give evidence of the fraudulent scheme; otherwise the wife would have been presumed to have received an advancement. They both admit that the transfer was made for the purpose of defeating creditors. So the presumption of advancement was successfully rebutted provided it involves no other illegality.

But the Statute of Frauds is pleaded by the wife who claims that the husband will have to adduce written evidence of the alleged trust.

The Statute of Frauds was not made to cover fraud; it does not prevent the proof of a fraud.

It is a fraud on the part of a person to whom land is conveyed as trustee to deny the trust and claim the land herself. It is competent to prove by parol evidence that the property was conveyed upon trust for the plaintiff and that the wife is denying the

trust and relying upon the form of conveyance in order to keep the land herself. *Rochefoucauld* v. *Boustead*(1).

The question then is whether the plaintiff can invoke his own fraudulent intent to recover the property from his wife.

In general principle fraud vitiates all contracts. The courts never assist a person who has placed his property in the name of another to defraud his creditors, and some decisions go so far as to state that it is of no consequence whether any creditor has been actually defeated or delayed.

Mundell v. *Tinkis*(2); *Rosenburgher* v. *Thomas,* in 1852,(3); *Kearley* v. *Thompson,* in 1890(4).

In the case of a trust the same principle applies and the settlor is prevented from recovering the estate if the trust has been created for a fraudulent purpose. Lewin on Trusts(12 ed.), p. 120.

But the trial judge relying on the case of *Symes* v. *Hughes*(5), says that, where the purpose is not carried into execution, the mere intention to effect an illegal object does not deprive the assignor from recovering the property from the assignee and he says also that it was not necessary, in the present case, for the husband to have the property conveyed to his wife at the time in order to protect the lands in question against his creditors because they were exempt from seizure.

By the exemption ordinance, which I have already mentioned, the homestead was exempt from seizure if

(1) [1897] 1 Ch. 206.
(2) 6 O.R. 625.
(3) 3 Gr. 635.
(4) 24 Q.B.D. 742.
(5) L.R. 9 Eq. 475.

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it did not exceed in value $1,500. We have no positive evidence as to the value of the property at the time it was conveyed to the wife; but we have the evidence that, a short time after, the property was sold for a much larger price. The intent of the husband, then, was to defeat the creditors when the property would become of a value sufficient to become liable to seizure.

Cases of the same kind with regard to homesteads have been decided in the United States. I find a case of *Kettleschlager* v. *Ferrick*(1), where it was held that a transfer of the homestead from husband to wife without consideration to prevent creditors from subjecting such premises to the satisfaction of their claims *in case the debtor should remove therefrom is fraudulent as to creditors.*

Similar decisions have been rendered in Texas: *Taylor* v. *Ferguson*(2); *Baines* v. *Baker*(3).

We have also *Barker* v. *Dayton et al*(4), which was decided in the Wisconsin courts.

The plaintiff in having the homestead conveyed to his wife never ceased to be the real owner of the property. If the property had remained in his hands it could have been seized by his creditors for the payment of his debts. During all the time his wife was in possession of that property, the creditors, if it was a homestead exceeding in value $1,500, could claim the payment of their debt upon the property.

The courts should never help any person who has acted with a fraudulent intent, and the same rule should apply whether a transfer is made for the purpose of defeating subsequent creditors or when it is

(1) 12 S.Dak. 455.
(2) 87 Tex. 1.
(3) 60 Tex. 139.
(4) 28 Wis. 367.

made with the purpose of defeating existing creditors who may exercise their right upon the increased value of the property.

For these reasons I am of opinion that the plaintiff cannot recover the property from his wife and that his action should have been dismissed.

The appeal is allowed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Emery, Newell, Ford, Bolton & Mount.*

Solicitors for the respondent: *Short, Cross, Biggar, Sherry & Field.*

1915
*Nov. 15.
1916
*Feb. 1.

THE MONTREAL TRAMWAYS COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

MATHILDA SÉGUIN (PLAINTIFF) ... RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT, SITTING IN REVIEW, AT MONTREAL.

Practice and procedure—Trial by jury—Personal wrongs—Appeal—Taking new objection—Art. 1056 *C.C.—Arts.* 421 *et seq. C.P.Q.—"Lord Campbell's Act"—Charge to jury—Opinion on questions of fact.*

Per curiam.—Where an order has been made for trial with a jury, according to the provisions of articles 422 *et seq* of the Code of Civil Procedure of Quebec, and both parties have acquiesced in that form of trial, objection to the right to trial by jury cannot be urged for the first time on an appeal to the Supreme Court of Canada.

An action for damages, under article 1056 of the Civil Code, brought by dependents of a person whose death was caused in consequence of *délit* or *quasi-délit* is an action resulting from personal wrongs within the meaning of articles 421 *et seq.* of the Code of Civil Procedure of Quebec in which there may be trial by jury. Fitzpatrick C.J. *contra.*

Per Fitzpatrick C.J., dissenting.—The right of action given to the dependents, under article 1056 of the Civil Code, is purely statutory, and not a representative right (see *Robinson* v. *Canadian Pacific Railway Co.* ((1892) A.C. 481); consequently, the dependents, who have suffered no personal wrongs, are not entitled to trial by jury under the provisions of chapter 21 of the Code of Civil Procedure of Quebec.

Per Idington, Duff and Anglin JJ.—In his charge to the jury, the judge is entitled to express his opinion on questions of fact if he does so in such a manner as will not lead the jury to think that they are being given a direction which it would be their duty to follow.

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

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APPEAL from the judgment of the Superior Court, sitting in review, at Montreal, affirming the judgment entered by Guerin J., upon the verdict of the jury at the trial in favour of the plaintiff.

The plaintiff brought the action, under article 1056 of the Civil Code, claiming damages on behalf of herself and as tutrix to her minor children, in consequence of the death of her husband, the father of the children, caused, as alleged, by the negligence of the defendants. By the judgment appealed from, on the verdict of the jury, damages were awarded for $3,100 to the widow and $1,000 to the children.

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

Rinfret K.C. for the appellants.

Aylmer K.C. and *Bissonnet* K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—At first, I was inclined to think that the action might be said to be

for the recovery of damages resulting from the personal wrong done to the deceased.

But, on further consideration, I have come to the conclusion that the right of action in this case is purely statutory and, if so, the right to trial by jury would not exist.

The foundation of the right is article 1056 C.C., which gives an action for the damages occasioned by the death of the injured person to his consort and his ascendant and descendant relations.

The "Quebec Act," 25 Geo. III., ch. 2, the provisions of which are now to be found in article 421 of the

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Code of Civil Procedure, gives the right to trial by jury only in certain enumerated cases amongst which are

actions for the recovery of damages resulting from personal wrongs.

By article 1056 of the Civil Code, where the person injured by the commission of an offence dies in consequence without having obtained indemnity or satisfaction, his consort has a right to recover from the person who committed the offence all damages occasioned by such death. The pecuniary loss caused by the death

is at once the basis of the action and the measure of damages.

The measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to the family, so that a jury, in assessing damages, cannot take into consideration the mental sufferings of the plaintiff in respect of bereavement. *Blake* v. *Midland Railway Co.* (1852) (1).

The Privy Council held in the case of *Robinson* v. *Canadian Pacific Railway Co.* (2), and in subsequent cases, that the right of action given by this article is an independent and personal and not, as under "Lord Campbell's Act," a representative right.

This right is a statutory one. No wrong has been done to one of those to whom the right of action is given for which any claim could be advanced were it not for the statute.

Speaking of "Lord Campbell's Act," Lord Selbourne said, in *Seward* v. *The "Vera Cruz"* (3) :—

The Act gives a new cause of action,

(1) 18 Q.B. 93. (2) [1892] A.C. 481.
(3) 10 App. Cas. 59.

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and does not merely remove the operation of the maxim *actio personalis moritur cum personâ*, because the action is given in substance not to the person representing, in point of estate, the deceased man who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of person in the name of his executor. See also *per* Grive J. in *Bradshaw* v. *Lancashire and Yorkshire Railway Co.* (1875) (1); *Leggott* v. *Great Northern Railway Co.* (1876) (2); *Potter* v. *Metropolitan District Railway Co.* (1874) (3); *British Columbia Electric Railway Co.* v. *Gentile* (4); *British Columbia Electric Railway Co.* v. *Turner* (5).

Such a statutory claim is not essentially dependent on any wrongdoing by the party made liable in damages. He may not have committed any wrong to the deceased or any wrong at all. As an instance of the latter, I may refer to section 298 of the "Railway Act," R.S.C. 1906, ch. 37.

The Privy Council in the case of *Canadian Pacific Railway Co.* v. *Roy* (6), held that the defendant having been guilty of no negligence, was not liable for setting a fire on lands adjoining the railway whilst exercising the rights conferred on it by the legislature.

Section 298 of the "Railway Act," however, expressly provides that notwithstanding a railway company may have been guilty of no negligence it shall

(1) L.R. 10 C.P. 189.
(2) 1 Q.B.D. 599.
(3) 30 L.T. 765.
(4) 30 Times L.R. 594.
(5) 49 Can. S.C.R. 470.
(6) [1902] A.C. 220.

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be liable for any damages caused by a fire started by a railway locomotive to the extent of $5,000.

The provision in article 421 C.P.Q. does not include such cases of statutory actions and, however suitable we might consider it that such claims should be submitted to a jury, we cannot extend the privilege to a class of cases which is clearly beyond what the statute has authorized.

The damages which the deceased might have recovered during his life for the wrong done him, are different from those which his widow is entitled to recover under article 1056 C.C.; *Robinson* v. *Canadian Pacific Railway Co.*(1). The legislature has provided by article 431 C.P.Q. for the assessment of the former by jury, but has made no similar provision for the latter.

There certainly has been a certain amount of practice in accordance with the course complained of; but that claims under article 1056 C.C. have frequently been tried with a jury is easily explained, when we remember that, until the decision of the Privy Council in the case of *Robinson* v. *Canadian Pacific Railway Co.*(1), above referred to, it was thought that such actions were of a representative character and that the widow was authorized to sue in derogation of the legal maxim *"actio personalis moritur cum personâ."*

Since the time when the nature of the action was established by the above decisions, it has not hitherto occurred to any one to notice that this difference removed the action out of the class of actions in which

(1) [1892] A.C. 481.

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article 421 C.P.Q. gives an option of a trial by jury.

I would allow the appeal with costs.

IDINGTON J.—I think the objections taken to the learned trial judge's charge, which it is to be observed were not taken at the trial, are untenable.

The objection that this is a case not triable by a jury comes rather late in view of the fact that appellants assented to that mode of trial, acquiesced in all that was done in that behalf, and only took the objections for the first time in the appellate court.

If there is in law anything in such objections, then in view of all that has transpired, it might well be urged that this is an appeal from a trial in and by a tribunal selected by the parties, and from whose judgment no appeal can lie to this court. See the cases of *Attorney-General of Nova Scotia* v. *Gregory*(1); *The Canadian Pacific Railway Co.* v. *Fleming*(2); *Burgess* v. *Morton*(3); *White* v. *Duke of Buccleugh*(4); *Craig* v. *Duffus*(5); *Dudgeon and Martin* v. *Thomson and Patrick* (1854)(6); *Robin et al* v. *Hoby et al* (1856)(7).

I am afraid the objection is rather late in another sense. The article of the Code as well as preceding legislation in same sense having been so long interpreted as giving the right of trial by jury in the class of cases to which this belongs makes it rather difficult for us now critically to examine the article and

(1) 11 App. Cas. 229.
(2) 22 Can. S.C.R. 33.
(3) [1896] A.C. 136.
(4) L.R. 1 H.L. Sc. 70.
(5) 6 Bell App. Cas. 308.
(6) 1 Macq. 714.
(7) 2 Macq. 478.

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declare all that so done was the result of grave error of law. Besides we are asked to apply a mode of interpretation and construction which might have commended itself more readily to the courts of long ago when dealing in over refinements, than to us now.

The distinction counsel makes between the right of action a survivor passing through the ordeal of such an accident as in question would have and that given his representatives in case of his death, would have been looked on as very substantial at one time and is to be so yet in the proper application thereof; but, in these times when the point of view has changed so sadly to apply it as a necessary means of interpreting this article 422 C.P.Q. would be going far, and especially so under all the foregoing circumstances.

If, however, any one thinks the question worth raising, he should begin at the right stage and not try to do so after such acquiescence as exhibited herein.

I think the appeal should be dismissed with costs.

DUFF J.—There are two points argued by the appellants: First, that the learned trial judge misdirected the jury in expressing his opinion that the appellants' theory of the accident was not a reasonable one. The learned trial judge was entitled to express his opinion on the point so long as he did not lead the jury to think that he was giving them a direction it would be their duty to follow and it is quite clear that he did not err in this respect.

Secondly, it is argued that this was not a case for trial by jury under article 421 of the Code of Civil Procedure. Article 1056 of the Civil Code involves a

declaration that the dependents entitled to compensation thereunder have an interest in the life of the member of their family standing to them in a relation entitling them to recover under that article. I can see no good reason for saying that this is not an action for damages arising from a personal wrong within the meaning of article 421 C.P.Q. If I had doubts upon the proper construction of article 421 C.P.Q. it would be too late now, I think, in view of the course of interpretation to adopt the construction proposed by the appellants.

Thirdly, an order directing trial by jury was made and the case was tried without objection. The objection comes too late. *Pisani* v. *Attorney-General for Gibraltar*(1).

ANGLIN J.—The appellant attacks the judgment against it on two grounds;—that there was misdirection by the learned trial judge, and that the right to trial by jury exists only in cases in which it has been specially provided for and that this is not such a case.

The alleged misdirection consisted in the expression by the learned trial judge in his charge to the jury of his own opinion upon the evidence on one point in the case. What is complained of the learned trial judge immediately followed by this statement:—

> Now, I want you to remember that so far as any opinion of mine is concerned upon any of the facts I have mentioned, you are not bound to follow my opinion on any question of fact. You will determine those for yourselves, and if you find in the expression of my views anything with which you do not agree on a question of fact, you are not obliged to agree with me, but you can render a decision quite at variance with what I have said with reference to any question of fact.

(1) L.R. 5 P.C. 516.

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The course taken by the learned judge was, in my opinion, quite within his rights and affords the appellant no ground of complaint.

By article 421 C.P.Q. the right to trial by jury is conferred, *inter alia,*

> in all actions for the recovery of damages, resulting from personal wrongs.

Giving to the words "personal wrongs" the most restricted meaning contended for by Mr. Rinfret, *i.e.,* wrongs causing injury to person or reputation, as distinguished from injury to source of revenue, means of support, property or estate, I think this action is within the purview of article 421.

The plaintiff sues under article 1056 C.C. to recover damages occasioned by the death of one Couvrette, who was injured by a fault of the defendant. The damages sought to be recovered resulted from the personal wrong thus done by the defendant to the deceased Couvrette, although the plaintiff does not sue as representative of the deceased or upon the cause of action which he had. That the personal wrong caused to the deceased by an offence or quasi-offence of, or chargeable to, the defendant is the basis of the new cause of action given by article 1056 C.C. for the recovery of the damages resulting from it to the consort and relations is made still more clear by the fact that that right of action exists only if the deceased had not himself obtained satisfaction or indemnity. Had the deceased survived he would have been entitled to recover compensation for any loss of income and diminution in his earning capacity ascribable to the injury which he sustained. That he would have had the right under article 421 C.P.Q. to have

his claim for these damages disposed of by a jury the appellants concede, and it seems to me indisputable that they would have resulted from the personal wrong done him. The failure of income and other elements of loss for which article 1056 gives the consort and relations a right to recover damages result just as surely and directly from the personal wrong done to the deceased as would his own loss of income and diminished earning capacity had he survived. They are not the same damages as the deceased would have sustained, and could have sued for. The right of action to recover them does not flow directly and immediately from the injury to the deceased. His death is the condition on which it arises and the statute itself is its source. But while it is the statute which confers the right to recover them, and the death of the deceased is the condition of that right coming into existence and is in one sense the immediate cause of the damages to the consort and family (yet the death is an effect rather than a cause—an effect from which further consequences flow), the damages themselves result from the personal wrong which caused the death entailing them as a consequence neither remote nor indirect. Article 421 C.P.Q. does not prescribe that the wrong resulting in the damages sued for should be to the person of the plaintiff or to the persons of those on whose behalf she sues. It suffices to bring the case within the letter of the article that the damage claimed should have resulted from a personal wrong whether the injury itself was to the person of the plaintiff or to that of another. I find nothing in the spirit of the article or in its history which requires that it should be given an application more restricted than is called for by its literal terms.

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I express no opinion upon the question whether in the phrase "suits for the recovery of damages resulting from personal wrongs," now found in article 421 of the C.P.Q. of 1897, which replaced article 348 of the C.C.P. of 1867, which, in turn, was founded on the Consolidated Statutes of Lower Canada of 1860, ch. 83, sec. 26, continuing the right to trial by jury originally conferred by the 25 Geo. III. (L.C.), ch. 2, in the words

> actions grounded * * * in personal wrongs proper to be compensated in damages,

the words "personal wrongs" are susceptible of a construction which would include the wrong or injury done to the consort and relations by the death of the victim of the defendant's fault.

Hundreds of actions brought under article 1056 C.C. and the earlier legislation (10 & 11 Vict. (Can.), ch. 6; Con. Stat. (Can.), 1859, tit. 9, ch. 781), have been tried by juries, many of them having been carried on appeal to this court and to the Judicial Committee without any question of the competence of the trial tribunal having been raised. The statutory provision for jury trials thus interpreted and acted upon for many years has been at least three times re-enacted without alteration. *Casgrain* v. *Atlantic and North-West Railway Co.*(1), at p. 300. The weight of authority in the few cases in which the question has been raised in the provincial courts, also seems to support the right to have such actions as this submitted to a jury. *Steele* v. *Canadian Pacific Railway Co.*(2); *Robinson* v. *Montreal Tramways Co.*(3).

(1) [1895] A.C. 282. (2) Q.R. 23 K.B. 36.
(3) Q.R. 23 K.B. 60.

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Moreover, I incline to think that the objection of the defendants, if otherwise good, having been taken for the first time in review and after acquiescence by them in all the proceedings leading up to the submission of the case to a jury, is probably too late.

I would dismiss the appeal.

BRODEUR J.—La principale question qui se présente dans cette cause est de savoir si une action en dommages-intérêts instituée par la veuve et les enfants de la victime d'un accident peut être soumise à un procès par jury.

Cette question a été soulevée pour la première fois devant les tribunaux il y a deux ans et a donné lieu à une divergence d'opinions sérieuse parmi les juges de la Cour Supérieure et de la cour d'appel dans les deux causes suivantes: *Steele* v. *Canadian Pacific Railway Co.*(1); *Robinson* v. *Montreal Tramways Co.* (2).

La dernière de ces causes est maintenant pendante devant le Conseil Privé.

Le droit d'action de la veuve et des enfants de la victime d'une accident est exercé sous les dispositions de l'article 1056 du Code Civil, au chapitre des délits et quasi-délits et se lit comme suit:—

Dans tous les cas où la partie contre qui le délit où le quasi-délit a été commis décède en conséquence, sans avoir obtenu indemnité ou satisfaction, son conjoint, ses père, mère et enfants ont, pendant l'année seulement à compter du décès, droit de poursuivre celui qui en est l'auteur ou ses représentants pour les dommages-intérêts resultant de tel décès.

L'article du Code de Procédure Civile en vertu

(1) Q.R. 44 S.C. 455; 23 K.B. 36.

(2) 15 Que. P.R. 77; Q.R. 23 K.B. 60.

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duquel la demanderesse a réclamé un procès par jury est l'article 421, qui se lit comme suit:—

> Le procès par jury peut avoir lieu * * * dans toute poursuite en recouvrement de dommages résultant de torts personnels ou de délits et quasi-délits contre la propriété mobilière.

La demanderesse prétend que sa poursuite a pour objet de recouvrer des dommages "résultant de torts personnels" et que par conséquent elle a le droit de demander le procès par jury.

Que veulent dire les mots "torts personnels"?

Cette expression a eu sa source dans notre droit statutaire quand on a introduit, en 1785, le procès par jury. Cette loi avait été rédigée en anglais et la version française qui en est publiée dans les ordonnances de l'époque démontre qu'elle n'a été qu'une traduction de l'anglais. L'institution du jury, comme on le sait, est une institution anglaise et nous pouvons nous autoriser de tout cela pour rechercher dans les auteurs anglais l'interprétation de ces mots "torts personnels."

Je trouve que Bigelow, *"On Torts,"* après avoir, dans son introduction assimilé le mot "wrong" au mot "tort," nous définit le "tort" comme étant la violation d'une obligation déterminée par la loi, *breach of duty fixed by law,* et il ajoute que *"a tort"* is distinguished from "a contract"

> in which the duty to be performed is fixed by the parties themselves in the terms of the agreement.

Pollock, *"On Torts,"* assimile les "torts" aux "civil wrongs."

Il s'ensuit donc que les "torts" ou "civil wrongs" du droit anglais comprennent les délits et les quasi-délits de la loi civile.

L'adjectif "personnels" ajouté au mot "torts"

donne nécessairement une portée restreinte à ce dernier mot. Les "torts personnels" ne couvrent nécessairement qu'une partie des délits, c'est-à-dire les délits, ou torts concernant les personnes. Les délits concernant la propriété immobilière n'y sont pas compris. Il en est de même concernant les délits concernant la propriété mobilière puisqu'en 1829 la législature a été obligé d'adopter une loi spéciale pour permettre à ces derniers délits d'être soumis à un jury. Blackstone, Commentaries, vol. 3, p. 119 dit:—

As to injuries which affect the personal security of individuals, they are either injuries against their lives, their limbs, their bodies, their health or their reputation.

Wharton définit les mots "personal rights" qui sont l'antithèse des mots "personal wrongs" ou "torts personnels" comme suit:—

The rights of personal security comprising those of life, limb, body, health, reputation and the right of personal liberty.

Ainsi le meutre, la blessure corporelle, la maladie, le libelle, la diffamation et l'emprisonnement peuvent entrer dans la catégorie de torts personnels.

Comme le disait si bien l'Honorable Juge Mathieu, dans la cause de *Chouinard* v. *Raymond*(1) :—

Les torts ne sont qu'une infraction ou violation des droits. Il s'ensuit que le système négatif des torts doit correspondre et cadrer avec le système positif des droits. Comme on divise tous les droits en droits des personnes et droits sur les choses, on doit diviser de même généralement les torts en ceux qui affectent les droits des personnes et en ceux qui affectent le droit de propriété.

Qu'avons-nous dans le cas actuel ?

Un homme a été blessé par incurie ou négligence. Il est incontestable que de son vivant il aurait eu le

(1) 3 Que. P.R. 184.

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droit d'obtenir réparation pour ces blessures. On lui avait causé un tort personnel.

La loi dit, cependant, que, s'il vient à mourir de cet accident, sa femme et ses proches ont un droit d'action contre l'auteur du délit.

Est-ce que ce droit d'action ne résulte pas des torts infligés à la personne du défunt? Je crois donc que le droit d'action des demandeurs est basé sur ces blessures infligées à la personne du défunt et tombe sous le coup de l'article 421 du Code de Procédure qui permet aux parties de soumettre leurs prétentions à un jury.

Si nous examinions la jurisprudence, nous voyons que toutes ces actions ont toujour été jugées susceptibles du procès par jury.

Le point n'a été soulevé, que je sache, avant la cause de *Steele* v. *Canadian Pacific Railway Co.*(1), que dans une cause, savoir celle de *Bouissede* v. *Hamilton*(2), jugée en 1898, où le juge Curran a décidé

that an action by a wife for damages resulting from the death of her husband is one for personal wrong and can be tried by jury.

Une multitude de causes semblables instituées par la femme ou les enfants de la victime sous l'article 1056 du Code Civil ont été soumises à des jurys, ont fait l'object de débats judiciaires très importants devant cette cour et devant la Conseil Privé et on n'a jamais songé à soulever le droit des parties de les soumettre à un jury. Voyez, par exemple, *Miller* v. *Grand Trunk Railway Co.*(3), jugée par le Conseil Privé en 1906 et qui a passé par la Cour Supérieure, la Cour de Revision, la cour d'appel et

(1) Q.R. 44 S.C. 455; 23 K.B. 36.

(2) 2 Que. P.R. 135.

(3) [1906] A.C. 187.

la Cour Suprême; *Robinson* v. *Canadian Pacific Railway Co.*(1); *Ravary* v. *Grand Trunk Railway Co.*(2), en 1869; *Curran* v. *Grand Trunk Railway Co.*(3).

Une autre question qui se présente dans cette cause est de savoir si la défenderesse appelante peut maintenant prétendre que cette cause n'aurait pas du être soumise au jury.

La demanderesse avait par son action opté pour un procès par jury suivant les dispositions de l'article 423 du Code de Procédure Civile.

Si la défenderesse voulait s'objecter à cette action, elle aurait du alors le faire et faire rejeter cette option. Non, elle ne conteste pas le droit réclamé par la demanderesse d'avoir un procès par jury. La contestation est liée entre les parties. Plus tard le 18 janvier, 1913, motion est faite sous l'autorité de l'article 424 C.P.Q. pour définir les faits dont le jury doit s'enquérir. Les deux parties, y compris l'appelante, fournissent au juge un mémoire des faits qu'elles croient nécessaire de soumettre à l'appréciation du jury. Jugement est rendu sur cette motion et sur ces mémoires. Il y a donc chose jugée sur ce point. Il n'y a jamais eu d'appel ou d'exception au jugement. L'acquiescement qui y est fait par la défenderesse lie cette dernière et elle ne peut plus maintenant en appel nous demander de faire mettre de côté un jugement qu'elle a accepté et qui a force de chose jugée.

Le procès par jury est un mode d'instruction qui ne touche pas a la compétence *ratione materiæ* des tribunaux.

La cause soumise à un jury est toujours sous le

(1) [1892] A.C. 481. (2) 1 L.C. Jur. 280.
(3) M.L.R. 5 S.C. 251.

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contrôle du juge de la Cour Supérieure. Les tribunaux peuvent être un peu gênés dans l'appréciation des faits de la cause à cause du verdict; mais ils n'en restent pas moins maîtres de rejeter le verdict s'il est contraire au poids de la preuve (art. 498). Quant aux questions de droit qui se soulèvent dans la cause, elles demeurent, qu'il y ait procès par jury ou non, à l'entière discrétion des juges.

Thomine-Desmazures, au volume 1er, nos. 11, 12 et 13, discute longuement cette question de compétence absolue et compétence relative. Il nous dit qu'une affaire peut donner lieu à une poursuite devant différents tribunaux et cite le cas du créancier d'une obligation qualifiée de lettre de change qui pourrait être portée devant le tribunal civil parce qu'elle peut être regardée comme simple promesse de payer. Il n'est pas absolument nécessaire qu'elle soit soumise, vu son caractère commercial, au tribunal de commerce.

Si même, dit-il, on assigne devant un juge qui ne soit incompétent qu'à raison de la qualité des parties ou du domicile du défendeur ou de la situation des biens et que le défendeur ne demande pas à être renvoyé devant son juge naturel, l'action aura été régulière.

Au no. 200, il dit:—

Si un marchand est traduit pour une affaire de son commerce devant un tribunal civil, l'incompétence n'est pas absolue mais relative parce qu'elle résulte de la qualité de la personne du défendeur.

Et plus loin, il ajoute, après avoir cité plusieurs cas d'incompétence:—

Le défendeur ne sera plus recevable lui-même à opposer cette pièce d'incompétence s'il a reconnu ou est censé avoir reconnu la jurisdiction devant laquelle il est appelé.

Je relève dans nos rapports judiciaires la cause de *Rivers* v. *Duncan* (1), où il a été décidé:—

(1) Stu. K.B. 139.

That if a party moved for a jury, he cannot afterwards reject the verdict on the ground that the jury ought not to have been allowed because, he, the mover, was not a merchant or a trader.

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Dans la cause actuelle la défenderesse n'a pas elle-même demandé le procès par jury mais elle n'a pas contesté l'option faite par la demanderesse et plus tard elle a participé et acquiescé au jugement qui a défini les faits à être soumis au jury.

Les parties ont toujours le droit de soumettre à certaines personnes qu'elles désigneront (*persona designata*) les conflits qui s'élèvent entre eux. La procédure dans la présente cause énonce l'intention mutuelle des parties de faire juger leurs différends par un jury. Il me semble qu'il s'est établi là un contrat judiciaire qu'elles ne sont plus libres de briser. D'autant plus que leur acquiescement a fait l'objet d'un jugement qui a la force de chose jugée.

Je suis donc d'opinion que la défenderesse ne peut pas en appel essayer de se faire relever de cet acquiescement et de ce jugement.

Pour ces raisons, l'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellants: *Perron, Taschereau, Rinfret, Vallée & Genest.*

Solicitors for the respondent: *Bissonnet & Cordeau.*

1915
*Nov. 16, 17.
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*Feb. 1.

W. P. LAROCHE (PLAINTIFF).....APPELLANT;

AND

MARY ANN LAROCHE AND OTHERS (DEFENDANTS).....RESPONDENTS.

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

Quebec marriage laws — Community of property — Dissolution by death—Failure to make inventory—Insolvent estate—Continuation of community—Estoppel—Renunciation.

Where the matrimonial community was in insolvent circumstances at the time of the wife's death, in 1877, the failure of the husband to make an inventory of the common property did not have the effect of causing continuation of community under the provisions of articles 1323 *et seq.* of the Civil Code as then in force. *King* v. *McHendry* (30 Can. S.C.R. 450) followed. Fitzpatrick C.J. and Duff J. dissented.

The judgment appealed from (Q.R. 24 K.B. 138) was affirmed.

Per Duff J. (dissenting).—The failure of the husband to cause an inventory to be made within three months after the death of the wife had the effct of concluding him finally, as against the minor children, from asserting that continuation of community did not take place; the heirs, claiming through him, are in the same position. As the right to the benefit of continuation of community is not a personal right, but is one given to the minor children in substitution of their right to an account, as at the expiration of the time for making an inventory, it is a claim that may be made at any time unless it could be said that the failure to make the demand during the lifetime of the surviving consort operated as a renunciation.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), reversing the judgment of

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

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Dorion J., in the Superior Court, District of Quebec, and dismissing the plaintiff's action with costs.

Community as to property existed between the plaintiff's father and mother, who were married in 1872, and were residents of the City of Quebec. The plaintiff's mother died intestate, in 1877, leaving, her surviving, her husband and the plaintiff and his sister, children, issue of the marriage. At the time of the death of his wife, the husband's estate (which consisted of a drug business, in Quebec) was insolvent and he did not make an inventory under the provisions of the Civil Code, articles 1323 *et seq.*, as then in force, relating to "Continuation of Community." In 1883, the plaintiff's father contracted a second marriage, of which seven children were born and were still living at the time of his death, in 1912. He died intestate and was survived by the second wife, who was separate as to property under their marriage contract. The plaintiff, appellant, brought the action against his sister, his stepmother and the children of the second marriage, contending that there had been continuation of community of the first marriage and claiming, for himself and his sister, their proportionate share in the estate as it existed at the time of the death of his father. His action was maintained in the Superior Court, but the judgment of that court was reversed by the judgment now appealed from.

St. Laurent K.C. for the appellant.

G. G. Stuart K.C. for the respondents.

THE CHIEF JUSTICE (dissenting).—I am of opinion that this appeal should be allowed for the reasons

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given by the trial judge and by Mr. Justice Carroll in the Court of King's Bench.

IDINGTON J.—Though entertaining much doubt as to the correctness of the inference of fact upon which the judgment of the court below rests, I cannot see my way to reversing the same.

DUFF J. (dissenting).—The better view seems to be, on principle, that the failure of the husband to make an inventory within three months after the death of the wife has the effect of concluding him finally as against the minor children from saying whether the community was dissolved by the death of the wife. It is for the minor children to say whether they shall or shall not take advantage in this way of the default and until something has been done by them which precludes them from doing so they do not lose this right. It is difficult to say why the death of the father should deprive them of the right. The heirs claim through the father and I cannot understand why, in principle, their position as against his minor children should be any better than his position at the moment of his death.

The respondent's construction leads to inconveniences and I have been unable to find any satisfactory ground upon which such rule can properly be rested.

It might throw some light upon the question to know whether the community is dissolved by the death of the infant heir leaving an heir. As the right is not a right personal to the infant heir and as it is given in substitution of the right to demand an account as at the expiration of the time for making an

inventory, it should seem on ordinary principles that it is a demand that could be made at any time unless it could be said that the failure to make it during the lifetime of the survivor operates as a renunciation.

Pothiers' treatment of the subject seems to be opposed to the respondent's hypothesis.

See also Lamignon at pages 288 and 289:—

Le même article 241 ajoute, qu'à faute de faire clore l'inventaire dans les trois mois, la communauté est dissolue, si bon semble aux enfants: et quelques-uns ont pensé que ce qui était à la fin de cet article ne signifie autre chose, sinon que la continuation de communauté n'est point necessaire de la part des enfants, et qu'il est en leur liberté d'y renoncer; et que, quand ils demandent la continuation de communauté, ils sont obligés d'en souffrir le cours pour l'avenir, nonobstant l'inventaire qui n'a point été clos dans les trois mois, puisque, par le défaut de cloture, il se trouve nul et défectueux, et est déclare tel par la coutume.

Mais il semble que l'intention et l'esprit de la coutume a été de faire une décision contraire; car il était inutile de répéter, en cet article, que les enfants ont la faculté de prendre la communauté du temps du mariage, dans l'état qu'elle était lors de la dissolution du mariage, ou bien de demander la continuation de communauté. Cela avait été reglé, en termes formels et précis, par le précédent article. Mais, dans celui-ci la coutume ayant décidé, premièrement, que la communauté est dissolue du jour que l'inventaire est fait et parfait, à la charge de le faire clore dans trois mois: et, en second lieu, qu'a faute de faire la, dite cloture dans le temps prescrit, la communauté est continuée, et reprend son cours ordinaire; elle a apporté à cette dernière décision un temperament, *si bon semble aux enfants;* c'est-a-dire, que la défaut de cloture, dans trois mois, rend la continuation de communauté nécessaire contre le survivant des père et mère, qui pouvait et devait faire clore l'inventaire pour satisfaire à la coutume. Mais, à l'égard des enfants, elle a laissé à leur liberté de se servir du défaut de cette formalité pour faire courir la communauté; ou bien de l'arrêter du jour de l'inventaire, quoiqu'il ne soit pas clos; parceque cette cloture et cette affirmation judiciaire de l'inventaire ayant été ordonnée en faveur des enfants, il leur est loisible de renoncer à ce qui a été établi en leur faveur, et à une solemnité extrinseque qui n'est ni du corps ni de la substance de l'inventaire, attendu même que, par le texte de l'article, l'inventaire était parfait et capable de dissoudre la communauté avant la clôture.

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Had the representatives from Quebec in this court been unanimous I should not have ventured to differ from the view of the court below.

In the existing circumstances, however, with great diffidence, I am constrained to say that in my opinion the appellant ought to succeed.

ANGLIN J.—In *King* v. *McHendry*(1), Mr. Justice Girouard speaking for his colleagues says, at page 456, that, in order that there should be continuation of community between a surviving spouse and the children of the marriage,

il faut donc qu'il ait des biens communs et c'est aux parties qui invoquent la continuation de communauté à alléguer et prouver ce fait.

The learned judge adds that the maxim, *de minimis non curat lex,* applies and that the possession of trifling articles of absolute necessity and exempt from seizure does not impose the obligation of inventory. This was the basis of the judgment of this court, reversing that of the Court of King's Bench.

This precedent binds us.

In the formal judgment of the Court of King's Bench in the present case we find this *"considérant"*:

Considering that it appears from the record that at the time of his first wife's death, respondent's father and the community of property that existed between his father and mother were insolvent.

Mr. Justice Trenholme, speaking for the majority of the court, says:—

The community was, beyond doubt, insolvent. * * * The evidence and documents filed shew that the insolvency extended back to the first wife's death.

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Speaking for the dissenting minority, Mr. Justice Carroll says:—

> La preuve indique que la solvabilité de W. H. Laroche à la mort de sa première femme, était bien problématique.

It is, therefore, evident that the appellant failed to prove the existence at the time of his mother's death of such property of the community as would, under the authority of *King* v. *McHendry*(1), subject his father to the obligation of inventory.

While by no means satisfied that if free from the constraint of authority I should not have reached the same conclusion as the learned trial judge, in deference to the previous decision of this court I concur in the dismissal of this appeal.

BRODEUR J.—Il s'agit dans cette cause de savoir s'il y a eu continuation de communauté.

Lors du décès de la femme, qui est arrivé en 1877, les biens de la communauté qui avait existé entre elle et son mari étaient peu considérables, et il paraît évident que le passif excédait l'actif. A tout événement, deux ou trois ans plus tard, le mari, qui faisait affaires comme pharmacien, a été obligé de faire cession de ses biens suivant les dispositions de l'acte de faillite de 1875.

Il n'avait pas jugé à propos de faire inventaire, évidemment à raison du fait que les frais d'inventaire et de partage auraient occasionné des dépenses qui auraient augmenté davantage le passif de la communauté; et alors il a cru qu'il valait mieux continuer les affaires.

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Il comptait sur des jours meilleurs où il pourrait améliorer la situation financière de la communauté. Malheureusement ce commerce ne fut point prospère et il fut obligé de faire cession de ses biens. Il y eut liquidation de tous les biens, même ceux de la communauté, et le mari est resté avec des dettes.

Le mari a fait affaire ensuite sous le nom d'un frère qui a été obligé encore cependant de faire cession de ses biens vers 1885. Il a continué encore à faire affaire comme pharmacien sous la raison sociale de Laroche & Compagnie et en définitive, à sa mort, il avait réussi à amasser une fortune assez considérable.

Le demandeur est devenu majeur il y a à peu près quinze ans et pendant la vie de son père il n'a jamais songé à demander la continuation de la communauté.

Je vois que la Cour d'Appel a déclaré qu'il n'y avait pas eu continuation de communauté parce que l'absence d'inventaire n'avait causé aucun préjudice au demandeur.

Cette question était venue devant cette cour il y a quelques années dans une cause de *King* v. *McHendry* (1), et il avait été jugé dans cette cause qu'il n'y avait pas eu nécessité de faire inventaire parce que les biens étaient d'une valeur insignifiante et que dans ce cas il n'y avait pas lieu à la continuation de communauté.

En appliquant les principes de cette décision à la cause actuelle, je considère que le demandeur n'est pas en droit de faire déclarer qu'il y a eu continuation de communauté parce que s'il n'y a pas eu d'inventaire cela ne lui a occasionné aucun préjudice.

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Il me paraît évident que la communauté était insolvable à la mort de la femme. Le père, cependant, a jugé à propos de continuer à tenir pharmacie dans l'espoir qu'il réussirait à sortir des difficultés financières où il se trouvait. Malheureusement le succès ne vint pas couronner ses efforts: il fut obligé de faire cession de ses biens et là un inventaire a été fait, qui n'est pas, il est vrai, l'inventaire notarié requis par la loi mais il y a eu liquidation des biens de la communauté et le droit demander alors l'inventaire est disparu, puisqu'il n'y avait plus rien à inventorier.

Pour ces raisons, le jugement de la Cour d'Appel qui a déclaré qu'il n'y avait pas eu continuation de communauté doit être confirmé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Galipeault, St. Laurent, Métayer & Laferté.*

Solicitors for the respondents: *Pentland, Stuart, Gravel & Thomson.*

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COMMUNITY—*Quebec marriage laws—Community of property—Dissolution by death—Failure to make inventory—Insolvent estate—Continuation of community—Estoppel—Renunciation.*] Where the matrimonial community was in insolvent circumstances at the time of the wife's death, in 1877, the failure of the husband to make an inventory of the common property did not have the effect of causing continuation of community under the provisions of articles 1323 *et seq.* of the Civil Code as then in force. *King* v. *McHendry* (30 Can. S.C.R. 450) followed. Fitzpatrick C.J. and Duff J. dissented.—The judgment appealed from (Q.R. 24 K.B. 138) was affirmed.—*Per* Duff J. (dissenting). The failure of the husband to cause an inventory to be made within

PILOTS—*Pilotage authority—Compulsory retirement of pilot—Judicial functions—Liability to action.*] The pilotage authority in a pilotage district of Canada has not absolute and arbitrary power to cancel a pilot's licence, but can only do so after complaint and inquiry and proof on oath of incapacity. If a pilotage authority by resolution alone, without complaint, notice or investigation, declares a pilot to be dismissed "for neglect and incapacity" and thus prevents him from performing a pilot's duties, inasmuch as it failed to observe the statutory requirements respecting the proceedings for such dismissal it has not exercised judicial functions and is not protected from liability to an action by the pilot for damages. Fitzpatrick C.J. and Davies J. dissenting. —*Per* Duff J. A by-law of a pilotage authority purporting to provide for the forfeiture of pilot's licences for incapacity could only have the effect, if at all, subject to the condition exacted by 433 (*j*) of the "Shipping Act" that such incapacity should be "proved on oath before the pilotage authority" and a resolution of a pilotage authority pretending to dismiss

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a licensed pilot for incapacity without such proof on oath was legally inoperative; but as the resolution was intended to have and had the effect of preventing the pilot exercising his calling and since it was an act without justification or excuse it was actionable within the principle laid down by Bowen L.J. in *Mogul Steam Ship Co.* v. *McGregor* (23 Q.B.D. 598). —*Per* Duff J. Sec. 433(*e*) of the "Shipping Act" does not empower a pilotage authority to limit the term of a pilot's licence to a period of one year. Judgment of the Supreme Court of Nova Scotia (48 N.S. Rep. 280) reversed. (Leave to appeal to Privy Council granted, 14th April, 1916). MCGILLIVRAY *v.* KIMBER **146**

PLANS—*Construction of statute—Sales of subdivided lands — Registration of plans—Prohibitive sanction—"Land Titles Act," 6 Edw. VII., c. 24, s.-s. 7 (Alta.);—4 Geo. V., c. 2, s, 9; 5 Geo. V., c. 2, s, 25 (Alta.) Retrospective legislation—Illegality of contract—Recission—Recovery of money paid —Right of action—Practice—Pleading—Appeal.*] The effect of the amendment to the Alberta "Land Titles Act," 6 Edw. VII., ch. 24, by 1 Geo. V., ch. 4, sec. 15 (25), adding the seventh sub-section to sec. 124 of that Act, is to prohibit sales of lands subdivided into lots according to plans of subdivision until after the registration of the plans in the proper land titles office and also to render any sales made in contravention of the prohibition inoperative.—The vindicatory sanction imposed by the statute is directed against the vendor and where there is no presumption of knowledge of the invalidity on the part of the purchaser he cannot be deemed *in pari delicto* with the vendor and is not deprived of the right of action to set aside the agreement and recover back moneys paid thereunder.—After the judgment appealed from had been rendered the statute was further amended (5 Geo. V., ch. 2, sec. 25) by the addition of sub-sec. 8(*a*) providing that the seventh sub-section could not be pleaded or relied upon in any civil action or proceeding by a party to any such agreement when the plan in question had been registered before the action or proceeding was instituted or where it was the duty of the party pleading to make such registration. —*Held*, that, as the last amending Act was not a statute declaratory of the law

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